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ABUSE OF PROCEDURAL RIGHTS

REGIONAL REPORT

(Italy, and some references to the French legal system) (*)

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Summary: 1. Complex and controversial definition of APR; 2. Some aspects of the Italian conception of abuse; 3. Emerging perception of procedural abuse in the Italian normative context; 4. The “French approach” as to the problem of procedural abuse; 5. Lawyering, legal ethics and sanctioning procedural abuse; minimal conclusive remarks.

1. Strictly sticking to a procedural and normativistic approach, nothing might actually look more mutually different than two in many ways extremely close legal models like the French and the Italian in connection with a general definition of APR.

In fact, the presence of a specific rule concerning it in the Nouveau Code de Procedure Civile (the article 32.1, most often referred to as *abus de procedure*) hasn't got any counterpart in an equivalent rule of the Italian Codice di procedura civile, as well as any other procedural norm¹. On the contrary, and in spite of this gap, these two models maintain an altogether quite strict relationship on the very subject of APR or, more precisely, of abuse as a notion and as a specific and by this time very stratified “culture”.

Both legal systems share in fact the same originating idea of abuse as “abuse of legal rights”, in the French meaning of *abus de droit*, i.e. of substantial rights. For both the natural approach as well as the starting point for considering the question of abuse seems deeply rooted into substantive law, with special regard to the various ways of conceiving property, and the related rights.

It doesn't seem too far from what actually happened earlier in the

¹ See, e.g., Vincent, Guinchard, *Procedure civile*, 24 ed., 1996, 77; Cornu, Foyer, *Procedure civile*, 3 ed., 1996, 319; for the text and a comment of the article 32-1, see Normand, Wiederkehr, Desdevises (editors), *Nouveau Code de Procedure Civile*, 1997, 50.

French and, subsequently as much as in a different way, in the Italian legal culture to link up this process concerning abuse with the evolution of these conceptions around the end of the last and the beginning of this century. In this connection, a fundamental role was performed by the increased perception of the social values involved in the notion of property, together with a widespread relativization of its functional space. Brought mainly about by the rejection of a sharply liberal and merely economical conception of property, such a reduction has taken place through a progressive appreciation of the many interactions likely to exist between the carrying out of the particular rights of the proprietor and the protection to be granted to the numerous surrounding interests of the community, conceived either as a general entity or as the single subjects virtually affected by these activities.

It might be considered nearly obvious that the basic notion of abuse was originated in the context of devising a “modern” framework, aimed at overpassing the 19th century traditionally unbounded and overliberal conceptions prevailing in this connection. Still largely unrefined at the turn of the century, this very notion kept being seriously developed mainly by the French legal culture, by which it came to be very quickly transformed from a sort of makeshift and quite fuzzy perception into ceptual tool for reshaping the core of many apparently ummutable legal and social constructions².

As is widely shown in a famous essay by Josserand, shortly before the 30ies the notion of abus de droit has in fact surely reached at least in France a remarkable level of elaboration³. Not only this notion has in fact received steady acceptance, but also enlarged its influence and extention in

² An early example of definition of abus de droit can be found in the decision by the Chambre des requetes of Dec. 26th 1893, which seizes this idea where “...l’usage d’une faculte’ degenerate en abus”, see *Dalloz period.* 1895, I, 5321 (note 3).

³ Josserand, *De l’esprit des droits et de leur relativite’* (*Theorie de l’abus des droits*), 1927, passim; about this essay and its present influence see Pirovano, *La fonction sociale des droits: reflexions sur le destin des theories de Josserand*, in *D. Chron.* 1972, 67; id., *L’abus de droit dans la doctrine et la jurisprudence francaises*, in Rotondi (editor), *L’abus de droit*, 1979, 334.

many areas, while an articulated theoretical specification of its functional features has taken place.

What in this view seems particularly noteworthy is the progressive overcoming of the original operative area of abuse. In other words, the notion begins to be extended beyond the traditional context of the proper behaviour of the proprietor, or rather its framing and limitations, to reach more precisely and closely further areas. Among these, a fundamental role is progressively recognized to be played by the way (or, rather, by the various ways) of resorting to the procedural mechanism of a lawsuit. Not by chance envisaged -according to the abovementioned Josserand- as an “arsenal riche en armes juridiques”, procedural instruments begin to be considered the very tools through which the most common, effective, and widespread activities of abuse of legal rights (*abus de droit*) can actually be performed⁴

In such a perspective, rather than strict, the overlapping between the “substantial” and the “procedural” sides of the problem has turned out to be practically unavoidable. This, at least, the more the notion of abuse has been analyzed by either legal scholarship or judiciary, given the strong jeopardizing effects on other people virtually linked up with the use of the discretionary strategic powers provided by procedural law⁵.

These being more or less the basic general features of the notion of abuse, a further consideration about its development and elaboration ought to be added: i.e. its being essentially due to the French legal culture and scholarship, in nearly total absence of meaningful Italian contributions, at least dating back to the first half of this century⁶.

Although understandably not easy to fully understand as to its deepest reasons, this mere circumstance comes actually to represent in itself a fundamental problematic aspect of the notion of abuse in the cultural context

⁴ See Josserand, *De l'esprit...*, 54, 66.

⁵ Mazeaud, Mazeaud, *Leçons de droit civil*, 1962, 2nd ed., T. II, 193, 397.

⁶ This even if some studies seem to show the presence of a different approach, as is recalled, providing a short bibliography, among many in Dondi, *Manifestazioni della nozione di abuso del processo civile*, in *Diritto privato 1997 - L'abuso del diritto*, 1998, 459 (notes 5, 6, 10, 11).

we are considering. And this understandably because of the impact of such a by the time traditional absence over the evolution of a notion of abuse of legal rights in the Italian legal system, seriously affecting at various stages its same singling out and functional evaluation.

This kind of remark, far from discouraging, ought to be regarded as containing at least a suggestion and a warning: that the scanning of the area of abuse ought to be carried out keeping in mind, on the one hand, its factually marginal placement in the general context of the Italian legal system and culture, while on the other, its conversely firm, widespread and fruitful reception into the French one⁷.

2. So far we have dealt with a more or less general and theoretical idea of abuse, regardless of the path of questions suggested by the General Reporter, and mostly interested in pointing out some special characters acquired by this notion. In view of trying somehow to react to the suggested path, what one can immediately derive from the shortages envisaged in the Italian approach is that in this context clearly defined examples of abuse (of “procedural rights”) are at least hardly trackable.

Yet, because of the at any rate allegedly sharp impact of the -proper or improper- use of procedural tools over people’s everyday life, “how did it come about” is certainly a fundamental question with regard to this circumstance. In this respect, a fairly obvious although maybe oversimplifying assumption might be the presence of a very strict conception of both the basic notions of property as well as of procedural law (understandably, of civil procedure in particular). To simplify furtherly, this conception could be characterized as denying in principle room for somehow reducing the fundamental absoluteness of the two rights, in order to dispose as of one’s own goods as of the procedural instrument (i.e.,

⁷ As is exemplified, although with some critical remarks, by, e.g., Cadiet, *Abus de droit*, in *Enc. Dalloz*, I, 1992, 3; Monateri, *Abuso del diritto e simmetria della proprietà* (un saggio di *Comparative Law and Economics*), in *Diritto privato* 1997 - *L’abuso del diritto*, 1997, 90 (of wider and general interest are also also the other essays contained in this book).

basically a lawsuit) aimed at granting such a free disposal.

An altogether very typical example of this approach can be retraced in the same commenting forewords to the previous and first Italian Code of Civil Procedure, dating back to 1865. Here the freest expression of strategic procedural skills granted to the parties of a transaction is clearly ment as a pendant of the unconditionable conception of fundamental rights, among which in particular that of property. In other words, its absolute acceptance in such a typically liberal culture and approach seems to be perceived as necessarily consistent with a virtually strong enforcement “operated” or put “in action” into a civil procedural context⁸.

Although probably not the only one, it’s therefore the prevailing acceptance of this consequently deeply-rooted approach that can be taken as the main explanation of the correlative lacking perception of the problem of abuse. In a historical perspective and in view of this situation, it’s easy to understand that the reaction to the suggestions coming from the first sequel of questions by the General Reporter (I - GENERAL) can only be negative. As a matter of fact, while taken for certain from the French notion of “abuse of right”, the idea of abuse hasn’t undergone in the Italian context an evolution allowing actually either to state the existence of a specific notion of abuse or to speak properly of any elaborated connection with conceptions like that of “procedural fairness” or moreover of standards of legal ethics or, more crucially, to effectively crash on abusive practices however defined.

⁸ See *Relazione Ministeriale sul Libro primo del Progetto di Codice di Procedura Civile, presentato in iniziativa al Senato dal Ministro Guardasigilli (Pisanelli) nella tornata del 26 novembre 1863 (n. 63)*, in *Codice di Procedura Civile del Regno d'Italia*, (Gianzana and others, ed.), 1889, vol. I, 3, 83-84; also reproduced in *Raccolta dei Lavori Preparatorii del Codice di Procedura Civile del Regno d'Italia*, 1866, vol. II, 75, 82-83, 89 (where, on the other hand - at 75-, the same conception is used to stress the “fatto politico” related to procedure, where “political” is conceived as the power to oblige another citizen to engage in a civil action in front of a judge, a circumstance involving chances of abuses, in themselves regrettable and hence to be avoided); as to this event of the Italian civil procedural code of 1865, see also Taruffo, *La giustizia civile in Italia dal '700 a oggi*, 1980, 107,116, 142.

On the other hand, while scant or no room remains for further tentative explanations about the original state of the Italian evolution of the problem we're dealing with, in this connection a general remark seems still appropriate.

Quite paradoxically, in fact, this situation hasn't essentially changed -and mostly not as to the perception of a procedural qualification of abuse- despite some examples of considerable concern now and then retraceable at scholarly level since the second decade of this century⁹. The lack of influence by these studies -more or less refinedly belonging to the main stream of the French elaboration of the notion of abus de droit, and anyhow reflecting it- is blatantly shown by the disciplines of either the Codice civile or the Codice di procedura civile, both enacted much later, in 1942. The whole philosophy of both these sets of norms seems definitely quite far from taking into serious account any previous proposal aiming at reducing or limiting the traditionally absolute conceptions either of the right of property or of the right to engage in a civil action and freely pursue its course, placing somewhere as a threshold a notion of abuse, as well of rights as of civil or criminal proceedings.

As a matter of fact, the recently widespread, and by this time nearly commonplace, evaluation of these two codes rather as examples of inherent conservative approach than as results of any pervading fascist imprinting finds here sort of a demonstration *sur le champ*¹⁰. An event this one which is apparently common to the two sets of rules, although displaying in one from the other a slightly different approach.

The Italian Civil Code of 1942, while short of any express reference to the notion of abuse of right, contains in fact at least a norm revealing some marginal and almost fortuitous trace of the previous Italian, of course derived mostly from the French, elaboration on this subject. Such a hint is mainly supplied by the provision of the articolo 833 of the Codice civile¹¹.

⁹ See, e.g., Rotondi, *L'abuso di diritto*, in *Riv. dir. civ.* 1923, 209, 417, 1054; recently on this event some interesting remarks are findable in Levi, *L'abuso del diritto*, 1993, 3, 16.

¹⁰ See, among many others, Taruffo, *La giustizia civile* (cited in n. 8 *supra*).

Just located after the norm defining the right of property, its contents and functionality, this rule provides a sort of limitation in this connection, for the case of activities of the proprietor voluntarily and exclusively ment either to harass or to jeopardize other people's rights¹².

The divieto di atti di emulazione defining this provision might in itself hardly be seen as an actual pendant of a notion of abuse of right, and rather represent an inevitable boundary to a conception of right of property still conceived as in principle absolute¹³.

More than the original philosophy of the Codice, in which the social hints remain all in all vague and anyhow traditionally relegated to subjects like that say of the relationships between employers and employees, are mainly the subsequent scholarly interpretations that have ascribed to this rule a unique and relevant role envisaging the presence of a notion of abuso di diritto in the Italian legal system¹⁴. Basically founded on a less traditional idea of property, these interpretations tend to relativize in a social direction its function inside the legal system taking into due account the large social openings coming from the more progressive constitutional provisions of 1947, and therefore reframing this notion consistently with a general and prevailing conception of solidarity asserted in this regard by rules 2 and 42 of the Italian Constitution¹⁵.

¹¹ See, e.g., Salvi, *Il contenuto del diritto di proprietà* - artt. 832-833, in *Il Codice civile - Commentario* (Piero Schlesinger ed.), 1994, 9, 44, 130; Perlingieri (ed.), *Codice Civile annotato con la dottrina e la giurisprudenza*, 1991, vol. 2, 53; Bigliazzi Geri, Brecchia, Busnelli, Natoli, *Il sistema giuridico italiano - Diritto civile -III, Obbligazioni e contratti*, 1989, 708.

¹² See Cendon (ed.), *Commentario al codice civile*, 1991, vol. 3, 101; Bianca, Patti, Patti, *Lessico di diritto civile*, 1991, 2.

¹³ See Natoli, *Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano*, in *Riv.trim.dir.proc.civ.* 1958, 23.

¹⁴ Add to the previous citations in the last footnotes Rodota', *Scienza giuridica ufficiale e definizioni della proprietà*, in *Materiali per una storia della cultura giuridica raccolti da Giovanni Tarello*, 1972, vol. 2, 439; Bessone, *Proprietà* "egoista", *abuso del diritto e poteri del giudice*, in *Saggi di diritto civile*, 1979, 275.

It ought to be added that, despite its intensity and extension the effort to derive from this an articulate and effective notion of improper or abusive use (of rights) hasn't so far been actually succesful, and this maybe because of the method generally used at scholarly level to accomplish this task. Such an attribution to article 833 Codice Civile of the quite different meaning of a *lex generalis* sanctioning any even unintentional deviation from a socially-consistent use of rights (like that of property) has actually turned out to be fairly tentative in the Italian context. Not purporting any correlative transformation of the very disposition of this rule -so far expressly asserting the clear intentionality to cause totally useless harm-, this elaboration hasn't brought about any widespread stream of judicial decisions accepting a generalized notion of abuse of rights, conceived at the very least as an activity implying the use of a right overpassing the original range and intention of its definition by the law, i.e. the same Codice Civile or any other¹⁶.

All in all unsuccessful apart from bringing up this subject and problem in the Italian context, this attempt seems even more a failure if compared with the French level of elaboration attained in this same connection. The relative gap between the two legal cultures might be summarized by the fact that, while despite everything a precise *anumens nocendi* is still required by the Italian case law to conceive the form of abuse corresponding to the so-called *atti emulativi*, such an approach seems largely outdated in France

¹⁵ Salvi, *Il contenuto...*, (cited at the n. 11) 9; Natoli, *La proprietà* (Lezioni), 1963, 129; Mengoni, *Proprietà e libertà*, in *Riv. crit. dir. priv.* 1988, 427; Patti, *Abuso del diritto*, in *Dig. IV (sez. civ.)* 1987, I, 7; and again Rodotà, *Scienza giuridica ufficiale*, (cited at the n. 14) *passim*.

¹⁶ Quite on the contrary, the still prevailing trend in the decisions by the Cassazione seems to attribute fundamental importance to the intentionality of the harming action as a condition for the application of the rule devised in the articolo 833. On this subject see, e.g., Perlingieri (ed.) *Codice civile annotato con la dottrina e la giurisprudenza*, 1991, 2nd ed., vol. 3, 54 (quoting the decision n. 4708, 1977). For the concise definition suggested, it is basically taken from the fundamental essay by Rescigno, *L'abuso del diritto*, in *Riv.dir.civ.* 1965, I, 216, and Natoli, *Note preliminari a una storia dell'abuso del diritto nell'ordinamento italiano*, in *Riv.trim.dir.proc.civ.* 1958, 26.

where the mere is by now traditionally representing a sufficient basis for abuse de droit¹⁷.

3. Despite its scant conceptual and factual results, there's an aspect of the Italian elaboration worth to be taken into account in special connection with the procedural side of abuse: i.e. the widespread tendency to convey any abusive event into the performance of procedural activities. According to this approach, abuse becomes essentially visible wherever a claim containing a demand inconsistent with basic and acknowledged law philosophies has been filed. Moreover, through this approach is actually retrieved a conception deeply rooted in the Italian legal culture, that of the ancient "exceptio doli": i.e., a typical defense tool applied to allege misuse of procedural rights whenever ungrounded on the proper parameters defining substantial rights as that of property¹⁸.

Therefore, on the one hand, in conceptual terms the connection between abuse of rights and procedural abuse seems very tight in the Italian legal culture, also because of the fact that actually the only existing and generally accepted notion of abuse is ment to involve necessarily the carrying out of procedural activities either by the abuser or by the subject reacting to it (in other words, abuse becomes an activity almost necessarily performed through procedural activities and into a procedural context). Yet, on the other, one might hardly find any highly developed normative apparatus somehow concerning abuse -however defined, I repeat- in the Italian procedural law, as a consequence of this connection. A consideration this one to which can be easily added that the same seems to be true for the

¹⁷ See, e.g., Mazeaud, Mazeaud, *Lecons de droit civil*, (cited at the n. 5) 397; but also, much before, for a similar approach Laurent, *Principii di diritto civile* (italian translation by Gandolfi), 1926, vol. 6, 136; recently, among many others interventions, see Cadet, *Abus de droit*, in *Enc. Dalloz*, 1992, I, 3.

¹⁸ See, e.g., Pellizzi, *Exceptio doli (diritto civile)*, in *N.N.D.I.*, 1960, VI, 1075; Allara, *Atti Emulativi*, in *Enc. dir.*, 1959, IV, 37; Mazzoni, *Atti emulativi, utilita' sociale e abuso di diritto*, in *R.D.C.* 1969, II, 606; Gambaro, *Emulazione*, in *Dig. IV (Disc. priv.)*, sez. civ., 1991, VII, 442.

elaboration, practically inexistent, developed as to this problem by the Italian procedural doctrine during this century.

Not surprising on the whole, given what we've noticed so far about the Italian experience on this subject, such a situation could be summarized as a sort of blunder rebounding from the "substantive" to the "procedural" side of the problem of abuse (which in Italy has ment and means also a rebounding between substantive and procedural sides of the legal doctrine) actually ending up in a normative and intellectual vacuum. It seems consequently rather helpless trying to find out something apparently unexisting, like any sign of specific concern for the problem of procedural abuse within the same Italian procedural scholarship. The only chance left in this direction is inevitably to take note of this lack of concern and of cultural perception.

Anyhow, as regards to this, a general remark could be related to the long-lasting tradition of the Italian procedural legal thought of steadily avoiding and ignoring subjects that have become pivotal in other procedural cultures. It seems worth noticing for instance that the question of lawyering-together with the virtually consequent ethical evaluation of the many different and also abusive ways of carrying out the related activities of advocacy- has never actually attained any crucial level of interest in the doctrinal debate.

An altogether fairly obvious, but nevertheless quite actual and convincing, interpretation of such a phenomenon might be connected with the basic philosophy still permeating the Italian civil procedure¹⁹. To the endurance of an on the whole widespread strictly adversarial approach, providing the parties' lawyers with a virtually absolute power on strategies and development of procedural options, seems possible to ascribe the probable perception of a notion like that of abuse as an undue interference virtually disrupting this untouchable clot of related powers.

This fairly makeshift summarization of the basic fetures of the Italian

¹⁹ For a notoriously prominent description of this cultural situation, see Denti, *La giustizia civile - Lezioni introduttive*, 1989, 155 and passim.

cultural approach is furtherly confirmed by a yet rapid glance at the normative context. Here, while it goes without saying that no rule is expressly defining a notion of procedural abuse, one can't avoid noticing a small set of norms nevertheless hinting at some residual perception or normative solution of the problem we're dealing with.

These norms are contained on the one hand in the article 88, and on the other in the articles 92 and 96 of the Codice di Procedura Civile²⁰. Although in a different way and from a mutually different perspective, all these articoli are related to the lawyers' procedural behaviour (i.e., lawyering), indeed something totally unusual in the whole Italian normative context where the expected approach is generally tending to avoid any explicit reference as well to advocacy as at large to lawyers' various professional tasks²¹.

Therefore exceptionally related to lawyers' activities in a procedural context, these rules as previously suggested are all but homogeneous in their single dispositions. While all of them represent an apparent and unusual link between procedure and legal ethics, it's particularly the articolo 88 of the Codice di Procedura Civile to be explicitly related to the respect of standards of professional conduct, as positively stated by a besides not at all punctual title-definition speaking of duty of loyalty and of professional integrity²². Despite or maybe because of the subject, the vagueness of this initial definition finds a meaningful pendant in the same internal disposition of this rule. Resorting to an approach rather consistent in itself, as much as the rule is actually lacking any further analytical explanation of the meaning of these two expressions (loyalty/integrity are referred to as virtually

²⁰ For a short but extremely updated comment to the text of these rules, see Carpi, Taruffo, *Commentario breve al codice di procedura civile - Compendio giurisprudenziale*, 1996, 242.

²¹ Some critical hints about this approach are envisaged by Dondi, *Introduzione della causa e strategie di difesa - I, Il modello statunitense*, 1991, passim.

²² For an analogous evaluation about the whole approach of this norm see, for instance, Mandrioli, *Corso di Diritto processuale civile*, 1996, vol. 1, 313.

selfevident standards of compliance for the carrying out of advocacy or lawyering at large), the same rule is also lacking sanctioning provisions whatsoever for the noncompliance with duties after all so much fuzzily determined. This, of course, unless one comes to consider a sanction the extremely marginal chance for the judge to inform the local bar association of the improper-but, how or on which basis detected?- lawyer's behaviour²³.

"Empty masks for nothing" as they were also defined²⁴, on the other hand these undefined and unsanctioned standards fit perfectly the whole Italian approach to the problem of abuse, as furtherly confirmed by the other two abovementioned norms. In fact, neither articolo 92 nor articolo 96 of the same Codice part from this tendency providing any precise borderline definition of procedural abuse as well as of a sanctioning apparatus of any sort.

Both these rules are more or less dealing with fee shifting, in truth a subject not exactly overlapping that of lawyering, not to speak expressly of that of procedural abuse. Nevertheless, if ever there has been an even minimal show of interest for this very problem in the Italian procedural tradition, dating back to the turn of the century it can be retraceable in connection with this very context of studies and normative elaboration²⁵.

Conceived as an instrument for the actual sharing of the economical burdens related to procedural activities, the basic philosophy of the so to speak "Italian rule" is in fact grounded on the notion of expenses' responsibility laying entirely such a responsibility -inclusive of attorneys' fees as well as of any other procedural expense- on the losing party. This of

²³ This vagueness seems, on the contrary, to have found widespread appreciation among Italian procedural scholars as an example of "suggested free application of legal norms"; see, e.g., Mandrioli, *Dei doveri delle parti e dei difensori*, in *Commentario del codice di procedura civile diretto da E. Allorio*, 1973, vol. 1, 961; Mazzarella, *Avvocato e procuratore (Diritto processuale)*, II, E.G.I., 1988, 4.

²⁴ See Satta, *Commentario al codice di procedura civile*, 1959, vol. 1, 292.

²⁵ The by far more prominent study in this connection, given also the prominence of the author traditionally considered the beginner of the modern Italian procedural scholarship, is by Chiovenda, *La condanna nelle spese giudiziali*, 1901, 381.

course, and rather understandably, provided the presence of some exceptions and arrangements that are worth considering in connection with the problem of abuse. Although not explicitly mentioned, this seems especially the case of the provision contained in the first section of articolo 92 of the Codice di Procedura Civile, where a yet minimal show of reaction to improper lawyering activities identifiable as procedural abuse might be recognized²⁶.

What the first section of articolo 92 prescribes is that -unlike the general rule, in principle charging the loser with whatever trial expense- there won't be refund to the winning party in case of "excessiveness or superfluity" in carrying out procedural activities²⁷. Quite obviously one ought frankly to point out that it doesn't seem that much for a provision actually representing as abovesaid the only one in the Italian normative procedural context to envisage something probably similar to what the "guidelines from the general reporter" would define as abuse of specific procedural devices, or at least getting fairly close to it.

The limited examples of procedural abuse rising out from the on the whole extremely scant range of decisions that have in more than half a century concerned this rule seem in fact to fit the General Reporter's definition. Thus, among these procedural activities, are not considered to be reimbursable the expenses derived say from procedural choices like that: of a lawyer practicing outside the district of the appellate court in which the same judge of the case is located (together with the connected problem of burdensome travelling expenses); of requesting ungrounded either third-party practice or vouching in; of resorting to unjustified expert witness testimonies, i.e. unjustified because evaluated by the judge as actually superfluous for the decision of that specific lawsuit²⁸.

No chance to find in this provision anything close to the altogether

²⁶ As it has been by, e.g., Mandrioli, *Dei doveri delle parti e dei difensori*, (cited at the n.23); Vaccarella, Verde, *Codice di procedura civile commentato*, 1997, vol. 1, 287.

²⁷ See Carpi, Taruffo, *Commentario breve al codice di procedura civile*, 1994, 3rd. ed., 203; *Compendio giurisprudenziale*, 1996, 254.

²⁸ See the citations in the previous footnote.

wide and comprehensive disposition of the U.S. Federal Rule 11, providing through yet an in many ways ambiguous notion like that of frivolousness (and its pendant of improper purpose) a general definition of abusive procedural practices and, moreover, conversely of “well grounded” pleadings²⁹. But more interesting and certainly more relevant in our perspective is another circumstance, in comparison with a rule like the F.R.C.P. 11: the absolute lack in the Italian norm above-considered of any sort of devices sanctioning the carrying out of similar procedural activities by the lawyer. Unlike the complex -and probably even in some ways overcomplicated, in spite of the recent amendments- sanctioning apparatus characterizing the rule 11, in the Italian norm there’s no direct sanction whatsoever toward the attorney. As a result, the only consequence of these abusive procedural behaviours is hence connected to his client and, as abovesaid, in the really marginal form of the non-reimbursement of the relative expenses.

4. A similar result and evaluation with regard to the Italian normative context concerning abuse might also be reached in comparison with a closer legal system like the French one. As previously pointed out, the most noticeable feature differentiating these two legal systems in connection with the problem of abuse is represented by the mutual enormous mutual gap in terms of perception and consequent cultural and normative elaboration. Definitely in favour of the so to speak “French approach”, such a gap seems easily appreciable just taking into account the presence inside the Nouveau Code de Procedure Civile of a rule like the article 32.1³⁰.

This rule marks a so far unbridgeable gap between these two legal systems for the mere fact of its existence as a disposition unambiguously

²⁹ See in general Joseph, *Sanctions - The Federal Law of Litigation Abuse*, 1994, 2nd ed., 106 and passim.

³⁰ See, e.g., Normand, Wiederkeher, *Nouveau code de procedure civile*, 1997, 89th ed., 50; Vincent, Guinchard, *Procedure civile*, (cited in n. 1) 77; Cornu, Foyer, *Procedure civile* (supra n. 1) 319.

speaking of what no Italian norm ever mentions in whatever form. What the article 32.1 is actually dealing with is namely procedural abuse, i.e. abus du droit d'agir en justice, and this in the wide meaning of either dialtory practices and specific improper procedural startegies ("celui qui agit en justice de maniere dilatoire ou abusive peut etre condamne' a une amende")³¹.

It's fairly easy to realize how far this disposition stands from the one contained in the articolo 92 of the Italian Codice di Procedura Civile. Not only the French norm faces the problem of abuse openly and suggesting a precise solution to the question of figuring out what abuse is about, instead of adopting the fuzzy, evasive and altogether ambiguous approach of the Italian norm. But even more noticeable and intrinsically relevant is the fact of having into the same rule specifically provided consequences and sanctions in this connection³².

A slightly different consideration seems in many ways proper as to the very consequence provided by the article 32.1. The rule resorts to the quite expectable solution of sanctioning the abusive procedural behaviour through the commination of an "amende civile", a monetary sanction expressly devised in a sum ranging from 100 to 10.000 francs, combined with the even more usual at least in the French context compensatory damages of the so-called dommages interets³³; a fairly complex solution to which might anyhow furtherly be added the chance to apply in case of noncompliance to the judge's orders a tpical device as that of astreinte (i.e., a monetary sanction bound to increase according to the persisting non compliance)³⁴.

³¹ See the essays cited in the previous footnote.

³² See, e.g., Desdevises, *L'abus du droit d'agir en justice avec succes*, in *D.Chr.*, 1979, IV, 21-22; Widerkher, *La notion d'action en justice selon l'aricle 30 du nouveau Code de procedure civile*, in *Mel. Habraud* 1981, 949; more recently, see Courtieu, *Droit a reparation - Abus du droit . Notion*, in *J.-Cl. - Responsabilite' civile*, 1997, Fasc. 131-1, 14 (concerning more precisely the problem of the "reparation et sanctions de l'abus du droit" rather than the one of the abus de procedure); id. *Droit a reparation - Abus du droit d'agir en justice*, in *J.-Cl. - Responsabilite' civile*, 1997, Fac. 131 - 3, 5, and passim.

³³ See, e.g., Vincent, Guinchard, *Procedure civile*, as cited at note 1 ; Cornu, Foyer, *Procedure civile*, cited at note 1, 325.

All except unusual, this solution rises some problems as to the effectiveness of its reaction to the phenomenon of abus du droit d'agir en justice³⁵. And this also for the fact of being the typical solution applied to sanction procedural abuse even beyond the pleading stage, and actually resorted to in further norms of the Nouveau Code de Procedure Civile dealing in quite the same terms as article 32.1 with the problem of abusive or delaying practices, performed either at an appellate stage (article 559, referred to as "appel principal dilatoire ou abusif") or at a recours stage - "extraordinaire" or "de Cassation"- (articles 581 and 628, referred to as "recours dilatoire ou abusif")³⁶.

Also in these cases -to which ought to be added that of 550 related to the "appel incident"- the sanctioning apparatus is basically modelled on the solution applied at the pleading stage, i.e. that combination of a civil penalty specified in its amount from 100 to 10.000 francs, with the virtual inclusion of the compensatory damages defined of the dommages interets originally comminated in the article 32.1³⁷.

By the French doctrine and jurisprudence the criteria for applying

³⁴ See, e.g., Cadiet, *Droit judiciaire prive*, 1932, 414; Resquec, *La nature juridique de l'astreinte en matiere civile*, in *J.C.O. G. - Sem. Jur.*, 15.9.1993, n. 37, 354; in general, about the n. 91-650 of 1991, reforming the astreinte, see Chabas, *La reforme de l'astreinte*, in *D. Chr.*, 1992, 299.

³⁵ For an almost ancient elaboration of such a question, see Morel, *Les dommages-interets au cas d'exercice abusif des actions en justice*, (th.) 1910, passim; Lecomte, *A responsabilite' du plaideur envers son adversaire en matiere civile et commerciale*, 1938, 481; more recently, Mestre, *L'abus de droit de recouvrer une creance*, in *Mel. Raynaud*, 1985, 450-455.

³⁶ See, for the text os the mentioned norms and comment, Normand, Wierderkeher, *Nouveau Code de procedure civile* n. 1) 335, 365; and also, e.g., Courtieu, *Droit a reparation - Abus du droit d'agir en justice*, (cited in n. 32), (fac. 131-3), 9-14.

³⁷ Originally stemming from the notion of "fol appel", anyhow justifying just a minimal monetary sanction (from 50 to 150 francs), an harsher sanctioning trend in this connection is dating back to the of 1942 and futherly modified with the of December 22nd 1958 aiming at increasing effectiveness and adequacy of these sanctions, see Vincent, Guinchard, *Procedure civile*, as quoted at note 1, 833.

these sanctions have in fact been abundantly and deeply analyzed. What turns out as a widespread and progressively evolving trend in this respect is the sufficiency attributed to the notion of negligence or fault (, hence “comportement fautif” on the one hand or “dilatoire” on the other) as an element in itself justifying the enforcement through the abovementioned sanctions³⁸. It’s also through such an approach that has been performed by the French jurisprudence the scanning and recognition of specific examples of abusive procedural activities³⁹.

This is true especially for the very beginning of a lawsuit, in connection at large with the pleading stage. A circumstance clearly shown by the dispositions of two specific norms like the article 123 (concerning the kind of peremptory exceptions called “fin de non recevoir” and virtually leading to dismissal before taking into consideration the merits) and the article 118 (concerning specific exceptions for invalidity of a procedural step that would lead to void judgment) that expressly allow the court to apply the usual monetary sanction and the connected compensatory damages of “dommages-interets”, if these exceptions were not proposed early in the action, and this merely for delaying reasons⁴⁰.

Apart from it, what can really be considered noteworthy in our perspective is the elaboration of a basic “conceptual core” for detecting abusive practices performed at the initial stage of a lawsuit. In this area, the French case law has actually worked out a standard generally useful to react

³⁸ Dating back to the 30ties and the 40ties, this approach is by now deeply rooted in the French legal culture as a way to fence the use of a right and at the same time a way of suggesting a generally its proper exercise, with carefulness and attention (i.e., with the prudence avoiding negligence), see, for instance, Juillot de la Morandiere, in Colin, Capitant, *Traite' de droit civile francais*, t. 2, ed. 8, par. 195; in general and for a rapid excursus on the evolution on this very subject, see Courtieu, *Droit a reparation - Abus de droit. Notion - Responsabiite' civile*, fasc. 131-1 n. 1), 3-4.

³⁹ See Courtieu, *Droit a reparation - Abus du droit d'agir en justice - Responsabilite' civile*, fasc. 131-3, (cited in n. 1) 5 and passim.

⁴⁰ See Courtieu, *Abus du droit d'agir...*, 3; Desdevises, *L'abus du droit d'agir en justice avec succes*, (cited in n. 32), 22.

to these practices, and this resorting -as shortly before already mentioned- to a notion like that of, or more precisely of *faute simple*, i.e. not implying intentionality or malice of any sort⁴¹. It's on this basis that has taken place the recognition of the specific circumstances revealing, in case of fault or anyhow improper behaviour, the presence of abuse of procedural rights.

At the initial stage of a controversy one of the most widespread features of an action en justice abusive has been traditionally singled out in groundless pleadings, like say the vouching in of a third party for the mere sake of harassment⁴². At the appellate stage, the same kind of approach might be represented by the lack of requests actually justifying review through the taking and prosecution of an appeal, as well as trying to delay a consolidated or a cross appeal not prosecuting it opportunely⁴³. In general, a further chance for carrying out abusive practices, among the many possible, is recognized in the multiplication of lawsuits alleging different causes of action (so-called "montage procedural artificiel"); an inevitably multiform practice to be necessarily evaluated case by case rating its excessiveness⁴⁴.

Typologies apart, provided that the ones abovementioned are actually giving just a minimal hint of the paramount elaboration performed by the French legal scholarship and case law on this very subject, a few more words seem to deserve both the sanctioning apparatus - as regards especially

⁴¹ For an example of this by now long lasting approach, see Cass.Ire civ. (10 janv. 1964) Bull. civ. I, n. 310; more recently Cass. 2me civ.(10 janv. 1985) Gaz. Pal. 1985, I, pan. 113 (with a note by Giunchard).

⁴² See, for instance, Vincent, Guinchard, *Procédure civile*, (cited in n. 1), 77 (n. 4, 5); about the most recent way of approaching the sanctioning process by the Cassation in similar cases see Cass. soc., 28 janv. 1997 (pourvoi n. 95. 42. 866; rejet n. 445) Gaz. Pal. (3 juill. 1997), n. 215, 8.

⁴³ See, e.g., again Vincent, Guinchard, *Procédure civile*, 830, 833; Courtieu, *Droit a reparation - Abus du droit d'agir en justice.*, 6 and 10 (about the recours abusif especially dealt with by article 550 of the *Nouveau code de procédure civile*).

⁴⁴ See Desdevises, *L'abus du droit d'agir en justice...*(supra), 21; Courtieu, *Droit a reparation - Abus du droit d'agir en justice*, (supra) 9.

the subjects by it concerned- and a partial similarity with the Italian approach as to abuse in connection with the procedural expenses.

This last side of the problem we're dealing with is essentially regulated in France by the article 700 of the Nouveau Co. A norm this one roughly similar to articolo 92 and especially to the just en passant abovementioned articolo 96 of the Italian Codice di Procedura Civile, regulating through monetary sanctions in the form of compensatory damages the so-called sponsabilita' aggravata" of a lawyer litigating issues knowingly and openly inconsistent with the law (but in practice almost never awarded because of the difficulties concerning the demonstration of the damage causation). Likewise, what the French article 700 provides is that the losing party, in addition to the expenses ex lege to be refunded, can at court's discretion be burdened with further expenses "a titre de frais exposes et non compris dans les depenses"⁴⁵. While this rule is not mentioning explicitly any kind of abusive practice, it's generally admitted -following a specific party's request- the cumulation of these further expenses with the monetary sanctions abovementioned as the typical reaction to procedural abuse in the French context⁴⁶

5.

5.1 Coming to deal with the just before defined "sanctioning apparatus" -and especially with its targets- we're nearly approaching the conclusion of these poorly scattered considerations. As a matter of fact, of real sanctions one might properly speak only with regard to the French legal system, while for the Italian one a probably correct definition could

⁴⁵ For the text of the rule and a comment, see Normand, Wiederké, *Nouveau code de procédure civile*, (cited in n. 1), 391; in general, see Martin, *L'abus de droit et l'article 700*, in J.C.P. 1976, G, IV, 6630; Pansier, Pansier, *Abus de procédure, article 700 du code de procédure civile et refère*, in S.J. / G, I, Doc, 1983, 3105.

⁴⁶ See again Pansier, Pansier, *Abus de procédure, article 700* (supra), 21.

rather be at most that of “likely consequences”. What we’ve noticed in the course of these considerations is in fact that the Italian approach is to say the least the less reactive to the problem of procedural abuse in terms as well of conceptual elaboration as of normative dispositions; the contrary seems true for the French, characterized by an impressive elaboration of the philosophy of abuse at large and of abus du droit d’agir en justice in particular, inclusive of some paradigmatic monetary sanctions (as the amende civile, damages et intérêts, and others).

This given in extremely general terms as to the mutual differences between these two legal systems, both of them seem yet to share a factor worth pointing out in connection with the problem of procedural abuse, and especially with regard to the forms of reaction to it. Either through monetary sanctions, or -and in this of course showing at least a much more lenient approach- through negative consequences in terms of costs, both legal systems seem to ascribe exclusively to the parties the responsibility for the carrying out of abusive practices. The actual performer of these practices, i.e. most probably the lawyer, is not expressly contemplated in norms like the articolo 92 of the Italian Codice di Procedura Civile or the article 32.1 of the French Nouveau Code de Procedure Civile⁴⁷.

Quite paradoxically, according to this normative approach a party in a proceeding (or, in other words and in a slightly different perspective, a client), after having undergone the blamable and abusive strategic or tactical procedural choices of his lawyer, might also be the only one bound to suffer their legal consequences. And this while against the same legal counselor or “litigator” -anyhow the advocate who in this very circumstance carried personally out activities evaluated by the court as abusive and therefore beyond the procedural standards- there would be no expressly prescribed sanction whatsoever.

It’s a type of remarks that tend to stress an aspect of abuse very seldom

⁴⁷ For some remarks in this perspective, see Dondi, *Manifestazioni della nozione di abuso del processo civile*, (cited in n. 6).

coming out at least in the European discussions in this connection, i.e. the more than ever necessary or inevitable mingle in this area of ethical and procedural factors.

Although unusual, such an outlook seems useful to explain some of the most relevant absences concerning the two systems considered, in general but especially in comparison with a legal system like that of the U.S.⁴⁸.

Notwithstanding some relative variations, the scarce relevance in the European context of an elaborated legal ethics culture, and moreover the less than marginal recognition of its necessary interaction with procedural law especially in areas like that of abuse where the implication of lawyer's activities is actually pivotal, seems to play a fundamental role. As a matter of fact, it's not only on the side of procedural law that apparently no room is left for involving the lawyer's responsibilities in the sanctioning process of abusive practices carried out at a procedural level. In the same rules of legal ethics the concern for such a matter is, if any, scant or marginal at all.

This is certainly true as to Italy, where the brand-new Codice deontologico of 1997 does not seem to appreciate a lot the idea of burdening lawyers with so much cumbersome responsibilities. No rule -as for instance do the American Model Rules of Professional Conduct 1.2 (a) and 3.1 and 3.2⁴⁹ - is disposing directly against the lawyer who accomplished abusive practices, expressly sanctioning his behaviour.

The only provisions likely to puport this kind of questions in the Italian context are in the form of vaguely conceived general contentions or randomly suggestions: articolo 5 concerning lawyers' "dignity and decorum" in performing their professional activities; articolo 6 concerning "loyalty and correctness" while acting in the same context; and mostly articolo 14 about the so-called "duty of truthfulness", all of them share this normative approach⁵⁰. Moreover, for all of them is submitted to the express

⁴⁸ See again Dondi, *Manifestazioni della nozione di abuso Introduzione della causa e strategie di difesa, I- Il modello statunitense*, 1991, passim.

⁴⁹ See Hazard, Hodes, *The Law of Lawyering - A Handbook on the Model Rules of Professional Conduct*, 1990, II ed., V. 1, passim.

maliciousness of the act the only shadow of sanction for non-compliance, i.e. a disciplinary proceeding held in front of a panel of practicing colleagues belonging to the same bar.

And likewise can, after all and given this less than lenient and largely evasive approach of the whole Codice Deontolo, be considered the only disposition marginally suggesting a sort of perception of the values connected with the notion of procedural abuse, i.e. the subsection II of the articolo 23⁵¹. Related among other subjects to the “duty of [correct?] representation”, what this norm provides is that the lawyer must object to any groundless procedural activities disrupting or anyhow harming the proper course of a judicial proceeding, and harming his client’s interests. Roughly attaching to this provision the function of a basic anti-abuse norm seems nevertheless drastically impracticable since it would mean leaving out of consideration the whole philosophy of the Italian Codice Deontologico; an attempt completely useless also because of the abovenoticed lack of an efficient sanctioning apparatus at legal ethics level.

All in all a similar approach seems also to characterize the French discipline of legal ethics. Not so much unlike the Italian, the French system of legal ethics seems actually scarce in providing specific provisions sanctioning lawyers’ abusive practices. In spite of their higher complexity and much older elaboration, the many and multiform French ethical rules seem addressed to structure the legal profession (in terms of access, internal organization, and continuous legal education) rather than face the kind of problem we’re dealing with. As a matter of fact, the only type of provisions yet indirectly addressing to it could probably be recognized in dispositions like that of article 131 of Decret of November 27th 1991 (n. 91-119), where the lawyer is considered “civilment responsable” for the professional activities accomplished by his associates. All the more reason, a likewise expressed responsibility is, obviously besides, provided by -article 25, 26- of the of December 31st 1971 wholly reforming the structure of the French

⁵⁰ For the text of these rules, see *Foro it.*, 1997, V, 341.

⁵¹ For the text of these rules, see the indications in the previous footnote.

legal profession⁵².

5.2. Far from purporting to be a complete and satisfactory survey, the picture so rapidly and roughly outlined in these few pages can just provide some scattered clues about the state of APR in the after all fairly limited context of the French and Italian legal systems. Clues actually dealing mainly with their mutual differences as well as to this notion as to the many problems connected.

One of the basic considerations that in fact can be drawn from this tentative outline is that, neither at a conceptual nor at a normative level, the two systems here considered seem to share an actually common functional approach to cope with this problem in order to clash effectively the carrying out of abusive practices. An evaluation that -according to the previously developed considerations- appears fundamentally correct, despite the common origins and sources of the two systems considered, and the nevertheless still quite frequent cultural interactions concerning the very subject of abuse⁵³.

On the other hand, while some remarkable analogies of course remain, like the similar shortages envisaged with regard to the area of legal ethics, the normative and conceptual solutions adopted in these two systems seem to follow parallel tracks. In short, the lack of sanctions, on the one side, is

⁵² See the text of this norm in *Journal officiel de la Republique Francaise - La profession d'avocat*, Textes legislatifs et reglementaires, 1993, 83; of course, in the of December 31st 1971 (n. 71-1130), titled "Creation et organisation de la nouvelle profession d'avocat", provisions related to disciplinary proceedings and generally to the way of submitting lawyers to them are not missing (see articles 25 and 25.1, and 26 recalling in general the special provision mentioned in the text, in the same book here quoted, p. 13-14); with regard to the lawyers' professional responsibilities, see also, in general, Martin, *Deontologie de l'avocat*, 1995; and especially Hamelin, Damien, *Les regles de la profession d'avocat*, 1992, 7th ed., 538-541.

⁵³ Rotondi (ed.), *L'abus de droit*, (cited in n. 6) passim; Gambaro, *Abuse of Rights in Civil Law Tradition*, in Rebello (ed.), *Aequitas and Equity*, 1997, 632.

thus facing, on the other, the tendency to stick to the substantially homogeneous philosophy as well of the *dommages et interets* as anyhow other sorts of monetary sanctions, representing in France the by far prevailing solution to the problem of reacting to the besides so precisely scanned abusive procedural practices.

It must also be added that -fortunately in many ways- what has been sketched as a static situation, with its set of immutable factors, at a closer look doesn't seem to stand completely still. Essentially with regard to the Italian legal system, undoubtedly the less advanced of the two considered, in the last few years some noticeable displays of interest for the problem of abuse at large must at least be pointed out. In this context can be placed the recent discussions about the multiple notions of abuse, either concerning legal rights or the machinery of justice at large⁵⁴; and also the ever more frequent studies aimed at cataloguing the obviously numerous examples of abusive behaviours⁵⁵.

In nearly the same context can also be placed the by now long-lasting debate on the provisional remedies and their widespread overuse in the Italian legal practice⁵⁶.

Last and not at all least, a final mention might deserve a recent decision by the Italian Corte di Cassazione in which the lawyer is held responsible

⁵⁴ See, e.g., *Diritto privato* 1997 - *L'abuso del diritto* (cited in n. 6).

⁵⁵ See, e.g., Traverso, *L'abuso del diritto*, in *Nuova giurisprudenza civile commentata*, II, 1992; Ghirga, *Conciliazione giudiziale e abuso del processo*, in *Riv. dir. proc.*, 1998, 196; and, in much wider terms, Levi, *L'abuso del diritto*, 1993, 39.

⁵⁶ See, e.g., Mandrioli, *I provvedimenti d'urgenza: deviazioni e proposte*, in *La tutela d'urgenza - Atti del xv convegno nazionale* (Quaderni dell'Associazione italiana fra gli studiosi del processo civile - XLII), 1986, 22, 25, 32; in this same book (at 83, 104) see also Verde, *L'attuazione della tutela d'urgenza*; more recently and also as to the reform of this part of the Italian civil procedure together with the amendments of 1990 and 1995, see Consolo, in Consolo, Luiso Sassani, *Commentario alla riforma del processo civile*, 1996, 2nd ed., 679; *Processo cautelare: problemi aperti e linee di tendenza*, in *Giur. it.* 1998, III, 611; for some keen remarks concerning the chances of abusive practices in labour law proceedings, see de Angelis, *Il processo del lavoro tra funzionalità e rispetto delle garanzie*, in *Riv. it. dir. lav.*, 1994, 341, 345.

for the negative outcome of a judicial proceeding whenever brought about by his own negligent representation in court of the client's interests⁵⁷. Because of the condemnation of the lawyer to the payment of compensatory damages, can this decision represent the leading case of a new sanctioning trend -although linkable rather to notion of professional negligence or malpractice than of expressly recognized abusive practices- roughly shaped on the French model of heavily sanctioning these activities through *dommages et interets* or other kinds of monetary sanctions? So far suffice to notice in this decision a yet extremely initial show of approaching to the idea that the role of the lawyer may also involve his actual and personal responsibility for the carrying out of procedural practices, which in a hopefully short run may come to include also the abusive ones.

⁵⁷ Cass. civ. sez. III, February 6th 1998, n. 1286.