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**THE COUNCIL OF STATE AS A POLITICAL ACTOR.
ORIGINS AND STRATEGIC IMPLICATIONS OF THE CONTROL ON
ADMINISTRATIVE ACTS**

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Introduction

Research questions

This work intends to analyze the Councils of State as political actors. Councils of State are peculiar unelected bodies that present a double, “amphibious” nature. As advisory boards of the government on legislation, they belong to the executive. However, as highest courts responsible for the judicial review of administrative acts, they are also part of the judiciary.

Adopting a strategic approach to the analysis of the relations between the legislature and the judiciary, the research investigates the interaction between government and the Council of State in the Italian case. The first question that I intend to answer is if the interaction between the two institutions in the process of implementation of primary laws produces different outcomes, according to the political circumstances. More precisely, I analyze the extent to which the level of government ideological heterogeneity and the size of alternation affect the probability to activate the Council of State as Advisor.

Second, I try to answer if the political factors that determine the activation of the Council of State in Italy also play a role in influencing the institutional characteristics of courts that review administrative acts in other countries. Following the game theoretical framework adopted for the Italian case, I examine the characteristics of courts that review administrative acts in fifteen countries, showing the correlation between courts’ institutional features and the prevailing political conditions (taking into consideration the post-Second World War period through the end of the 1990s).

The Councils of State: ancient institutions with a considerable role in the political system

Although, as emphasized by law scholars, commentators and the same political actors, Councils of State play a relevant role in the political system, little is known about these institutions, which have ancient origins.

In the first chapter, I reconstruct the origins of the Councils of State across European countries, which, in the cases of Spain and of the Netherlands, date back to the age of Charles V. Their evolution as consultative bodies follows the formation and the changes in characteristics of the executives. The development of their judicial function is also a consequence of the expansion of the different interests represented by the governments. This fact is highlighted in particular with reference to the Italian case, which is investigated more in depth, through a diachronic analysis. In chapter II, indeed, the evolution of the Italian Council of State is analyzed paying attention to the prevailing political conditions of the various ages, from the Kingdom of Savoy until the Republican Regime. The current characteristics of the Councils of State of Italy and of France are compared and some considerations on their different roles are drawn on the light of the political variables and of the different characteristics of the two political systems.

The Italian Council of State in the process of implementation of primary laws

Especially in recent years, the Council of State of Italy has been accused of being among the subjects responsible for the late implementation of primary laws. In chapter III, I report some relevant testimonies of political actors and commentators that, from the time of the Bicameral Commission to nowadays, have criticized the role of the Council of State as Advisor (its *ex ante* control on regulations) and as Court. I contend that the criticism against the institution is higher in potential and actual phases of policy change. Although the capacity of the Council of State of delaying the adoption of regulations is highly criticized and it is periodically discussed also in the public debate, measures of the timing for the adoption of the decrees that derive from primary laws (“*decreti attuativi*”) have still not been provided. In chapter III, I compare the timing for

the adoption of regulations, or rather, the administrative acts submitted to the *ex ante* control of the Council of State, and the timing for the adoption of “general administrative acts”, which are not sent to the Council of State for its *ex ante* control. As argued by several law scholars, general administrative acts are increasingly used by the governments instead of regulations, in order to avoid the preventive scrutiny of the Council of State. I find that between 1988 and 2014 the timing for the implementation of administrative acts, measured as the number of days that separates the adoption of law and the adoption of the decrees, is significantly higher for regulations. The analysis concerns five policy areas (economy, education, interior, defense and justice).

The strategic interaction between government and the Council of State (1988-2014)

After reviewing the most relevant contributions to the analysis of the legislative-judicial interaction that follow the strategic approach (Chapter IV), I describe the interaction between the Italian Council of State and national governments, according to a game theoretical framework. The Council of State is described as a “policy” conserver court (Steunenberg 1997; Ferejohn and Weingast 1992). Since it follows a procedurally based jurisprudence, the Council of State prefers to maintain the status quo of the existing administrative acts. Substantive policy preferences might also play an important role in Council of State’s behavior, but they tend to oppose policy change. Moreover, following Thies (2001) and Martin and Varberg (2005), the Council of State is conceived as a “guardian of the law” that limits ministerial discretion.

I use some simple spatial models in order to explain the political circumstances under which governments should be more prone to activate the Council of State as Advisor. In particular, for great levels of government ideological heterogeneity, I expect that at least one government party may benefit from the activation of a policy-conserver court as Advisor, in order to prevent the risk of “ministerial drift” during the process of regulations’ adoption. In addition, I expect that, for high levels of government ideological heterogeneity, government parties should be more interested in knowing the

preferences of the Council of State as Court, in order to anticipate its decisions. Instead, for high level of alternation, governments may be less prone to activate the Council of State as Advisor, both in its quality of “guardian of the law” and in order to know its preferences as Court. In fact, in case of high size of alternation, the Council of State as Court could at least choose the ideal point of the most conservative member of the coalition, if it does not want to be overruled.

I test my hypotheses employing a dataset of 1.140 observations, which includes regulations and general administrative acts adopted by eighteen Italian governments in five policy areas from 1988 to 2014. I provide spatial measures of the political explanatory variables, deriving parties positions from expert surveys and calculating the variables according to Tsebelis (2004), and non-spatial measures, based on the number of government parties and their turnover. The results confirm that the activation of the Council of State as Advisor is positively related with the level of government heterogeneity. On the contrary, higher values of alternation seem to have a negative impact on the probability to activate the Council of State as Advisor in the implementation of primary laws.

Implications of the findings of the Italian case

I try to verify if the political conditions have implications for other countries. On the basis of the quality of information available, I map the presence of institutions external to government responsible for the *ex ante control* on administrative acts in 15 European countries. In Italy such control, in the case of regulations, is provided by the Council of State. In the other countries, a preventive external control on administrative acts may be absent (as in Germany, Austria, Portugal, Ireland, Denmark and Spain). Alternatively, it can be exercised by administrative courts (Sweden and Finland), by the Councils of State (France, Belgium, Luxembourg, Greece, the Netherlands) or by committees of the legislatures (U.K.). I describe the characteristics of courts that review administrative acts in these countries, taking into account if they belong to a separate system of courts

inside the judiciary, if they can be activated as Advisors of government on the drafting of administrative acts and, in the case of the Councils of State, considering if the consultative and the judicial functions are exercised separately or on a unitary basis.

I attribute scores to courts according to the level of separation between consultative and judicial functions. The lowest levels mean complete overlapping between the functions, whereas the highest scores refer to the absence of overlapping between the functions. I verify the presence of correlations between courts scores and the prevailing political conditions in each country. The data show the presence of negative correlations between government heterogeneity and courts scores. In other words, we notice courts in which consultative and judicial functions tend to overlap where the government heterogeneity presents higher values. Alternation is positively correlated with the scores on courts functions: courts with no consultative functions or in which consultative and judicial functions are provided separately are present in countries that experience high level of government alternation. Such results suggest that the strategic interactions between legislatures and the courts that review administrative acts depends on political conditions and have an impact on the characteristics of these courts.

CHAPTER I

Origins and main developments of the Councils of State in the European countries

1.1 Origins of the consultative function of the Councils of State

Councils of State have their “ancestors” in the Medieval courts (*curia regis*) of European countries. When kingdoms used to have a feudal organization, the prerogatives of the monarchs were limited. In such contexts, courts charged with helping sovereigns in their offices were generally itinerant (they used to follow the monarchs in their changes of residencies) and their composition was variable: they could include knights, representatives of the clergy, servants, executive agents, as well as barons and vassals who had business with the king (Tilley, 2010). When the monarchies started to pursue expansionary policies and to consolidate their territories, the increase in volume and in complication of governmental affairs (finance, administration, justice, control of the peripheral territories) determined a process of specialization of the royal courts. Courts started to have permanent members, with technical knowledge, specialized in the functions of government. These organs- in France the *Conseil du Roi* of the XIII Century- evolved, following the transition from feudal to always more powerful, until absolute, monarchies. When the monarchies became absolute or near absolute, kings were at the same time legislators, head of the executives and sovereign judges. In these contexts, the courts (the councils) were organized in specific sections according to the different affairs and they were conceived as instruments to legitimize royal authority. In the extremely vast empire of Charles V, the councils (for the first time named “Councils of State”) were often composed by the great nobles and they were used to coordinate governments of the distant regions of the reign, as the Netherlands. In countries in which the councils originated as imitations of

the French *Conseil d'Etat*, founded by Napoleon in 1799, as Italy and Greece, such bodies gave a “consultative” legitimacy to the monarchies, that were still far from being “representative”.

1.1.1 Origins of the French Conseil d'Etat

The roots of the French *Conseil d'Etat* can be found in the *Conseil du Roi*, an institution that originated from the *curia regis* (the court) of the Capetian dynasty. Under the dynasty of the Capetians, that ruled between 987 until 1328 with fourteen successive kings, the monarchy of France went from being a mere lordship to a consolidated kingship. The role and nature of the advisory bodies evolved, following the transformation of the monarchy. At the end of the X century, France was organized in semi-independent kingdoms and, since the monarchy didn't have a permanent seat, the sovereigns used to travel along the territories of their domain, moving their headquarter. The councilors of *curia regis* used to met in assemblies without a permanent location. Councilors were mostly non-functionaries men, as the great vassals that belonged to the court as of right, minor nobles and representatives of the clergy. The court included also a smaller council, which was charged with following the king and that was consulted especially for current affairs. The prerogatives of councilors were ill-defined and their influence over kings' decisions unclear. A process of specialization of the court occurred starting from the XIII century, in consequence of the acquisition of territorial control over several duchies and counties that took place during the XII century and that strengthened French monarchy. Besides current affairs, kings had to face new issues. They had to make decisions in political matters, to administer justice and to supervise financial affairs in the new territories. The multiplicity of new affairs and the necessity to simplify the composition of the full court led to the formation of a new central government political organ: the *Conseil du Roi* (XIII-XIV century). In such council, professional members trusted by the king started to be appointed in addition to the great vassals. The council was organized into three branches: the Court of Finance (*Le*

Chambre des Enquetes), the Judicial Court (*the Parlement*) and the Council proper (the *Conseil*). Members of the three branches were called king's councilors and they were assisted by masters of petition (*maître des requêtes*), charged with making reports on the affairs submitted to the council; they used to meet in plenary and sometimes in restricted assemblies. Although *Parliament* councilors were competent for the judicial function, the king still had the power to decide in last instance on litigations on government acts. Between the XIII and the XVII Century, the *Conseil* gained increasing power at the expense of the other branches. This process happened in conjunction with the consolidation of royal authority, that led to the emergence of the absolute monarchy of Louis XIV. Compared to the other bodies, *Conseil* members eventually gained a sort of superior status. Although there was a formal division of labor between the three bodies, the competences of the *Conseil* tended to overlap with the tasks of the other branches and to prevail over them. As direct organ of the will of the king, the *Conseil* claimed for itself the right to correct and revoke the decisions of *Chambre des Enquetes* and *Parlement*. During the 16th Century, it began to exercise a judicial competence, claiming notice of all cases that concerned the government. Before king Louis XIV definitely stated the prevalence of the decisions of the *Conseil*, its prerogatives were repeatedly questioned by the States- General and the *Parlement*, whose protests culminated in the Fronde of 1648 (Brissaud and Garner, 1915). In the XVII Century, the *Conseil* was reformed by Richelieu and Louis XIV. Its affairs were organized keeping separate the political government and the administration of justice; several sections that used to address the king with not binding advices were established. Among these sections, the most numerous was the *Privy Council*, a court of justice, whose decisions were rendered in the name of the king. Relevant acts of the entire *Conseil* were deliberated in plenary sessions held with the *Privy Council*. The whole *Conseil* extensively contributed to the legislation of the monarch and to the application of the laws. In this regard, it represented the closest “ancestor” of the *Conseil d'Etat* founded by Napoleon in 1799, which was fully invested with the dual task of participating in the drafting of the most important governmental texts and of settling disputes related to public administration.

Under the Consulate and the First Empire (1799-1814) the Council gave a crucial contribution to the formulation of the Napoleonic codes. It became responsible for drawing up legislation, interpreting bills, formulating administrative regulations and answering questions of administrative nature from departments and municipalities. Under the Restoration, its role as consultative body became less relevant. Present-day structure of the *Conseil d'Etat* goes back to the French Third Republic. At that time the Council was also settled at *Palais-Royal* (1875).

1.1.2 The Council of State of Emperor Charles V: the Spanish Consejo de Estado

The roots of the Spanish *Consejo de Estado* can be found in the system of government councils that consolidated in the period of residency of Charles V in Spain (1522-1529). Such system was not entirely created by the emperor, but it had some anticipations under the reign of the “Catholic Monarchs” Ferdinand II of Aragon and Isabella I of Castile (1479-1504). When Isabella became queen of Castile, her reign was in chaotic political conditions. One of her major concerns was the power of the nobility, that threatened the stability of the kingdom. To strengthen the monarchy, Isabella started a process of centralization, that involved the creation of permanent government councils under her direct control. In particular, to reduce the overgrown powers of the nobility, the queen reformed the existing council of the monarchy, the *Consejo Real*. The reformed royal council, the Council of Castile, started to act as the central organ of the government. Organized into five departments dealing with foreign affairs, justice, finances, the Santa Hermandad¹ and affairs concerning the kingdom of Aragon, the council acquired also judicial competences. The aristocrats were excluded from its composition in favor of trusted legal experts. When Charles V became ruler of the Spanish Empire, he maintained only the judicial function of the Council of Castile and he built a system of government councils with distinct competences. Besides the

¹ The Santa Hermandad was a municipal league of armed individuals established by the monarchs, a sort of permanent police force supported by the municipal councils to protect persons and property against the violence of the nobles (Gerli, 2013, 219) and of bandits.

councils with judicial functions only (as the Council of Aragon, the Council of Castile and the Council of the Indies), further councils were created, performing executive-advisory tasks, as the Council of Finance, the Council of the Crusade, the Council of State (*Consejo de Estado*). The *Consejo de Estado* was an executive body of advisors very close to the monarch, that used to discuss the administration of the lordships in the Americas, the German empire, Hungary, the Low countries, Italy, North Africa and Spain (Espinosa, 2008, 142). It used to have a subsection, the *Consejo de estado y guerra*, whose main task was to advise the monarch on war campaigns. Under the reign of his son, Philip II, the *Consejo de Estado* became the main advisory body for the political affairs of the empire and it was supported by a network of other councils responsible for the administration of the territories of Aragon, Italy, the Netherlands, Portugal and the Indies (Lesaffer 2009, 331).

Successive evolutions of the council date back to the XIX Century, when, with the Spanish Constitution of 1812, the *Consejo de Estado* was established as the controlling body of the power of the monarch, who needed the approval of the council to promulgate some acts. From the first years of the XX Century, it became a consultative body of the executive.

1.1.3 Charles V and the Low Countries' Raad van State

The Councils of State of present-day Belgium, Luxembourg and the Netherlands have their antecedent in the governmental council (*Raad van State*) established by Charles V in the Low Countries in 1531. The Low Countries were highly fragmented territories, composed by seventeen provinces, covering the current Netherlands, Belgium, Luxembourg and part of the northern France. As ruler of the Low Countries (1515-1555), Charles V started a process of centralization, that aimed at organizing the provinces into a unitary state and at strengthening the administrative apparatus of central government. Because of his long absences from the Low countries, the emperor used to delegate the government of the territories to a permanently resident Governors-

General (his sister Mary of Hungary and then his daughter Margaret of Parma). The foundation of the *Raad van State* was instrumental in fulfilling the centralizing process of the emperor. Composed by the high nobles of the Low Countries, members of the clergy and a number of lawyers, the main task of the Council was to advise the Governor-General in matters of foreign affairs, defense and public order (Van Gelderen 1992). In addition to the *Raad van State*, two collateral councils were created: the Privy Council and the Council for Finance, the first with administrative and judicial functions, the second competent for central fiscal administration (Blom and Lamberts, 1999, 119). During the regency of Charles V, the Governors-General had to face the discontent created by the politics of centralization and with the increasing tensions caused by the repression of the Protestants. In this context, the *Raad van State*, as board of advisors of the Governor-General, played a delicate role. Charles V appointed to the Council mostly Dutch high nobles in order to obtain their cooperation. In fact, during his reign, he could rely on the loyalty of the moderate members of the Council, such as William of Orange. The moderate members of the Council, although opposing the prosecution of the Protestants, made several conciliation efforts with central government and tried to soften the ordinances against heresy of the emperor. Such “balancing role” of the Dutch nobles inside *Raad van State* ended when Philip II succeeded to Charles V. Philip II appointed several Spanish councilors, weakening the role of the Netherlandish nobles in the government. He tightened the oppression against the Protestants, rejecting any requests for moderation and imposing a strict implementation of the ordinances to punish heresy. This led to the resignation of prominent members of the Council, amongst which Prince William of Orange and Count Egmont. The institution was marginalized. With the annexation of the Netherlands to France, in 1810 the *Raad van State* disappeared: the country fell under the French rule, which had its own *Conseil d'Etat*. When the Kingdom of the Netherlands was established, the 1814 Constitution restored the *Raad van State* and it established that the monarch had to consult the Council for all royal bills and decrees. The *Raad van State* was presided by the king himself, that appointed councilors from all provinces. The 1848 Constitution introduced

the principle of ministerial responsibility and transferred the power of the King to the whole government. The *Raad van State* became advisor of the government and its members became almost jurists.

1.1.4 Origins of the Greek Council of State (Συμβουλιο της Επικρατειας)

A Council of State was first established in Greece in 1833, under the absolute monarchy of king Otto. King Otto, son of King Ludwig I of Bavaria, was the sovereign that the Great Powers (France, Great Britain and Russia) imposed to Greece, at the 1832 Convention of London, after the Greek War of Independence. As Bavarian, the king was strongly influenced by German and French administrative traditions. He never accepted the liberal institutions adopted by the Greek provisional governments after the rebellion against the Ottoman Empire. Conversely, he monopolized the government and the administration with bavarian officials, without conceding a constitution. The king founded a Council of State, emulating the French *Conseil d'Etat*, The Council, however, was composed by Greeks to compensate the lack of local experience of the foreign administrators. In such autocratic regime, without any representative body nor assembly, the Council of State, as a consultative organ, played an important political role, contributing to the transition to the constitutional monarchy. When the large-scale resentment among the population brought to the conspiracy against the absolute monarch and to the 3rd September 1843 revolt, the Council of State participated to it. This constituted the most important moment in the first ten-year history of the Council. The Council drowned up a series of provisions that the king was forced to adopt through decree: the imposition of a new council of ministers and the convocation of the National Assembly to adopt a constitution². Essentially, the Council of State gave formal legitimacy to the claims of the revolution supporters. However, since the Council was considered as an organ associated with absolute monarchy, in the 1844 Constitution

² Information from the Greek Observer of the 5th September 1843, mentioned by the Colonial Gazette, in Agnew (1843)

it was abolished. In the 1864 Constitution, a Council of State with functions of project of laws revision was reintroduced. It was thought, on the basis of the suggestions of the monarch, George I, as a sort of “mitigated Senate”, a kind of substitute of an upper chamber. But its existence was short: it was abolished again by the chamber of deputies, with a large majority, in 1865 (Finlay 2014). The Council of State was then re-established with the 1911 Constitution revision, according to which it assumed the functions of consultant for legislative proposals and for draft regulatory decrees, and of court of appeal for administrative cases. However, this Council never became operative, since the administrative acts required by the Constitution to make the Council active were never approved. The Council of State was finally founded on the provisions of the 1927 Constitution and it began to operate in 1929.

1.1.5 “Consilium nobiscum residens”: origins of the Council of State of Italy

The earliest “ancestor” of the Italian Council of State can be identified with the *Consilium nobiscum residens* of counts and dukes of Savoy of the XIII Century. This council was composed of aristocrats that used to advise counts and dukes in political and judicial affairs. From the *Consilium*, in the XIV Century emerged a consultative organ that included also a function of financial control, the *Curia principis*. Such bodies constituted an evolution of the medieval courts, but they still reflected a feudal system of political organization: the aristocrats, chosen as councilors, used to exercise an important influence in the territories of the reign, a proper central government did not exist and the monarch was the first guarantor of subjects' rights. Significant evolutions of these bodies occurred during the Napoleonic domination of Italy (1796-1815), when the *Conseil d'Etat* founded by the absolute monarch in 1799 became a role model. The Napoleonic institution exercised a direct influence in Italy. As several parts of Italy had become French, some nobles and intellectuals participated to the French *Conseil d'Etat*

as auditors (among these, Cesare Balbo in 1807³). First, the competences the French *Conseil d'Etat* were extended to the Italian territories annexed to the French Empire: Piedmont (1800), duchy of Parma and Piacenza (1802), Liguria (1805), Tuscany (1808), Umbria and Lazio (1808). Subsequently, autonomous Councils of State were established in the Napoleonic kingdom of Italy (1805-1814) and in other Italian kingdoms not directly annexed to the French empire, but still under the influence of Napoleon. The Council of State of the Napoleonic kingdom of Italy was instituted by royal decree in 1805 and it was occasionally chaired by the same Napoleon. Such council was charged to advise the emperor in the organization of the public administration through the adoption of specific organic laws and and through the implementation of an increasing control of the central state over the peripheral territories. Councils of State were created in the Kingdom of the Two Sicilies under the regency of Giuseppe Bonaparte (1806), in the Pontifical States (1848), in the Duchy of Parma and Piacenza (1814) and successively, in years between 1845 and 1865, a Council of State used to work in Tuscany⁴. The Council of State of the kingdom of Savoy, which represents the closer “ancestor” of present-day Italian Council of State, was founded by king Charles Albert in 1831. When he inherited the throne, Charles Albert had to face contrasting developments: from one side, he needed to strengthen his credibility amongst the most traditional segments of the monarchy, affirming the conservative order emerged after the Congress of Vienna; from the other, he had to deal with the raising claims for the concession of liberal institutions and for changes in the authoritarian organization of the reign, ideals that he himself had supported in his

³ In a 1831 note addressed to Charles Albert, in the months that precede the institution of the Council of State in Italy, Cesare Balbo describes the French *Conseil d'Etat* as the main instrument of government of Napoleon and he reassures the monarch that the institution was far from limiting king's prerogatives and it was compatible with a strong (“pure”) monarchy (Casana Testore, 1995).

⁴ The Council of State of the Two Sicilies was reformed by Gioacchino Murat in 1808 and then abolished in 1815, after the Congress of Vienna. The Council of State of the Duchies of Parma and Piacenza was founded by Marie-Louise of Austria and it was removed in 1865, when administrative litigation was temporarily abolished in Italy. In Tuscany the Council of State started to work after the Restoration and it used to exercise consultative functions and judicial prerogatives in matters of waters and roads. The Council of State of the Pontifical States (1840-1870) had consultative and judicial functions and its judgements were not subject to the approval of the monarch (Pezzana, 2011, 34).

youth⁵. In this context, the foundation of the Council of State represented a sort of compromise: the monarchy, still far from being constitutional, became “consultative”. The opinions of “remarkable individuals, devoted to the monarchy and dedicated to the study of political sciences”⁶ were supposed to give the monarch a greater legitimacy, making his decisions less arbitrary in the eyes of the subjects. Actually, the 1831 Council of State could not limit the absolute power of the king. According to Santi Romano (1932), a prominent Italian jurist that chaired the Council of State between 1928 and 1944, in the early years of its functioning, the Council of State rather played a political role. As a consultative body of the king, the Council worked in parallel to the ministries and eventually it balanced their power. The consultative activity of the Council covered all activities of the State except for foreign policy and war. It was charged with examining all proposals of legislation and regulation, the general budget of the State and taxation. It supported the implementation of the conservative program of the monarch, focused on administrative reforms of local administrations that included the introduction of organs of central control on the peripheral territories (*Intendenze Generali*), and on a process of legislative unification, that led to the creation of civil, commercial, military and penal codes. When the increasing competences and the process of specialization of government brought to the growth of ministerial tasks, the relation of the ministries with the Council and the role of the Council itself changed. Possibly in order to reduce its political role, the ministries started to submit to the Council minor files and technical questions, retaining for themselves the most important decisions. This fact gradually determined a change in the consultative character of the Council, that switched from “political” to “technical- administrative”. If the ministries partly reached their goal of weakening the political role of Council, they also laid the

⁵ Charles Albert had a liberal education. He was aware of the conspiracy of the young liberal aristocrats that brought to the Revolt of he May 1821. When King Victor Emmanuel abdicated because of such revolt, Charles Albert, acting as regent, granted the liberal constitution of Spain. The constitution was then disowned by King Charles Felix.

⁶ From the preamble of the 1831 royal decree of Racconigi, in which King Charles Albert announced the purposes for his reign https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mdax/nze2/~edisp/intra_033968.pdf (p. 215)

basis for the successive consolidation of the institution, that, from an organ of political consultancy of the monarch, became a technical advisor of the whole government. Its apparent lack of political power preserved the existence of the Council, when the 1848 Albertine Statute affirmed the new constitutional regime (Wright, 1994, 30).

1.2 Origins of the judicial function of the Councils of State

In countries where Councils of State act also as supreme administrative courts, administrative justice has basically developed inside public administration, in the framework of the executive power. These countries present a “dual legal system”, in which administrative courts run parallel to civil justice tribunals and they rule on the legality of administrative action. The idea at the basis of the “purest” model of dual justice, the French system, was that ordinary justice was inadequate to know and to judge affairs in which public administration does exercise a discretionary power. Not only. According to the ideals of the French Revolution and of its rigid conception of the separation of powers, the activities of the administrative authorities, pursuing the “public interests”, had to be protected from the interferences of ordinary courts. The control over their acts had to be exercised by the Administration itself. Such principles were embodied in the model of the “judge-administrator”, according to which the Council of State was the definitive arbiter for the affairs involving the acts of bureaucrats. This conception was reinforced and implemented under the reign of Napoleon. It must be noticed that, in France, both the concept of public interest and of the necessity of a separate administrative justice consolidated under an authoritarian regime, where the administrative structures and the territorial articulations of the State were already present and they were strengthened by the centralizing program of Napoleon (Wright, 1994). In this context, administrative justice was strongly dependent from the executive power: although the *Conseil d'Etat* was vested with a proper judicial function since 1799, its judgements became formally autonomous from the approval of

the Head of State only in 1872. The success and the adoption of the Napoleonic model by the other countries is a fact, but the way in which it was implemented is far from being homogeneous and in line with the pure French model. The Napoleonic model of administrative justice was implemented in contexts that differed significantly from France, for political and administrative aspects. In Italy, when the judicial function was attributed to the Council of State (1859), the country had already known liberal institutions and the different models of administrative justice of pre-unitary states. Moreover, since the articulations of the State and of public administration were still weak and in construction, the Council of State was far from representing the head of a centralized system of public administration. The country experimented in fact also a short window of a unified-monistic model of justice (1865-1889), on the basis of the Belgian system. In Greece, where the Council of State was abolished several times before being definitively embedded in the Constitution, the institution consolidated first of all as the archetypal judge for recourses for excess of power, as the guardian of the principle of the rule of law. The concept of popular sovereignty embedded in the Greek Constitution (1975) focused in fact on the jurisdictional control over the legality of the administrative action, more than on the non-interference of the ordinary judges over public administration activities. Independent Belgium (1831) did not adopt a separate system for administrative justice until 1946, and the organization and functioning of the Belgian Council of State were regulated only in 1973. Luxembourg followed the monistic model of Belgium, to which it used to be administratively annexed, until 1856, when King William III imposed the foundation of a Council of State. Such Council, vested also with a judicial function, was supposed to act as a sort of second chamber, to balance the prerogatives of the Parliament. However, the judicial function of the Council of State of Luxembourg was recently questioned and finally abolished (1997), after a sentence of the European Court of Human Rights denouncing its lack of independence from the executive power. The Council of State of the Netherlands, entitled to act as a court since 1861, was strongly dependent by the monarch, being presided by the king himself and its decisions being adopted by the Crown. However,

different from the French model, the Council entered a context which was characterized by the presence of several specialized administrative authorities and tribunals.

1.2.1 The Conseil d'Etat as the evolution of the “administrator-judge” in France

Administrative justice in France originates from the exclusion of the ordinary judges from the administrative contentious. The conflict between ordinary tribunals and the *Conseil du Roi* already existed at the time of the absolute monarchy of Louis XIV (paragraph 1.1). The necessity to preserve the “public interest” from the interference of the judges was an element at the basis of the narrow interpretation of the separation of powers’ principle by the French Revolution. The independence of the judiciary did not receive the same consideration. The administrative contentious started to develop in its modern form with the law of 16-24 August 1790. The possibilities of ordinary tribunals bordering on the administrative domain were particularly feared by the Revolution supporters, hostile to the power of justices of the regular courts, politically unaccountable and immovable. The law of 16-24 August 1790 separated judicial and administrative functions, insulating the administration from the supervision of ordinary courts. More specifically, the law forbade ordinary courts from interfering in the activities of the administrative authorities and prevented them from prosecuting State officials for acts carried out in the exercise of their functions. The administrative action became subject to the specific control exercised by the Administration itself. This led to the configuration of a system in which the judge is known as the “administrator-judge”. In this system, in case of a dispute with Administration, an individual could only appeal to the immediate supervisor of the decision maker and, eventually, to the competent Minister, who was both, judge and party. The sentiment of hostility toward the ordinary magistrates was shared also by Napoleon, that, in 1799, restored the *Conseil du Roi*, under the name of *Conseil d'Etat*. Napoleon conceived the *Conseil d'Etat* as a part of the hierarchical chain of command. The *Conseil* consolidated as an integral part of an already powerful State. The law February 17, 1800 on local administration established

an administrative justice system based on two levels: the *Conseils des préfecture* and the *Conseil d'Etat*. This law followed an authoritarian logic and it was inspired to the principles of uniformity, hierarchy and centralization. The historians define this institutional model “administrative monarchy”. Administrative monarchy was a system of government in which a highly centralized public administration, composed of a new class of bourgeois officials, substituted representative and constitutionally autonomous political organs (Aimo, 1990, 39). Inside this framework, an integrated system of administrative justice was created. The members of the *Conseil d'Etat* were appointed and removed by the First Consul, becoming as a consequence more permeable to the prerogatives of the executive power and of administration. Although the *Conseil d'Etat* since 1799 used to be the supreme court for the acts of the public administration, it had to wait until the foundation of the Third Republic to develop a proper judicial function, autonomous from the executive. Until 1871, under the regency of Napoleon III, the judgements of the *Conseil d'Etat* necessitated to be embedded in a decree of the Head of State to become effective (“retained justice”). The law of May 24, 1872 marked the transition from retained to delegated justice. On this basis, the *Conseil d'Etat* was recognized as an autonomous judicial authority and the last word on judicial decisions was no longer left to the Head of State. The same law introduced the *Tribunal des conflits*, which was responsible for resolving conflict of powers between the administrative and the civil courts. In 1953 the *tribunaux administratifs* substituted the *conseils des préfecture*. The *tribunaux administratifs* received a broad competence, becoming judges in the administrative disputes of first resort, while the *Conseil d'Etat* retained jurisdiction of first and last instance only in most important cases and it became appellate judge. The law December 31, 1987 completed the administrative justice organization, introducing the *cours administratives d'appel* to which most of the appeal competences was transferred. The *Conseil d'Etat* became the supreme administrative judge, court of cassation for the new appellate courts.

1.2.2 The development of administrative justice in Italy: between pre-unitarian judicial

traditions and the transposition of the French model

Italy inherited both the Napoleonic tradition and the juridical practices of the pre-unitary states. This fact had to some extent complicated the development of a proper model of administrative justice. Pre-unitary states presented different judicial traditions. The French system of jurisdiction, based on two level of judgement- the local level of the *conseils des préfecture* and the central level of the *Conseil d'Etat*- was implemented in the Napoleonic Kingdom of Italy (1805-1814), in the Duchy of Parma and Piacenza, in the Pontifical State (1848) and in the Kingdom of Savoy (1842). In Tuscany, instead, administrative law was based on the unitary jurisdiction of the ordinary judge for subjective rights. The Albertine Statute of 1848 did not mention the judicial function of the Council of State. The parliamentary debate in years between 1850-1857 did not reach an agreement on a reform of the institution and also the law-proposals of the Interior minister, Urbano Rattazzi, based on suggestions of the same Council of State, were not approved. The government took advantage of the extraordinary power that it was conferred to it, because of the Second War of Independence, to approve a reform of the Council in 1859. Such reform introduced the figure of the President of the Council of State, which substituted the king, and it attributed to the Council a judicial function. The first level of judgement was provided by the Government Councils, administrative courts of first instance that replaced the *Intendenza* Councils, and that used to operate as part of the prefectures. Through the institution of the III judicial section, the Council of State became the court of appeal against the decisions of Government Councils. Although its judicial activity used to have a certain level of autonomy⁷, still the Council was fully embodied inside the executive power. A list of competences was attributed to both Government Councils and the Council of State: public law disputes concerning property and taxation, civil rights litigations involving procurement contracts, administrative law disputes on road classification, public water, borders of the

⁷ Unlike the judgements of the *Conseil d'Etat* up to 1871, the sentences of the Council of State adopted between 1859 and 1965 did not necessitate of royal decrees to become effective.

municipalities (Sandulli 2011). In all other affairs that implied the authority of public administration, individuals did not have proper rights, but only “interests”. After 1861 Italy unification, in 1865 the Parliament approved a package of legislation on the initiative of the government, concerning administrative unification. This package included several reforms, as the organization of the provinces and the municipalities, public safety, public health, public works, and, relevant for this work, the administrative contentious. The 1865 legislation abolished the administrative contentious. It attributed disputes between individuals and public administration to the ordinary courts, while it left “affairs” to the competence of non-contentious administrative authorities. “Disputes” were used to indicate cases in which individuals had civil or political rights in front of the administration. Vice versa, “affairs” involved individuals’ mere interests (*interessi legittimi*). Such reform was inspired by liberal principles and it intended to better safeguard the independence of the judges, emulating the model of the 1831 Belgian constitution⁸. However, since its beginning, the system showed evident limits: ordinary judges could not annul or modify unlawful administrative acts, but they could only dis-apply them; the legal protection of subjective legal positions, the interests, remained de facto uncovered. In 1889, a second package of legislation on administrative unification, pursued by the President of the Council of Ministries, Francesco Crispi, was approved. As a result of a movement that claimed adequate protection for “interests”, the IV judicial section of the Council of State was instituted. In 1907, the V judicial section of the Council of State was added. Since the distinction between rights and interests, which used to separate the jurisdiction of the Council of state from that of the ordinary courts, presented particular difficulties, especially in cases involving civil

⁸ 8 Belgium obtained the independence from the United Kingdom of the Netherlands in 1830, after the Belgian Revolution. Its Constitution of 1831 was at that time considered as the most modern and democratic in Europe.

service, in 1923 the “exclusive jurisdiction” (*giurisdizione esclusiva*)⁹ of the Council of State was established (Rava, 1942). The exclusive jurisdiction of the Council attributed jurisdiction over rights to the administrative courts in a series of affairs enumerated by the law. Such affairs were subtracted to the competence of the ordinary judges. As a consequence of this change, an important increase in the work-load of the Council of State occurred and in 1948 the VI judicial section was added, in order to speed up the solution of the appeals. The decentralization of the organs and functions of administrative justice dates back to the 1970s. After the Constitutional Court, in a series of judgments, declared unconstitutional the administrative justice organs of pre-democratic legislation¹⁰, the Parliament approved the law n. 1043/1971 which instituted the Regional Administrative Tribunals of first instance (T.A.R.), which started to work effectively in 1974. The Council of State became the appellate court against the judgements of Regional Administrative Tribunals.

1.2.3 The foundation of the Council of State in independent Belgium

In present-day Belgium, a Council of State with judicial prerogatives was introduced only in the half of the XX Century. In years preceding independence, Belgium saw the presence of Councils of State because of the affiliation, first, to the empire of Charles V, then to the First French Republic of Napoleon and, finally, to the United Kingdom of the Netherlands under the King William I. In 1830, the Belgian Revolution culminated in the secession of the Belgian provinces and Belgium formed an autonomous kingdom. Not surprisingly, the 1831 Constitution did not include a Council of State.

⁹ According to the Italian legal system, administrative courts should judge the legitimacy of acts that potentially infringe legitimate interests, while the protection of subjective rights lies with the ordinary courts. The exclusive jurisdiction of administrative court is an exception to this rule. According to it, administrative courts can have jurisdiction over individuals' subjective rights towards public administration in a series of matters enumerated by the law. The list of the matters in which administrative courts have exclusive jurisdiction constantly increased. One of the most important expansions of the exclusive jurisdiction occurred between the 1970s and 1990s and it concerned the sectors of public services, housing, urban planning.

¹⁰ *Consigli di prefettura and giunte provinciali amministrative* (rulings n. 30/1967 and n. 33/1968, in Righettini 1998, 97)

This because of the discouraging historical precedents (the reminiscence of the institution as an “instrument of power”¹¹) and because of the reluctance of the components of the Constituent Assembly to organize administrative justice within the framework of the executive power. The founders initially opted for a monistic system of legal protection, in which judges of the ordinary courts and tribunals were authorized at settling administrative disputes. Such jurisdiction was exclusive if the disputes pertained to civil rights. However, for disputes involving political rights, the Constitution had included the possibility to form specific administrative courts also. This disposal was used by the legislator when, in the half of the XX Century, the monistic system was questioned. The increase of the activities of the state determined the growth of disputes between citizens and public administration, but the civil courts seemed to be reluctant to review governmental actions. Civil courts for several decades had developed a restrictive interpretation of their jurisdiction and declared themselves to have no competence to judge the administration in the exercise of public authority. After years of extensive debate, a Council of State was created in 1946, acting both as the highest administrative court and as an advisory body of government for legislation. Its organization and functioning were disciplined by organic laws in 1973. In 1993 the institution of the Council was incorporated in the Constitution.

1.2.4 Begin and end of the judicial function of the Council of State of Luxembourg

In years between 1831 and 1839 Luxembourg was administratively attached to Belgium. After the Treaty of London of 1839, the Grand Duchy of Luxembourg was formed, constituting an autonomous and sovereign state in personal union to the King of the Netherlands. Its Constitution of 1848, which emulated that of Belgium, did not mention the Council of State. A Council of State responsible for issuing opinions on all government bills and for settling administrative litigations was introduced by the

¹¹ As reported in the “history of the institution”, available at http://www.raadvst-consetat.be/?page=about_history&lang=en

constitutional reform imposed by King William III in 1856. The Council was untouched by the 1868 Constitution, that modified the existing text in a liberal sense, and by the revisions of 1919. The 1989 Constitution underlined the independence of the Council of State from the government, especially in its judicial function. However, in 1996, after the Procola ruling¹² of the European court of Human Rights, the impartiality of the litigation section of the Council was questioned. A reform of 1997 abolished such section and attributed the judicial function to administrative tribunals and to an Administrative Court of appeal.

1.2.5 The development of the judicial function of the Raad van State

The Council of State of the Netherlands started to develop a judicial function in the second half of the XIX Century. After a parliamentary debate about whether the *Raad van State* should have been responsible for deciding administrative disputes, a 1861 organic law attributed to the Council a function of advise to the King to solve cases of conflicts between administrative organs. This led to the creation of a section of the Council that used to act similarly to an administrative court, but its decisions were adopted by the Crown: the section used to hear the parties and to propose draft decisions in form of royal decrees. The Constitution of 1887 allowed the Council of State to act as a proper administrative court, but such provisions were implemented only with the legislation of the 1960s and 1970s. Various special administrative courts were introduced, but with limited jurisdictions, based on the provisions of specific statutes. The right to appeal against any decree of the executive was definitely introduced in 1976 with the AROB Act (*Administratieve Rechtspraak Overheidsbeschikkingen*, Administrative Jurisdiction on Public Authorities' Decrees). This act granted the right to appeal to the newly constituted judicial section of the *Raad van State* if no other special

¹² The agricultural association Procola questioned the impartiality of the members of the litigation section of the Council of State in front of the European Court of Human Rights. The members of litigation section that judged on an affair concerning milk quotas had previously issued their opinions on the same case.

administrative court was available for an appeal. This produced a huge expansion of the work-load of the Council, that led to an important increase in the number of councilors and of their staff.

1.2.6 The development of the judicial function of the Council of State of Greece: the supreme administrative court as a guardian of the rule of law

The abolition of the Council of State in 1844 interrupted the first attempts to create an administrative justice sector, started in 1833¹³. In years between 1844 and 1911, a system of unitary jurisdiction was introduced. The jurisdictional control over public administration actions was assigned to the ordinary courts, except for some affairs enumerated by the law. The Constitution of 1911 introduced for the first time the annulment jurisdiction of the Council of State. However, such provision became operative only in the late 1920s, during the Second Hellenic Republic. The Republican Constitution of 1927 aimed at improving the protection of civil rights and freedoms. To broaden the constitutional protection of civil rights, a series of reforms concerning the judiciary was approved. In particular, with the the law n. 3713/1929, the Council of State became operative as Supreme Administrative Court, competent for the judicial review of administrative acts. The aim of the institution was to assure the principle of the rule of law, according to which the exercise of public authority must be based on legal provisions. The most important competence of the Council of State was the receiving of applications of annulment of individual or normative administrative acts¹⁴. To each section of the Council was attributed a particular jurisdiction. The first section was the last resort for all cases regarding civil employees, the second had appellate jurisdiction in all cases heard before lower administrative courts and general jurisdiction

¹³ A first rudimental system of administrative justice was provided in 1833 by two institutions: the “Controller and Auditor General”, an administrative body that used to provide administrative jurisdiction on certain administrative litigations, and the Council of State, which had some limited capabilities of jurisdictional nature.

¹⁴ Information available on the official website of the Greek Council of State
http://www.ste.gr/FL/history_en.htm

in affairs concerning local governments, the third had annulling jurisdiction in certain fields of public administration and the General Assembly had jurisdiction in all petitions for annulment of illegal administrative acts (Stassinopoulos, 1960). The expansion of government activity and the increase of the recourses to the Council of State determined the changes in the organization of the judicial function formulated in the Constitution of 1975 (confirmed in the amendments of 1986 and 2001). First, the competences to annul administrative acts were attributed mainly to administrative courts of second instance, and the Council of State became the court of appeal against the judgements of these courts. Second, a number of administrative-law disputes were assigned to the substantial review¹⁵ of administrative courts, the Council of State becoming a court of revision. In particular, the Council of State became competent for substantive judicial review of recourses of civil servants against decisions on disciplinary measures of demotion and dismissal.

¹⁵ In annulment disputes, the court may reject an application or annul the administrative act, binding the public administration to decide in compliance with the court ruling. Vice versa, in substantive disputes, the court may resolve the dispute altering the unlawful administrative act.

CHAPTER II

Political conditions at the basis of the role of the Councils of State.

The evolution of the Council of State of Italy and recent developments of the *Conseil d'Etat* in France

Introduction

What differentiates Councils of State from other institutional bodies inside the executive and from the other courts of the judiciary is their “amphibious” nature: the fact that they are, at the same time, governments’ consultants and judges for the acts of public administration. As supreme judges for the administrative disputes, Councils of State can exercise a sort of “credible threat” to governments: if governments do not follow their opinions on secondary legislation acts, Councils of State as Courts could declare the acts approved by the governments void. When they act as consultants, Councils of States should be able to exercise a direct influence on their governmental- counterpart. I contend, however, that the intensity of such “threat” should vary from country to country, on the basis of political conditions. The interaction between governments and Councils of State can be characterized by different levels of cooperation and conflict. This fact is reflected in their consultative activity, in which they can present different “styles”. The consultative function, which consists in the *ex ante* control on governments acts, can be exercised *as if* Councils were already acting as judges or “censors”, or, vice versa, *as if* Councils were more oriented to the results of government activity. The influence that Councils exercise can be more oriented to the juridical accuracy of the acts or more political. In the first case, the threat of annulment is in the position to prevail and the “language” that the Council use is juridical. In the second case, the Council is more similar to a co-decision-maker, interested in approving the act. I argue that the possibility for the Councils to exercise credible threats to governments

varies according to governments' strength and according to political conditions. The characteristics of the political system can induce the Councils of State to exercise their functions of consultants and of judges “in a unitary way”, or, on the contrary, to substantially separate them, in favor of a more cooperative attitude with governments. In the chapter, I review first the main steps in the development of the Italian Council of State. Since its very origins, I try to focus on the political conditions that have characterized changes in the functions of the institutions. Then I compare more recent developments of the Councils of State of Italy and France. I argue that the different prerogatives accorded to the governments of the two countries may be at the basis of the development of a more political attitude of the *Conseil d'Etat*, opposed to the more juridical (and judicial) character of the Italian Council of State.

2.1. Political conditions at the basis of the evolution of the Council of State of Italy

The diachronic analysis of the development of Council of State's functions seems to suggest that different political conditions have affected the characteristics of the institution. Government's emancipation from the monarch has determined first the focus of the Council of State on administrative, more than on political, activity. The necessity to give a unitary interpretation of administrative activity represents the *fil rouge* of the so called Liberal Period, characterized by frequent changes in government, and in which the consultative prerogatives of the Council of State were reinforced. The need to represent the interests of more heterogeneous government coalitions has contributed to the introduction of the judicial function of the Council of State by Crispi. The roots of a more political use of the consultative function of the Council seems to date back to the Giolittian era, an age of deep policy change. In the Republican regime the political conditions has brought the Council of State to exercise its consultative and judicial prerogatives in a unitary way and to develop mostly its character of “censor of the legality” of secondary legislation acts.

2.1.1 When the executive power starts to be exercised by the ministries, the Council of State becomes a consultant for the administrative activity

In years between 1831 and 1848, when the King of Savoy still represented a unified expression of the powers of the State, the Council of State used to exercise extensive consultative prerogatives, participating to the legislative and administrative affairs as the highest political consultant of the monarch. The start of the constitutional regime, marked by the concession of the Albertine Statute of 1848¹⁶, led to a discontinuity in the role of the institution. The emerging role of Parliament and of the Ministers determined a gradual conversion of the Council of State, which passed from being an organ of political consultancy of the monarch to be an advisor for the administrative activity of the ministries. The Statute introduced the two Chambers of Parliament and it transferred to them a series of prerogatives, before of competence of the Council (as the analysis of State budget or taxes assessment). The Statute established also the principle of ministerial responsibility¹⁷. According to such principle, the government needed to enjoy the majority support of the Parliament, and the ministers, which became responsible for their acts in front of the Parliament, necessitated to increase their control on the subordinated administrative structures. A process of unification of the political and administrative responsibilities inside the ministries was enacted in 1853, with the reform of central administration and general accounts sought by Cavour. Such reform intended to overcome the old model of ministerial organization, based on the separation between political directives and administrative-economic activities. In the old model of ministerial organization, specialized agencies (*aziende*), separated from the ministries, were entrusted with the implementation of the political directives and with the

¹⁶ The Council of State was mentioned only in two points of the Statute: one specifying that Senators could have been selected among councillors with at least five years experience (Article 33), the other stating that the institution had to be reorganized through ordinary legislation (Article 83).

¹⁷ Some commentators observed that, in establishing the principle of ministerial responsibility, Article 67 of the Albertine Statute did not specify if Ministers were responsible to the King or to the Chambers. However, according to the interpretation of the article claimed by Cavour and as the importance of the Chambers grew over the years, it became an established consuetude that ministers were legally and politically responsible to the Chambers.

management of economic-financial aspects¹⁸. With the reform of 1853, political and administrative activities were unified inside each ministerial structure. The ministers became responsible also for the execution of the political directives. They were put at the head of a hierarchic structure, in which the internal administrative apparatus was conceived as a “machine” (Melis, 2014, 38) that had to achieve the political inputs, in a sort of *continuum* between political power and administration. As the responsibility for political and administrative action began to be distributed among the ministries, “third bodies” within the framework of the executive power, characterized by some independence, were gradually charged with controlling their acts: the re-organized Council of State (1859), the Court of Audit (1862)¹⁹ and the *Ragioneria Generale dello Stato* (1869)²⁰. In the idea of Cavour, the control of ministerial acts by independent officials was a necessary condition to make the control of the Parliament over the government effective. More in general, the control on the acts of the ministerial structures intended to ensure a certain uniformity of the administrative activity. This principle was confirmed in the reform of the Council of State of 1859.

2.1.2 With the Rattazzi reform, the Council of State acts as a guarantor of uniformity and of continuity of the administrative activity

The first legislative reorganization of the Council of State was included in the package

¹⁸ The “mixed-model” of ministerial organization, composed by eight ministries and nine agencies (*aziende*) used to work in the Kingdom of Sardinia since 1817. The agencies could serve more than one ministry. For example, the agency of Intern was accountable to the Ministries of Intern, of Justice, of Public Education and of Public Works. The Ministry of Finance used to rely on three agencies: the agencies of finance, of taxation, of “*Real Casa*” (Aimo, 2002, 29).

¹⁹ The creation of the Court of Audit was part of the reforms pursued by Urbano Rattazzi in 1859 and it was created on the basis of the Belgian and Dutch models. The Court of Audit is one of the oldest institution of independent Belgium and it was incorporated in the Constitution of 1831. In the Netherlands, the evolution of the Court presents some similarities with that of the Italian Council of State: the 1814 Constitution conceived the Court of Audit as an organ subordinated to the king. But when the ministers became accountable to the Parliament (1848), the Court ceased to be in service of the monarch only and it became accountable to the Parliament for the acts of the whole government.

²⁰ The foundation of *Ragioneria Generale dello Stato* follows the concentration of the initiative of the spending process in the Ministry of Finance. The institution was introduced in 1869 with the accounting law of the minister Cambrey-Digny.

of administrative reforms pursued by the minister of the Interior Urbano Rattazzi, two years before Italian unification. The annexation of Lombardy, after the Second War of Independence, made of the “administrative question” a primary issue and it accelerated the process of administrative unification. Profiting from the extraordinary powers attributed to the government, Rattazzi, in 1859, enacted a series of legislative decrees to carry out a process of homologation of the administrative systems and of local administrations²¹. The legislation of 1859 brought several changes to the organization of the Council of State. First, it introduced the figure of the President of the Council of State, which came to replace the King. The institution was configured as a consultative body of the whole government and it became responsible for preserving the coherence and the continuity of the administrative action. In particular, in the words of Rattazzi, the Council of State had to temper “*the large latitude that frequent changes in government might cover in different and, sometimes opposite, directions*” and to ensure the consistency of the administrative principles (Calandra, 1978, 38). In addition, the legislation of 1859 transferred to the third section of the Council of State a judicial prerogative in a limited number of affairs, before of competence of the Chamber of Accounts (*Camera dei Conti*²²). In particular, the Council of State retained the competence of judge of first and last instance on interpretation of government loans contracts, cases of pensions' payment by the State, other affairs concerning “mines and quarries” and it became judge of second instance against the decisions of Government councils. Government- or prefectural- councils started to operate at the level of prefectures, replacing the *Intendenza* councils of the Kingdom of Savoy. Composed by public officials and chaired by the governor of the prefecture, also these bodies were competent for a number of affairs established by the law (direct taxation and duties,

²¹ The reform covered the organization of municipal and prefectural administrations, the suppression of the Chamber of Account and the institution of the Court of Audit, the competition and the competences of the Council of State, the regulation of the judiciary, public safety, public education, public health system and public works.

²² Since the administrative contentious initially concerned almost exclusively economic and financial affairs, in the Kingdom of Sardinia the competence for this type of judgment was originally attributed to the Chamber of Accounts (royal decrees of 1842 and 1847).

public concessions, public contracts, land registry, municipal and national roads, public waters, payment of salaries of municipal employees). All other disputes were left to the competence of the ordinary judiciary. The attribution to the Councils of judicial prerogatives in a strict number of affairs was achieved by Rattazzi in a peculiar context, in which he had obtained extraordinary powers. However, Rattazzi's position was already a compromise with a different argument, which was rising, and few years later became majoritarian in the Historical Right. Prominent members of the political group, such as Mancini, Minghetti and Peruzzi were in favor of a “monistic” system, in which citizens could claim protection before the ordinary judge only for civil and political rights (as property rights and electoral rights) connected to administrative acts. Vice versa, if an illegitimate administrative act was related not to a right, but to a citizen's private interest, the protection of such interest had to be invoked before the same government or before the King, through hierarchic petitions. Such position, which substantially was a conservative interpretation of the rights of the citizens in front of the executive power, prevailed in the reform of 1865.

2.1.3 To achieve the process of administrative unification, the Historical Right attributes to the executive power several affairs that used to pertain to the administrative tribunals

In 1865, the second government La Marmora, expression of the Historical Right (*Destra Storica*) took forward the process of administrative unification started by Rattazzi. Political urgency, due to the relocation of the capital to Florence, allowed to put to the vote collectively all measures of the law No. 2248/1865 on administrative unification, avoiding the parliamentary debate. Alternative regionalist or even *self-government* oriented projects were defeated and, according to the historian Piero Aimo (2002, 37), the provisions- which concerned municipal and prefectural organization, public works, public safety, public health and the administrative system- designed a highly centralized administrative model, substantially “hierarchic and authoritarian”.

Two annexes to the law No. 2248/1865 concerned the organization of administrative justice. Annex “D” attributed to the Council of State the right to judge all conflicts of adjudicatory jurisdiction between administrative authority and ordinary judges. Annex “E” abolished the administrative tribunals of pre-unitary States and it devolved the competence to examine administrative disputes involving citizens' subjective rights²³ to the ordinary judges. In stating this, Annex “E” established that all affairs in which administrative acts were connected to citizens' private interests could not find the protection of a judicial body. Violations of legitimate interests could be censured only through hierarchic petitions directed to the executive power. This measure was presented by its supporters as a “liberal revolution”, since it was inspired to the monistic system of justice introduced in Belgium in 1831²⁴. It is difficult however to argue that this reform was a real turning-point. Some authors underline how, in Italy and also in Belgium, these provisions mostly limited the jurisdiction of ordinary courts on the basis of a strict interpretation of the principle of separation of powers. Merusi (2015) emphasizes how Italian ordinary judges did not increase their power: ordinary judges could become aware of the content of administrative acts only *incidenter*, when assessing the violation of a right, and they could not annul, but merely dis-apply the illegitimate act. Moreover, it is well documented how, in case of conflicts of adjudicatory jurisdiction, the Council of State tended to decide in favor of the administrative authority, delegating the decisions on administrative complaints to the executive power. In this respect, the reform of 1865 proved to be far from a “liberal revolution”: the ordinary judiciary possibly was not prepared to absorb the

²³ “Subjective rights” are basic rights, substantially civil and political rights. The distinction between “subjective rights” and “legitimate interest”, that characterizes Italian administrative law, originates from the division of the adjudicatory jurisdiction between ordinary and administrative judges, that the reform of 1865 started to define. According to such division, the holder of a subjective right can claim its protection before ordinary judges, while the holder of a legitimate interest has to apply to the administrative judge (at the time of the reform of 1865, to the administrative authority). Such distinction has become less stringent, since, through the years, the protection of a series of subjective rights has been devolved to the administrative judge (Pizzorusso 1992).

²⁴ After independence, Belgium abolished the “hated” administrative jurisdiction dating from French and Dutch dominations, and it devolved the control of administrative acts to ordinary courts, incorporating such measure in the Constitution of 1831.

administrative disputes and public administration continued to be a “world apart”, whose acts were not supposed to be known by the judges. It is reasonable to think that, attributing the controversies to the public authority, the Council of State intended to preserve, again, the uniformity in the interpretation of government's acts. In the first thirty years after unification, the ordinary judiciary had not yet assumed a bureaucratic organization and several problems involved lower level tribunals in particular. While the highest-ranking magistrates used to belong to the same political élite, sharing its values and in some cases assuming the role of deputies and ministries, judges of lower courts were less qualified and with no chances to become part of the highest judiciary (Guarnieri, 1995). Central government could hardly expect ordinary judges of lower courts to comply with its directives. In addition, the organization of the judiciary through *preture*, tribunals and Courts of Appeal, had to wait until 1923 for the definitive unification of the Sections of the Supreme Court of Rome (*Corte di Cassazione*), that could guarantee the uniformity of interpretation and of the supremacy of central laws. Although the political group of the Historical Right was organized into regional factions, as the *Associazione liberale permanente* of Piedmont and the most conservative *consorteria* of Tuscany headed by Peruzzi, the interests they represented were substantially homogeneous: they were expression of the aristocrats, of the landowners and of the bourgeoisie of Northern and Central Italy. Their project of administrative unification and also their conception of administrative justice tended to reflect such conservative interests²⁵. Coherently, they intended the Council of State as an “agency of administrative unification”, more than a body that could guarantee citizens' rights and interests. After the so called “parliamentary revolution” of 1876 and the advent of the Historical Left to power, the political functions of the Council of State were adapted to the emergence of new political instances.

²⁵ Although they tended to declare themselves in favor of *laissez-faire* principles, at government they often defended fiscal conservatism and interventionist measures of political economy. In the name of political urgency, they approved reforms, as the administrative centralization, in contrast to liberal ideals. The historian Romanelli (1995) has described the absence of coherence of the liberal Right as the dilemma of the “impossible command”, according to which the liberal state might restrict the sphere of autonomy of civil society and use “illiberal” means to create the conditions for the exercise of freedom.

2.1.4 The Crispi reform of 1889. The Council of State becomes a guarantor of the interests of the heterogeneous coalitions of the Historical Left

With the system established in 1865, the prerogatives accorded to ordinary judges in matters of administrative disputes turned out to be very limited. The control on administrative activity was concentrated inside the ministerial structures. In case of a petition, the act adopted by the subordinated organ of a ministry was verified by the vertex of the structure itself, following a hierarchic logic. The resolution of the conflicts between administration and citizens was devolved to the discretionary power of the (changing) ministers²⁶, that, without checks outside the executive branch, became substantially unaccountable (Sambataro, 1977, 69). Such situation started to become unsustainable when parliamentary equilibria changed and the Historical Left came into power, in 1876. Left coalition was more heterogeneous than the Right: it used to include members of the Historical Left that opposed Cavour in the Piedmontese parliament, Mazzini's followers, other deputies that, although reconciled with the monarchy, were attached to democratic principles, Garibaldi's followers, other political groups that were against the highly centralized administrative system implemented by the Historical Right, southern regionalists hostile to the economic interests of Northern Italy (Saladino, 1966, 214). In addition, it must be noticed how, after the completion of unification, in 1870, the labels “Left” and “Right”, which used to distinguish the two political aggregation in the pre-unitary phase, ceased to represent marked differences in policies and ideals. Democratic and republican values, conventionally attributed to the Left, were translated into concrete acts only partially and not necessarily with the opposition of the Right. The political differences between Left and Right became less

²⁶ To give an example of the new ministerial turnover and of the higher complexity of cabinet composition that occurred with the government of the Historical Left, we can look at the organization of the Ministry of Finance: the II cabinet La Marmora (Historical Right) in 15 months of government had one Minister of Finance (Quintino Sella). The I Crispi cabinet (Historical Left) in 20 months of government had four Ministers of the Treasury (Agostino Magliani, Costantino Perazzi, Bonaventura Gerardi, Sidney Sonnino) and three ministers of Finance (Agostino Magliani, Bernardino Grimaldi, Bonaventura Gerardi).

clear, to the extent that the most important reforms²⁷ were approved through agreements between moderates members of the two blocs, determining the phenomenon of *trasformismo*. In the 1880s, majority coalitions were configured as loose conglomerations of local and personal groups. The increasing influence of such groups on ministerial activity undermined governments' stability, since each minister was forced to any compromise to get parliamentary support. As result of the prevalence of specific interests, the ministers tended to adopt systematically illegitimate administrative acts. Gaetano Mosca argued that the configuration of the political system obliged the ministers to succumb to favoritisms to the advantage of influential groups and to the detriment of the others²⁸. The author suggested that ministers' "autocracy" could be defeated establishing independent administrative tribunals, headed by the Council of State (1884, 219-220). The need for a reform that allowed to better represent and regulate the different interests inside public administration grew quickly and it was supported in particular by a movement headed by Silvio Spaventa, a leader of the Right at the opposition, who highly criticized the logic and the consequences of *trasformismo*. The slogan of his movement was "justice in the administration" and it denounced partisan interferences into public administration, pushing for integrations to the system established in 1865. A leading role in approving the reform of 1889 was played by the President of the Council of Ministers, Francesco Crispi. Crispi became President in 1887. He was a supporter of the centrality of the executive power and an admirer of the German chancellorship. With the reform of 1889, which established the new administrative courts (*Giunte Provinciali Amministrative*) and which added the IV

²⁷ As the introduction of a uniform penal code, compulsory elementary education, the abolition of the grist tax, a more democratic electoral law, accident insurance for workers.

²⁸ "(...) il Ministero è obbligato a largire dei favori. I quali non sono quasi mai, né furono mai forse, direttamente pecuniari, ma, senza scendere al vile metallo, vi è nell'amministrazione dello Stato, nelle mille cose di cui un Ministro dispone, tanto da contentare ogni più smodata ambizione o brama di lucro. Vi sono mille e mille posti, che si possono togliere all'anzianità ed al merito e dare siccome l'interesse del portafogli detta, vi sono mille contratti ed appalti che lo Stato può concludere a patti più o meno onerosi, che può aggiudicare all'uno anziché all'altro, (...), una strada od una ferrovia possono farsi o non farsi, passare di qua o di là. E ciò senza parlare delle onorificenze, dei privilegi, dei sussidi, delle esenzioni più o meno larvate del servizio militare, del pagamento d'imposte, etc., che i deputati non si vergognano a chiedere né i ministri a dare (...)", Mosca (1884, 195). http://documenti.camera.it/bpr/11606_testo.pdf

section of the Council of State, Crispi appointed Spaventa at the head of the new section of the Council. The competence devolved in 1865 to ordinary judges on disputes involving subjective rights was left intact. The reform added that citizens who had a legitimate interest in an administrative act could contest the act in front of *Giunte Provinciali Amministrative* and, in appeal, in front of the Council of State. It is interesting to note that, in the system pursued by Crispi, administrative courts remained again in the sphere of the executive power. For what concern the Council of State, the nature of the IV section and of its decisions were not immediately recognized as judicial²⁹ (the law of 1889 never uses the words “jurisdiction” nor “sentence”, but “competence” and “decision”). The authors of the reform, more than establishing a proper jurisdictional organ, intended to create a “deliberative body” within central administration, which had to keep administrative action inside the limits of legality and justice. The control on government administrative activity and the eventual annulment of administrative acts (which now became a prerogative of the Council) were provided by an institution that was conceived, again, as part of the executive power. The appointment of the presidents of the sections and of the councillors were managed by the government (by the Ministry of the Interior), who could select the councillors from personnel that belonged to specific categories (as ordinary judges and judges from the Court of Audit, professors of law, long-serving functionaries, ministerial officials), but with no other specific limitations. For what concerns the *Giunte Provinciali Amministrative* (GPA), these bodies were introduced in order to control local governments. They were based on the model of the Prussian *Bezirksausschuss*, an organ that resulted from the union of the District Council and of the District Administrative Court and that included two professional officials qualified for administrative and judicial service and four non-professional members chosen by the Province Committee. Similarly, the GPA was presided by the prefect and was composed by both, prefectural

²⁹ The judicial nature of the IV section of the Council of State started to be substantially recognized by the positions taken by the Sections of the Supreme Court of Rome, on the basis of the new law on conflicts of 1877. This law attributed the competence to regulate conflicts of jurisdiction between the judicial authority and administrative authority, which used to be of the Council of State, to the Supreme Court of Rome.

councillors, with a technical-administrative competence, and members chosen by the Province Council.

2.1.5 The Giolittian era: the judicial nature of the Council of State and the “political” use of the consultative function

Years between 1900 and 1914 that preceded the first World War are defined as the “era of Giovanni Giolitti”. These years are of particular interest for the changes that occurred in the relations between politics and public administration and that concerned also the role of the Council of State. This age conventionally starts with the formation of Zanardelli government, in which Giolitti hold the strategic portfolio of the Interior and then covers the various coalition governments presided by Giolitti (1903-1905, 1906-1909, 1911-1914). Fundamental political and social reforms were approved during this phase, as the extension of the suffrage (1913), the achievement of an open system of labor relations, the introduction of a rudimental system of welfare. The State developed several new functions: between 1905 and 1912 railways, telephone networks and life insurances were nationalized. The social and territorial transformations due to the take off of modern industry created the need for new public policies, which deeply affected the configuration of public administration. Cassese and Melis (1990) refer to such phase as an “administrative revolution in government”. The increase of ministerial tasks was reflected by the expansion of the bureaucratic structures, which passed from the 24 general directions of 1882 to the 40 of 1907. The personnel of the State had a 6-fold raise between 1881 and 1911 and the geographical composition of the administration changed too, since public officials started to be recruited also from the Southern Regions of Italy (Melis 1996). In a speech of 1909, Santi Romano argued that the ministers were starting to have a “social responsibility” in addition to the juridical and political ones, underlying the fact that the relation between citizens and government was becoming always more direct. The growing social demands were managed also through the creation of new positions inside the public sector. Graduates in law from

Southern Regions became the majority of the candidates in the competitions for Civil Service and they were employed into the Ministerial offices, contributing to the prevalence of the culture of administrative law inside the ministerial apparatus. Especially after the extension of the suffrage of 1913, the lower middle class employed into the offices of the central State, mostly based in Rome, became an important constituency. The administrative procedure, increasingly representative of the multiple interests, started to get slower and it became a remarkable instrument, for the government, to treat the most divisive issues in the implementation phase. The bureaucratization of the administrative personnel was achieved at detriment of the technical expertise³⁰. The technical personnel (as engineers and statisticians) was employed in the so called “parallel administrations”³¹. As underlined by several scholars, parallel administrations’ organization was the exact opposite of the bureaucratic ministerial model: it was characterized by the use of technical, non-bureaucratic expertise, essential internal rules, employment relationship of private law. In addition, the new administrations had some financial independence and their activity was subject to lesser controls by the Court of Audit. A sort of double channel for implementation was established: from one side, the traditional, hierarchic ministerial structures, where conflictual issues could rely on the control of a legal bureaucracy; from the other, new institutes and agencies charged with dealing with the emerging economic issues, with a more efficient decision-making. The Council of State was reorganized coherently with the new issues with which government had to deal. From one side, in 1907 the judicial character of the institution was definitely confirmed, with

³⁰ An emblematic example is given by the new regulations precluded the technicians of *Genio civile*, a *grand corp* of the State which supervised public work projects, to reach the vertex of the structure, in favor of officials with an administrative career. Similar regulations were applied in all other ministries, in which the applicants for top positions had to be public and administrative law experts.

³¹ Parallel administrations, established in reaction to the excessive rigidity of the bureaucratic ministerial apparatus, were special offices connected the ministries, with an autonomous management, charged with coordinating specific public policies. Example of such administrations were the new public agency for State Railways and the *Magistrato delle Acque* for the management of water bodies of North-eastern Italy, connected to the Ministry for Public Works; the General Commission for emigration, which depended on the Ministry of Foreign Affairs; the National Institute for life insurances (*Istituto Nazionale delle Assicurazioni*, Ina).

the introduction of the fifth judicial section. The new section intended to reduce the backlog accumulated, especially in matters of public employment, a field in which the Council of State produced a relevant jurisprudence³². From the other, the government made a new use of the consultative function of the Council of State. A substantial innovation of the Giolittian era consisted in the appointment to the Council- increasingly composed by old exponents of bureaucratic careers and of university professors of law- of expert officials of the Ministries (especially of the Ministry of Interior) still in the middle of their careers³³. The new members of the Council, trusted by Giolitti, after a short phase of full activity inside the institution, then tended to be employed into the cabinet with high positions, as directors-general, cabinet secretaries, chairmen of various committees. In this phase, the formal consultative activity of the Council of State (the preventive control on government acts) was substantially reduced in favor of the individual missions and offices of the new councilors inside the cabinet. This fact, which caused repeated complaints from the same Presidency of the institution, intended to make the new administrative élite of the Council to some extent co-responsible for government activity. Giolitti, previous member of the Council of State and with a vast knowledge of the internal logic of the administration³⁴, made a “political” use of the consultative function of the Council of State and tried to align the interests of the high ministerial bureaucracy with those of the government. In addition,

³² The first organic regulation of public employment that was approved in 1908, according to the commentators was in a strict continuity with the jurisprudence elaborated by the Council of State. The law from one side attributed to public employees rights and wages that were not available for private employees. From the other, it aimed at preventing civil service from unionizing.

³³ Melis (1999) quotes the examples of Ottavio Serena, ex prefect appointed when he was 52 years old, Attilio Brunialti, prominent constitutionalist appointed at the age of 44, Raffaele Perla 38 years old magistrate and Carlo Schanzer, 33 years old, future general director and minister.

³⁴ The political career of Giolitti is preceded by a long *cursus honorum* inside public administration. The impressive number of positions that he held inside public administration allowed him to develop a deep knowledge of the administrative apparatus. Volunteer in the Ministry of Justice at 20 years old, Giolitti became public official in the cabinet of the minister Miglietti in 1864. He quickly won a public competition to become magistrate, he participated to the cabinet of several other ministers, he was the Private Secretary of Quintino Sella, for whom he reorganized and unified the tax system; between 1873 and 1876 he was councilor of the minister Minghetti and then general director at the Ministry of Finance with Depretis. In 1877 he became Secretary-General of the Court of Audit and in 1882 he was appointed to the Council of State, where he stayed for 12 years (Melis, 2011).

Giolitti made a “partisan” use of the *Giunte Provinciali Amministrative* (GPA). He did not hesitate to use the control of legitimacy provided by GPA to dissolve municipal Councils, when the political forces resulting from local elections were in opposition to the political majorities of central government³⁵.

2.1.6 The symbolic-legitimizing role of the Council of State in the fascist regime

The fascist regime did not alter the functions of the Council of State. The proclaimed “fascistization” of the apparatus did not take place in the institution, nor in the ministerial administration. The Council of State was conceived as a body of juridical consultancy, that did not interfere with the Grand Council of Fascism, nor, for what concerned the judicial activity, with the Special Tribunal for the Defense of the State. Its judicial function was partially re-organized, but in continuity with the disposals of the Giolittian era. The De Stefani reform of public administration attributed exclusive competence to the judicial sections of the Council of State in matter of public employment (1923). Such reform established that the administrative judge, on this issue, was competent for disputes concerning both, legitimate interests and subjective rights, excluding the intervention of the ordinary judge. But more than being expression of the instances of the fascist regime, the reform answered to the necessity to rationalize the organization of administrative justice, as a consequence of the previous reform of 1907. According to several authors (amongst them Righettini 1998 and Lochak 1994) the institution in this age exercised some, limited autonomy in its jurisprudence. In particular, it was able to intervene in the interpretation of the antisemitic legislation inside public administration, to some extent mitigating its effects. The consultative function of the Council continued to exist, but it was undermined. The executive power, after to the so called *leggi fascistissime* of years 1925-1926, which attributed large part of the legislative function to the government, saw a strong extension of its prerogatives

³⁵ He refused to limit central government discretion in the procedure of dissolution of municipal Councils, going against the suggestions also of the minister Sonnino (Aimo 2002, 94).

to the detriment of Parliament, which was levered out. The President of the Council of State appointed by Mussolini in 1928, the prominent jurist Santi Romano³⁶, tried to advocate a more important role for the institution, suggesting to extend the consultative function of the Council to the control and coordination of government legislative activity³⁷. The suggestions of the President of the Council of State did not find in Mussolini a receptive interlocutor. The most important contribution of the Council to the legislation of the regime concerned the drafting of consolidation acts (*testi unici*). For the rest, its opinion remained mandatory only on acts of secondary legislation. The competence to provide mandatory opinions on legislation on a series of affairs was attributed to the Grand Council of Fascism. At the same time, it has been noticed how the government made an extensive use of the decree-laws, right to avoid the mandatory control of the Council of State and of the Court of Audit on secondary legislation acts, as the Law No. 100/1926 had established (Calandra 1978, 308). Similarly to what happened in the Giolittian age, the consultative function of the Council of State was “fractionalized”: individual members of the Council participated to the consultative technical bodies established among the ministries. A practice that was criticized by the same President Santi Romano, since it risked to threaten the unity of the interpretation of the Council, weakening the whole institution. The Council of State was not involved, instead, nor as juridical consultant, nor as administrative judge, in the process of “entification” (*entificazione*) of large policy sectors, as pensions, social assistance, life insurances, agriculture, industry and others, which represented the

³⁶ Santi Romano, before being appointed to the Council of State as its president (a position that he held from 1928 to 1943) had a brilliant academic career. He represented the only case of a president of the Council that did not have a previous *cursus honorum* inside the administration. Together with other jurists, he was a theorist of the “Administrative State”. According to Romano, it was a duty of the jurists to continue their work also inside the fascist regime. Also in absence of a parliamentary government, the rule of law continued to exist as “Administrative State” and the jurists had to contribute to its functioning and regulation.

³⁷ In a letter attached to the report for the activity of the Council of State for the years 1931-1935, the President Santi Romano suggested Mussolini to increase the consultative prerogatives of the Council of State, without succeeding: “*se l'eccellenza vostra volesse affidare al nostro istituto più ampie funzioni, noi le assumeremmo con spirito di responsabilità, con fede fervente, e innanzitutto con l'orgoglio di contribuire con tutte le nostre forze al compimento della missione alla quale la patria è stata da voi chiamata*”.

continuation of the “parallel administrations” of the Giolittian era. First of all, the institution played an important symbolic role for the legitimation of the fascist regime. Solemn ceremonies were organized in occasion of the opening of the works of the institute in 1924, for the start of the presidency of Santi Romano in 1928 and for the centenary of the Council of State in 1931. According to Santi Romano, also in the fascist regime, public administration could have been representative of the traditional values of the rule of law, in virtue of its acts and of its proper jurisdiction. Legal rules could have prevailed on the pure expression of the political will. The ideology of “neutrality”, the *super- partes* character of the institution became instrumental in offering to the regime a symbolic legal legitimacy.

2.1.7 The unitarian character of the functions of the Council of State in the Republican regime

The Italian Constitution of 1948 equated the protection of subjective rights and legitimate interests, putting an end to the disparities of the system of 1889. Article 103 established that the Council of State and the other organs of administrative justice have jurisdiction on legitimate interests and, in the affairs enumerated by the law, on subjective rights. As for the Court of Audit, the Constitution guaranteed the independence of the Council of State from the government and this fact possibly constituted the most significant innovation of the new political era. Approving a proposal voted by the same General Assembly of the Council of State, the Constituents decided to preserve the institution in the Republican regime and not to separate its consultative and judicial functions. Article 100 of the Constitution defined the Council of State as a body of “juridical and administrative consultancy” and, at the same time, of “promotion of justice inside the administration”. The consultative function of the Council of State in the Republican regime was perfected by the Law No. 400/1988 on the organization of the Presidency of the Councils of the Ministers. In substantial continuity with fascism, the control of the Council was putted on secondary legislation

acts (regulations) and on certain types of government bills (consolidation acts: *testi unici*). However, the law of 1988 made this control mandatory. An integration to the law No. 400/1988, dating to 1997, introduced a further consultative section into the Council, called “section for the analysis of normative acts”, which reduced the number of the days, from 90 to 45, to provide mandatory opinions on the drafts submitted by the government. Governments voluntarily tend to ask the opinion of the Council also on primary legislation drafts when such legislation has a relevant content for the regulation of public sector (e.g. public procurement)³⁸. The republican regime has also maintained the institute, which derives from the monarchic age, of the extraordinary appeals before the President of the Republic, according to which the President can adjudicate upon appeals concerning definitive decisions by administrative bodies and the content of the Presidential decree consists in a transposition of the advice of the Council of State. The judicial prerogatives of the Council of State in the years of the democracy has tended to increase: since the number of affairs on which the Council has exclusive jurisdiction can be established through ordinary law, the list of subjective rights that the legislator devolved to the protection of the administrative judge (and that subtracted from the ordinary one) has consistently increased, as a result of the pressure of the various stakeholders. However, also some signals of conflicts between the government and the Council of State have occurred and some governments have tried to reduce the influence of the institution. One reform in particular has affected the competences of the institution: the legislative decree No. 29/1993, attributed to the employment contracts of the public sector the same legal basis of those in private sector. As a consequence, the competence on disputes concerning public employment contracts was devolved to the ordinary judge. Such reform, approved in years in which private sector collective

³⁸ The Ministry of Infrastructure and Transport has submitted to the Council of State the draft legislative decree on the new code of public procurement, based on the Law no. 11/2016. All legislative decrees implementing the recent, comprehensive reform of public administration (Law no. 124/2015, the so-called “Madia” law) have been submitted to the Council of State. The opinions on the decrees have been provided by a dedicated commission, instituted by the President of the Council. All documents are publicly available:
https://www.giustizia-amministrativa.it/cdsintra/cdsintra/Notiziasingola/index.html?p=NSIGA_4074993

bargaining arrangements were introduced also in a number of European countries to improve the efficiency of public administration and to rationalize the costs of public work, found the strong opposition of the Council of State. Moreover, the tendency by the governments to “fractionalize” or to “individualize” the consultative function of the Council of State, internalizing single members of the Councils at the vertex of ministerial structures- a practice that have its roots in the Giolittian and then also in the fascist era- occurs also in the Republican regime. The phenomenon of the extra-judiciary offices of the councilors, appointed as cabinet secretaries, juridical consultants, heads of legislative offices, recently strongly criticized also by journalists and newspaper commentators, remains an instrument that governments tends to use, with varying intensity. In addition, as a signal of the fact that governments are not always prone to submit their regulations to the *ex ante* control of the Council of State, a tendency to evade such control, adopting general administrative acts in place of regulations, has constantly developed. This “stratagem” has been reported by several jurists as a concerning phenomenon of growing importance that could threaten the uniformity of law. The same Council of State has sanctioned this attitude through its doctrine and jurisprudence.

2.2 Present-day consultative functions of The Council of State and of the Conseil d'Etat: inputs for a comparative analysis

Several jurists and prominent members of the Council of State, in coherence with what the Constitution establishes, have repeatedly underlined the unitary configuration and the complementarity of the functions of the Italian Council of State. For instance, Gabriele Pescatore, President of the Council of State between 1980 and 1986 and then judge of the Italian Constitutional Court, argued that the consultative and judicial functions of the Council of State are managed on a unified basis (Pajno 1999, 65). Pasquale De Lise, former President of the Council of State, in his inaugural speech of

2010 affirmed that, ensuring the legitimacy of the acts of the executive, the consultative function would aim at preventing the administrative contentious. The same Council of State, in official documents, describes its *ex ante* control on government acts as a sort of anticipation of the orientations of the institution in case disputes should occur (Council of State, Section I, March 6th, 1997). The idea that derives from these statements is that the Italian Council of State, when provides its control on secondary legislation acts, behaves as if it was (already) a judge. Its opinions tend to be inspired by the principles of a consolidated jurisprudence, that the same Council of State has established. The jurisprudence of the Council, since the age of Rattazzi and of the Historical Right, aims at preserving the continuity of administrative action and the uniformity of the interpretations of government activity. The contemporary evolution of the French *Conseil d'Etat*, on the contrary, seems to reveal different characteristics with respect to the consultative function of the institution. In particular I contend that the introduction of the semi-presidential system, which has definitely strengthened the role of the government, has attracted the consultative function of the *Conseil* in a more political sphere and it has induced the institution to develop a more cooperative attitude with government. Striking signals of conflict between the *Conseil* and French government dates back to the phase immediately preceding the introduction of the direct election of the President of the Republic, in 1962, when the government was headed by Charles De Gaulle. In that occasion, the General Assembly of the *Conseil d'Etat*, declared illegitimate the procedure by which the government intended to introduce the direct election of the President of the Republic. The opinion of the *Conseil*, usually secret and directed only to the government, was given to the press. Charles De Gaulle in a first moment threatened to deeply reform the *Conseil*. Then such project was abandoned, but the opinion of the *Conseil* was not followed. The enshrining of the consultative function of the *Conseil* occurred with the Constitution of the Fifth Republic. The new Constitution extended the prerogatives of the institution as consultant and, most importantly, it recognized constitutional dignity to this function only. While the consultative function of the *Conseil* is quoted in several parts of the fundamental law,

the role of the institution as supreme administrative judge is not even mentioned. The predominance of the consultative function over the judicial one is underlined also by the same members of the institution, that, contrary to the Italian colleagues, have they themselves promoted reforms aimed at reducing the workload connected to the contentious, devolving it to other administrative tribunals. The creation of the further level of jurisdiction of the Administrative Courts of Appeal in 1987 (which were added to the Administrative tribunals created in 1953) was an answer to the problem of administrative justice's overload and it allowed the *Conseil* to focus only on the most important, *high politics'* related decisions (Meny 1994). While the Italian Council of State has constantly defended the unitary character of consultative and judicial functions, the French *Conseil d'Etat* has promoted their separation, in favor of the first one. In addition, it has to be noticed how several French councilors are alumni of the *Ecole National d'Administration* (ENA) and, since their educational background is not juridical but more generalist, they do not seek to join the *Conseil* with the idea of becoming judges. On the contrary, they are more attracted by the tasks and the affairs that the consultative function of the institute can offer and by the subsequent careers that a position inside the *Conseil* may open into politics or in the private sector. Until 1958, the consultative prerogatives of the *Conseil* concerned mainly government secondary legislation. The Constitution of the V Republic of 1958 has radically changed such state of affairs, attributing to the institute competence also in matters of primary legislation, a result that the Italian Council of State occasionally tries to achieve, but without succeeding. According to the French Constitution, government bills are adopted by the Council of the Ministers, after the opinion of the *Conseil*. Such procedure is considerably relevant, if we take into account that in the semi-presidential system established in 1958 the high majority of primary legislation has become of competence of government, to the detriment of Parliament. The same procedure applies also to secondary legislation acts (regulations and governmental decrees to be approved “*en Conseil d'Etat*”) that derive from a delegation or from other primary legislation approved by the Parliament. If Italian governments tend to employ even “stratagems”,

adopting specific acts- the general administrative acts- in place of regulations to avoid the *ex ante* control of the Council of State, their French counterparts do not seem to be equally concerned of the “threats” of annulment of the *Conseil*. In fact, both French government and the *Conseil* are aware that a too drastic opposition of the *Conseil* to the content of an act of government would be easily evaded by the government itself. In particular, government could evade the critiques of the *Conseil*, by modifying primary legislation from which a contested decree derives: new primary legislation may be adopted *ad hoc*, in order to make a regulation *ex ante* considered illegitimate less vulnerable to defeat in case of a legal dispute (Page 2010, 1026). Also for this reason, the attitude of the *Conseil*, when it exercises its consultative prerogative, tends to be cooperative. Formally presided by the Prime Minister, more than being a “censor”, the *Conseil* tends to be a “codecision- maker”, aware of the political feasibility of its proposals (Many and Gueraudin 1994). The opinions of the *Conseil* generally are not radical in their conclusions and they consist in a sort of analysis of costs and benefits of government's decisions. The rapporteurs that the *Conseil* designates for the *ex ante* analysis of a government proposal, in some cases is consulted by the same government since the first elaboration of the project. In these cases, a strong cooperation between the two institutions occurs. The practice of the extra-judicial offices is extensive also in France, where councilors can go on administrative leave to hold positions at the head of central administrations, of technical consultant of the ministries, of cabinet secretaries. Differently from Italy- and further signal of the more political character of the consultative function of the institution- several prominent politicians, before being directly involved in the policy-making have been serving at *Palais-Royal*³⁹. In general, the awareness of the political role that this institution plays for the political and institutional equilibria clearly emerges both from public debates and from the studies on the activity of the *Conseil* (Amirante, 1994).

³⁹ Some prominent examples are Georges Pompidou, former Prime Minister and President of the Republic, who was a member of the *Conseil d'Etat*. Michel Debré, Laurent Fabius, Edouard Balladur have served at the *Conseil* before being prime ministers.

CHAPTER III

The *ex ante* control of the Council of State of Italy on regulations

Introduction

The Council of State was born as an advisory board of the government. Nowadays, with the *ex ante* control on secondary legislation and with the *ex post* judicial control on administrative acts, it participates to the descending phase of the political process, contributing to the implementation and to the interpretation of the administrative acts. However, looking through the articles of the editorialists and of the commentators, and considering the declarations of the same political actors, it is possible to affirm without fear of contradiction that the institution has ceased to be the “indispensable prompter of the government” (“*insostituibile suggeritore del governo*”)- a definition that the historian Guido Melis has used to describe the Council of State of Liberal Italy. In this chapter, I try to show how the Council of State has progressively gained consistent independence and how it tends to act, first of all, as a “self-serving” actor, more than as an advisor of the government. As a result of the difficulties in producing significant policy change and as a consequence of government instability, the institution would have no incentives in being co-responsible for governments' policy goals. On the contrary, the Council would act *in primis* as a “censor”, that takes advantage from the cumbersome nature of the legislative decision-making and of the implementation process. In the following section, I report testimonies of the fact that the efficacy and the efficiency of Regional Administrative Tribunals and of the Council of State tend to be contested in occasion of potential or actual phases of policy change. Then I provide some evidence of the capacity of the Council of State of delaying the process of regulations' adoption and I report data on the highly-contested phenomenon of the extra-

judicial offices of the councilors.

3.1 The Council of State of Italy: a self-serving institution?

Signals of considerable aversion to the role of the Council of State and with the functioning of administrative justice occur periodically in the Italian Second Republic. The double nature, consultative and judicial, of the Council of State was questioned during the works of the Third parliamentary Bicameral Commission, established to reform the Italian constitution in 1997⁴⁰. In particular, one of the subcommittees in which the commission was organized, the Committee for the “System of Guarantees”, discussed a comprehensive reform of the judiciary, which involved also issues of administrative justice. Committee members evaluated the hypothesis of unifying administrative and ordinary jurisdictions, but then the proposal, opposed by the same magistrates, was abandoned. Committee members agreed instead on the fact that judges should not exercise both, advisory and judicial tasks, a circumstance that clearly concerned (and still concerns) the Council of State. In this regard, it was proposed to establish a separate administrative court, with judicial functions only, while the Council of State would have exercised mere consultative tasks⁴¹. As is known, the final draft of the Bicameral Commission got sunk in Parliament. However, its proposals were prominently featured in the press and debated by journalists and commentators. The role of the Council of State was subject to serious criticism in the debate that followed the working sessions of the committee for the system of guarantees. One of the major

⁴⁰ The commission, composed of 35 senators and 35 deputies appointed in proportion to the strength of their parliamentary groups, proposed several modifications to the second part of the Constitution. If approved, these amendments would have significantly affected the governance of the political system. The main changes concerned the form of government, in particular a direct elected presidency, the end of bicameralism, a greater role for sub-national levels of government. The modifications concerned also the organization of the judiciary (the ordinary judiciary and the Constitutional Court). However, as is known, the final bill of the commission got sunk in Parliament.

⁴¹ Parliamentary Commission on Constitutional Reform, Report on the Committee of the System of Guarantees by the deputy Marco Boato: <http://www.camera.it/parlam/bicam/rifcost/comitati/sg0507rs.htm>

Italian newspapers started a lengthy dispute, publishing an editorial entitled “Council of State to throw out” (“*Consiglio di Stato da buttare*”). In this article it was claimed that the Council of State and the Regional Administrative Tribunals should have been abolished, since the downturn that they were causing to the certainty of administrative acts with their jurisprudence was damaging the proper functioning of public administration. Moreover, the editorialist accused the consultative function of the Council of State of delaying government decision-making and Council of State's members of bargaining their opinions to preserve their privileges of “caste”⁴². To this editorial, besides several members of the Council of State⁴³, reacted the economist Paolo Baratta, Minister for Public Works and for the Environment under the “technical” Dini cabinet and former minister in other previous governments. In his letter, Baratta first underlined the pervasive presence of Council of State members at the head of the ministerial structures (as heads of cabinet and heads of legislative offices). Then he observed how, contrary to what he expected⁴⁴, even for acts that would have required only few days of work, with the *ex ante* control of the Council of State the procedure used to get lost in months, often several months. The procedure to adopt a regulation is described as follows: “the first draft is drawn up after exhausting negotiations between the ministries. Then the draft is sent to the Council of State. The President of the

⁴² The editorial of Eugenio Scalfari: <http://ricerca.repubblica.it/repubblica/archivio/repubblica/1997/02/09/consiglio-di-stato-da-buttare.html?ref=search>
In an article that followed the first editorial, Scalfari describes the Council of State as a “lobby” mixed-up with public administration:
<http://ricerca.repubblica.it/repubblica/archivio/repubblica/1997/02/16/che-serve-questo-consiglio-di-stato.html>

⁴³ Among the others: the letter in response to the editorial of Eugenio Scalfari by the President of the Council of State, Renato Laschena:
<http://ricerca.repubblica.it/repubblica/archivio/repubblica/1997/02/11/chi-giudica-il-palazzo-sia-autonomo.html?ref=search>
The letter of a prominent member of the Council of State, Antonio Catricalà, former President of the Antitrust Authority, former Undersecretary of the Presidency of the Council of Ministers, former Vice Minister for Economic Development. Catricalà criticizes the proposal of converting the Council of State into a mere government advisor. He defends the convenience of a unified jurisdiction, to be developed by both, consultative and judicial sections, in order to diminish the risk of censures by the same Council of State: <http://ricerca.repubblica.it/repubblica/archivio/repubblica/1997/07/20/consiglio-di-stato-riforma-ambigua.html?ref=search>

⁴⁴ The expectation of the Minister was that the presence of Council of State's members at the head of ministerial structures would have fasten the procedure to adopt regulations.

Council receives the draft and then he send it to one of the three consultative sections, which attribute the draft to a rapporteur. If the analysis of the rapporteur to the section is not sufficient, the draft will be discussed by the General Assembly, which meets once a month. The opinion approved by the Assembly will be drawn up by the rapporteur and then it will be sent to the administration; if the opinion is interlocutory, the process starts all over again". The fact that the time to issue opinions on regulations was reduced from 90 to 45 days by the law, in 1997, was vanished by the introduction of the institute of "non-mandatory terms" ("*termini non perentori*"). Non-mandatory terms imply that there are no consequences if the implementation act is not adopted within the time frame established by the law. According to Baratta, this simply made the time-limit to adopt regulations "a joke"⁴⁵. The problem of the slowdown in the implementation of primary laws due to the *ex ante* control of the Council of State was raised more recently by the "technocratic" government of Mario Monti. This non-partisan government, which followed the collapse of Berlusconi IV cabinet and which was in office between November 2011 and April 2013, made some relevant policy changes under the pressure of the sovereign debt crisis⁴⁶. Monti government identified the law rates of approval of implementation acts as a real problem and it started a systematic monitoring of the enactment of secondary legislation. A report published two months before government's end on the status of implementation of primary laws reported that, among the reasons for the the late implementation of several laws, some were external and independent from government's will. One of these was exactly the *ex ante* control of the Council of State on regulations⁴⁷. After Monti cabinet, an inconclusive general election left Italy without effective government for two months. In the aftermath of a turbulent political

⁴⁵ The letter of the Minister Paolo Baratta: <http://ricerca.repubblica.it/repubblica/archivio/repubblica/1997/02/14/la-congiura-del-silenzio.html?ref=search>

⁴⁶ In particular, it approved a pension reform, greatly postponed by the previous government, which switched all workers into the contribution-based state pension and which, above all, extended working lives.

⁴⁷ The report by the Minister for Relations with Parliament and for the Implementation of Government Program, Piero Giarda (the reference to the Council of State mentioned in the text is at page 10): http://presidenza.governo.it/ufficio_statistica/documenti/rapporto_amministrativo.pdf

impasse, a coalition government headed by Enrico Letta was formed, with the aim, first of all, of facing the deep economic recession. Few months later, in August 2013, the former President of the Council of the Ministers, Romano Prodi wrote an article directed to the government and which was published on several newspapers, with the unequivocal title: “Abolishing T.A.R. and the Council of State to avoid slowing down Italy's growth” (*Abolire il Consiglio di Stato per non legare le gambe all'Italia*⁴⁸). In this article, Prodi invoked the abolition of the Council of State and of Regional Administrative Tribunals in order to release resources to relaunch the Italian economy. By referring to a dialogue with an entrepreneur, Prodi described how these institutions would have gained a power that has no parallel in other countries. The unacceptable delay in the implementation of regulations; the absence of substantial limitations to the appeals of the individuals in matters of public procurements, public competitions, as in any decision with an economic impact; the effects of the appeals of blocking for years the infrastructure investments, as the public examinations called by the universities would have serious negative effects on country's economy. In particular, according to Prodi, these elements would contribute to create a situation of “eternal uncertainty”, that lead the investors to approach other countries in which such uncertainty does not exist. Signals of impatience with the activity of the Council of State has been expressed by the current President of the Council of Ministers, Matteo Renzi. Renzi, who has promised a sweeping overhaul of the electoral and constitutional systems, has made large use of targeted controversies against actors and praxis that would obstacle policy change. Amongst these, at the start of his office he initiated a dispute against the power of Council of State's members at the vertex of ministerial structures and he announced he would have banished them from the head of the legislative offices and of the ministerial cabinets. As “mandarins of the bureaucracy”, administrative judges are considered as the real supervisors of government legislative activity, able to affect government legislation and to lengthen the adoption of legislative and administrative

⁴⁸ http://www.romanoprodi.it/articoli/abolire-tar-e-consiglio-di-stato-per-non-legare-le-gambe-allitalia_7074.html

decrees⁴⁹. Curiously, even a former member of the Council of State, Domenico Cacopardo, described the section of the Council for the analysis of normative acts as a self-referential and unaccountable body, able to affect government activity. This councillor suggested the President Renzi to demobilize such section of the Council, if he intended to undertake a real course for change⁵⁰...

3.2. The impact of the ex ante control of the Council of State on the timing for the adoption of administrative acts

The testimonies reported denounce that the consultative function of the Council of State causes delays on regulations' adoption. This fact, however, has received few or no attention by the scholars. Although the adoption by the ministries or by the whole government of the administrative acts is fundamental for the effectiveness of the same laws (Italia, 2015), such process constitutes a sort of “black box”. To my knowledge, a measure of the delay produced by the *ex ante* control of the Council of State on regulations' adoption has never been provided. Therefore, I have attempted to quantify it, comparing the time needed by the Government to approve regulations and the time needed to approve "*decreti non regolamentari*" equivalent to regulations. Such decrees belong to the so called category of general administrative acts (GAA). GAA are addressed not to individual, but to plural beneficiaries, identifiable after their approval. Unlike regulations, they do not require the *ex ante* control of the Council of State to be enacted. Nevertheless, they have general effects and governments tend to use them as substitutes for regulations. Some examples of GAAs and regulations used as perfectly equivalent instruments are the following. The discipline of tax provisions concerning the revaluation of undertakings' assets ("*disposizioni tributarie in materia di*

⁴⁹ <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2014/02/24/la-burocrazia-volti-nuovi-nei-ministeri-andranno.html>

⁵⁰ <http://formiche.net/2014/02/22/consigliere-stato-renzi-dico-rottami-po-il-consiglio-stato/>

rivalutazione dei beni delle imprese") was regulated in 1991 through a GAA (ministerial decree February 14th, 1991 of the Ministry of Finance). In 2001, the same affair was issued through a regulation (ministerial decree April 13th, 2001 No. 162) that, unlike the previous act, was submitted to the *ex ante* control of the Council of State. The Decree of the President of the Council of Ministers, approved in conjunction with the Ministries of Justice and of Economy and Finance, which enacts the Statute of the Institute for the assistance of the personnel of Prison Administration (*Ente di assistenza per il personale dell'Amministrazione penitenziaria*) was submitted to the *ex ante* control of the Council of State and it was adopted as a regulation in 1997 (D.P.C.M April 30th, 1997). However in 2008, a new version of the same Statute was re-enacted as a GAA, without the activation of the preventive control of the court (D.P.C.M. February 2nd, 2008). The ministerial decree November 24th, 1994 No. 687, adopted by the Ministry of the Interior, concerns the programs on the protection of collaborators with justice and their implementation. The decree, which derives from law March 15th, 1991 No. 82 (decree-law January 15th 1991, No. 8) on the protection of collaborators with justice, was not submitted to the *ex ante* control of the Council of State and it was adopted as a GAA. When the same issue was re-regulated by the government through the law February 13th, 2001 No. 45 on the protection of witnesses and of collaborators of justice, the corresponding decree (D.M. April 23th, 2004 No. 161), unlike the previous one, was a regulation and it was submitted to the *ex ante* control of the Council of State.

I have quantified and then compared the length of the processes necessary to adopt regulations and "GAA equivalent to regulations" counting the days that separate the date of approval of the laws and the date of adoption of the decrees in five policy areas: Economy and Finance, Education, Defense, Interior and Justice, in years between 1988

and 2014⁵¹. However, since secondary legislation acts derive in largest part from laws approved by previous governments, I have considered first a subset of decrees, which derive from laws of incumbent governments only: in this case, I have provided the timing for the adoption of Ministerial Decrees in the policy sector “Economy”. Then, I have considered both, the acts descending from laws of incumbent and of previous governments. In this case I have reported the median value of the timing for the adoption of all the administrative acts in all policy sectors.

3.2.1 The first measure: timing for the adoption of the “success stories”

The first measure includes only the acts deriving from laws of incumbent governments. They represent, somehow, the “success stories”: they are the acts that governments intended to adopt and that managed to approve on time (before governments ended). Therefore, the measure does not take account of the delays in the procedure that may have postponed the approval of a regulation to a successive government.

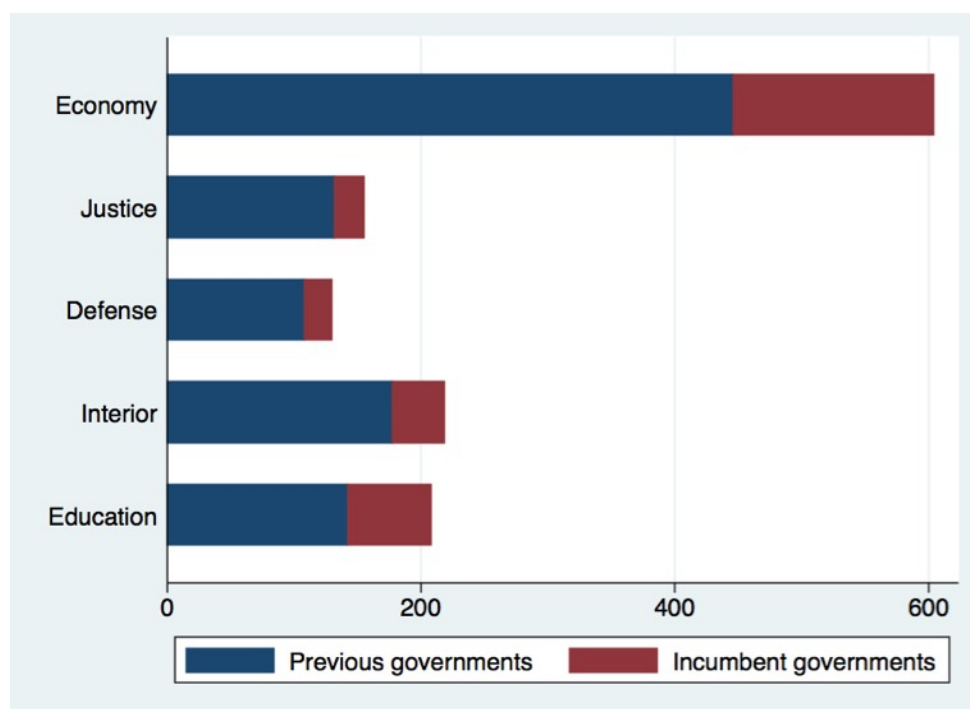
The “success stories” are actually a minority of the administrative acts. According to the data I collected, the highest number of decrees descending from laws of incumbent governments belong to the Economy and Finance policy sector, followed by Education policy sector. However, for the large majority, administrative acts do implement past primary legislation.

As shown in Figure 1, “Economy” is the policy sector with the highest total number of acts approved (604 over 1.318, the 45.8% of the total). The non-inherited acts adopted by the Ministries of Economy and Finance constitute a 11.9% of the total number of acts approved between 1988 and 2014 in all policy sectors (158 over 1.318) and they

⁵¹ Data have been computed from the juridical database *Leggi d'Italia*. Regulations and GAA can take the form of ministerial and inter-ministerial decrees (D.M.), of President of the Republic decrees (D.P.R.), of President of the Council of the Ministers decrees (D.P.C.M.). They have been collected from 1988, year of approval of the law No. 400/1988 on the on the reorganization of the Presidency of the Council of Ministers. This law made the *ex ante* control of the Council of State mandatory and not binding for all types of regulations (D.M., D.P.R., D.P.C.M.). The policy sectors Economy, Education, Defense, Interior and Justice have been chosen since the Constitutional Reform of 2001 left intact the prerogative of the corresponding ministers to adopt regulations (with no redistributions between central government and the Regions).

represent the 26.1% of the total number of acts approved in the same period by the Ministries of Economy and Finance only (158 over 604). “Interior” policy sector follows Economy for what concerns the total number of acts approved: 220 over 1.318, the 16.6% of the total. The non-inherited acts adopted by the ministries of Interior represent the 3.1% of the total number of acts approved among 1988 and 2014 in all policy sectors (42 over 1.318) and the 18.7% of the total number of acts adopted in that policy area in the same period (42 over 219).

Figure 1. Frequency distribution of administrative acts deriving from laws of incumbent and previous governments, per policy sectors



Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014). Types of act: D.M., D.P.R., D.P.C.M.. Total number of acts: 1.318

The policy sector “Education” enacts 208 acts over a total of 1.318, the 15.7%. The acts descending from laws of incumbent governments represent the 4.9% of the total number of acts approved between 1988 and 2014 (65 over 1.318), but they constitute the 31.2% of the acts approved in that policy sector only (65 over 208).

The policy sector “Justice” has approved 156 acts over the 1.318 total (11.8%). Its non-inherited acts are 24, the 1.8% of the total number of acts adopted in all policy sectors and the 15.3% of the acts from justice sector (24 over 156) between 1988 and 2014.

The policy sector “Defense” adopts 130 over 1.318 acts, the 9.8% of the total. The acts deriving from laws of incumbent governments represent the 1.6% of the total (22 over 1.318) and they constitute the 16.9% (22 over 130) of the acts approved between 1988 and 2014 in that policy sector only.

I have chosen the policy sector “Economy” to compare the timing for the adoption of regulations and GAA, since it is the only one that provides a quite significant proportion of acts deriving from laws of incumbent governments. According to the data, the average number of days to adopt an administrative act which has been submitted to the Council of State for its *ex ante* control- a regulation- is **308.4** (almost 10.2 months). Vice versa, on average, it takes **179.3 days** (almost 5.9 months) if the act has "skipped" the control of the Council of State, and in this case the decree is a general administrative act, GAA.

Since a specific category of acts: the Ministerial Decrees (D.M.) is predominant among the non-inherited acts of the Economy policy sector (108 over 158 acts)⁵², I have focused the analysis on it to describe more in detail the timing for the adoption of regulations and GAAs (see Table 1).

⁵² Acts that modify the text of existing regulations or GAA were not included.

Table 1. Timing for the adoption of Ministerial Decrees in the policy sector “Economy”, per type of decree (Regulations and GAA)

Timing	Regulations	GAA	Total (Regulations + GAA)
1 month (30 days)	0	22,45%	10,19%
2 months (60 days)	5,08%	10,20%	7,41%
6 months (180 days)	28,81%	38,78%	33,33%
1 year (365 days)	47,46%	16,33%	33,33%
3 years (1.095 days)	18,64%	12,24%	15,74%
Total	100,00% (N=59)	100,00% (N=49)	100,00% (N=108)

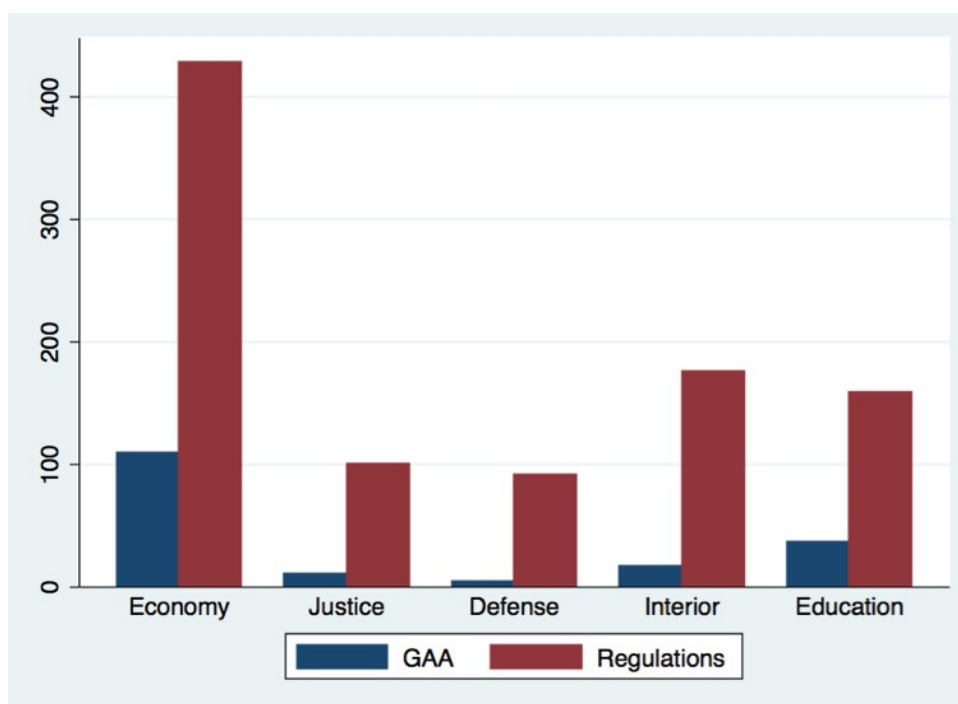
Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014). Types of act: D.M.

The majority of ministerial decrees tends to be adopted between 6 months and one year from law's approval. The acts that governments manage to approve “on time” (before the government ends) are for 59% regulations and for 49% GAAs. However, general administrative acts and regulations have completely different behaviors: while the 71.43% of GAA is approved within the first 6 months after law's adoption, the 66% of regulations is approved after the first 6 months and within 3 years after law's approval. More specifically, almost half of regulations (47,46%) takes one year to be approved, versus the 16,33% of GAA. Within the first month after the law's adoption, the 10.19% of the total number of decrees is enacted. This 10% is composed by GAA only: the 22.45% of the total number of GAA is enacted within a month, while no regulation is approved within 30 days after law's adoption. These data seem to confirm that if governments intend to implement an act very quickly, they do not activate the control of the Council of State.

3.2.2 *The second measure: median value of the timing for the adoption of administrative acts, including those deriving from laws of previous governments*

The second measure includes both, the acts deriving from laws of incumbent and of previous governments. It consists in the median value of the number of days that separate the dates of adoption of the laws and the date of adoption of the decrees (regulations and GAA). All types of decrees have been considered (D.M., D.P.R., D.P.C.M.), except those deriving from laws prior to 1988 (this to exclude acts descending from remote laws, that ensure the mere administrative continuity). The distribution of GAA and regulations per policy sector is represented on Figure 2:

Figure 2. Frequency distribution of Regulations & GAA deriving from laws of incumbent and previous governments, per policy sectors



Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.142

Several Italian law scholars report that governments would increasingly (and illegitimately) make use of general administrative acts in place of regulations in order to avoid the *ex ante* control of the Council of State. According to Cassese (1999), this tendency was present even during fascism: regulations were substituted with primary legislation to evade the control of the Council of State. In recent years, after the law No. 400/1988 extended the control of the Council of State on all types of regulations, governments would tend to avoid the *ex ante* control of the institution adopting decrees with the form of general administrative acts. Such phenomenon has been defined “escape from regulation” (*fuga dal regolamento*)⁵³. An example of a general administrative act used as an equivalent of a regulation is the ministerial decree August 8th, 2009 which regulates the associations of the so-called volunteers observers for urban safety, better known as patrols (*ronde*). The decree, adopted by the Minister of the Interior, derives from law No. 94/2009, which regulates the involvement of groups of citizens to report to the police situations that can damage urban security. Such law was preceded by a strong political controversy, since the Minister that during national parliamentary election of 2008 largely campaigned for it (for the establishment of the *Patrols of Padania*) was a member of an anti-immigrants right-wing party and risks of violent degenerations were feared from many quarters. The decree clarified several aspects that the law had left open (as the fact that the associations cannot be expression of a political party, that they have to be non-profit and that they must be registered in the prefectures) and it was approved only 24 days after law's adoption. There are cases in which governments have announced in primary laws that they would have derogated

⁵³ Among the others: Caringella (2011, 238), Lupo (2011), Tarli Barbieri (2011), Padula (2010), Cintioli (2007), De Siervo (1991). Some of these scholars argue that the escape from regulation is more marked in the affairs in which the prerogative to adopt regulations has been transferred to the Regions by the Constitutional Reform of 2001. Adopting GAAs, central government would end with regulating also the affairs of competence of the Regions. This is not the case for the policy sectors I have considered. In Economy, Education, Justice, Defense, Interior policy sectors, the prerogative to adopt regulations has remained untouched by the 2001 reform and it is of full competence of central government. The same juridical doctrine has identified as a *ratio* for the escape from regulation also the attempt by the government of evading the obligations of the law No. 400/1988, which requires the acquisition of the opinion of the Council of State in order to adopt regulations (Albanesi, 2011, Moscarini 2008).

from the procedure laid down by the law 400/1988 and that they wouldn't have submitted the administrative act to the *ex ante* control of the Council of State for “reasons of urgency”. It is the case, for instance, of the ministerial decree No. 233/1996, which derives from Law No. 563/1995 and which concerns urgent provisions for the further use of armed forces to control the maritime borders of an Italian Region (*Regione Puglia*). The law was approved in December 29th, 1995 and the decree, which was concerted between the Ministers of the Interior and of the Treasury and that authorized the institution of three reception centers for migrants, was enacted on January the 2nd, 1996. Another example of a general administrative act which derives from a measure considered of emergency is the decree December 21th, 2012. In this case, the “*Milleproroghe* decree” No. 225/2010 (law No. 10/2011) modified an existing law of 1992 concerning civil defense, and it introduced a new article in the law that allowed to adopt a general administrative act to manage a Guarantee Fund for companies affected by natural disasters. The general administrative act that derived from it regulates on detail the access conditions and the management of the fund. There are also cases in which governments have modified an existing law to adopt a general administrative act on a issue previously addressed by a regulation. It is the case of the decree-law No. 174/2012, concerning urgent disposals on finance and local authorities, that modified the Consolidated Law (*testo unico*) on local governments of 2000. After such amendment, the standards to determine structural deficit of local authorities have started to be addressed by a general administrative act (ministerial decree February 18th, 2013). But in the past the same subject matter was addressed by a regulation (ministerial decree June 10th, 2003 No. 217). Although law scholars report the use of general administrative acts in place of regulations as a pervasive and concerning phenomenon⁵⁴, in the policy sectors I considered, such phenomenon seems to be quite circumscribed. Except for the policy sector Economy, in which GAAs constitute the 20.4%, in each policy sectors GAAs are under the 20% of the acts. They represent the 10.8% in the

⁵⁴ Since the use of GAAs instead of regulations would introduce elements of uncertainty in the legal system and it would make it less knowable.

policy sector Justice, the 5.1% in the policy sector Defense, the 9.2% in the policy sector Interior, the 18.8% in the policy sector Education. The Council of State has underlined how several GAAs approved by the government actually have a “normative” content and, therefore, they should be regulations (Council of State, decision No. 9, May 4th, 2012). It is not unusual that the Council of State, when addresses opinions on regulations' drafts, rejects the provision of eventual GAAs mentioned in the texts, recommending the government to adopt further regulations in their place. It is the case, for instance, of the D.P.R. September 14th, 2011, No. 222, concerning the discipline of National Scientific Qualification to become Associate or Full Professor. The first draft of the regulation was submitted to the Council of State on February 1st, 2011 and it received a first interlocutory opinion on February 25th, 2011 (00670/2011). In this interlocutory opinion, the Council of State criticized the content of some articles, it underlined that the agreement on the draft of some ministries and of CRUI (the Conference of Italian University Rectors) and CUN (the Italian National University Council) was lacking and it contested the “non-regulatory” nature of a decree envisaged by the same D.P.R.. In the successive opinion, issued on April 21th, 2011, the Council recognized that government had positively converted the decree in question into a further regulation. Another case is provided by the D.M. February 8th, 2013 No. 45 concerning the criteria to institute and organize Graduate Schools. This D.M., which, as the previous D.P.R., derives from law December 30th, 2010 No. 240, known also as Gelmini Reform, had a longer and difficult *iter*. The Council of State expressed a first interlocutory opinion on it on November 24th, 2011 (No. 04820/2011). In this opinion, the Council of State suggested to rethink the draft and to make it more coherent with primary legislation. The second opinion was issued only on January 10th, 2013 (the draft was submitted to the Council of State on December 13th 2012). In the second opinion, the Council observed that the new draft was more coherent with primary legislation, but, among other remarks, it required the government to cancel, at Article 6(2), the words “*it can be modified with a ministerial decree with no-regulatory*

*nature*⁵⁵; namely it was denying the possibility to adopt a GAA to modify specific aspects of the regulation. This last case (the *iter* for the approval of the D.M. February 8th, 2013 No. 45) is interesting also because emblematic of what can happen in terms of timing for the adoption of a regulation, when an interlocutory opinion of the Council of State interrupts the procedure of adoption of an act. The interlocutory opinion of the Council of State is an opinion which contains major/serious remarks on a regulations' draft. It is not binding, but the government can hardly ignore it (if it does it, it takes the risk of seeing the same act annulled, in case the Council should judge its legitimacy as Court). The first draft of the D.M. No. 45/2013 was submitted to the Council of State in the last days of government Berlusconi IV: the draft actually dated November 7th 2011; the Council of State declared that the act was received by its Secretariat only on November 14th 2011, one week later and two days before government Berlusconi IV ended. The Council of State therefore provided its first interlocutory opinion after ten days, on November 24th, 2011, when the successive government of Monti was in office. It was indeed the cabinet of Monti which had to submit a revised version of the draft to the Council. It did it almost one year later, on December 13th 2012. The same Monti government finally adopted the regulation on February 2013, two months before its end.

⁵⁵ On a restricted dataset of 341 observations, which includes all the opinions provided by the Council of State between December 2009 and December 2013, I've found several cases in which the Council has required the government to cancel references to GAA from the drafts or to convert them on regulations. These are the opinions: 04599/2009 on the D.P.R. No. 87/2010 concerning the re-organization of the vocational institutes; 04597/2009 on the D.P.R. No. 88/2010 on the re-organization of the technical institutes; 04596/2009 on the D.P.R. No. 89/2010 on the reorganization of high schools (*licei*); 00190/2010 on the unification of the central commission for historical study (whose regulation was not adopted); 00008/2010 on the D.M. No. 81/2013 on teachers training; 03370/2008 on the D.M. No. 30/2011 on the Fund for the victims of asbestos; 02699/2010 on D.M. No. 147/2010 on motorcycles brakes; 01086/2011 on D.P.R. No. 151/2011 on fire prevention; 01215/2011 on the D.M. No. 146/2011 on a National Guarantee Fund; 02325/2011 on the D.P.C.M. No. 225/2011 on short-term administrative procedures in the Ministry of Infrastructure and Transport; 03240/2011 on the D.M. No. 223/2011 on the employment contracts of development co-operation experts; 02602/2011 on the legislative decree No. 20/2012 on army regulation; 03849/2011 on the D.M. No. 32/2012 on the national index of civil registry; 04470/2011 on a ministerial draft implementing the directive 2008/63/CE regulating competition on the telecommunication sector; 04909/2011 on the D.M. No. 76/2012 on the criteria to evaluate the candidates and to attribute the National Academic Scientific Qualification; 0428/2010 on the D.P.R. No. 73/2013 on the re-organization of the bodies and entities of the Ministry of Environment; 00363/2013 on the amendment of the D.P.R. No. 139/2010, which then was not adopted; 00552/2013 on the implementation of the legislative decree No. 39/2010 on statutory audit, which then was not adopted; 00943/2013 on the D.M. No. 165/2013 on services of the telecommunication sector; 01278/2013 on the D.M. No. 57/2014 concerning funding to enterprises; 02681/2013 on the D.P.R. No. 61/2014 on civil courts organization.

The interlocutory opinion of the Council of State, together with the establishment of a new government, have definitely delayed the adoption of the decree, which was part of the implementation of a complex primary law of a previous government. In this case, between the adoption of the law and the enactment of the ministerial decree **771 days** (more than 2 years) elapsed. I have provided the median value of the days that separate the dates of adoption of primary laws and of the decrees that descend from them on all policy sectors included in my dataset (the mean value, more sensitive to extreme values, is shown in Appendix). This calculation include the decrees that derive from laws of previous governments, as it was the case of the D.M. No. 45/2013 and as it is the case of the majority of acts. When the decrees are regulations, the timing for their adoption tends to be much higher. Table 2 give a proxy of the time needed to adopt regulations and GAA. Data include administrative acts from laws of previous governments, that the incumbents have decided to enact.

Table 2. Timing for the adoption of regulations and GAA, per policy sector

In the cells: number of days that separate the date of adoption of the laws and the date of approval of the administrative acts. Median value.

<i>Policy sectors</i>	<i>Regulations</i>		<i>GAA</i>		<i>Regulations + GAA, per policy sector</i>
	<i>number of days</i>	<i>(N)</i>	<i>number of days</i>	<i>(N)</i>	<i>Total number of acts (N)</i>
Economy	678	430	252	111	541
Education	664	159	176	37	196
Defense	979,5	92	830	5	97
Interior	845	176	305	18	194
Justice	728	101	503	13	114
Total number of acts (N)	/	958	/	184	1142

Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded

In all policy sectors, the difference in terms of time needed to adopt the two types of acts is higher for regulations. In Economy policy sector, the procedure to adopt a regulation requires, according to the median value, almost 22 months: 14 months more than a GAA. Education policy sector behaves similarly: it takes almost 22 months to adopt a regulation, while a GAA is adopted in less than 6 months. In Defense policy sector GAA are actually rare, but they require 149.5 days less than regulations to be approved. In the policy sector Interior, it takes almost 10 months to adopt a GAA, while it takes 28 months to adopt a regulation. In Justice policy sector, the procedure to adopt a GAA is 7.5 months shorter than that required to enact a regulation.

3.3 The extra-judicial offices of Council of State members (1988-2014)

The phenomenon of the extra-judicial offices of Council of State's members is possibly the best known and most criticized aspect of the institution in both, academic and journalistic debates. The peculiar configuration of the institution, that belongs to the executive and to the judiciary, has traditionally induced governments to co-opt Council of State members in key administrative positions inside the ministries as heads of cabinet, heads of legislative office and legal advisers. Moreover, before such tradition was interrupted by the cabinet of Matteo Renzi, also the Department for the Juridical and Legislative Affairs of the Presidency of the Council of Ministers (DAGL) used to be headed by a member of the Council of State. Extensive collections of data on extra-judicial offices of the councilors have been provided by Righettini (1998) and, to a more limited extent, by Ponti (2001). Some commentators argue that, with their positions inside government and with their juridical expertise, Council of State's members would be “the real legislators”, together with the magistrates of the Court of Audit and with the members of *Ragioneria Generale dello Stato* (Mania and Panara 2014). The constitutionalist Roberto Bin (2013) claims that the magistrates of the Council of State, assuming and leaving offices within the government, would have enveloped the

political institutions with a “corporatist network”⁵⁶. The excessive proximity between government and the Council of State would have created an “institutionalized short-circuit”, that would threaten the same rule of law. This argument is supported also by the constitutionalist Michele Ainis, according to whom administrative justice is a sector in which the interests of the “controllers” and of the “controlled” are mixed up⁵⁷. Other commentators have accused the Council of State of being a “caste”, whose members take advantage of their positions, accumulating public offices and the relative salaries⁵⁸. Among these, there are the journalists Rizzo and Stella (2010), who have noticed that, since the magistrates of the Council of State in leave of absence earn two salaries, surely they have no incentives in reducing their extra-judicial offices. Moreover, according to the two journalists, the fact that a considerable proportion of Council of State members is in leave of absence would contribute to the backlog of the Council of State as court. I provide a short description of the extra-judicial offices of the councillors that served the governments between 1988 and 2014. In the prosecution of this work, I intend to investigate if any relation occurs between the presence of the councillors inside the ministries and the choice of governments to implement primary legislation through regulations or GAAs. The presence of Council of State's members within the governments that occurred between 1988 and 2014 is shown in Figure 3. I collected data on extra-judicial offices of Council of State's members that served governments in the policy sectors Economy, Education, Justice, Defense and Interior. Data do not include councillors' positions among the Presidency of the Council of

⁵⁶ A similar argument is reported in a 2015 opinion article (“*Come battere la corruzione e come costruire la nuove Europa*”) written by Eugenio Scalfari. The author underlines the negative effects of the conflict of interests of the councillors on public administration:
http://www.repubblica.it/politica/2015/03/22/news/come_battere_la_corruzione_e_come_costruire_la_nuova_europa-110173099/

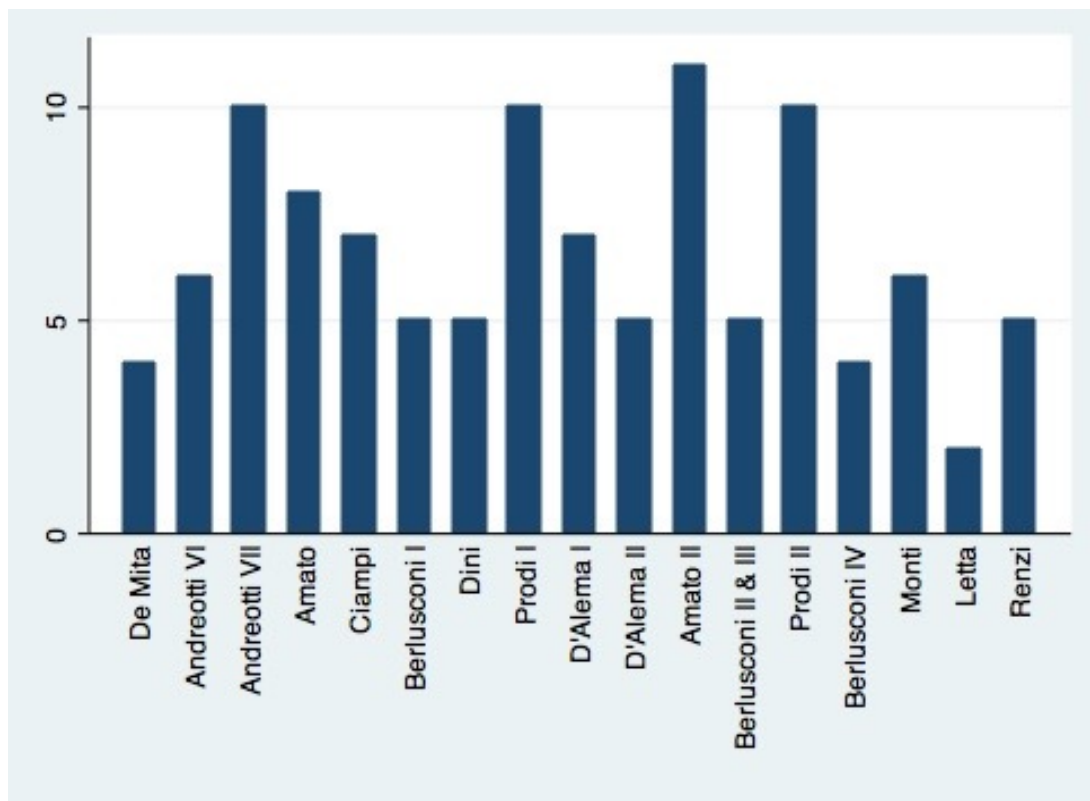
⁵⁷ The article of Michele Ainis (2009): “The scandal of the controlled controllers” (“*Scandalosi controllori controllati*”)
<http://www.lastampa.it/2009/03/18/cultura/opinioni/editoriali/scandalosi-controllori-controllati-H8SGa0RgGQflnL1ahb0YFJ/pagina.html>

⁵⁸ Among the others: a 2009 article from the column *Palazzo* (literary “the Palace”) of the magazine *Espresso* reports the benefits of the extra-judicial offices of the councillors:
<http://espresso.repubblica.it/palazzo/2009/10/08/news/consiglio-di-stato-e-di-casta-1.16244>

Ministers and among other policy areas. Hence, data can't provide a complete overview of the presence of the councilors temporarily “transferred” in government offices. They represent a partial measure- relative to 5 policy sectors- of the presence of the councilors among the 1988-2014 governments⁵⁹.

Figure 3. Distribution of extra-judicial offices, per government (1988-2014)

Sum of the councilors that worked in the policy sectors: Economy, Education, Defense, Justice and Interior in each government.



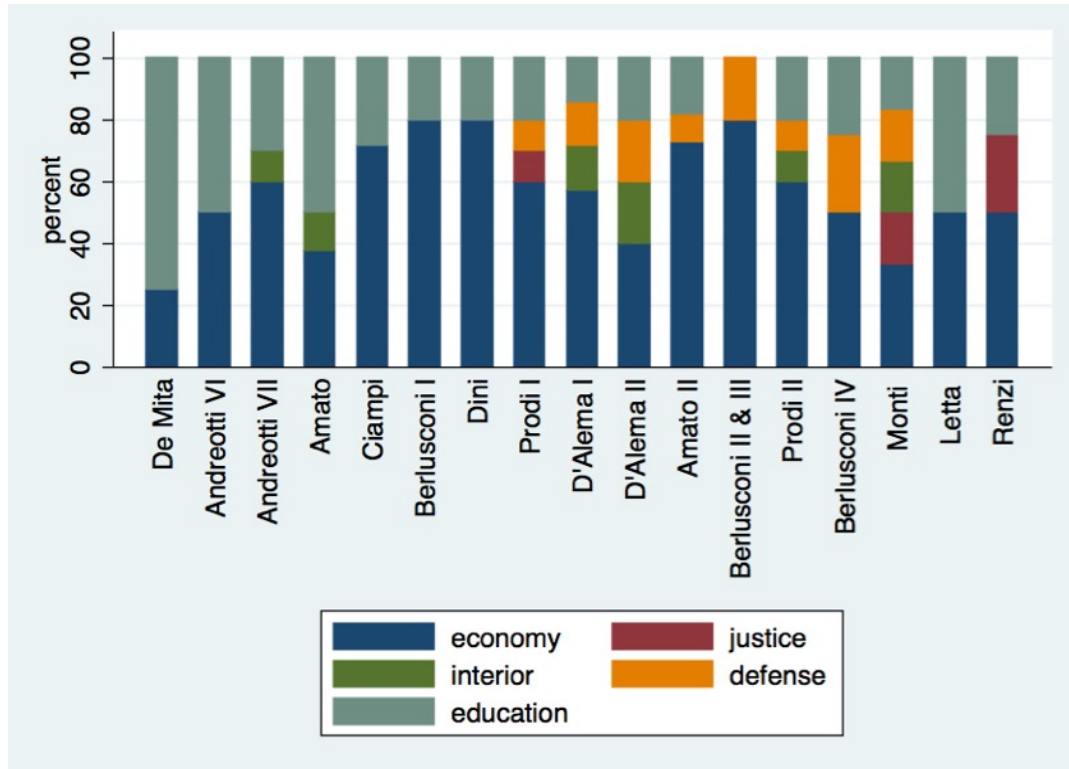
Data: personal computations from the journal “*Consiglio di Stato: rassegna di giurisprudenza e dottrina*”, from Righettini (1998) and from the Italian Administrative Justice website (www.giustizia-amministrativa.it)

⁵⁹ For instance, the cabinet of Enrico Letta (April 28th, 2013 – February 22th, 2014), that, according to the data, presents a limited number of councilors, had several councilors involved in other policy areas and, in particular, at the Presidency of the Council of Ministers: Filippo Patroni Griffi was Undersecretary of the Council Presidency; Carlo Deodato was Head of the Department for the Juridical and Legislative Affairs (DAGL); Roberto Garofoli was Secretary-General of the Council Presidency. In the Presidency were involved also several judges of Regional Administrative Tribunals.

Governments of the First Republic, from De Mita to Andreotti VII (1988 – 1992) had 20 councilors overall (10 concentrated in Andreotti VII cabinet). The last two governments of the First Republic, Amato and Ciampi (1992-1994) had 15 councilors in total (Amato 8, Ciampi 7). The first governments of the Second Republic, Berlusconi cabinet and Dini cabinet (1994-1996) had 10 councilors, 5 for each cabinet. The center-left governments, from Prodi I to Amato II (1996-2001) had the highest presence of Council of State members, in total 33 (11 in the cabinet of Amato II). The governments Berlusconi II and III (2001-2006) incorporated only 5 councilors. The second Prodi government (2006-2008) had 10 councilors. Berlusconi IV and Monti (2008-2013) had in total 10 councilors (4 into Berlusconi cabinet, 6 into Monti cabinet). Letta and Renzi (2013-2014) had in total 7 councilors.

The distribution of Council of State members among policy sectors per government (Figure 4) allows to make further considerations. Except for De Mita cabinet, in which councilors from policy sector Education prevail, the majority of councilors in all governments belong to the policy sector Economy. In the First Republic, councilors are concentrated mainly in policy sectors Education and Economy. In the Second Republic, especially in center-left cabinets, councilors tend to cover more policy sectors: 4 in governments Prodi I, D'Alema I, D'Alema II and 3 in Amato II; 4 in Prodi II. In government Berlusconi IV, councilors cover 3 policy sectors; in Monti cabinet they cover all policy areas. In Letta and Renzi cabinets, they are spread, respectively, in 2 and 3 policy sectors.

Figure 4. Distribution of extra-judicial offices among policy sectors, per government (1988-2014)



Data: personal computations from the journal “*Consiglio di Stato: rassegna di giurisprudenza e dottrina*”, from Righettini (1998) and from the Italian Administrative Justice website (www.giustizia-amministrativa.it)

Appendix

Table 3. Timing for the adoption of regulations and GAA, per policy sector

In the cells: number of days that separate the date of adoption of the laws and the date of approval of the administrative acts. Mean value.

	Regulations		GAA		Regulations + GAA, per policy sector
<i>Policy sectors</i>	number of days	(N)	number of days	(N)	Total number of acts (N)
Economy	1149,5	430	565,30	111	541
Education	961,01	159	560,64	37	196
Defense	1349,17	92	1117,8	5	97
Interior	1215,42	176	877,55	18	194
Justice	1059,74	101	715,81	13	114
Total number of acts (N)	/	958	/	184	1142

Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded

CHAPTER IV

Courts as political actors: the “strategic approach”

Introduction

Most juridical and some political science literature conceive courts as if they had the “last word” in politics. This argument rests on two main assumptions: first, it attributes the power of last word to courts, in virtue of the fact that courts are formally placed at the end of the policy process. Second, it conceives courts as institutions that can behave as *super partes* actors, unconstrained by the political reality.

Strategic approaches to the study of judicial behavior provide a more realistic account of the relation between the legislative and the judiciary.

First, they contend that legislative and judicial actors are reciprocally aware of their power. In this sense, actors are all political and strategic. Second, they do not assume that courts, when interpret legislation, have necessarily the last word. Strategic interaction presupposes the possibility of legislative responses to courts decisions. When courts interpret statutes, a legislative majority can overrule the policy outcome established by the court. When courts give constitutional interpretations, overriding their decisions requires supermajorities of the legislature. In these cases, legislative actors tend to anticipate courts actions.

Political conditions affect the capacity of the legislative actors to overrule courts decisions. Adopting the point of view of courts, political conditions affect courts’ autonomy when they interpret legislation. Courts, in particular, can take advantage (they can gain independence) from the heterogeneous nature of government coalitions: several authors have found that the farther the ideal points of the legislative actors, the larger the set of the feasible judicial interpretations that political actors cannot overrule.

In the following paragraphs, I provide a synthetic overview of some relevant

contributions to the study of the strategic interactions among courts and the legislatures. I contend that the strategic approach can be applied also to courts that review administrative acts. Although the process of adoption of administrative acts, as regulations, is understudied, these acts often determine the efficacy of legislation and they include important decisions delegated by primary laws to the executive. In particular, since these acts are concerted by the whole government or between the ministries, it is reasonable to think that administrative courts can take advantage from the ideological divisions of government to pursue their own preferences.

4.1 What does explain judicial preferences? A focus on strategic theory of judicial behavior

In virtue of their power not only to enforce, but, above all, to review and to potentially overrule legislation, courts are relevant objects of study for the political scientists. Courts are composed of individuals with specific preferences and proper utility functions (Zucchini 2013, 47) and, according to some approaches, they can be studied as “political” actors. Several researches that aim to explain judicial behavior concentrate on the U.S. Supreme Court. In particular, the dominant approaches developed by scholars include *attitudinal*, *legal* and *strategic* theories of judicial behavior.

Attitudinal theories of judicial behavior argue that judicial decisions are explained by the political preferences justices bring on their cases (Posner, 2008). Judges are supposed to decide on the basis of their ideological values, and the political party of the President who appointed the judge is generally used as proxy for ideological preferences: justices appointed by Republican Presidents are expected to vote on average more conservatively than justices appointed by Democratic Presidents, who are expected to vote more liberally. The content analysis of judges speeches or newspaper editorials written in occasion of their appointment is another technique to infer justices preferences (Segal and Cover 1989). The key point of attitudinal approaches is that

judges have well-defined preferences of policy and they try to impose them through their interpretations. Several scholars have built on this theory, providing also specifications and improvements. Segal et al. (2000), for instance, argue that the impact of partisan appointment on justices decisions tends to have a limited duration. The authors studied the degree of concordance between presidential preferences and judicial decisions, considering supreme court judges votes in civil liberties and economic cases between 1937 and 1994 and they finally suggest that the influence of the appointment is present in the early years only and then it tends to decline over time.

Such *realpolitik* vision of judicial behavior, that tends to compare judges to elected officials, is opposed by legal theories of judicial behavior. Legal theories argue that ideology has no role in explaining justices decisions. According to legal theory of judicial behavior, justices act like “single minded seekers of legal policy” (George and Epstein 1992, 325). They apply the law on the basis of pre-existing rules written in the Constitution and of previous judicial decisions. Using legal, politically neutral techniques of decision making (as. the logic of the precedent and the plain meaning rule⁶⁰) justices would generate objective decisions.

The approach on which I’m going to focus is that of strategic theories of judicial behavior. The basic idea of strategic theories of judicial behavior is that, when justices make a decision, they are constrained by the preferences of the legislative actors⁶¹: in the words of Epstein et al. (2001, cited Varberg 2015, 179) judicial decisions must remain within “the tolerance intervals” of the political actors . Strategic calculations can reflect also justices sincere values and preferences. But basically, judges are not supposed to behave as unconstrained players, that follow their values and ideological attitudes only. According to strategic approaches, judges want to move substantive

⁶⁰ the plain meaning rule is a statutory construction by which statutes have to be interpreted using the ordinary meaning of the language. If the statute lacks of the definition of specific terms, words must be given their literal meaning.

⁶¹ or also of other actors, as the public (Baum 2006) or the electorate. In its classic analysis of the U.S. Supreme Court, Robert Dahl (1957) argued that the Supreme Court is responsive to national majorities. For the author, Supreme Court justices are supposed to be a reflection of the electorate, in virtue of their appointment.

content of laws as close as possible to their preferences, but knowing that legislators may replace their most preferred decisions (Epstein and Knight, 1998). Therefore, if they want to gain their preferred outcomes, they must act strategically, taking into account other actors' preferences.

4.1.1 The strategic approach: courts statutory interpretations

The interaction between courts and legislators has been investigated by several scholars according to game theoretical frameworks. Such frameworks aim to identify equilibrium- outcomes from the interdependent choices of justices and of the other political actors. Scholars have focused on two types of courts actions, to which legislative actors can respond or that can try to anticipate: *statutory judicial review* and *constitutional judicial review*. Through statutory judicial reviews, or statutory interpretations, courts can assess if acts of regulatory agencies (or acts of lower level of governments, rulings of lower courts) are compatible with existing laws. If a court establishes that an act of a regulatory agency is inconsistent with the existing legislation, legislative actors supported by a sufficient majority *could* approve new legislation, in order to override courts' decision. They *could* approve new legislation, but not necessarily they are able to do it: courts might move the status quo in a position that legislative actors are unable to change. An important early finding suggested by Gely and Spiller (1990), in an article that focuses on statutory interpretation by the US Supreme Court, concerns exactly this point. The authors found that, in equilibrium, Congress tend to acquiesce to judicial decisions. This happens because rational justices, aware of the constraints imposed by the preferences of the legislative actors, when interpret a statute, shift legal status quo in the area between the ideal points of the House and the Senate. In such area, the legislative players are unable to overturn Courts' policy outcome. Ferejohn and Shipan (1990) show that courts empowered to review agency actions take into account the preferences of the legislative players, shifting the equilibrium outcome in the direction of the median member of the Congress. Ferejohn

and Weingast (1992) sketch a “positive theory” of statutory interpretation which entails the inevitably political nature of courts interpretations: courts are conceived as actors that must take into account the capacity of legislative players to react to their actions. In the strategic setting proposed by the authors, a court interacts with the enacting and future legislatures, interpreting the statutory enactments of previous legislature in presence of the current one. According to their model, sophisticated legislators will tend to adapt to court’s jurisprudence in order to limit the ability of the future legislators to undermine their enactments, only in presence specific political conditions⁶². Differently from previous models of legislative-judicial interaction, in the setting imagined by Ferejohn and Weingast, court preferences do not necessarily coincide with substantive ideologies. Judges preferences can be thought as “procedurally induced values”: judges might prefer an interpretation to another because it better implements some notion of legislative intention. Therefore, a strategic court might act as *politically sophisticated honest agent* of the earlier legislature. In this case, the court will try to achieve the policy outcome politically viable, closest to that desired by the previous legislature. Otherwise, a strategic court can act as an *unconstrained policy advocate*, a court that has well-defined policy preferences and that seeks to impose them, but also in this case considering the viability of its interpretations. This account of courts preferences is used also by Steunenberg (1997), who analyzes strategic interactions between the Dutch Supreme Court and legislature on the issue of euthanasia. In the model proposed by the author, the court has to decide if giving a new interpretation of a statutory decision, to which the cabinet, that initiates almost all legislation, could react introducing a new bill that might override court’s interpretation. The court can act as a *constrained policy advocate*, trying to impose its policy preferences, or it can behave as a *conservator*, preferring to maintain the status quo as long as it is politically viable. The evidence

⁶² The authors consider a model in which Congress delegate the authority to oversee a policy issue to a committee which is not necessarily representative of the current legislature. Legislatures rationally anticipate the conditions under which they can hope the court will act as an agent of the enacting (the previous) Congress, if the status quo, the committee and the court are on the same side of the chamber median. The presence of non representative committees with gatekeeping authority is a necessary condition for the policy outcome to depend on the preferences of the previous legislature (Ferejohn and Weingast, 1992, 278).

found by the author suggests that the Dutch Supreme Court acted as a policy advocate on the issue of euthanasia and that it chose an interpretation close to its ideal point, that could not be changed by the legislature. The divergent opinions of political parties in governing coalitions prevented the legislature from finding an agreement to change the policy outcome reached by the court in the successive cabinets.

4.1.2 The strategic approach: constitutional judicial review

Supreme Courts and Constitutional Courts can check the constitutionality of legislation passed by the legislature. This type of court action exercises a considerable power of threat to the legislative actors, since constitutional reviews, differently from statutory judicial reviews, cannot be overturned by simple legislation.

For instance, to overrule constitutional decisions of the U.S. Supreme Court, constitutional amendments are necessary and they require the support of two thirds of each house of the Congress and of at least three-fourths of the State Legislatures. Whether or not legislators coalitions are sufficiently large to amend the constitution determines courts autonomy in the exercise of judicial review. With regard to this, Gely and Spiller (1992) found that the set of “feasible constitutional outcomes”- the set of points in the policy space chosen by the Court that will not be reversed by the legislative actors- is larger when the ideal points of the legislative actors are far from each other (when the legislative actors are more divided). Santoni and Zucchini (2002) found that in Italy during the First Republic, the independence of Constitutional Court, measured in terms of number of sentences of constitutional illegitimacy, increases when governments are more divided (when the number and or the ideological distance of veto players increases). Other authors highlight that governments tend to restraint or to auto-limit their legislative activity as indirect consequence of courts capacity to declare laws unconstitutional. Volcansek (2001) argues that Constitutional Courts can influence the legislative process directly, invalidating a law, but also indirectly, through the anticipated reactions of the legislators to courts moves. The author treats Constitutional

Courts as veto players (Tsebelis 1999) considering them as unitary actors, integral to the policy-making. Stone Sweet (1992, 2002), Tate and Vallinder (1995) and others have underlined the increasing importance of Constitutional Courts in the political process, considering this fact controversial. The studies in particular of Stone Sweet concentrate on the so-called “judicialization of politics” phenomenon. An implication of the judicialization of politics is that legislators are supposed to anticipate possible censures of their enactments by the courts. As Constitutional Courts increase their role in different policy areas, the discretion of legislators would be reduced, with the risk of the formation of a “government of judges”⁶³.

For Tsebelis (2002) such predictions would be exaggerated, since, most of the time, Constitutional Court’s ideal points are located inside the unanimity core of the other veto players, the set of policies that parties at government cannot agree to change. Since Constitutional Courts generally occupy the center of policy space, they would be absorbed by the existing veto players⁶⁴. Following Tsebelis (2002) and Gely and Spiller (1990), Santoni and Zucchini (2006) provide a multi-stage game of the interactions between the legislative veto players and the Italian Constitutional Court, whose prediction is that legislative policy change is lowered by the presence of the Court. The authors do not consider the Constitutional Court as a proper veto player, since they assume that courts’ ideal point is inside veto players’ Pareto set.

Other scholars underline that the judicialization of politics meets limits in endogenous and contextual variables. Hönnige (2010) underlines that courts composition and judges’ decision-making, although understudied in Constitutional Courts, are endogenous variables that can foster or limit judicialization. In an article of 2009, analyzing the consequences of the selection of Constitutional Courts judges in France

⁶³ These considerations have normative implications. As in the weberian dilemma of the “bureaucratization of politics”, these authors address the issue of the power of the unelected bodies (Vibert, 2007), not subject to direct public oversight. According to Stone Sweet (2000) the increasing role of Constitutional Courts would have serious consequences on parliamentary sovereignty, that in many countries is considered as threatened.

⁶⁴ According to the author, the only cases in which Constitutional Courts can be considered as additional veto players are when the existing veto players are located in extreme policy positions or when new issues come under consideration (Tsebelis, 2002, 330)

and Germany, the author found that when the pivotal judge is chosen by the governments, courts are more likely to reject oppositional proposals (abstract review procedures). Vanberg (2001) provides a game-theoretic model of the interactions between constitutional courts and the legislatures, which addresses legislative anticipation of judicial review and legislative reactions to judicial decisions. According to his results, the transparency of political environment would affect the way in which courts use their power. Legislative majorities would be more prone to evade (to not implement) constitutional court decisions⁶⁵ in “non-transparent” policy environments, in which voters are not able to monitor legislative responses to judicial decisions. In non-transparent policy environments, evasion attempts by the legislatures do not become of public knowledge and do not result in a negative public backlash. In absence of this deterrent, legislative majorities would have more margins of maneuver and may not implement courts rulings. As a consequence, Constitutional Courts would be more likely to annul statutes or other legislative provisions when the likelihood of acting in a transparent environment is higher. The importance of public support for courts and the transparency of policy environment⁶⁶ as crucial elements for the enforcement of courts rulings (since the implementation of courts decisions requires the cooperation of other actors, including the decision-makers whose acts have been annulled) is affirmed also in Vanberg (2005).

⁶⁵ The author makes the example of the non- reaction of the German Bundestag to a decision of the Constitutional Court, which stated the necessity to change the differential taxation of civil servant pensions and regular retirement benefits. A parliamentary commission studied possible revisions, but then tax code was not modified.

⁶⁶ These conditions are better specified by the author as: the presence of sufficient public support for the court, in order to make the possibility of evasion by the legislators unattractive; in addition, citizens must be likely to be aware of the attempts of evasion by the legislators.

CHAPTER V

The strategic interaction between government and the Council of State of Italy. The determinants of the activation of Council of State as Advisor (1988-2014)

5.1 The Council of State as a “policy” conservator court

The Council of State has been described as a “self-serving” institution: as an actor interested in maximizing its role and the prerogatives of its members. Building on strategic theories of judicial behavior, and in particular on Ferejohn and Weingast (1992) and Steunenberg (1997)⁶⁷, I consider the Council of State as a single political player that, in pursuing its goals, behaves as a “policy” conservator court. I argue that the Council of State tends to follow a procedurally based jurisprudence and that it prefers to preserve the *status quo* provided by the already existing administrative acts. Substantive policy preferences can also play a crucial role in Council of State’s behavior, but such preferences are usually against policy change. Arguments in support of this position concern: the rules of composition of the institution and the non- politicization of the judges; the low turnover of the judges; the fact that, in some policy sectors, the preservation of the *status quo* corresponds to the preservation of Council of State’s members prerogatives.

⁶⁷ According to Ferejohn and Weingast (1992), courts that provide statutory interpretations might not have specific policy preferences; they can behave as *politically sophisticated honest agent* that aim at providing interpretations as close as possible to the legislative intentions. For Steunenberg (1997) this types of courts behave as *conservators*: as courts that prefer to maintain the original legislation. On the contrary, *constrained policy advocate courts* try to impose their policy preferences. In both cases, courts that review statutory decisions try to strategically prevent legislative bodies from overriding their interpretations. However, in pursuing their ideal points, they are limited by the configuration of the incumbent legislative majority.

Rules of composition and non-politicization of the judges

The Council of State is organized into three legal and four judicial sections. The “consultative section for normative acts” is the section that provides mandatory opinions on government secondary legislation. Currently, 104 councilors rotate between the sections. The Council of Presidency of Administrative Justice, the self-governing body of administrative justice, each year decides their composition. Councilors are assigned to both, legal and judicial sections, during their career. Members of the Council of State appointed by the government are actually a minority: judges are recruited for the 50% among T.A.R. judges with at least four years experience; 25% are selected through a competitive examination among T.A.R. judges with at least one year experience, ordinary and military judges with at least four years experience, Court of Audit judges, state lawyers with at least one year experience, chamber of deputies officials with at least four years experience, state officials with a law degree; 25% are appointed by the government among university professors of law, lawyers admitted to specific Bars and with at least fifteen years experience, ministerial and other public administration's officials. Contrary to the civil judicial system, administrative justice national association is not organized into partisan factions⁶⁸. Council of State members that hold extrajudicial offices do not present a long-term political affiliation. During the Italian “Second Republic” (1994-present), 88% of judges that held extrajudicial offices in more than one cabinet in the same policy sector was appointed by both, center left and center right governments⁶⁹.

Turnover of the judges

Judges' turnover is particularly low: 94% of chairs of Council of State's sections in 1998

⁶⁸ Trial courts' judges are organized in a national association whose factions reflect the traditional left-right conflict in the society (Guarnieri 1992). This association plays a relevant role in their Higher Council and in their judicial activity (Ceron and Mainenti 2015). Instead, the national association of administrative judges is not as relevant and it is not divided into partisan factions.

⁶⁹ Data on extrajudicial offices in four policy sectors: economy, education, justice, interior, defense, collected from the journal *Consiglio di Stato: rassegna di giurisprudenza e dottrina*, from Righettini (1998) and from the administrative justice website.

was already member of the institution 10 years before; 90% of chairs of Council of State's sections in 2015 was already member of the institution in 2004⁷⁰. It is therefore reasonable that councilors should prefer regulations they themselves approved and that they should prefer to follow a jurisprudence they themselves created.

Preservation of the status quo in defense of councilors' prerogatives

Council of State tends to oppose policy change, if it implies the reduction of its competences. For instance, both Regional Administrative Tribunal of Lazio and the Council of State contested the legitimacy of the reform of 1993 on the privatization of public employment (Council of State General Assembly opinion n. 146, August 31th, 1992; T.A.R. Lazio order n.1171, sec. III-bis, June 5th, 1996 and T.A.R. Lazio, order n. 119 sec. I, July 5th, 1995). The reform deprived the administrative judges of the competence on disputes concerning public sector's employment relationships⁷¹ and it attributed it to the ordinary judges. There are policy sectors in which Council of State's members have specific interests and in which they tend to oppose policy change. A striking example is given by the case of a councilor that appealed to the same Council of State for the annulment of the D.M. June 6th, 2002, which introduced new criteria for the appointment of tax commissions' members (*commissioni tributarie*). The councilor, already member of a tax commission in an Italian region, contested the legitimacy of the new criteria, that would have penalized his position⁷². Another example concerns the opposition of the Council of State to specific parts of a regulation, that aimed to introduce an “unwelcome” innovation. Most councilors belong to or have ties with the scientific community of jurists and legal scholars. This community has repeatedly

⁷⁰ Data from: *Consiglio di Stato: rassegna di giurisprudenza e dottrina*; administrative justice website; official document *Ruolo di anzianità del personale del Consiglio di Stato e dei tribunali amministrativi regionali*, 2007, provided by Istituto Poligrafico e Zecca dello Stato.

⁷¹ with the exception of the categories of magistrates, diplomatic and prefectural personnel, university professors, State barristers-at-law.

⁷² The order of the Council of State on the request of annulment of the decree June 6th, 2002: http://www.gazzettaufficiale.it/atto/corte_costituzionale/caricaArticolo?art.progressivo=0&art.idArticolo=3&art.versione=1&art.codiceRedazionale=004C0158&art.dataPubblicazioneGazzetta=2004-02-18&art.idSottoArticolo=0

expressed criticism on impact factor based criteria for the evaluation of scientific publications⁷³. The Council of State expressed a negative opinion on the draft regulation of the Ministry of Education which established the National Academic Qualification for university professors (D.P.R. n. 222, September 14th, 2011). The regulation changed several aspects of the discipline of national academic qualification and it opened the way to the use of quantitative-impact factor based criteria for the evaluation of scientific publications. In its two interlocutory opinions, the consultative section for normative acts criticized, among other aspects, the online (and not in hard-copy) transmission of the candidates' publications to the evaluation committee. The councilors refer to scientific publications as “highly voluminous printed works”⁷⁴ that should be already known in the scientific community. Administrative judges' opposition to the legitimacy of impact factor based evaluation emerges also in several T.A.R. Sentences⁷⁵.

5.2 The Council of State of Italy as a “guardian of the law” that limits ministerial discretion

Since the Council of State acts as a policy conserver court, some members of the government might benefit from the activation of Council of State as Advisor in the process of implementation of primary laws. When it issues opinions on regulations, the Council of State verifies the technical-juridical accuracy of the acts, their coherence with the overall legal system, the eligibility of the minister or of the government to regulate the issue, the fact that the acts have received the agreement of all the parties

⁷³ A law scholar's article, that argues the impossibility to adopt impact factor criteria to evaluate scientific publications in legal disciplines, published on the website of the academic network ROARS (Return On Academic ReSearch). <http://www.roars.it/online/indicatori-bibliometrici-e-valutazione-della-ricerca-in-campo-giuridico-qualche-spunto-per-un-dibattito-da-avviare/>

⁷⁴ Affair n. 00670/2011, p. 7

⁷⁵ T.A.R. Lazio, sec. III, sentence n. 11630/2015; T.A.R. Lazio, sec. III, sentence n. 3884/2014; T.A.R. Lazio, sec. III, order n. 3079/2014

involved. Such process requires time and, as it has been shown, it often delays the adoption of regulations. However, providing such control, the Council of State is able to limit ministerial discretion. The *ex ante* control of the Council of State can become convenient for coalition parties, in case specific issues generate conflict. An issue that creates conflict among the ministerial structures is, for instance, veterinary legislation. On this issue, both Health and Agriculture Departments claim the competence to adopt regulations. Inter-ministerial regulations are usually chosen in this case, but even if an initial agreement between the ministers has been reached, the risk of ministerial drift⁷⁶ persists during drafting process. Council of State's intervention ensures that both departments are involved and that final regulation draft reflects the agreement between the ministries. When it issues opinions, the Council of State always verifies that final regulation draft is subscribed by all ministers, and not by permanent secretaries or by junior ministers only. Binding ministers to the respect of specific bureaucratic procedures, the Council of State reduces their discretion in the process of regulations' adoption. Therefore, similarly to other control devices employed at the executive level (Thies 2001, Martin and Vanberg 2005)⁷⁷, the control of the Council of State can be an used as an instrument to manage the divergent preferences of the ministers. Also in virtue of its role of “guardian of the law” and given the interests of the coalition partners, it is possible to imagine a strategic interaction between the government and the Council of State.

5.3 A model of Council of State activation

I argue that political circumstances can influence the choice between different types of

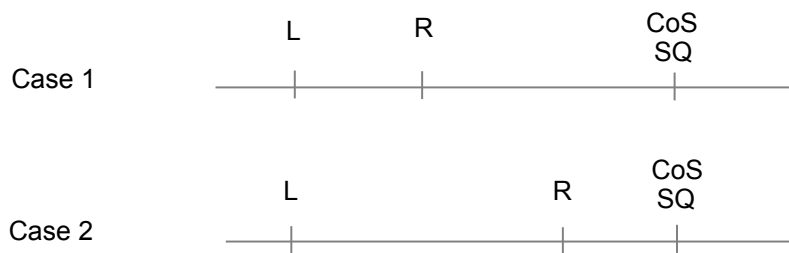
⁷⁶ each minister might use its discretion in drafting regulations to move the final policy in its direction, at the detriment of the preferences of other coalition members.

⁷⁷ According to Thies (2001), coalition partners “keep tabs” on each other appointing junior ministers to hostile ministers. For Martin and Vanberg (2005) coalition parties use legislative institutions to mitigate agency problems within the coalition.

administrative acts. In other words, I expect that governments are more prone to adopt regulations, activating the ex ante control of the Council of State, under specific political conditions. In order to illustrate the logic of the interaction between parties at government and the Council of State, I use three simple spatial models.

Imagine that two parties form a government in a unidimensional policy space, on a left-right continuum. Parties' ideal points are located in L and R. Status quo is located in point SQ. Council of State's ideal point coincides with SQ. Status quo can be modified if the two parties find an agreement.

Figure 5. Activation of the ex ante control of the Council of State in the implementation process (marginal policy change)

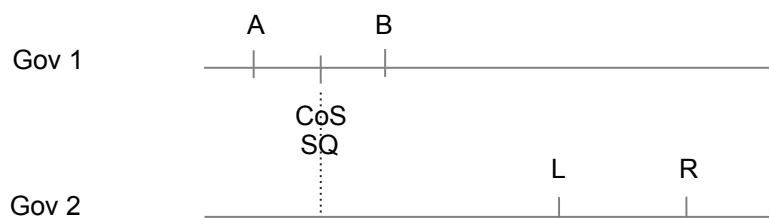


In this model, the closer the status quo is to coalition range, the more risky the agreement is for party R. Even if the two parties find an initial agreement, during law implementation party L could move the final policy in a position closer to its ideal point and further from the initial status quo, penalizing party R (Case 2). The situation is different, if the status quo is considerably far from coalition range (Case 1). In Case 1, the activation of the Council of State as Advisor, since its ideal point coincides with the status quo, represents an obstacle to change. Therefore, its advise is not promoted by both parties. Vice versa, when government heterogeneity is higher, the activation of the ex ante control of the Council of State ensures that the initial agreement between parties L and R is respected.

I consider now the case in which alternation moves the status quo far from coalition parties' ideal points: in Gov 2, L and R parties' ideal points are considerably far from the status quo inherited by Gov 1 (Figure 6).

Both L and R parties prefer a new status quo to the one inherited from Government 1. If a law of Government 2 introduces the possibility of a consistent policy change, each agreement between L and R is preferred to eventual shifts in the direction of the old status quo.

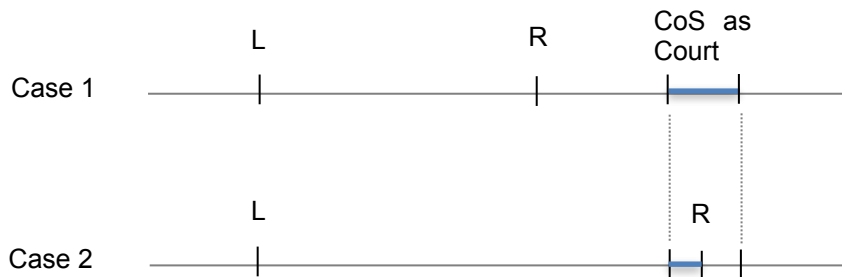
Figure 6. Activation of the ex ante control of the Council of State in the implementation process, if alternation occurred



Therefore, in the circumstances described in Figure 6, I expect coalition parties to be less prone to activate the ex ante control of the Council of State and to opt for implementation acts alternative to regulations.

The following figure shows instead that, in presence of great levels of ideological heterogeneity, governments should be more prone to activate the ex ante control of the Council of State, in order to know its preferences as Court. In presence of high ideological heterogeneity, the status quo tends to be close to the ideal points of coalition partners, or it is placed inside the Pareto set. In these circumstances, a decision of the Council of State as Court can produce a policy output that cannot be modified by partners coalitions. It is useful to represent the Council of State not as a point, but as a range of all possible ideal points that it could occupy in policy space as Court:

Figure 7. Activation of the the ex ante control of the Council of State, in order to know its preferences as Court



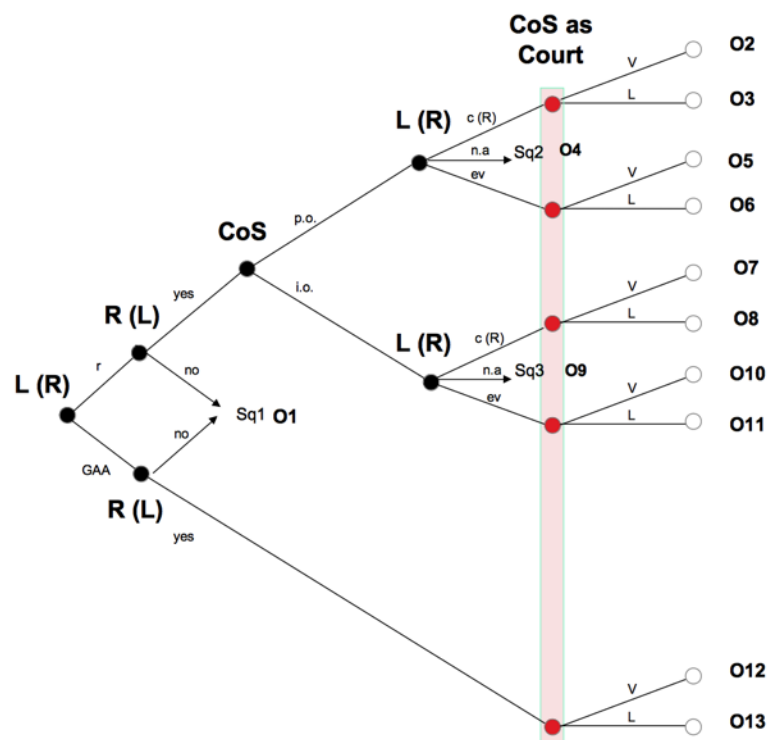
In Case 1, all Court's possible ideal points are located outside coalition range. For not being overruled, the Court can at most obtain R: it can shift the status quo to the ideal point of the most policy-conserving member of the coalition. In these circumstances, it is not necessary to activate the ex ante control of the Council of State to know its preferences as Court. The situation, in Case 2, is different. Government ideological heterogeneity is greater. Some of the possible courts' ideal points are located inside the Pareto set. If court's ideal point is located to the right of R party, the court can at most obtain R, as in Case 1. Vice versa, if its ideal point is located to the left of R party, the court could obtain its ideal point, with no possibility for L and R to change it. In these circumstances, coalition parties have a greater interest in knowing court's ideal point. They will tend to activate Council of State as Advisor, as its scrutiny can reflect Council of State's preferences as Court. On the contrary, when alternation occurs, the anticipation of court's decision is not as relevant, for the same reasons explained with reference to Case 1.

5.4 The strategic interaction between government and the Council of State

The following representation synthesizes, according to a game theoretical framework, the interaction between parties L and R and the Council of State, when a primary law has to be implemented. The game represents the interaction between government parties

L-R and the Council of State in order to adopt administrative acts. Parties L and R are aware that the Council of State might judge the lawfulness of the acts as Court, and, even if this move is not represented in figure 8, the Council of State is aware that L-R coalition may overrule its decision with a new law.

Figure 8. The strategic interaction between L-R coalition and the Council of State



Different types of administrative acts (regulations and GAA) can be chosen. The decision on the type of act to be adopted, a regulation or a GAA, is taken in the legislative process and it is represented in the first stage, when L requires that a regulation (“r”) or a GAA (“GAA”) has to be included in the law. At second stage, party R can decide whether to proceed (“yes”), starting the procedure to adopt the act, or not (“no”), confirming the legislative status quo. If R decides to adopt a regulation (“r”,

“yes”) it takes the risk that the procedure to adopt the regulation can become definitely long. However, the ex ante control of the Council of State on regulation’s draft can prevent the risk of ministerial drift. Moreover, R could be interested in knowing the exact preferences of Council of State as Court. At the third stage, the Council of State can provide positive (“p.o.”) or interlocutory opinions (“i.o.”) on regulation draft. Positive opinions imply that Council of State essentially agrees with the content of the draft. On the contrary, interlocutory opinions include comments and remarks, and government is supposed to send a new, amended version of the draft to the Council. In the fourth stage, party L can adopt a regulation, complying with Council of State observations (“c(R)”); it can decide not to adopt any act (“n.a”); or it can decide not to comply with Council of State’s observations, evading (“ev”), at least partially, its remarks. In this last circumstance, the Council of State usually issues a further interlocutory opinion, requesting another updated version of the draft. At the fifth stage of the game, the Council of State, acting as Court, can declare regulations and GAAs legal or void. Table 4 shows the outcomes of the game.

Table 4. Outcomes for parties R and L and the Council of State

Outcome	Description
O1	The process of implementation of primary law does not start
O2	CoS as Court declares void a regulation that received a positive opinion
O3	CoS as Court declares legal a regulation that received a positive opinion
O4	After a positive opinion of the CoS as Advisor, the regulation is not adopted
O5	CoS as Court declares void a regulation that received a positive opinion, that L partially evaded
O6	CoS as Court declares legal a regulation that received a positive opinion, that L partially evaded
O7	CoS as Court declares void a regulation that received an interlocutory opinion, with which L complied
O8	CoS as Court declares legal a regulation that received an interlocutory opinion, with which L complied
O9	After an interlocutory opinion of the CoS as Advisor, the regulation is not adopted
O10	CoS as Court declares void a regulation that received an interlocutory opinion, that L partially evaded

Outcome	Description
O11	CoS as Court declares legal a regulation that received an interlocutory opinion, that L partially evaded
O12	CoS as Court declares void a GAA
O13	CoS as Court declares legal a GAA

5.4.1 Hypotheses

On the basis of the spatial models of Council of State activation and of the strategic interaction between the players, I derive three hypotheses. I expect governments to activate more the Council of State as Advisor, when they are more divided and policy change is limited. At least one coalition partner will benefit from the activation of Council of State as Advisor and coalitions members should be more interested in anticipating Council of State preferences as Court. Hypothesis 1 can be formulated as follows:

H.1 I expect ideological division to have a positive impact on the number of regulations (on Council of State activation as Advisor)

I expect that governments are less prone to activate the *ex ante* control of the Council of State when alternation occurred and all policy solutions inside the new governmental range are preferable to the old status quo. In this case, the activation of the Council of State as Advisor would represent an obstacle to change and Council of State should exercise a lower threat as Court. Therefore, I expect that, in such circumstances, government should prefer GAAs. Hypothesis 2 can be formulated as follows:

H.2 I expect the presence of alternation to have a negative impact on the number of regulations (on the activation of Council of State as Advisor)

I formulate a third hypothesis, which concerns the role of Councilors as “individual consultants” inside government departments. I expect governments to be more prone to recruit judges of the Council of State as legal experts through extra-judicial offices, when they do not activate the Council of State as Advisor:

H.3 I expect the number of the councilors recruited in key positions inside the ministries to have a negative impact on the number of regulations (on Council of State activation as Advisor).

5.5 Data and variables

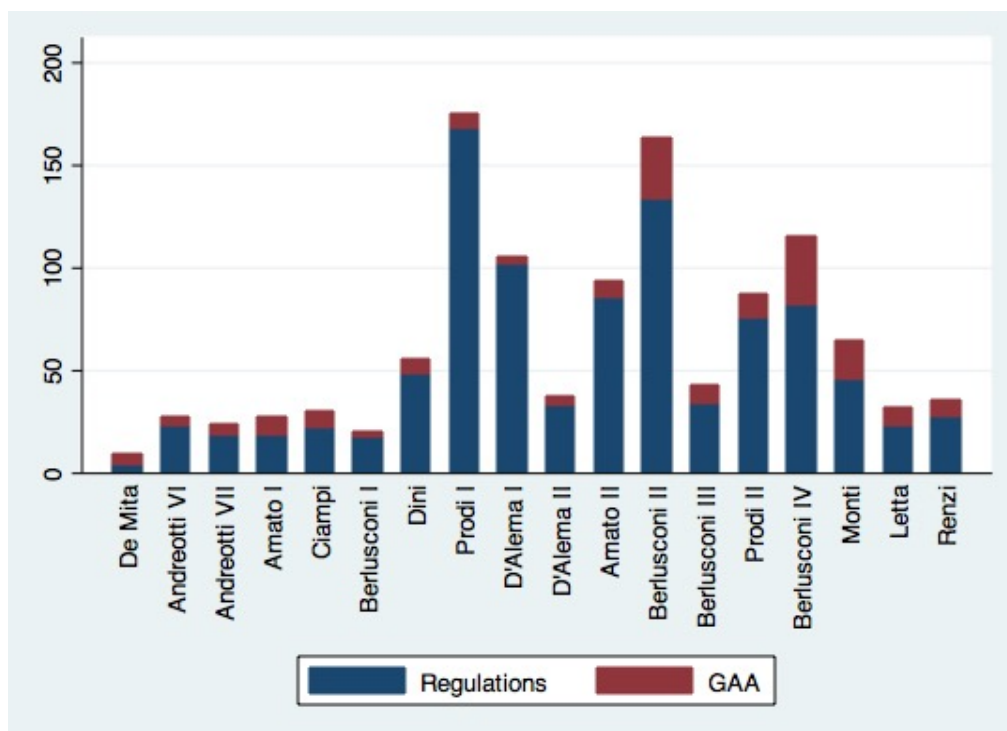
I collected original data on regulations and general administrative acts (GAA) adopted on the initiative of five ministries: economy, defense, interior, justice and education, between 1988 and 2014. These policy areas were not interested by the constitutional reform of 2001 (*riforma del Titolo V della Costituzione*), that re-distributed the competence to adopt regulations among central government and the Regions. Data are collected from 1988, since that year the law on the organization of the Presidency of the Council of Ministers, Law August 23th 1988 No. 400, established that the *ex ante* control of the Council of State was mandatory on all types of regulations. All types of ministerial and governmental decrees are included: ministerial decrees (D.M.), President of the Council of the Ministers decrees (D.P.C.M.), President of the Republic Decrees (D.P.R.). All times it was possible, the primary law from which the decrees derive has been recorded. Data were collected from the juridical database *Leggi d'Italia*. I identified GAAs used as substitutes for regulations by referring to the indication “non regulatory decree” (“*decreto non regolamentare*”) when it was mentioned in primary law. In case the law did not specify the nature, regulatory or not regulatory, of the administrative act, I have followed the indications provided by law scholars to classify the acts. In particular, Moscarini (2008) provides a sort of *vademecum* to identify

general administrative acts used in place of regulations, based also on Council of State's jurisprudence.

5.5.1 *The dependent variable: the decision of triggering the ex ante control of the Council of State, adopting a regulation*

The dependent variable, “Council of State”, is operationalized as a dummy variable that points out if the decree adopted by the government is a regulation or a general administrative act (GAA). That is: if the decree has been submitted to the Council of State for its *ex ante* control, or not. The variable assumes values 1 if the decree is a regulation, 0 if the decree is a GAA. The distribution of the variable “Council of State” during the governments that occurred between 1988 and 2014 is shown in Figure 9.

Figure 9. Frequency distribution of regulations and GAA, per government

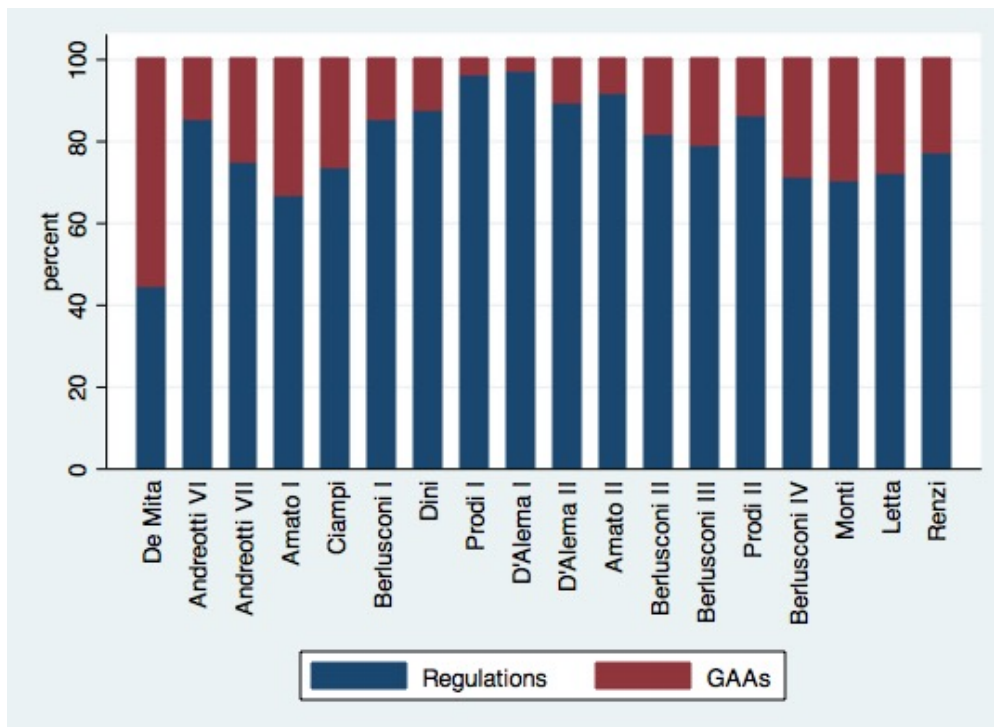


Data: personal computations on information available on the juridical database *Leggi d'Italia* (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.142

The use of GAAs in place of regulations seems to become a quite consistent phenomenon starting from the second Berlusconi cabinet. But in all governments, except for De Mita cabinet, in which the number of GAAs exceeds that of regulations (although on a restricted total number of acts), the number of regulations is much greater than that of GAAs.

Figure 10 shows that the governments that, in proportion, seem to be more prone to activate the Council of State as Advisor, adopting regulations, are the center left governments of the XIII legislature, from Prodi I to Amato II. While the governments more prone to evade the *ex ante* control of the Council of State as Advisor are, in addition to De Mita, the first government Amato, Berlusconi IV, Monti and Letta.

Figure 10. Percentage of regulations and GAAs, per government



Data: personal computations on information available on the juridical database *Leggi d'Italia* (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.142

5.5.2 *The Independent variables: the determinants of the activation of Council of State's supervision*

The independent variables concern the circumstances that might affect the choice to make a regulation, activating the Council of State as Advisor, or to make a GAA, evading the *ex ante* control of the institution. According to my hypotheses, these variables capture government division, the presence of alternation (the desirability of policy change) and the internalization of Council of State's members inside the ministerial structures.

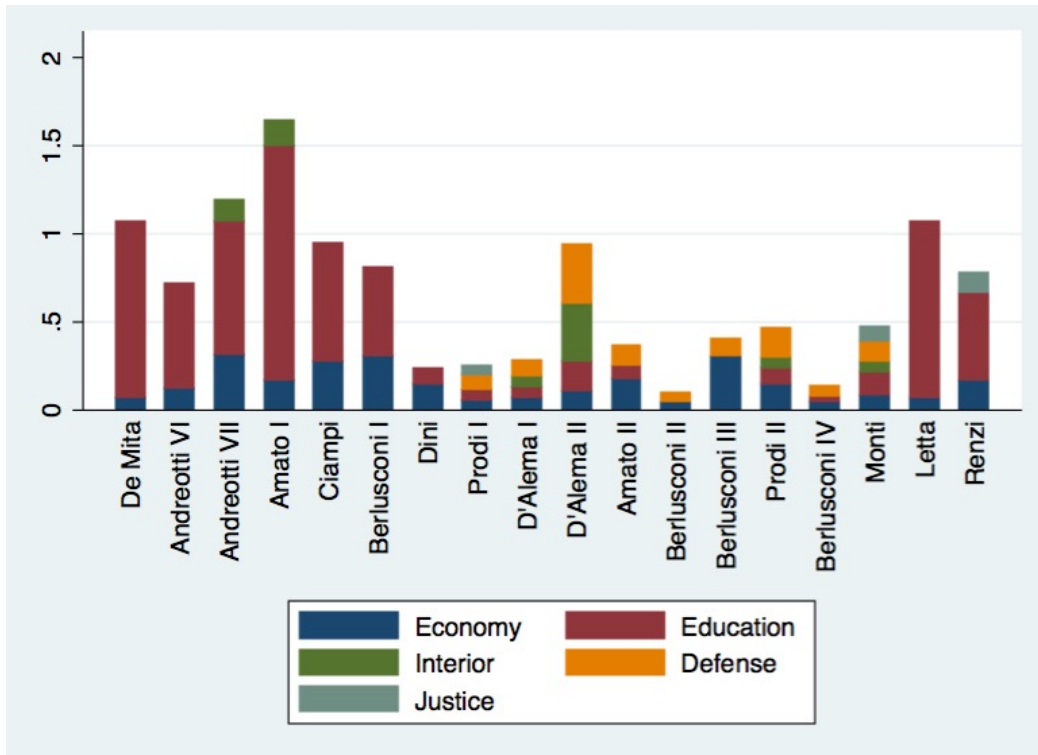
Bureaucratic capacity

The independent variable “Bureaucapacity” is calculated as the ratio of the total number of councilors recruited in each ministerial structure and the total number of acts adopted in the ministerial structures.

The total number of acts adopted in the ministerial structures constitutes a proxy of the relevance of each policy sectors. Therefore, Bureaucapacity summarizes the presence of the councilors inside the ministries, weighted for a measure of the importance of the same ministries. The variable captures the potential will of the governments to anticipate Council of State's orientation when they do not activate its *ex ante* control on administrative acts. Therefore, I expect this variable to have a negative impact on the number of regulations adopted.

As shown in Figure 11, the cabinets of the First Republic, from De Mita to Ciampi, and then the cabinets of the Second Republic Berlusconi I, Letta and Renzi, made the greatest investment in individual consultancy of Council of State's members in Education policy sector. All governments made some investment in Economy policy sector. The one with the greatest investment in this sector is the third Berlusconi government.

Figure 11. Distribution of “Bureaucapacity” variable, per government



Data: personal computations on information available on the juridical database Leggi d'Italia (1988-2014), on the journal “Consiglio di Stato: rassegna di giurisprudenza e dottrina”, on Righettini (1998), on the Italian Administrative Justice website (www.giustizia-amministrativa.it)

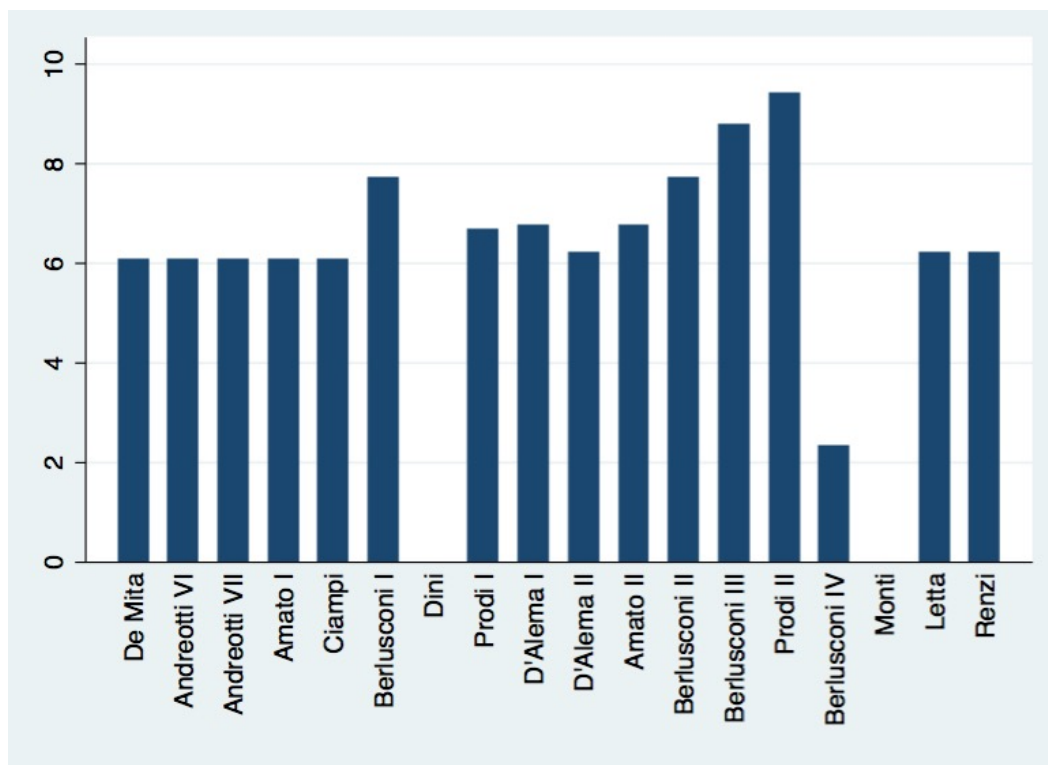
Governments started to recruit a consistent number of councilors in Defense policy sector starting from the first Prodi government until Monti government. The second government D'Alema had a consistent proportion of Council of State members in the policy sectors Defense and Interior. The investment in the individual consultancy of the councilors is residual in policy sector Justice.

Government heterogeneity

Two measures of the independent variable that captures government heterogeneity have been provided. One has been calculated according to spatial criteria, the other is based on the number of parties at government. The first version of the variable is

operationalized as the absolute value of the distance between the most extreme parties of the coalition. Parties' positions are drawn from expert surveys: Laver and Hunt (1992), Benoit and Laver (2006), Curini and Iacus (2008), Di Virgilio et al. (2015). I calculated the distance between the most extreme parties' positions on four policy dimensions: increase services versus cut taxes, pro- versus anti permissive social policy, pro- versus anti decentralization of decision, environment over growth versus growth over environment, and then I made the mean of such distances. The spatial variable that captures government heterogeneity is called "Range" and its distribution is represented in figure 12.

Figure 12. Distribution of "Range" variable, per government



Data: Laver and Hunt (1992), Benoit and Laver (2006), Curing and Iacus (2008), Di Virgilio et. al (2015)

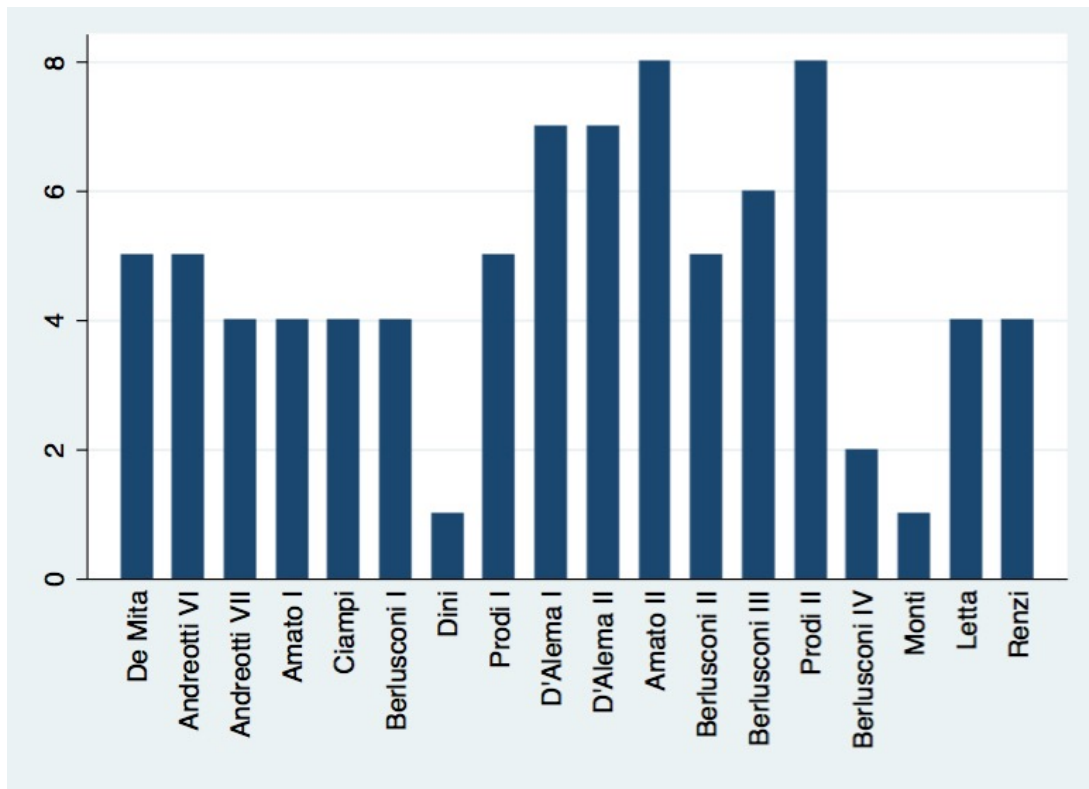
The variable assumes value zero in technical governments (*governi tecnici*) Dini and Monti, entirely composed of non-partisan ministers. Governments of the First Republic,

from De Mita to Ciampi, share the same level of government heterogeneity. The same applies to the last two governments of the Second Republic, Letta and Renzi. The most divided government is Prodi II, the less heterogeneous government is Berlusconi IV.

My expectation is that government heterogeneity has a positive impact on the activation of the Council of State as Advisor and, therefore, on the number of regulations adopted.

The non-spatial measure of government heterogeneity is given by the total number of parties at government, calculated as the sum of the parties at government. The variable Parties at government, abbreviated to “P_gov”, behaves rather similar to Range and it is distributed as follows:

Figure 13. Distribution of Parties at government (“P_gov”) variable, per government



Data: personal computations on information available on the official website of the Italian government (www.governo.it)

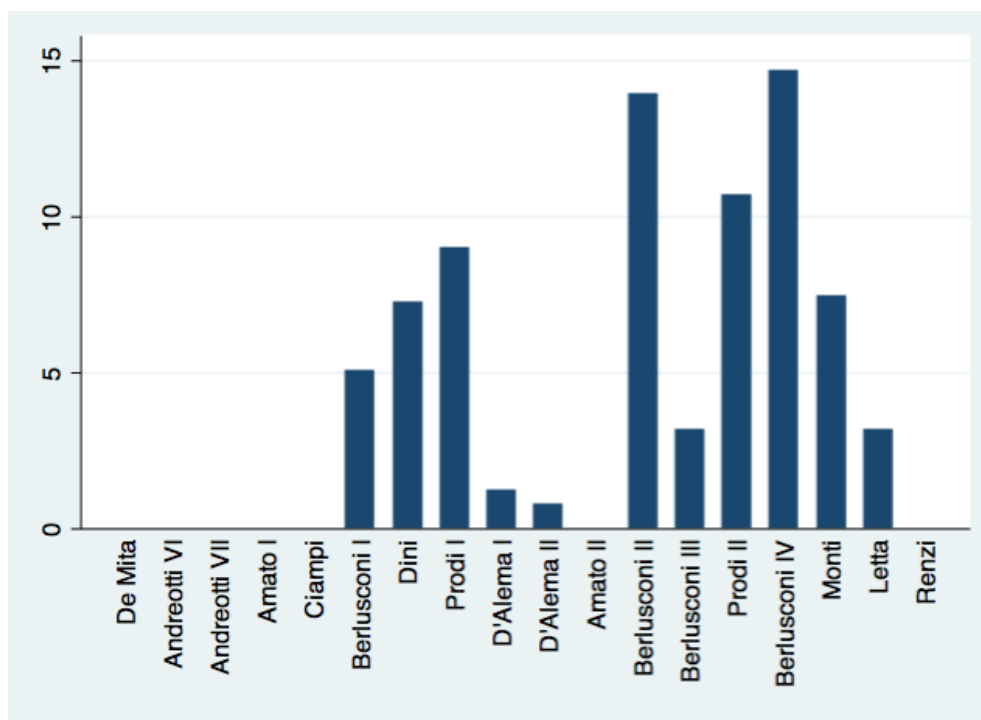
In the two technical governments Dini and Monti, the variable assumes value 1. The governments of the First Republic do not share the same level of heterogeneity, since De Mita and Andreotti VI governments include one more party, the PRI (Italian Republican Party), with respect to Andreotti VII, Amato I and Ciampi government. This party, in variable Range, is absorbed by the other parties, according to the rule elaborated by Tsebelis (2002). The governments with the highest number of parties are Amato II and Prodi II, while, except for Monti and Dini cabinet, the government with the lower level of heterogeneity is Berlusconi IV. As for Range variable, I expect that P_{gov} variable has a positive impact on the number of regulations adopted.

Government alternation

Two measures of government alternation are provided. One is calculated following spatial criteria, the other considering the turnover of parties at government. The first measure is conceptualized as the difference in ideological position between previous and current governments. Party positions on policy dimensions are drawn from expert surveys: Laver and Hunt (1992), Benoit and Laver (2006), Curini and Iacus (2008), Di Virgilio et al. (2015). The variable has been calculated by finding the mid-range position of each government on 4 policy dimensions: increase services vs cut taxes, pro permissive social policy vs anti, pro decentralization of decision vs anti, environment over growth vs growth over environment, then calculating the distance between the mid-ranges of two successive governments and, finally, making the square root of the sum of each squared distance, according to Tsebelis and Chang (2004)⁷⁸. The distribution of the variable, named “Alternation”, is shown in Figure 14:

⁷⁸ The distance between two governments on four dimension is calculated as $A_{1,2,3,4} = (A_1^2 + A_2^2 + A_3^2 + A_4^2)^{1/2}$, where $A_{1,2,3,4}$ are the alternations between two successive governments on each dimension.

Figure 14. Distribution of “Alternation” variable, per government



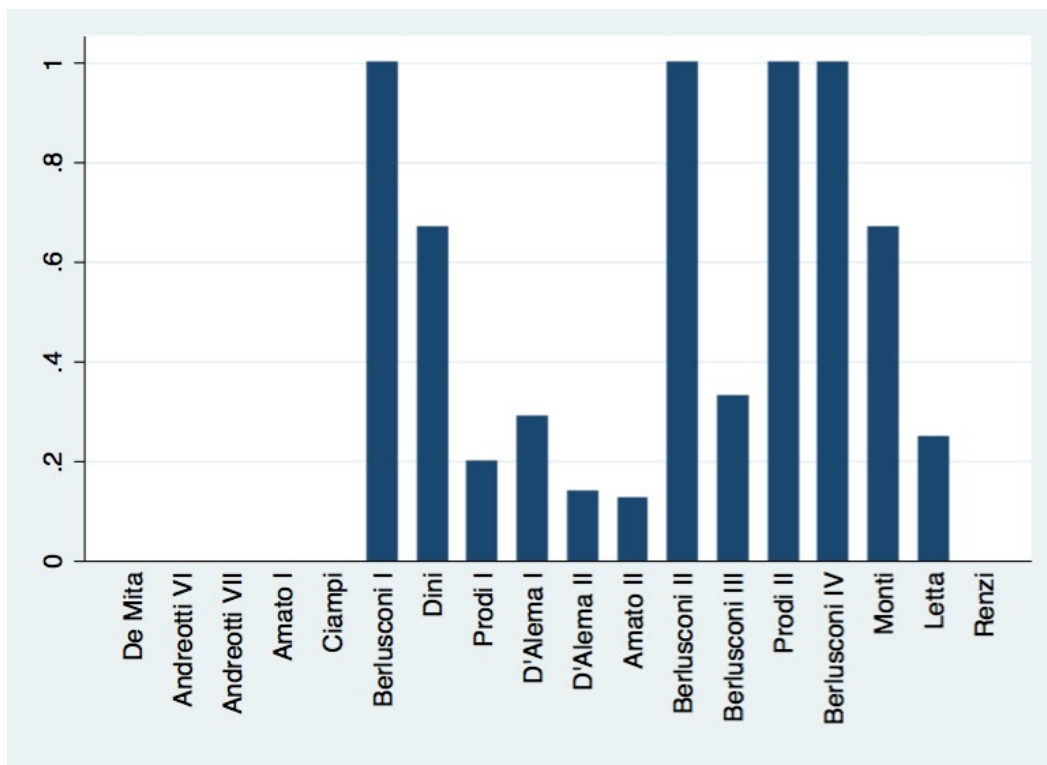
Data: Laver and Hunt (1992), Benoit and Laver (2006), Curini and Iacus (2008), Di Virgilio et al. (2015)

According to this measure, alternation appears for the first time after the end of the first Republic, with the first Berlusconi government. Then more consistent level of alternation takes place with the first cabinet of Prodi. The greatest level of alternation are registered with the succession of center-right and center-left government coalitions: with the II Berlusconi government, that followed the center-left governments of the XIII legislature (from Prodi I to Amato II); with the second cabinet of Prodi, that succeeded to the center-right governments of Berlusconi (II and III) of the XIV legislature. With the IV Berlusconi cabinet, that followed the second Prodi cabinet. The last government of the Second Republic, Renzi, registers no alternation with respect to Letta cabinet. My expectation is that this variable has a negative impact on government propensity to adopt regulations. Since the status quo inherited by the previous government is supposed to be far from coalition members' positions, if alternation occurred, incumbent government should be less interested in activating the Council of State as Advisor.

Therefore I expect that the higher the level of alternation, the lower the number of regulations.

The non-spatial measure of government alternation has been calculated as the ratio between new parties at government and the total number of parties at government. This variable is called “New_Parties” and its distribution is represented in Figure 15. Also according to this measure, alternation occurs starting from the first Berlusconi cabinet and it is absent in Renzi cabinet. As for the spatial version of the variable, the highest levels of alternation are registered with the first Berlusconi government and then with the coalitions of center-right Berlusconi II, with the center-left coalition Prodi II and then again with the center-right coalition of Berlusconi IV. As for Alternation variable, I expect New_Parties to have a negative impact on the number of regulations adopted.

Figure 15. Distribution of “New_Parties” variable, per government



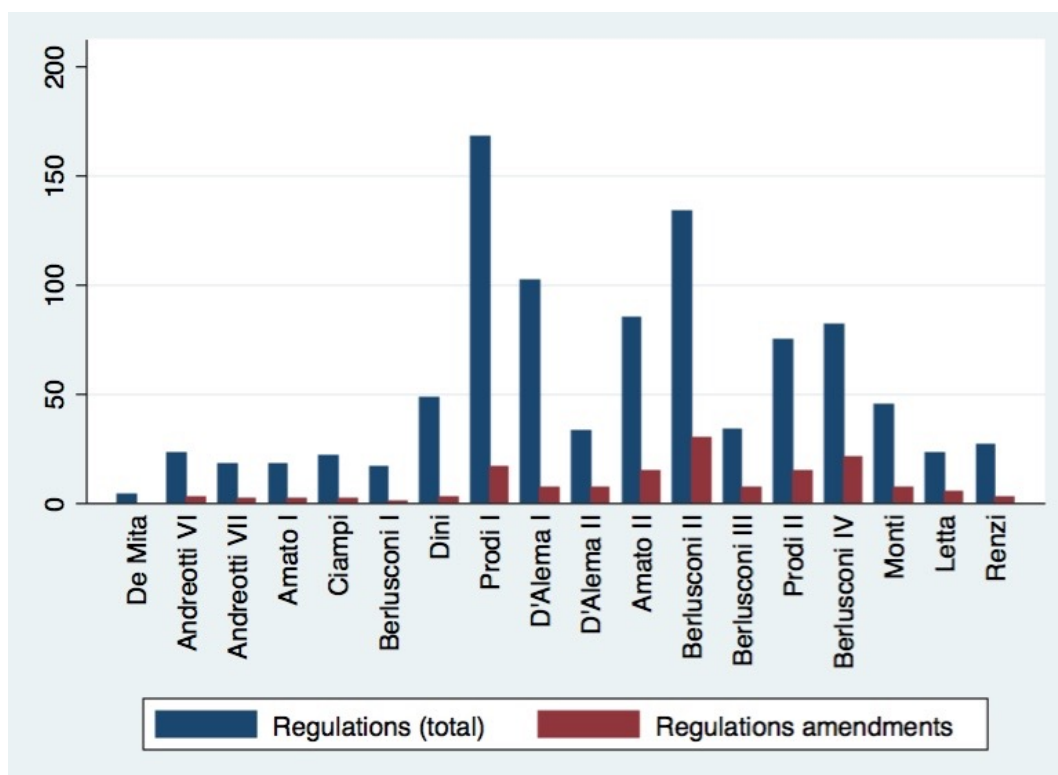
Data: personal computations on information available on the website of the Italian government www.governo.it

5.5.3 Control variables

Amendments to existing regulations

The choice between regulations and GAAs can be influenced by the presence of specific procedures that bind to the adoption of a specific type of act. The variable “Modify” points out if the decree is a modification of an existing regulation. An existing regulation should be modified only by the same type of act: by another regulation. The distribution of the variable Modify, marked as “Regulations amendments” in Figure 16, shows that governments that adopted the highest number of regulations amending previous regulations are Berlusconi II and Berlusconi IV, followed by Prodi I.

Figure 16. Distribution of “Modify” variable, per government



Data: personal computations on information available on the juridical database *Leggi d'Italia* (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.142

My expectation is that the control variable *Modify* has a positive impact on the dependent variable, since it should bind governments to adopt further regulations.

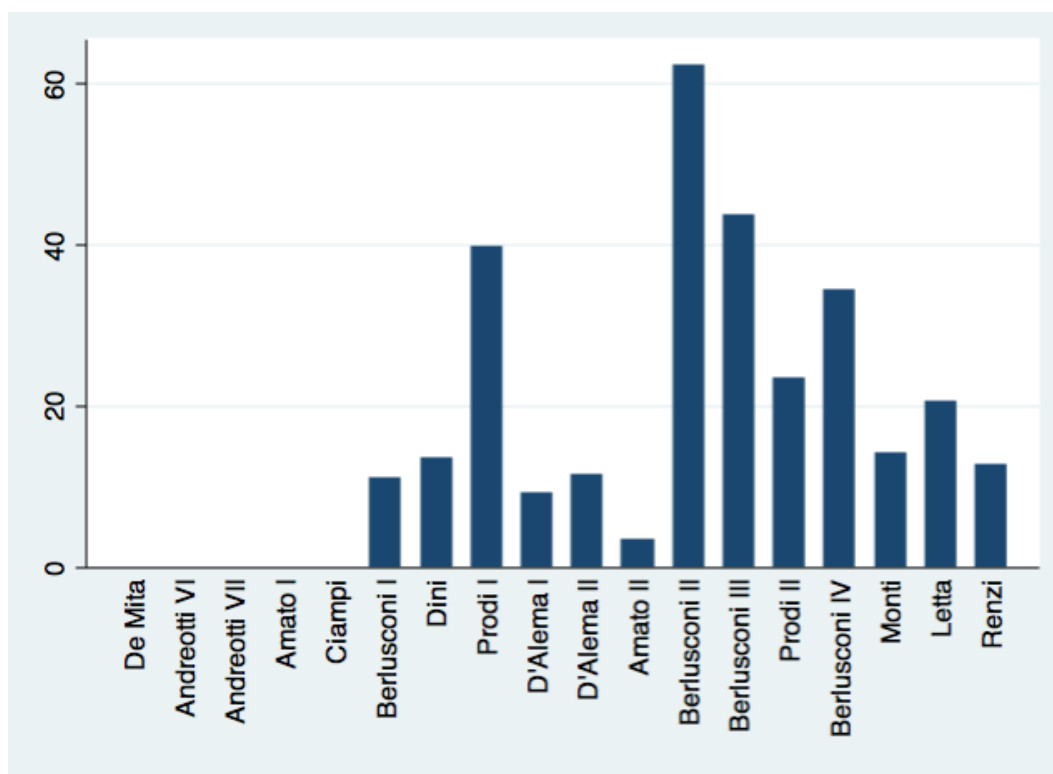
Measures of governments' "alterity"

The last control variable captures the difference between the cabinet that approved the primary law and the cabinet that adopted the administrative act, regulation or GAA. The level of "alterity" between governments could affect the choice on the type of instrument to implement primary laws. In particular, I would expect that to higher level of alterity between governments could correspond a lower knowledge of primary laws and, therefore, a higher necessity to activate the Council of State as a guarantor of the legitimacy of the implementation. In the spatial version of the variable, the level of alterity is conceptualized as the distance between the mid-range of the government which passed the law and the midrange of the government that adopted the decree. Such distance have been measured on the 4 policy dimensions considered also for *Range* and *Alternation*. Then the variable, "Alter", has been calculated, following Tsebelis and Chang (2004), as the square root of the sum of each squared distance. The distribution of the variable is shown in Figure 17.

Alter is equal to zero among the governments of the First Republic, since there is no distance between the mid-ranges of these governments. In addition, the decrees deriving from laws previous to 1988 and to De Mita cabinet⁷⁹ have been excluded from the dataset. The governments with the greatest values of alterity are the second and third Berlusconi cabinets. This means that, on average, these cabinets have adopted the decrees that derived from the more "distant" laws. This phenomenon, that occurred also in the first Prodi cabinet, tends to become less important in the second Prodi cabinet and in the fourth Berlusconi cabinet.

⁷⁹ Also two decrees of 1988, but that derive from laws approved by the predecessor of De Mita government, Goria government, have been excluded from the dataset.

Figure 17. Distribution of “Alter” variable, for government



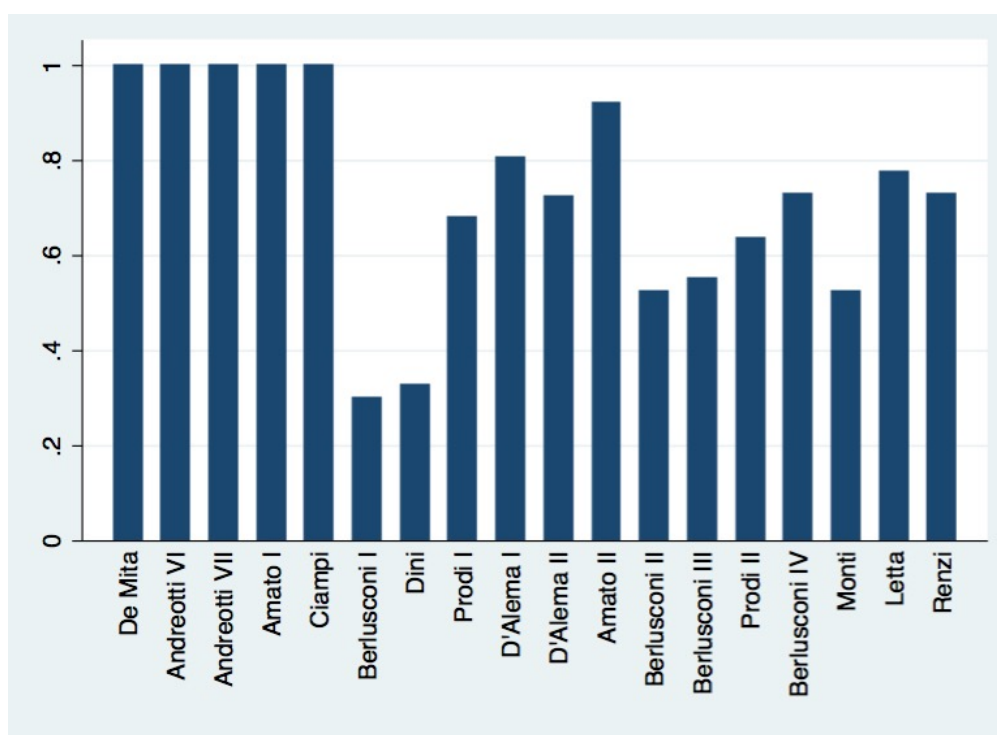
Data: personal computations on information available on the juridical database *Leggi d'Italia* (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.140

My expectation on the behavior of this control variable is that the greatest the alterity of the government which adopted the law, the highest should be the necessity to activate the formal consultation of the Council of State.

The non-spatial version of “Alter”, the variable “Alter_NS”, is calculated as the ratio between the number of parties common to the government that adopted the decree and the government that passed the law and the number of parties that passed the law. This variable captures how “close” is the government that implements the decree to the government that approved the law. Alter_NS assumes value 1 if the governments that adopt the laws and the decrees coincide or when they share the same characteristics in terms of government composition. It is the case of the governments of the First

Republic. The variable assumes value 0 if no parties of the government that approved the law are present in the government that adopts the decree. My expectation is that the more similar the government that enacts the law and the government that adopts the decree, the lower is the necessity to activate the control of the Council of State to ensure that implementation adequately interprets the law. Figure 18 shows the distribution of the mean values of the variable, per government. The cabinets that, on average, implemented decrees from laws of the less similar governments are, by definition, the first Berlusconi government and Dini government. These governments, the first of the Second Republic, were composed indeed of new political parties.

Figure 18. Distribution of “Alter_NS” variable, for government



Data: personal computations on information available on the juridical database *Leggi d'Italia* (1988-2014). Types of act: D.M., D.P.R., D.P.C.M., acts deriving from laws prior to 1988 excluded. Total number of acts: 1.140

Except for these governments, the cabinets that implemented the laws of the less similar

governments are, as in the spatial version of the variable, the second Berlusconi cabinet and also Monti cabinet.

5.5.4 Summary of the variables

The following table synthesizes the descriptive statistics of the dependent, independent and control variables presented before.

Table 5. Descriptive statistics

Variables	N	Mean	St.Dev.	Min	Max
<i>Dependent variable</i>					
Council of State	1142	.8388792	.3678034	0	1
<i>Independent variables</i>					
Range	1142	5.901708	2.632072	0	9.41
P_gov	1142	4.89317	2.160308	1	8
Alternation	1142	6.863092	5.503851	0	14.66092
New_Parties	1142	.4992776	.3965617	0	1
Bureaucapacity	1142	.0837858	.1051963	0	1.333333
<i>Control variables</i>					
Modify	1142	.1287215	.3350382	0	1
Alter	1140	26.02992	37.36826	0	155.2258
Alter_NS	1140	.6919158	.431735	0	1

The variables Alter and Alter_NS has 1.140 observations, since their values for two decrees that derive from laws approved by the predecessor of De Mita government (Goria government) are classified as missing.

5.6 The determinants of Council of State's activation: an empirical analysis

Since the decrees I collected are grouped by policy area and there might be different effects on them according to the policy area to which they belong, I use a mixed-effects logistic regression to test my hypotheses, with random intercepts for each level of policy area (economy, defense, interior, justice and education).

I ran the analyses in the entire dataset and then in a subset, in which the decrees that derive from laws of previous governments, the “inherited decrees”, are not included⁸⁰. Model 1 and model 2 test, respectively, spatial and non-spatial variables on the entire dataset. Model 3 and model 4 test spatial and non-spatial variables on the subset.

In Model 1 and 3, spatial variables are calculated on four policy dimensions (increase services versus cut taxes, pro- versus anti permissive social policy, pro- versus anti decentralization of decision, environment over growth versus growth over environment). In Appendix, I ran the analyses on the entire dataset and on the subset with spatial variables calculated only on the dimension “increase services versus cut taxes”.

⁸⁰ In the subset are included all D.P.R.. D.P.R are the most concerted type of administrative act, since they must be approved by the entire government. They often derive from combined provisions of different laws. Given their characteristics, have considered these type of acts as expression of the will of the incumbent governments.

Table 6. Determinants of Council of State's activation

	1	2	3	4
<i>Range</i>	.0736141** (.0299949)	-	.082078** (.040976)	-
<i>P_Gov</i>	-	.19897*** (.0405652)	-	.1704262*** (.0554691)
<i>Alternation</i>	-.0753881*** (.0181156)	-	-.0765409*** (.0256221)	-
<i>New_Parties</i>	-	-.7373838*** (.2390125)	-	-.8031298** (.3269295)
<i>Bureaucapacity</i>	-2.319556*** (.7866209)	-2.072043*** (.7470109)	-3.480938** (1.56353)	-2.485192* (1.452759)
<i>Modify</i>	1.31999*** (.4033515)	1.405935*** (.4027611)	1.1287** (.5426112)	1.117855** (.543194)
<i>Alter</i>	.0138604*** (.0031145)	-	-	-
<i>Alter_NS</i>	-	-.5761538*** (.2116973)	-	-
<i>Constant</i>	1.844117*** (.3222177)	1.89993*** (.3876084)	2.082121*** (.4564186)	1.575692*** (.4694673)
Observations	1140	1140	517	517
Group variable	policy_num	policy_num	policy_num	policy_num
Number of groups	5	5	5	5
Wald chi2	56.98	60.86	18.54	24.70
Log likelihood	-459.26603	-458.09523	-237.75181	-234.53936

Dependent variable: decree submitted to the ex ante control of the Council of State. Mixed effects logistic regression. Robust standard errors in parentheses.
*** p < 0.01; ** p < 0.05; *p < 0.1

In models 1 and 2 (analyses on the entire dataset) both spatial and non-spatial independent variables are statistically significant. The variables that capture government heterogeneity, “Range” in model 1 and “P_Gov” in model 2, are statistically significant,

respectively, at 0.05 and at 0.01 level. They both have a positive impact on the probability of activating the Council of State as Advisor. More specifically, every unit increase in Range enhances the probability of activating the *ex ante* control of the Council of State of 7.64%. Every unit increase in P_Gov (each increase of one party in the total number of parties at government) enhances the probability of submitting a decree to *ex ante* control of the Council of State of the 22.01%.

The variables that capture alternation in model 1 and 2, “Alternation” and “New Parties”, are statistically significant at 0.01 level in each model. They both have a negative impact on the probability of activating the *ex ante* control of the Council of State. In particular, for each unit increase of Alternation, the probability of adopting a regulation decreases of the 7.26%. When New Parties passes from 0 to 1, which means, when governments' composition passes from no new parties at government to only new parties at government, the probability of activating the Council of State as Advisor decreases of the 52.16%.

The variable Burecapacity, which represents the importance of the “investment” in the individual expertise of Council of State members among government departments, is statistically significant at 0.01 level in models 1 and 2 and it has a negative impact on Council of State activation. In the first model, when the variable passes from 0 to 1, the probability of adopting a regulation decreases of 90.17%. In model 2, the probability decreases of the 87.41 %.

The control variable Modify, which captures if an administrative act is an amendment of an existing regulation, is statistically significant at 0.01 in models 1 and 2 and it has a positive effect on the probability to adopt a regulation (it more than doubles the probability of adopting a regulation in model 1 and it triples the probability in model 2).

The control variables that capture governments “alterity”, Alter and Alter_NS, are both statistically significant at 0.01 level in models 1 and 2 and they have, respectively positive and negative effects on the probability to activate the *ex ante* control of the Council of State. The substantial impact of the spatial version of the variable is modest: for each unit increase of Alter, the probability to activate the Council of State as Advisor

increases of 1.40%. When Alter_NS passes from 0 to 1 (when governments that adopted the laws coincide with governments that adopt the decrees), the probability to activate the Council of State as Advisor decreases of the 43.79%.

In model 3 and 4 the analyses concern the subset of the non-inherited decrees. Therefore, control variables Alter and Alter_NS are no more included.

In Model 3, the statistical significance of Range remains at a 0.05 level. On the subset of the non-inherited administrative acts, the impact of an increase of one unit of this variable on the probability to adopt a regulation is of the 8.55%. In model 4, the non-spatial variable that captures government heterogeneity, P_Gov, remains statistically significant at 0.01. For each one more party at government the probability of adopting a regulation increases of the 18.58%.

Both versions of the independent variable that captures alternation: the spatial variable Alternation in model 3 and the non-spatial variable New Parties in model 4 are statistically significant (respectively at 0.01 and at 0.05) and they have a negative impact on the probability of activating the Council of State. In particular, for one unit increase of the variable Alternation in model 3, the probability to adopt a regulation decreases of 7.37%, while, in model 4, New Parties variable, passing from 0 to 1, determines a decrease of the 55,21%. The independent variable Burecapacity has a 0.05 level of statistical significance in model 3 and a 0.1 level in model 4. In both models it confirms its negative impact on the probability to adopt a regulation (when the ratio between the number of councilors and the number of acts adopted in a policy sector passes from 0 to 1, the probability to activate the Council of State decreases of the 96.92% in model 3 and of 91.67% in model 4). The control variable Modify is statistically significant in both models at 0.05 level and it has a positive impact on the probability to adopt a regulation. Passing from 0 to 1, this variable doubles the probability to activate the Council of State in both models 3 and 4.

Appendix

Table 7. Determinants of Council of State's activation

Parties' positions derived from policy dimension "increase services *versus* cut taxes"

	5	6
<i>Range</i>	.0578282* (.0297787)	.051948 (.0392392)
<i>Alternation</i>	-.132803*** (.0327813)	-.1387052*** (.0473233)
<i>Bureaucapacity</i>	-2.465999*** (.7954189)	-3.700613** 1.566592
<i>Modify</i>	1.328193*** (.4033396)	1.132965** (.5420843)
<i>Alter</i>	.1815867*** (.0368964)	-
<i>Constant</i>	1.885413*** (.3105534)	2.279724*** (.4429827)
Observations	1140	517
Group variable	policy_num	policy_num
Number of groups	5	5
Wald chi2	56.54	16.03
Log likelihood	-459.54713	-239.05773
Dependent variable: decree submitted to the <i>ex ante</i> control of the Council of State.		
Mixed effects logistic regression. Robust Standard errors in parentheses.		
***p<0.01; **p<0.05; *p<0.1		

In both models 5 (entire dataset) and 6 (subset) the variable Alternation is negative and statistically significant at level 0.01. In model 5, Alternation determines a decrease in the probability of activating the Council of State as Advisor of 12.44 %; in model 6 it determines a decrease of 12.95%. When the analysis is run on the entire dataset, Range is positive and statistically significant at level 0.1; it increases the probability of adopting a regulation of 5.95%. In the subset, Range confirms its positive sign, but it is no more statistically significant. The variable Bureaucapacity confirms its negative impact on the probability to activate the Council of State and it is statistically significant at level 0.01 in Model 5 and at level 0.05 in Model 6. It decreases the probability of activating the Council of State as Advisor of 91.51% in model 5 and of 97.53% in model 6. The variable Modify is positive and statistically significant in both models, at 0.01 level and at 0.05 level and it almost triples the probability to adopt a regulation in model 5, and it doubles it in model 6. Variable “Alter” in model 5 confirms its positive effect on the probability to adopt a regulation (+19.91%) and it is statistically significant at 0.01 level.

CHAPTER VI

Conclusions.

Implications of legislative-judicial interaction on the configuration of courts that review administrative acts in 15 EU countries

6.1 Determinants and implications of the ex ante control on administrative acts

Courts competent for reviewing administrative acts, as law scholars point out, check how public authorities exercise administrative discretion. Courts control if governments have chosen the most appropriate means and if their decisions do not go beyond what is necessary to achieve the goals established by legislation (“principle of proportionality”). In addition, courts check if individual rights have been respected in the exercise of public power and, as a sanction of their control, they can declare an administrative decision to be void⁸¹. In the majority of countries of Continental Europe, the judicial review of administrative acts is provided by courts organized in a separate system within the judiciary, parallel to that of civil and criminal tribunals. It is the case of countries as France, Italy, Germany, Austria, Belgium, the Netherlands, Luxembourg, Greece, Portugal. In Northern Europe, also Finland and Sweden have a separate system of administrative courts. On the contrary, Spain attributes administrative litigation to specific sections of ordinary courts, on the model of a common-law country as the United Kingdom. A prerogative of administrative courts that has received much less attention concerns their role of advisors of governments. To an extent that varies from country to country, administrative courts can be consulted by the governments and they can issue opinions on the drafts of the most important administrative acts (decrees with a regulatory content). In the case of Italy, the *ex ante* control of the Council of State on

⁸¹ The protection against unlawful decisions can include also that courts allocate damages to be paid by state or local budgets (Ziller 2012).

regulations seems to be triggered by specific political conditions. In particular, in presence of high level of government heterogeneity, at least one partner coalition would benefit from the intervention of the Council of State as Advisor, in order to prevent ministerial drift. Moreover, when government coalitions are heterogeneous, coalition members would be interested in knowing Council of State preferences, in order to anticipate its actions as Court. For this purpose, they would activate its *ex ante* control on regulations.

It is possible to imagine that the same political conditions can affect the necessity to provide a preventive legal control on administrative acts also in other countries and that such conditions can affect the characteristics of courts that review administrative acts as well. In particular, I would expect the activation of courts as advisory bodies to be limited in countries with low level of government heterogeneity and high level of alternation. As a consequence, in these countries I would expect to observe the presence of:

- administrative courts that do not provide a legal *ex ante* control on administrative acts
- Councils of State with a clear separation between consultative and judicial functions and in which the advisory role of the institution is more “policy oriented”, less connected with the role of the Council as a judicial body.

On the contrary, in countries characterized by high level of government heterogeneity and low level of alternation I would expect to find:

- administrative courts that are consulted also as advisors of governments on administrative acts
- Councils of State with a clear continuity between consultative and judicial functions, in terms of personnel and of content of the opinions and of the decisions. In these countries, the opinions of the Councils of State are supposed to constitute a sort of anticipation of the eventual judicial decisions.

In this conclusive section, I mapped the subjects responsible for the *ex ante* legal control on regulations in 15 European countries. Then I inferred the main questions that seem to qualify such control. Hence, I have focused on the characteristics of courts responsible

for the judicial review of administrative acts in the same countries and I have provided a classification of courts based on two dimensions: “organs responsible for the judicial review of administrative acts” and “separation between consultative and judicial functions”. Finally, I have associated courts' characteristics with political variables that capture alternation and government heterogeneity and I have verified the presence of correlations.

6.1.1 The ex ante control on regulations in 15 European countries

The legal control on administrative acts' drafting, in particular of regulations, is exercised by different organs in the European countries. Not necessarily such control is a prerogative of courts. There are countries in which this control is entirely exercised inside government departments. In some cases, an *ex ante* supervision is exercised also by committees of the legislative. In other countries, in addition to the control of legal units and of other bodies of the executive, a monitoring of administrative acts' drafting is attributed to third institutions, as the administrative courts. In the following table, using OECD data on regulatory capacity in the 15 original member states of the EU countries and information from official documents of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe), I have summarized the combinations of institutions and bodies that can supervise the lawfulness of regulations, highlighting if their control is internal or external to the executive in table 8:

Table 8. *Ex ante* control on regulations in 15 EU countries

<i>Countries</i>	<i>Institutions that supervise the legal drafting of regulations</i>	<i>Presence of a legal control external to the executive</i>
Austria	Constitutional Service of the Federal Chancellery (<i>Verfassungsdienst</i>)	No; Courts might be consulted on primary legislation's drafting
Belgium	Legal department of the Prime Minister's Office; Council of State	Yes, mandatory
Denmark	Ministerial legal units; Supervision of the Ministry of Justice	No
Finland	Ministry of Justice (Bureau of Legislative Inspection); Supreme Court and Supreme Administrative Court opinions are often asked in the preparation of new legislation	Yes, on request of the government
France	General Secretariat of the Government (legislative department); Council of State	Yes, mandatory
Germany	Ministry of Justice	No
Greece	Government General Secretariat (Office of Legislative Work); Central Law Making Committee; Council of State	Yes, mandatory
Ireland	Office of the Parliamentary Counsel to the government	No
Italy	DAGL; Council of State	Yes, mandatory
The Netherlands	Ministerial legal departments; Ministry of Justice; Council of State	Yes, mandatory
Luxembourg	Central Legislation Service; Council of State	Yes, mandatory
Portugal	Legal services of the Ministries; Legal centre of the Ministry for Presidency (CEJUR)	No
Spain	Council of State; Technical Secretariats General of the Ministries	No (the control of the Council of State on secondary legislation is residual)
Sweden	Director General for Legal Affairs (DGLA) in each Ministry; Ministry of Justice; Council on Legislation	Yes
United Kingdom	Joint committee of statutory instruments; legal unit staffed by government lawyers; GLS	Yes

Source: Better Regulation in Europe – The EU 15 project, OECD and official documents of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe).

In Germany, Austria, Portugal, Ireland and Denmark, the *ex ante* control on the lawfulness of regulations is provided only by institutions inside the executive. In Portugal, the Legal centre of the Ministry for Presidency (CEJUR) provide legal assistance to the ministries. In Germany the legal quality of the drafting is ensured by the supervision of the Ministry of Justice, that checks if drafts are consistent with the existing laws and if they comply with formal drafting rules. In addition, German top civil servants are traditionally trained as lawyers (Ziller, 2012) and they contribute to supervise the legal consistency of primary and secondary legislation. In Ireland, the legal quality of primary and, on request, of secondary legislation is ensured by a team of specialist lawyers that works at the Office of the Parliamentary Counsel to the government. This Office is part of the Office of the Attorney General, the highest legal advisory body of the government. In Denmark the legal quality of regulations is ensured by the legal units of the Ministries and by the supervision of the Ministry of Justice.

The majority of countries has services competent for supervising the legality of regulations that belong to both, the government and to institutions external to the government. For instance, in the United Kingdom, the parliament plays an increasing role in the control of the new regulations. Several parliamentary committees participate to the supervision of regulations which derive from primary laws⁸². Amongst these, the Joint Committee on Statutory Instruments assesses the legal basis and drafting defects of regulations; the House of Commons Regulatory Reform Committee, the House of Lords Delegated Powers and the Regulatory Reform Committee examine if ministers made a proper use of the powers conferred by legislation.

Other countries see the supervision of organs of the executive and of the administrative courts. In Sweden, in addition to the check of the Director General of legal affairs of the Prime Minister, a Council of Legislation (*Lagrådet*), composed of current and former judges of the Supreme Court and Supreme Administrative Court, advises government

⁸² Most of these regulations are known as “statutory instruments”. Statutory instruments cannot be modified by the parliament, but they tend to be subject to parliamentary approval. Therefore a specialized group of committees has developed in order to scrutinize their content.

on the conformity of regulations drafts with the legal system. In Finland, where the Ministry of Justice, through the Bureau of Legislative inspection, checks the legal basis of the drafts and their consistency with other legislation, the government can ask, in addition, the opinion of the Supreme Administrative Court.

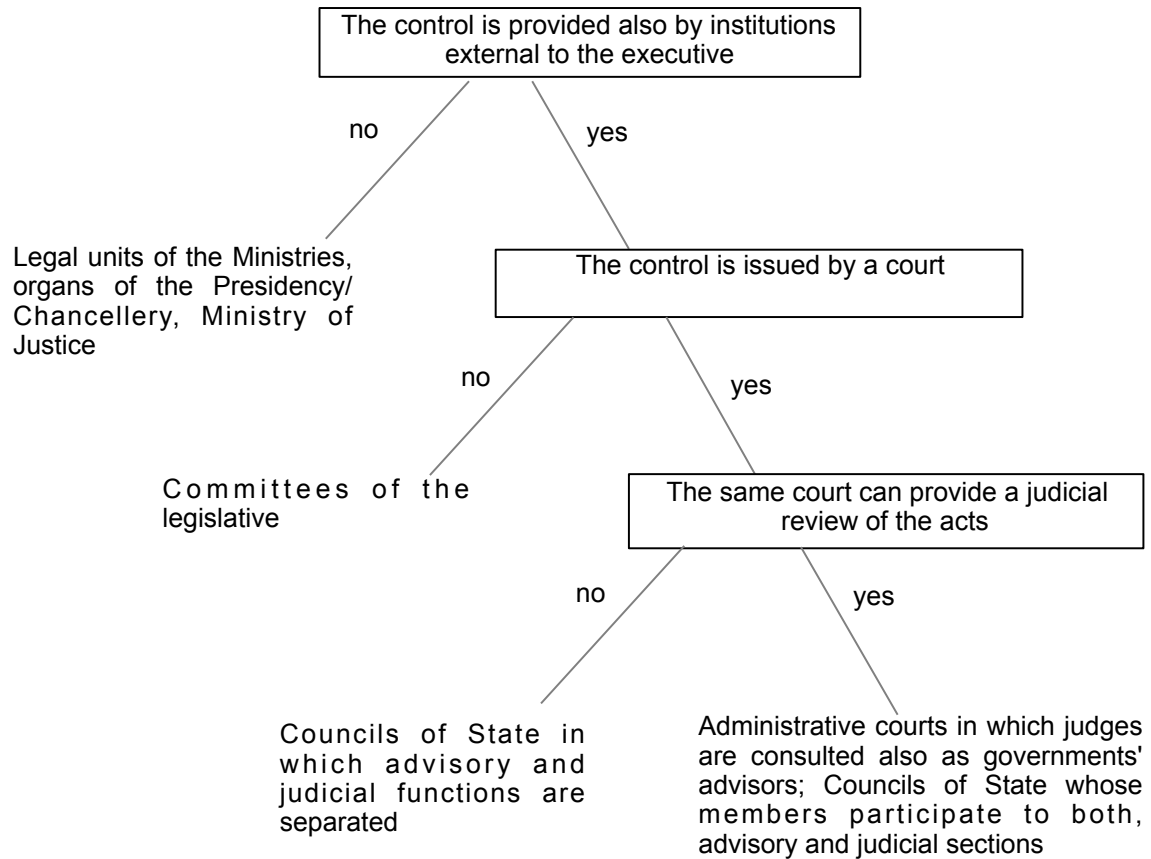
In France, Greece, Italy, Luxembourg and the Netherlands, in addition to the supervision of central bodies of the executive (as the Government General Secretariat in France and Greece, the Department of Legislative Affairs of the Presidency of the Council of Ministers in Italy the Central Legislation Service in Luxembourg...), the Councils of State provide an *ex ante* control on regulations.

6.1.2 Questions qualifying the ex ante control on regulations

The information collected allow to infer a series of questions that seems to characterize the logic of the *ex ante* control on regulations. In Figure 19, to the questions that qualify the supervision on regulations, I have associated the institutions and bodies that provide such supervision. When the control on regulations' drafting is provided by organs external to the executive, such organs can be committees of the legislative or courts. To the category of courts belong the administrative courts whose judges can be consulted as advisors on governments' secondary legislation and the Councils of State. Councils of State can be divided in: Councils of State in which consultative and judicial functions are provided separately; Councils of State in which the two functions overlap and advisory opinions and judicial reviews are issued by the same judges. Only in Councils of State in which consultative and judicial functions overlap, the court that advises government can be properly considered as the same subject that reviews administrative acts. The same cannot be affirmed, if there is a clear separation between the two functions and a sort of division of labor occurs among the councilors of consultative and judicial sections. In these cases, it is improper to consider the court that advises the government as the same subject that reviews administrative acts. Although the two functions are exercised within the bounds of a single institution, the logics and the

behaviors of the advisors and of the judges can be different.

Figure 19. Questions qualifying the ex ante control on regulations



Since the intensity of the relation between advisory and judicial functions of courts varies among countries, I have deepened this aspect in a classification of courts that review administrative acts in the 15 original member states of the EU. Countries were selected on the basis of the quality of information available and of the availability of public documents written in English and French.

6.2 A classification of courts that review administrative acts

In table 9, I have provided a classification of administrative courts that takes account of two dimensions. The first concerns courts' organization inside the judiciary: it registers if administrative courts are specialized sections of the ordinary judiciary, if they constitute a parallel system of courts, separate from that of the ordinary tribunals, if they follow the Councils of State- model. The second concerns the intensity of the relation between organs that advise the executive and organs that provide the judicial review of administrative acts.

Table 9. A classification of courts that review administrative acts, based on their organization inside the judiciary and on the intensity of the relation between advisory and judicial organs

	Relation between organs that advise the executive and organs responsible for the judicial review of administrative acts
Organs responsible for the judicial review of administrative acts	<i>Separation of functions</i> (- -) (+ +)
<i>Specialized sections of civil courts</i>	United Kingdom Ireland Spain Denmark
<i>Administrative courts</i>	Finland Sweden Austria Germany Portugal
<i>Councils of State</i>	Italy Belgium The Netherlands Greece Luxembourg (until 1996) France Luxembourg (after 1996)

Source: official documents of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe). <http://www.aca-europe.eu/index.php/en/tour-d-europe-en> and information available on the official websites of the Councils of State

Information on courts' organization are drawn from official documents of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA- Europe), from official websites of the administrative courts and of the Councils of State and from scholarly publications.

In the United Kingdom, the judicial review of administrative acts is provided by a branch of the High Court and the same court does not advise government on secondary legislation (as reported in previous paragraph, in the U.K. an *ex ante* control on statutory instruments' is provided by specialized committee of the parliament, in addition to the supervision of legal units of the executive). In this country, advisory and judicial functions are provided by organs clearly separated and that act with different incentives. In Spain, the judicial review of administrative acts is provided by specialized sections of the ordinary courts, which have no advisory role. In Spain there is also a Council of State, but its activity is limited to a consultancy to the government on primary legislation and, to a very limited extent, on secondary legislation (only questions concerning the organization of the same Council of State⁸³) with no judicial prerogatives. Also in this case, there is no overlapping between organs that provide judicial and advisory functions. In Portugal and Germany, the Supreme Administrative Courts are independent from the executive and they do not supervise the process of regulations' adoption. In these countries, third institutions that scrutinize regulations in addition to organs of the executive are not present. In Austria, administrative judges are not allowed to carry out activities as legal consultant in the administrative field and they have no proper advisory functions. However, as well as the justices of Constitutional Court, they can be invited to express their opinions on draft laws⁸⁴. Administrative justices of Finland and Sweden tend to have a closer interaction with the executive. In particular, in Finland, the Supreme Administrative Court can submit proposals to the government for legislative action and judges' opinions are often asked in the preparation

⁸³ The competences of the *Consejo de Estado* are specified by the law: <http://www.consejo-estado.es/articulos/Art21.htm>

⁸⁴ http://www.aca-europe.eu/en/eurtour/i/countries/austria/austria_en.pdf

of new legislation (Sarvilinna, 2007). In Sweden, justices of the Supreme Court and of the Supreme Administrative Court serve at the *Lagrådet*, a Council on Legislation which consists of two divisions composed of three members each and it is consulted by the government on legislation concerning freedom of expression, access to public documents, personal status of private individuals, obligations on citizens, administration of justice and fundamental principles of public administration. In the case of these two countries, a certain overlapping between advisory and judicial functions is present, the same judges of the administrative courts can be involved in the legislative process. Countries that adopt the model of the Council of State have one single institution responsible for advising the government and for providing the judicial review of administrative acts. However, the intensity of the relation between consultative and judicial functions in these institutions can vary. This fact is reflected by the organization of the personnel inside the sections of the Councils of State, by the presence of eventual regimes of incompatibility for the exercise the two functions and by the same requirements, in terms of expertise and background, necessary to become members of the institution. When advisory and judicial functions overlap, the consultative task of the Council of State tends to be “captured” by the justices: by their analytical tools, by the prevalence, in terms of numbers, of the judges in the advisory sections of the Councils of State. When the two functions are separated, the consultative function can present also a “political nature”: it can be provided also by councilors with a more general training, not exclusively legal, and it is more targeted on governments' policy objectives. In the majority of the cases considered, the functions of the Councils of State coincide and the judicial approach tends to prevail. Until 1996, the consultative and judicial functions of the Council of State of Luxembourg used to overlap. The members of the institution had a double role of judges and consultants: they used to rotate between the sections and they could be part of different sections simultaneously. After a sentence in which the European Court of Human Rights (the “*Procola v. Luxembourg*”

affair⁸⁵) judged the organization of the Council of State incompatible with the principle of impartiality and independence, the institution was reformed: the Council of State maintained only the advisory function and the judicial section was removed. In 1997, the administrative litigation was attributed to an administrative tribunal and to a new administrative court. In the Councils of State of Belgium, The Netherlands, Greece and Italy, judges rotate between the sections and, in a limited number of cases, they can be also simultaneous members of both sections. In the Council of State of Belgium⁸⁶, the councilors must meet a series of requirements to be appointed, as a relevant professional experience of legal nature (at least of ten years) and the possession of a master's degree or doctorate in law. It is rather frequent that members of the judicial courts move to the Council of State and that members of the Council of State apply for the Constitutional Court. Although the councilors may be assigned exclusively to the advisory or to the judicial section, in practice, as reported by a Chamber President at the Council of State of Belgium⁸⁷, they can switch from one function to the other when the workload of the institution makes this necessary. In particular, the councilors of the judicial section can be called to sit on the consultative section to replace a member prevented from attending or to constitute additional chambers when required; the members of the consultative section can be called to sit on the judicial section to form a bilingual chamber, to replace a member of the Dutch-speaking or of the French-speaking

⁸⁵ In the “Procola” case, a company contested a regulation on the apportionment of milk quotas before the judicial section of the Council of State of Luxembourg. However, four of the five councillors that heard the case had already examined the regulation when the government asked the Council to give advice on the draft. The European Court of Human Rights judged this fact incompatible with the principles of impartiality and independence.

⁸⁶ In Belgium, the Council of State issues opinions on primary and on secondary legislation; it checks the coherence of laws, decrees and ordinances with higher legal rules, including the constitution. Although its opinions are not binding, they tend to be followed by the government (Deschouwer, 2012).

⁸⁷ The organization of the Council of State of Belgium was described by the Chamber President Marnix Van Damme at the meeting of the members of the Association of the Councils of State and Supreme administrative jurisdictions of the European Union charged with acting in an advisory capacity in matter of legislation, held in The Hague on 16 February 2004. A minute of the meeting was published in the Newsletter of the Association.

chamber prevented from attending, or to form additional chambers⁸⁸. These elements seem to signal an overlap of advisory and judicial functions and a prevalence of the legal-judicial component of the consultancy. The same happens in the Council of State of the Netherlands. Recently the Dutch government, under the pressure of parliament, partially limited the possibility of simultaneous membership of the councilors to consultative and judicial divisions. This also as a consequence of a sentence of the European Court of Human Rights that, in “*Kleyn v. the Netherlands*” case (2003), questioned the capacity of the internal structure of the Dutch Council of State to ensure impartiality and independence in relation to the judicial proceedings (De Wet, 2008). But the intensity of the link between consultative and judicial functions is pointed out also by the same members of the Dutch Council of State. A Chamber President at the Council of State of the Netherlands⁸⁹ points out how councilors' ability in the scrutiny of the drafts descend from their experience as judges and how the advisory function on secondary legislation greatly benefits from the judicial experience. In Greece there seems to be a complete overlapping between the two functions. Members of the Greek Council of State are graduates of the National School of Magistrature. The advisory function is issued by one section only, to which belong only magistrates responsible for both, judicial and consultative tasks. According to some observers, because of its high technical standards, the Greek Council of State is perceived as a tough guardian of legality. Sometimes ministers opt to prepare legislative amendment or ministerial decision in order to avoid the rigorous scrutiny of the Council of State (OECD, 2012, 75). In Italy, Council of State members are in large majority magistrates: the admission to the Italian Council of State is based on seniority in the Regional Administrative

⁸⁸ The sections of Belgian Council of State are organized in French-speaking and Dutch-speaking chambers. Information on Council of State of Belgium are drawn from the questionnaire on forms of administrative justice in 25 Member States of the European Union, compiled by Paul Lewalle, member of the institution: <http://www.aca-europe.eu/index.php/en/tour-d-europe-en> and from the official website of the Belgian Council of State.

⁸⁹ Willem Konijnenbelt, former Chamber President at the Dutch Council of State. Meeting of the Association of the Councils of State and Supreme administrative jurisdictions of the European Union (2004) held in The Hague on 16 February 2004 (cit. in note 9).

Tribunals (50%), on direct admission exam restricted to common law judges, public finance court judges, state lawyers and senior officials (25%), on government appointment (25%). Council of State members rotate between the consultative and judicial sections and the two functions are not considered as incompatible. The unitary character of consultative and judicial functions of the Italian Council of State is promoted and defended by the same members of the institution, from the time of the presidency of Santi Romano. On the contrary, the different recruitment of Council of State members in France seems to suggest that the advisory function is not entirely captured by the judicial tasks of the institution. About 2/3 of the members of the *Conseil d'Etat (auditeurs)* are recruited by competition via the *Ecole Nationale d'Administration*. The *Ecole Nationale d'Administration* provides a limited legal specialization, on behalf of a more general training for the high level civil service. About 1/3 of the members of the *Conseil d'Etat (maitres des requetes e conseillers)* is appointed through an “external round” (*tour exterieur*). Through the external round, government can appoint to the *Conseil* officials with professional experience in other civilian or military institutions (as diplomats, prefects, officers, engineers) as well as in legal affairs (lawyers, academics) and a limited number of judges of the administrative courts and of the administrative courts of appeal. Except for these appointments (one in four *maitres des requetes*, one in three *conseiller d'Etat*) judges of administrative courts and administrative courts of appeal do not access the *Conseil d'Etat*. Differently from Regional Administrative Tribunals of Italy, administrative courts, established in 1953, and administrative courts of appeal, instituted in 1987, constitute separate judicial bodies. They are responsible for the largest part of administrative litigation and they select their members through external and internal competitions⁹⁰. The job profiles of the *maitres des requetes en service extraordinaire* at the *Conseil d'Etat* reflect how recruitment policies differ in the French Council of State compared with the other Councils. *Maitres des requetes en service extraordinaire* are members external to the

⁹⁰ <http://www.conseil-etat.fr/Tribunaux-Cours/Recrutement-Carriere>

institution, recruited through the detachment from other administrations. They can serve at the *Conseil* for no more than 4 years⁹¹. Profiles as: “director of human resources of the Senate”, “general director of the International council of museums”, “civil administrator at the general direction of the work unit of the Ministry of Labour”, “head of the resources management service of the City of Paris” serve in both, judicial and advisory sections of the *Conseil d'Etat*, with a training of 70 hours during the first months of service and the supervision of a “mentor”⁹². The recruitment of personnel with managerial skills, which is completely absent in the other Councils of State, suggests that French government requires to the *Conseil d'Etat* a different type of consultancy, not only legal. Moreover, the presence of a clear incompatibility regime between members of the *Conseil* that hear judicial cases and members that advised the government seems to suggest that the interlocution with government is not based on the potential threat of the institution in its capacity as judge. The separation of the consultative and judicial activities is guaranteed by an incompatibility regime established by the French code of administrative justice. Such regime does not allow Council of State's members to participate in appeals against acts on which they themselves advised the government. When the Council of State is informed of an appeal against an act on which it previously issued an opinion, the list of the councilors that took part in the deliberation of the opinion is communicated to the applicants. The members of the Council of State who participate to the trial cannot access the dossiers produced by the consultative sections on the act, nor they can know the content of opinions which have not been made public⁹³.

⁹¹ Unless they are appointed as *maitres des requetes* through the external round, after their 4 years experience.

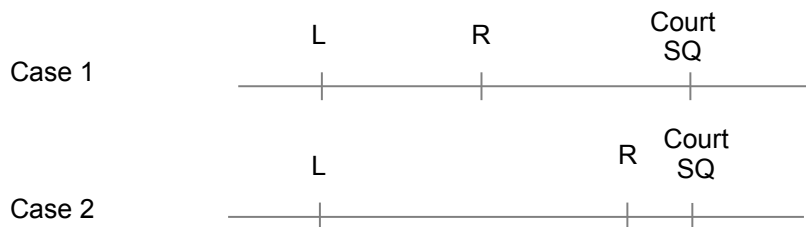
⁹² <http://www.conseil-etat.fr/content/download/62291/559193/version/1/file/Dossier%2BMRSE%2B2016.pdf>

⁹³ The large majority of the opinions of the *Conseil d'Etat* is not made public. Information of the incompatibility regime are drawn from the Code of administrative justice, Articles R122-21-1m R 122-21-2, R-122-21-3 https://www.legifrance.gouv.fr/affichCode.do;jsessionid=CB59059FF7903D58745BE8369F6DD828.tpdila16v_2?idSectionTA=LEGISCTA000006165674&cidTexte=LEGITEXT000006070933&dateTexte=20160801

6.3 An explanation of courts' characteristics based on political variables

My expectation is that the presence of specific political circumstances may affect the interaction between courts that review administrative acts and governments. In particular, I would expect that, in consequence of greater levels of government heterogeneity, governments should be more interested in activating courts as consultants and in anticipating courts' decisions. On the contrary, in countries characterized by higher level of alternation, I would expect governments to be less concerned with activating the ex ante control of administrative courts in order to prevent ministerial drift and to access courts' preferences. In chapter V, I analyzed the interaction between government and the Council of State of Italy according to a game-theoretic perspective. The results of the strategic interaction suggests that the ex ante control of the Council of State tends to be triggered, the higher the level of government ideological heterogeneity. On the contrary, governments tend to prefer administrative acts that do not imply the ex ante control of the Council of State, for increasing levels of alternation. In presence of high government ideological heterogeneity, in fact, at least one party (R in figure 20, Case 2) can benefit from the the ex ante control of a policy conserver court in the process of regulations' adoption, in order to limit the risk of ministerial drift:

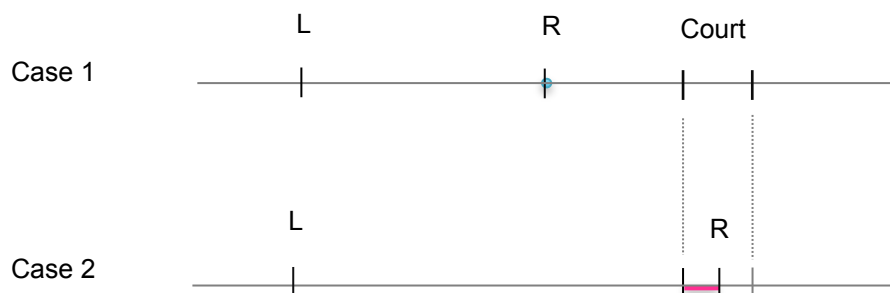
Figure 20. Government (L-R) and a policy conserver court, in the process of regulations' adoption



Moreover, since, in presence of high ideological heterogeneity, the status quo tends to

be close to the ideal points of partners coalitions (or it is placed inside the Pareto set), the decision of a policy conserving court can produce a policy output that cannot be modified by the parties (Figure 21, Case 2):

Figure 21. Government (L-R) and a policy conserving court that reviews administrative acts



In Case 2, knowing court's ideal point through the *ex ante* control on regulations is crucial for partners' coalition. While, in Case 1, all court's possible ideal points are located outside coalition range and, for not being overruled, the court can at most obtain R, in Case 2, the court can obtain its ideal point also with no possibility for L and R to change it (points to the left of party R).

The Italian case can be useful for comparative analysis, since it presents great mutability in the political conditions considered as explanatory variables: the different political conditions of Italy might reflect the prevailing political conditions of other countries. I would expect, for instance, the less heterogeneous governments of U.K., France and Spain to have lesser necessity to anticipate courts' decisions, since their courts can at least choose the ideal point of a member of the coalition: otherwise they would be overruled (Figure 21, Case 1).

I have used the classification of courts shown in the previous paragraph to attribute different scores to courts. Then I have associated courts of the different countries with different measures of the explanatory political variables. Scores attributed to courts range from 1 to 5. Score "1" means: complete overlapping between consultative and

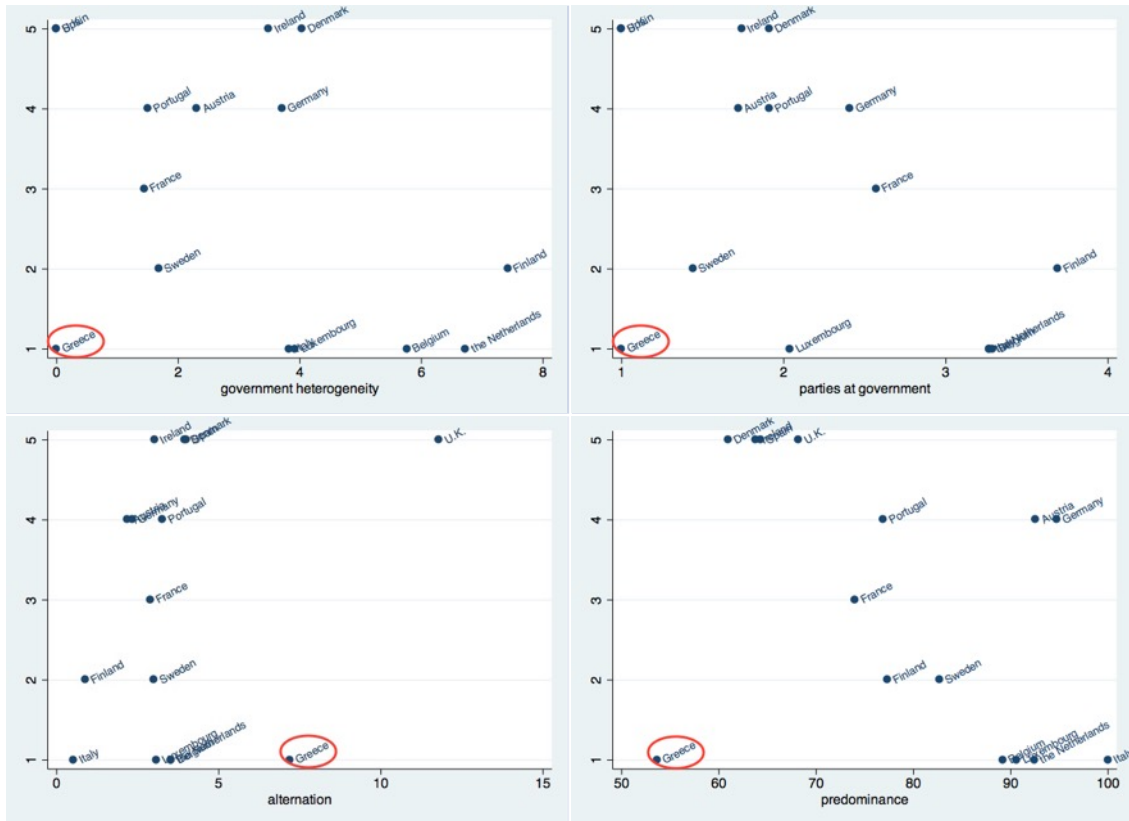
judicial functions; score “5” means: absence of overlapping between consultative and judicial functions. The measures of the explanatory political variables: the size of alternation and the level of government ideological heterogeneity are drawn from Zucchini (2011). Variables are calculated through spatial measures and with other indirect measures. In order to infer party positions, the author employs expert survey data (Laver and Hunt 1992) on the issue “raising taxes to increase public services” (score 1) versus “cutting public services to cut taxes” (score 20). Government ideological heterogeneity (“government heterogeneity”) is measured as the ideological range of the government⁹⁴ and it is calculated as the distance between the most extreme parties of the coalition. The size of alternation (“alternation”) is estimated as the difference between the midrange positions on the left-right dimension of two successive governments (Tsebelis 2002). Variables have been calculated also using an indirect operationalization, according to which government heterogeneity is estimated by considering the average number of parties at government (“parties at government”) and the level of alternation is captured considering the proportion of days spent by the government party that has been longer in office (“predominance”). For all variables, the author calculated the weighted average for the post-Second World War period through the end of the 1990s⁹⁵.

Figure 22 shows the bivariate correlation between countries' scores and the two groups of explanatory political variables.

⁹⁴ Except when the parliamentary median party is outside this range. In this case, the variable is measured as the distance between the parliamentary median party and the government party on the opposite site.

⁹⁵ The period considered is shorter for France, including the Fifth Republic only, Portugal, Greece and Spain (only the democratic age), and Italy (only the First Republic): see Zucchini (2011, 760).

Figure 22. Bivariate correlation between countries' scores and explanatory political variables: “government heterogeneity” and “parties at government”, “alternation” and “predominance”



Source: “Countries scores” based on personal computation on official documents of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) and of the official websites of the Councils of State; Zucchini (2011)

A negative correlation seems to characterize the first group of explanatory variables: that measures government ideological heterogeneity, and countries' scores. This means that, to an increase in government heterogeneity or in parties at government corresponds a decrease in regard with countries' scores⁹⁶. Low values of the variable countries' scores include the countries in which consultative and judicial functions of courts tend

⁹⁶ The correlation index between countries' scores and government heterogeneity is -0.60, excluding Greece. It becomes -0.42, if Greece is included. The correlation index between countries' scores and parties at government is -0.71 if Greece is excluded. It becomes -0.52, if Greece is included.

to overlap. The higher government heterogeneity, the higher the necessity to activate the ex ante control of the courts. Greece constitutes the only exception, since it presents, at the same time, very low levels of government heterogeneity and a low country score: Greece has a Council of State with a complete overlap of consultative and judicial functions. Its behavior is not captured by the negative correlation. Conversely, a weak positive relation seems to characterize the spatial variable “alternation” and Countries' scores⁹⁷. Higher values of countries' scores include courts with no consultative functions, or in which consultative and judicial functions are clearly separated. Also in this case, Greece represents an exception, since, in presence of high level of alternation, it presents a court with a low country score, which means: a court in which consultative and judicial functions tend to overlap. The behavior of the variable “predominance”, a non-spatial measure of the size of alternation, is specular to that of “alternation”, since it captures the absence of turnover among parties at government. Therefore, the sign of the correlation with countries' data is expected to be negative. The data confirm the presence of a negative correlation: the greater the absence of turnover of parties at government, the lower the necessity to activate courts as Advisors. As in the previous case, this correlation is not confirmed in the case of Greece, which presents low levels of predominance and also a low country score⁹⁸.

These results represent a first attempt to interpret administrative courts configuration on the light of the strategic interaction between legislatures and courts and on the light of the political conditions that characterize such interaction. Although caution is required, considering in particular the exception of the case of Greece, the data seem to suggest that the conclusions drawn for the Italian case might have some explanatory content also for the other countries. Countries whose governments present, on average, low level of ideological heterogeneity and higher level of alternation, would not need to

⁹⁷ The correlation index between countries' scores and alternation is 0.43 not including Greece and it becomes 0.26 if Greece is included.

⁹⁸ The correlation index between predominance and countries' scores is -0.72, if Greece is not considered and it becomes -0.45 if Greece is included.

activate courts as Advisors. Therefore, in these countries, the *ex ante* control on administrative acts would be provided mainly by institutions other than courts (by organs of the executive or of the legislative), or by courts in which consultative and judicial functions are separated and present different characteristics. It is the case, above all, of the United Kingdom, of Ireland and of Spain, in which the judicial review of administrative acts is provided by specialized sections of ordinary courts and there is no relation between these courts and organs that supervise regulations' drafting; of Germany and Portugal, in which administrative courts have no relation with the executive and the *ex ante* control on regulations is provided inside the executive. It is also the case of France, in which the *Conseil d'Etat* presents a clear distinction between consultative and judicial functions and whose role of Advisor is not captured by its role of Court. On the contrary, countries whose governments present, on average, greater level of ideological heterogeneity and low size of alternation, would be more prone to activate courts as Advisors. This fact would be reflected in courts' organization and, in particular, in the overlap of the consultative and judicial functions. It is the case of countries as Italy, Belgium, the Netherlands, which present Councils of State in which consultative and judicial functions have a unitary character and, to a lower extent, of Sweden, Finland, in which administrative judges can be consulted as advisors on government legislation.

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