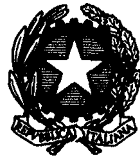

Consiglio di Stato

WAYS OF LIMITING THE NUMBER OF APPEALS BROUGHT TO THE JUDICIAL COMMITTEES OF THE ITALIAN COUNCIL OF STATE, AND OF ACCELERATING THEIR DECISION. TO WHAT EXTENT THESE GOALS ARE EXPEDIENT AND WITHIN THE POWER OF THE ADMINISTRATIVE COURTS.

(Foreword; legal principles; access, counsel and costs; technical means)

I

Foreword

It would seem evident that the two goals in question are different from each other. Yet, they are not completely independent: up to a certain point, the speed in disposing of appeals depends on the quantity of cases brought to the Upper Court.

A few remarks could perhaps introduce the present paper.

First, limiting the number of appeals must at times mean reducing those appeals which can be decided on their merits. In a sense, it is impossible to stop people from filing appeals which are inadmissable on points of procedure (but contra, see infra , III, e).

Secondly, we deal here with options open to the judicial committees of the Council of State without any need to introduce new legislation. However, some considerations will be given to principles contained in the Italian constitution, which are binding also for Parliament in its legislative capacity, and would forbid any restrictive legislation on the matter.

From now on, the afore-mentioned judicial committees

of the Council of State will be referred to simply as "Council of State".

Furthermore it is to be remembered that in Italy the administrative Courts of first instance are called Tribunali regionali amministrativi (regional administrative tribunals) and, for short, TAR.

The Council of State is the Court of second and last instance.

II

Legal principles

a) Limitation of access to the upper Court

aa) As to the Italian administrative Lawsuit, neither the Council of State nor the TAR have any possibility of limiting the right of a party who has not won completely his case in the first instance, to appeal to the upper Court.

In other words, leave to appeal need not be granted by the Court which has passed the sentence, or by the Court above.

It would also seem that the Italian constitution (§§ 125[2] and 103[1]) forbids any legislation contrary to this point. The Council of State could limit the

number of Lawsuit, and consequently the probable number of appeals, by defining more strictly the requisites for going to Court in the first instance.
In fact, in order to seek justice from an administrative Court one must have a present, personal and direct interest in a certain activity of an administrative authority acting as such (that is to say, implementing its statutory powers).

These requisites of personality and directness of interest can be given varying meanings. Thus, the wider the interpretation the greater the number of Lawsuit, and eventually of appeals; and viceversa.

bb) As to the rules concerning appeals, any tightening of principles either on new evidence or on new demands and points of defence in appeal, or on the necessary specification of the appeal as an application against the judgment given in the first instance, would perhaps reduce the number of appeals and the difficulty in dealing with them.
Up to a point, it is certain that the appealer must specify his complaints, and the grounds for them.
And as to the possibility of introducing new elements for the defence , which could have been put forward

in the first instance, the question is whether the two degrees of judgement be seen as more or less sharply divided. One could either give importance to the fact that the decision reached by the first Court was faultless in the light of the representations and evidence at its disposal, and that this decision will have already been enforced. Or one could consider all-important the fact that the party has changed his mind as to his proper defence, and it is not too late for justice to be done.

b) Possibility of judgments in first and last resort

aa) As already stated , any part has a right of access to the upper Court, regardless of the matter brought in front of the Court of the first instance.

This principle must be constructed as a guarantee for the citizen that his case - whatever the importance (on this point vide infra III,b) - can be judged in the last resort by the highest administrative Court of the land, whose task is to insure uniformity in the interpretation of the Law.

bb) On the other hand, it would seem open to the legislator to direct that, on some reasonable grounds, certain types of administrative litigation

should be spared the delays and uncertainty of a two-tier system, by being immediately brought in front of the Council of State.

This would shorten the Lawsuits, but certainly not save time to the upper Court.

Such cases do not exist at present, except on certain transient occasions.

c) Class-actions and appeals by supervenient counter interested parties.

aa) The possibility of class-actions, taken by citizens whose interest is shared by a large number of their peers, concerns chiefly the first instance.

Class-action is not, as we already know, the rule in Italian administrative Law; and must be authorised, in special fields, by Statute: it brings political - as opposed to strictly personal - interests into the arena of judicial adjudication.

If judgment is given against the plaintiff, it is clear that only he, and not other possible plaintiffs, can appeal.

On the other hand it must be remembered that in Italian administrative procedure the plaintiff must call to Court not only the authority who took the decision (or kept the silence) attacked. He must also

call, if existent, the individual or individuals mentioned in that decision (or clearly concerned by the lack of it), who would be damaged by a judgment given in favour of the same plaintiff.

These directly counter-interested persons are thus of necessity parties to the Lawsuit.

They, as well as the administrative authority concerned, are able to appeal when a judgment is reached against them.

This happens to class actions as well as to ordinary ones.

True, there is an extreme case in which the number of counter-interested parties is deemed by Law to be almost indefinite.

This is what happens in Lawsuits concerning the result of communal, provincial, regional and supra-national elections (national political elections being subject only to validation by the parliamentary Chamber concerned, and so immune from ordinary litigation).

In these events, any elector who has not been a party in the first instance can appeal against the judgement given in favour of the plaintiff, declaring that his interest lay in the rejection of the claim.

However, apart from electoral Lawsuits, only parties

identified in the first instance as directly counter-interested in the plaintiff's application can appeal.

It must be stressed that the number of directly counter-interested parties is kept by Law well within bounds, in order to insure that these people can be quickly identified by the plaintiff and called to Court, and judgment quickly given.

From this point of view, any increase in the types of class action would widen the gulf between the large number of possible plaintiffs, and the number of directly counter-interested parties, whose identification remains dependent on the general rules. A rather delicate balance would thus be jeopardized.

bb)It happens at times that the existence of directly counter-interested parties becomes apparent only in the course of the law-suit, and not at its beginning.

For instance, a citizen attacks his exclusion from a competitive exam, decided when the list of other applicants was not known to him; but during the course of the Lawsuit he learns who these applicants were, and who has been successful.

The tendency of the Courts seems to be not to consider those supervenient counter-interested parties as directly counter-interested in the legal action, and then as necessary parties to the Lawsuit.

The latter are not, of course, bound by a judgment given inter alios. Although they will suffer from the effects of the annullment (in the case mentioned above, the annullment of the competitive exam), they can ask the administrative authorithy to renew the decision taken in their favour, and can go to Court against the refusal issued or silence kept by that authorithy.

In other words, they can resume a new litigation on the same subject, this time calling all the candidates in the exams as directly counter-interested parties to their action. In this way, all parties will be bound by the new judgement.

On the other hand, it would seem that the choice lies between considering these supervenient counter-interested parties as fully and directly counter-interested ones, thus requiring their presence in the first instance, and giving them right to appeal; and denying their quality of necessary parties in the first instance, and also their right to appeal.

a) Separate hearings for appeals with little prospect of success, or not ready for a final decision.

There are no precedents of special hearings in the Council of State for appeals which would seem very weak, and could be decided without oral debate, or with less formality.

But appeals launched against orders of stay of execution, or against injunctions to implement a previous judgement are heard in camera.

On the other hand, there would seem to be no constitutional obstacle to a Statute setting up some special procedure, provided the distinction be drawn on reasonable grounds, and the right of defence be adequately safeguarded.

The Constitutional Court has, in the years 1987 and 1988, disposed of a backlog of more than two thousand cases by letting sub-committees of its judges decide informally on their grouping together according to subject, and by bringing large numbers of similar cases to the same hearing.

The Court can make use of a summary procedure when none of the parties has appeared in front of it, or when the case would seem clearly groundless.

The Court of cassation, both in its penal (§ 375 c.p.p.) and civil (& 531 c.p.c.) capacity, has a summary

procedure for cases which are clearly inadmissible, or which can be concluded only after further summons are served.

Apart from a special judicial Committee for Sicily, the three Committees of the Council of State have appeals distribuited amongst them according to subject matter.

The Courts will devise plans for putting together appeals concerning the same Statutes, or the same clauses of them. Or for calling together a great number of cases in which it is apparent one must ask some preparatory activity by the parties, so that not much work is at present left to the Court.

However, some difficulties must be mentioned:

1) an Order-in-Council foresees that cases be brought to judgment according to seniority. Urgent Lawsuits are called first, but these also should follow chronological order (art. 53 r.d. 1907 n. 64[2]);

2) no case can be decided without an express application from one of the parties. This means that the Council of State is not at liberty to hold a hearing for an appeal already launched, if this application has not been made;

3) it is not easy to say which case is ready for a

definitive judgment. Some cases could be immediately dispatched if judgment is given against the appealer, whereas if there are grounds for doubt he will be asked to notify his appeal to the remaining parties in the first instance, or further documents will be requested from the administrative authority.

4) Of course, any case deals with many points of Law, of which only some are common to other Lawsuits. This fact is more relevant to the administrative upper Court, which must at times re-try the case, than to the Court of Cassation, which would annul and send back the case to the judge below; or than to the Constitutional Court, which normally judges on a more limited number of questions.

5) (vide III, b-c). Grounds for recourse to the Court of Cassation are specified by Statute. In consequence, it is possible to start by considering whether any recourse is within those grounds. But any ground can be chosen in appealing to the Council of State.

e- Effects of excessive delays in giving judgment.

It cannot be denied that a judiciary system based on a double instance is more cumbersome and frustrating

than a system of first and last resort.

The administrative decision is by itself executive. So is the judgment passed by the upper Court.

The existence of many judgments given in favour of the plaintiffs, followed by appeals which cannot be quickly disposed of, could bring to a standstill significant areas of the public administration: delay is at times all but irreparable for the public interest served by the administrative authorities.

On the other hand, a definitive judgment in favour of the plaintiff, when is given too late, would give him little redress, whilst procuring at times a maximum of disadvantages also to the other parties. In many cases the plaintiff cannot even obtain monetary compensation.

On the other hand, the double degree of jurisdiction is almost a general principle in the Italian Law; and no doubt it can assist in insuring a closer consideration of all aspects of the case.

f- Relevant statistics on the number of appeals dealt with; questions decided ex officio.

aa) Administrative Courts give little thought to the apparent number of judgments given: they would

call many similar cases in the same hearing, and decide/ some of them with the same judgment or with separate ones, according to what they think expedient from the point of view of simplicity and quality.

Any statistics on the speed of justice should start by considering the number of cases launched during the year, and the number of cases outstanding at the beginning and at the end of the same period.

As to the appeals, the upper Courts dispose with one single judgment or all appeals launched by different parties against the same judgement. The same happens when the Court below has given a first judgment on some of the points in discussion, and then a conclusive judgment,and both judgments are appealed.

Furthermore, the Council of State may think expedient to dispose with a single judgment of appeals launched by different persons against different judgments.

bb) As a rule the Council of State is bound by the grounds of appeal. It is admitted that when the Court of first instance has found it expedient to

reject the action on its merits without dealing - explicitly or implicitly - with points of procedure, the Council of State can find ex officio that the action should have been declared inadmissible, and not considered on its merits at all.

Conversely, if the action has been held inadmissible by the TAR, and the Council of State quashes that judgment, the Council must consider ex officio the grounds for action given in the first instance by the plaintiff.

A judge of appeal is always, in a way, a judge of the judge below, whose judgment comes, so to speak, on trial. All the same, no communication is forseen, and indeed allowed, between the two Courts, with regards to any single case.

III

Access, Counsel and costs

a) Access to the administrative Courts.

According to the Italian constitution (§ 103[1]) individuals can ask protection of the Courts against administrative authorities both (aa) when the latter act as such, in pursuance of statutory powers, and

(bb) when they act under the rules of civil Law, making use of the same capacity given to corporations; in this case jurisdiction is allotted in principle to the Civil Courts.

aa) The usage of statutory powers (which of course are limited, as well as unilateral and imperative) can be checked by the administrative Courts at the request of any individual who has a present, personal and direct interest to do so.

In this way, from a subjection of the individual to the public authority stems out the possibility for the same individual to control the authority, and to oppose its administrative decisions. This possibility for the individual derives from his interest to do so; and this interest is called "legitimate" because it is recognised by the Law.

On the other hand, control on the administrative decision is necessarily ab externo: the usage of statutory powers is reserved to the administrative authorities, and not vested alternatively in the administrative Courts, or in the individuals.

For instance, all discretionary choice of sites in which to plan new activities, or of degrees of assistence to be granted to citizens or firms, or of health-standards to be secured, is reserved to the

authorities themselves.

The control by the Courts is limited to three grounds: due respect of formalities strictly prescribed by the relevant Statutes; in particular, due respect to the rules which allot amongst authorities power to deal with the various subject-matters; and due respect of general standards of reasonableness, fairness, and accuracy.

It is also recognized that when the authorities have founded their decision on a certain ground, and this decision is quashed by the Court, they retain the power to consider once more the situation, and to reach a new decision equally adverse to the former plaintiff, on the base of different reasons.

For instance, refusal of admittance to a competitive exam wrongly founded on the lack of Italian citizenship of the candidate can be reiterated on the base of the lack of an appropriate University degree.

In other words, judgment for the plaintiff on legitimate interests covers only the grounds considered by the Court, and does not necessarily insure final satisfaction of the practical interest felt by the party.

bb) There are plenty of contracts and pecuniary obligations between administrative authorities and

individuals; and these fields are in essence regulated by civil Law.

Still, in many occasions the Statutes prescribe that civil rights asserted by individuals in front of an administrative authority must be brought to the administrative Courts.

As in front of the civil Courts, any individual is then granted locus standi if he claims that his right exists, and that it has been infringed.

Normally these rights are credits; and even if there is an administrative decision denying their existence, it is understood that the issue in question remains the existence of the credit, and not the validity of reasons given against it by the decision. Here, any judgment given for the plaintiff would cover deductum et deducibile. and the existence of the credit would become res judicata: no other defence for the administrative authority can be made afterwards.

b-c) Access to the upper Court

In order to justify at all litigation, asserted civil Law rights or legitimate interests must have an appreciable value, which can be either economical or moral.

But once this limit of social appreciability is reached, no distinction can be made - as to the

unfettered right of appeal - with regards to quantitative standards, or to subject matters.

Access to the Council of State is granted for any possible fault incurred by the Court below, and for a certain number of miscarriages of justice resulting from the judgment given, and which that Court could not have appreciated.

In such a system, questions of manifest lack of grounds tend to be more or less similar in the two degrees of litigation: if anything, the appeal is at time less formal than the application to the TAR.

No further appeals can be lodged by the same party, as the grounds chosen for the first appeal is deemed to signify acquiescence to the other aspects of the judgment.

As already stated, no special procedure for dealing with administrative appeals which would seem prima facie particularly weak (or founded) is envisaged in the Italian system,

d) The role of Counsel in the upper Court.

In the Italian administrative Lawsuit parties must always be represented by qualified lawyers. In front of the Council of State, by lawyers qualified to address the upper jurisdictions.

Here is, then, a filter to the wishes of lay parties:

Counsel will use his discretion in selecting the grounds of appeal, or of defence against it.

As the administrative Courts can judge only within the grounds chosen by the plaintiff, or by the appealer, the paper-work of the attacking lawyer is of the greatest importance. Then, during the proceedings all lawyers have occasion to mark their relevance.

The adversarial system assists in order to spell out which facts are admitted by all parties. Any other evidence which the Court may need shall be given by the deposit of documents.

Furthermore, Counsel will normally be relied upon to find out and submit relevant precedents, and to discuss points of fact and of Law. An excessive diffuseness (which the Court could not easily check) of the written defences would add to the time spent by every judge in reaching a pre-hearing opinion on the cases to be called.

Administrative (and civil Law) judges have no legal staff. They cannot depend on expert advice in researching precedents, or forming a first opinion on the simplicity or complexity of coming cases,

e) <u>Possible checks on the number of Lawsuits.</u>

In fact, the two main checks on the number of Lawsuits seem to be cost of litigation, or the inefficiency of

the legal system as assessed by users of the Courts.
Any increase in the latter would reflect on the very idea of justice; and would concern both the prospect of redress for people who have a genuine grievance, and the position of people who are clearly in the wrong; both the defence of basic interest of life, and litigation about trifles.

As to the costs, they reflect sums to be paid by way of taxation to the Court; fees to be paid to one's own lawyers; and fees owed to the opponent's lawyers, decided by the Courts and charged to the party who lost his case.

Of this items, only the latter seems to be within the immediate gift of the Court, which could exercise its discretionary power by granting more regularily the costs to the winning party (instead of compensanting them), and fixing them on a realistic basis.

Here lays an option perhaps not wholly attractive to most judges, who could be inclined to think the loss of the case sufficient bad news for a party, or would dislike to distress the needy or the barely self-sufficient unsuccessful litigant.

Of course, cost of litigation can vary considerably in different countries, nor are there statistical assesments on the subject.

Nor it is realistic that the average citizen should think himself entitled to frequent recourse to the Courts without incurring in liabilities comparable to those he faces in his lifetime on other extraordinary occasions.

In Italy, unsuccessful litigation may perhaps be considered a kind of tort, whose consequence is payment of expenses incurred by the opponent. A tort punishable only within that same judgment; by the same Court who decides the principal controversy; normally, up to the limit of the sheer expenses of the contrary party; and subject to discretionary powers of compensation allotted to the Court.

Perhaps it will be argued that perserverance in a second degree of litigation is less excusable than a first degree. Although it can happen that a plaintiff be successful in the first instance, and be declared in the wrong by the Council of State, on the appeal of the opposing party, being so exposed to meet the expenses of a double degree of litigation: this is a case in which a compassionate (first instance) doctor worsens the disease.

Many are the dangers - through causing delays in meeting public needs, or disorders in the administrative apparatus - of Lawsuits on matters of

legitimate interests. One feels that, in countries with high levels of administrative litigation and comparative low costs of access to Courts, much could be achieved by considering the best policy for the judiciary with regards to orders on costs.

This subject is, of course, connected with that of legal aid.

The endevour to achieve better, cheaper and swifter justice - particularily appellate justice - must be subject to specification, with regards to a certain incompatibility of these three aims; and with regards to the great difference existing among various kinds of justice: constitutional, penal, civil, fiscal, and in checking the usage of administrative powers.

IV

Technical means

a) Present situation.

Little use of computers is made as yet in the Italian Council of State.

The Court of cassation has set up a computerised data bank (called CED, which stands for Electronic Documentary Center), which can be consulted, from terminal connected throughout Italy, by Courts of all kind, legal chambers, and interested parties.

This data bank records all legislation and many judicial precedents, including a large percentage of judgments passed by the Council of State, which is responsible for feeding the machine with the relevant software.

b) Changes under way

Studies are under way as to the usage of computers for clerical work in the Council of State. In 1990 sophisticated technology will be installed in the Council of State, and then extended to the TARs.

This should spare human energy in book-keeping, quick reproduction and transmission of papers, automatic completion of necessary forms, compilation of statistics, etc.

It should also impinge more directly in the judicial work, through classification of all pending cases according to affinity, in order to allow better planning for the hearing agendas.

c) Further goals

As to the work of individual judges, one must state again that in Italy each rapporteur researches his own cases before the hearing, and writes personally "his" judgments, after they have been agreed by the Court.

At present only a few State Councellors have any knowledge of computers.

Should most of them consent to acquire the necessary ability, it is envisaged that they would be provided with personal computers.

This would spare them time in researching and circulating legislation and precedents, as well as in transmitting to the presiding judge, for approval or comment, the minutes of judgments already agreed by the Court, and in forwarding these minutes to the clerk for publication.

In fact, much time is spent at present collecting and forwarding those papers between various addresses, and then in having the handwritten minutes typed, and checked by the relevant judge.