International Association of Procedural Law
International Colloquium

ABUSE OF PROCEDURAL RIGHTS: COMPARATIVE STANDARDS OF PROCEDURAL FAIRNESS

27-30 October 1998
Tulane Law School
New Orleans, Louisiana

Edited by
Michele Taruffo

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FOREWORD

Professor Dr Marcel Storme, President of the International Association for Procedural Law, President of the Royal Academy of Belgium for Science and Arts

As President of the International Association, I am pleased to have the opportunity of writing a foreword to the book embodying the report of our New Orleans Colloquium.

In between the World Congresses, our Association has been instrumental in arranging small-scale colloquia such as those at Lund (1986); Bologna, which actually came to assume the form of an extraordinary congress; co-operation in the Japanese Symposium in Tokyo (1992); the Thessaloniki Symposium (1997); and the colloquium in New Orleans (1998).

The last of these was held at Tulane Law School, the organization being in the hands of our colleague Yiannopoulos and hospitality offered by our colleague Sherman, Dean of the Law School.

The explosive development of procedural law has not only resulted in an overburdening of the courts and an unacceptable backlog of cases; it has also fomented the abuse of procedural law.

Justice is a service provided by the government for the benefit of the citizen and this service must not be administered recklessly or improperly. Furthermore, the procedure must be applied, in conformity with its etymological and teleological significance, to the progress of procedural law; procedure means progress.

Hence at the New Orleans Colloquium attention was devoted in large measure and also from the point of view of comparative law to this *fin-de-siècle* development of procedural law.

It was a particularly successful colloquium because, in a hospitable atmosphere, for which I reiterate my thanks to our colleagues Yiannopoulos and Sherman, we had a passionate and open debate on two legal (i.e. procedural) cultures, the common law system and the civil law system.

Such a debate could only take place in New Orleans, where French, Spanish and German settlers moulded the particular shape of this marvellous town.

On behalf of the International Association of Procedural Law I also wish to thank Mr and Mrs Weinmann and the Eason-Weinman Centre for Comparative Law.

In addition, we owe a considerable debt of gratitude to the reporters for their excellent work, ranging from the introductory report by M. Taruffo to the final report by J. Normand, and all the other regional reporters, as well as the chairpersons who initiated such splendid discussions.

As a president of our Association I am proud to state that there was also innovative input from our distinguished members and from our eminent American colleagues.

The promotion and development of the comparative study of procedural law is the "*raison d'être*" of our Association. Proceduralists are not very modest scholars. They think that civil procedural law is the most important branch of law and of course they are right to think so.

The Tulane Colloquium was a fine colloquium, where outstanding scholars were able to debate and compare the different approaches to the problem of abuse of rights. Proceduralists are accustomed to doing this, since courts may be considered to be "*lieu idéal de la rencontre des différences*" – the ideal meeting place for differences.

1. Let me repeat my concluding remarks at the closing session: "*There is more between civil and common law than we dreamt of in our procedural philosophy*".

Dean Sherman presented an extremely interesting paper on the evolution of the American trial process towards more congruence with continental practice.

And indeed, during our colloquium some striking examples were given in the field of APR (Abuse of Procedural Rights), notably in England and South Africa, where judges will become more active in controlling and even sanctioning the abuse of procedural rights.

2. I have defined APR above as a typical *fin-de-siècle* development of procedural law.

During the colloquium we had the opportunity to discuss the main problems of civil procedure today in the field of APR: quality of judges; procedural economy; forum shopping; behaviour of the parties and their lawyers; fair trial; international litigation; costs of the procedure; etc.

However, when confronted with Abuse of Procedural Rights, we hesitate to take up a clear, unambiguous position.

When we consider the skyrocketing litigation in our complex and conflictual society (litigomania) and the spectre of what an eminent member of our Association, Sir Jack Jacob, depicted as the three-headed hydra of civil procedure, i.e. delays, costs and vexation, we should put a stop to every kind of abuse, abuse of proceeding and abuse during the proceedings.

In doing so, we may arrive at a situation of non-litigation, in which cases of manifest injustice never reach the courts.

But then we have to go back to Geoffrey Hazard's question: Do we consider lawyers' strategy as a kind of APR?

My answer is no. When I started my lectures on civil procedural law at the Law Faculty of Ghent University, I always advised my students to read von Clausewitz's "*Vom Kriege*" (about war) instead of studying our Judicial Code.

3. This brings me to my third closing remark. Let us approach APR not as an abuse of rights – which is a contradiction *in terminis* – based upon the general idea of *bona fides*, but merely as an abuse of the public service of justice.

The bottleneck, the backlog, the overload, the slowness – all are due to the fact that too many citizens go to the courts instead of trying to solve their own legal problems themselves. We should see that everybody has a minimum of legal education, so that this do-it-yourself in legal matters can be achieved.

I would add that ADR (Alternative Dispute Resolution), which, with the exception of arbitration, can indeed be regarded as a second-class form of justice, could also help in preventing lawsuits from being brought before the courts.

4. We must remember that in procedural matters there are different players who are linked with the judiciary who are fated to meet each other regularly during a professional lifetime of 30-40 years.

This phenomenon was described by our German colleague Niklas Luhmann when he created the so-called "*Gesetz des Wiedersehens*" – the law of permanent encounter.

For fear of retaliation no one dares to take action against professional colleagues (lawyers, barristers), or judges or prosecutors.

My conclusion is that we should not leave the use of sanctions to the lawyers but place it firmly in the hands of the judge.

This means that the main sanctions should be either a fine or procedural sanctions, such as striking out a lawsuit.

Fines could be used for fund-raising in Legal Aid: frivolous litigants pay for poor litigants.

Striking-out will be in accordance with Recommendation R(84)5 of the Committee of Ministers of the Council of Europe:

"*When a party brings manifestly ill-founded proceedings, the court should be empowered to decide the case in a summary way...* ".

Of course I know that all this places reliance on the judiciary, but why shouldn't we on this occasion express the hope that training, selection and recruitment of judges could be harmonised world-wide and on a global level?

And we should be constantly reminding ourselves that the rights of defence can never be obliterated. And that the lawyers who master the strategy of the proceedings can (could) never be sanctioned for their choice.

5. Since the Woolf Report I have come to put my faith in a kind of managerial (authoritarian) justice.

The dispute is a matter for the parties; the litigation is a matter for the judges.

A steering judge will prevent APR, or at least not tolerate it.

Let me add that I am also in favour of world-wide congruence of the specific mission of the judge.

Everywhere there is a tendency towards a more active judiciary, with a firm balance between the inquisitorial and the adversarial system (*Dispositions- und Untersuchungsmaxime*): "*La guerre des maximes n'aura plus lieu*"

6. One of the main questions was: who can – or will – be held liable for APR: the party, the lawyer or the judge?

My answer is very simple: it depends upon the circumstances of the case.

There may be abuses by judges when they make irregular use of their managerial powers concerning the course of judicial proceedings, but also by making obviously wrong decisions. In my country the Supreme Court decided in 1991 – Anca case – that the State was liable for improper behaviour which caused harm to one of the litigant parties and which could not be redressed in any other way.

APR can, of course, be committed by lawyers, and they will be liable where they have not acted with the agreement of their clients.

7. The last of my closing remarks concerns Goldschmidt's quotation, recorded by our general reporter, Michele Taruffo: procedure is free of morality.

I personally don't accept this statement. Law – procedural law too – is closely linked with ethics.

In the next millennium we shall be searching for a "*homo novus processualis*": new ways for the citizens and their lawyers to handle disputes.

This is a question of education and also of legal education, but not of new legal rules – except for sanctions.

Political, social, moral and church leaders must again take the initiative in order to mitigate the conflictual nature of our society. So, for that matter, should anyone who has the slightest responsibility to bear, starting with the smallest human cell which is still and should remain the family.

Thus it should be possible to fulfil in the next century the utopian message from the Bible that "*the lion shall lie down with the lamb*".

If this can be done, both the courts and their proceedings will assume a totally different dimension, because they will have been reduced to a residual function in our society, something that is available "*just in case of...*".

If this goal can be achieved, the twenty-first century will become a glorious chapter in the fascinating history of legal civilisation, because then the Cape of Storms will be replaced by the Cape of Good Hope.

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ABUSE OF PROCEDURAL RIGHTS: GENERAL REPORT

GENERAL REPORT[1] ABUSE OF PROCEDURAL RIGHTS: COMPARATIVE STANDARDS OF PROCEDURAL FAIRNESS

Professor Michele Taruffo
University of Pavia, Italy

I. General

A.

From a bird's-eye view at the landscape of the various systems considered, the general impression one may have is that the problem of the Abuse of Procedural Rights (henceforth: APR) is present everywhere. It would be wrong, however, to move from such a widespread "perception of the problem" to say that there is a common and deep sensitivity towards the abuses in the administration of justice, or to believe that all systems share uniform and consistent ideas about the meaning and the importance of APR. Even more groundless would be the

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1 This general report is written on the basis of several area reports. These reports were provided, following an outline prepared by the general reporter, by Professors Angelo Dondi, Geoffrey C. Hazard, Burkhard Hess, Federico Mancini, Eduardo Oteiza, Francisco Ramos Mendez, Piet Taelman and Yasuhei Taniguchi. Some area reporters relied on national reports that were also submitted to the General Reporter: Geoffrey Hazard had reports from Neil Andrews, Bryan Beaumont and Richard Fentiman; Eduardo Oteiza had reports from Rodolfo Duarte Pedro, Adolfo Gelsi Bidart, Angel Landoni Sosa, Hernan Fabio Lopez Blanco, Gualberto Lucas Sosa, Jairo Parra Quijano, Jorge W. Peyrano, Jorge Hugo Rengel V. and Humberto Theodoro Junior. All these reports are extremely useful and interesting. The general reporter sincerely thanks the colleagues who gave their help, and regrets that his own work will not be able to reflect all the richness and the considerable amount of information and scientific reconstruction they provided. Of course, the general reporter alone is responsible for this report and for its defects.

It is impossible to make analytical references to the area and national reports about all the points they touched. Therefore, references will be made in very general terms, and only for the most important topics, just quoting the names of the reporters.

belief that efficient and viable remedies are present everywhere in order to prevent and punish such abuses.

In fact, things are, as usual, much more complicated. One may probably say that no legal system is completely indifferent to the APR, but this is just the beginning of the problem, not the end, since the actual approaches to the topic are numerous and various.

There is, in fact, a wide spectrum of different situations: in some countries, as for instance in France, there are clear and general rules concerning APR and vesting the court with the power to sanction abuses[2]. Such general rules exist also in other systems following the French model (as for instance Belgium and, to some extent, the Netherlands: see Taelman). At the opposite end of the spectrum there are systems in which the law does not speak openly of APR, but some general provisions speak of "loyalty and honesty" as standards for the parties' procedural conduct (see e.g. art. 88 of the Italian code of civil procedure). Similar rules exist in several Latin American countries, but now the most important reference point is the Codigo Modelo for Latin America, where principles of loyalty and fairness have a very relevant function and the need "to prevent procedural fraud, collusion and any other illegal or dilatory conduct" is taken into account (see Oteiza, for a description of this draft and an analysis of the relevant provisions). In the middle – so to say – there are some legal systems in which APR is more or less clearly conceived and more or less analytically regulated by the law.

It should also be considered that the various systems deal with APR in very different ways and with different approaches. In common law countries for instance, general definitions of APR are not explicitly stated, but there are rich and complex typologies of specific instances of APR and of sanctions used to prevent or to punish abusive practices (see Hazard, Andrews and Fentiman). Civil law countries do not share a uniform approach: sometimes they have very general rules or principles, as in France, Belgium, Japan and several countries in Latin America (see Dondi, Oteiza, Taelman and Taniguchi) or even very vague rules that perhaps refer to some general idea of abuse (as in Italy). Sometimes they state specific procedural rules, even not speaking openly of "abuse", and reference is made to general clauses only

2 The general rule concerning APR is art. 32-1 of the French code of civil procedure (enacted in 1978) in which a sanction is provided for "*celui qui agit en justice de manière dilatoire ou abusive*". Similar provisions are stated in arts.559, 581 and 628, with reference to abusive appeals (see Dondi).

when it is needed in order to fill gaps or to interpret such rules (see Hess, referring to Germany and Austria).

There are also significant variations in the perception of the importance and of the role of APR inside the legal system as a whole: sometimes it is said that the idea of APR is important as a means to ensure a fair and correct administration of justice (see e.g. Oteiza and Taelman), but in other countries the role of APR is considered as merely marginal (see e.g. Hess and Fentiman, and Taelman with reference to the Netherlands), at least when the instances that are literally defined as "abuse" of procedural devices are the only ones to be taken into account.

Therefore, the global landscape concerning APR is complex and varied: the general idea is probably present everywhere, since in any legal system there is the tendency to believe that procedures should be managed in a honest and fair way, according to general standards of good faith and correctness. However, such an idea emerges in very different forms and in various and sometimes fragmented dimensions. The landscape is not classical and quiet, with clear lines, bright colours and rational perspectives. Rather, it is a modern and in some parts abstract or informal picture, with intersecting lines and plans, variations and contrasts, different forms and tones all present in the same context.

B.

For the details of regulations concerning APR in the various countries reference must be made to the area reports. However, some general remarks can be sketched here.

First of all, it has to be noted that some general clauses or general principles concerning the abuse of procedural devices are used almost everywhere[3]. The most common general clause that is referred to in civil law systems is the "good faith clause" under its several names: *bona fides*, *buona fede*, *Treu und Glaube*, and so forth). The reference to such a clause is noteworthy for several reasons. On the one hand, it makes clear that the problem of APR is not always an independent and conceptually or historically autonomous issue. On the contrary, it is deeply rooted in the very general ideas of the law. It is well known, in

3 There is no need to make here a precise conceptual distinction between *general clauses* and *general principles*, although there is a broad literature on such problems. Suffice it to say that both are very general (and to some extent indeterminate) statements of fundamental ideas of fairness, good faith, morality...

fact, that the basic concept of "abuse" has its origins in the area of substantive law (specially of property law), and that the concept of APR derives from general values of fairness and correctness supposedly existing at the deepest levels of the legal system as such (see, for instance, Taniguchi with reference to Japanese law, and specifically to art.1 al.3 of the Japanese civil code; see also Oteiza and Taelman).

On the other hand, the reference to the general good faith clause may be interpreted – in some countries at least – as a symptom of the still insufficient development of a more specific concept of "fairness in procedure" that might possibly be used to define analytically abuses in the administration of justice. Of course we all speak of fairness in procedural contexts, and it may be said that "fairness" is now one of the fundamental values in the field of procedural law (also on the basis of constitutional provisions existing in many countries) even in civil law systems. However, it may be said that the connection between "procedural fairness" and APR is still vague and conceptually underdeveloped in many of these procedural systems. Hence the need to go back to the traditional general clauses as *Treu und Glaube* in order to find a more steady and "commonsense" foundation for the discourse concerning APR.

General clauses are actually used in at least two different ways in the area of APR. Sometimes the good faith clause is translated into – and enacted by – specific procedural rules included in the procedural codes. It is, for instance, the case of the standard of *lealtà e probità* provided by art. 88 of the Italian code of civ. proc., which is intended as a very general clause concerning the parties' conduct in civil proceedings (see Dondi). In some systems the general ideas of good faith or fairness are translated into specific rules (rather than into general "procedural" clauses) dealing analytically with procedural acts or conducts that are directly forbidden or sanctioned. This is, for instance, the case of Austria and Germany, where several rules of both ZPOs do not speak of "abuse" literally but can be interpreted as specific enactments of a general standard of procedural good faith (see a broad analysis in Hess).

The general clause of good faith is also used as a means to fill the gaps existing in procedural regulations. This case may be difficult to define specifically, but the basic reasoning is the following: a procedural act or conduct may not be specifically provided and explicitly defined as abusive by the law; however, it is perceived as abusive because it is unduly harmful, or it implies an abuse of power, or it is frivolous and dilatory, or it is aimed at illegal or improper purposes,

and so forth. Lacking any specific rule preventing or punishing such an act or conduct, a reference to the general good faith clause may be the only means to determine that a standard of fairness has been violated, i.e. to identify a violation justifying a sanction (see for instance Taniguchi with reference to post-war Japan)[4]. So to say, the fairness of the procedural context may be ensured by two layers of rules: specific rules considering particular cases of APR, and general clauses – not necessarily concerning only procedural issues – providing with broad standards of fairness and correctness.

This seems to be the typical situation in common law systems. Here the largely prevailing approach is not to rely upon a general good faith clause, but to refer to the ideas of due process , and perhaps also of equal protection (see Hazard and Fentiman), as general standards for the identification of possibly abusive practices. As it is stressed mainly by Hazard, such practices are acts and conducts that are considered as "fundamentally unfair". When one is looking for a standard of fairness the main point of reference is the concept of "due process of law" that is deeply rooted in the constitutional tradition of the Unites States and United Kingdom. A significant difference, if the common law approach is compared with the general clauses that are commonly used in civil law countries, is that the reference to due process is not used mainly to fill gaps in statutory regulations or to interpret statutory rules. It is applied directly by courts as a general standard for the evaluation of improper procedural practices (see mainly Fentiman and Andrews).

A peculiar situation is that of the European Court of Justice: the relevant regulations do not include express rules or principles referring to APR, but the idea of procedural abuses emerges in some significant judgments of the Court (see Mancini).

C.

A further problem which arises when we try to define APR is that abusive procedural conducts are frequently regulated and sanctioned by the law, but under different names frequently not including any explicit reference to "abuse". Then the problem is to consider the real phenomenon, paying less attention to the names that are used to label it, notwithstanding the danger of broadening excessively the scope of

[4] It is interesting to observe that the new Japanese code of civil procedure, enacted in 1998, expressly states the principle of "good faith and trust" in civil proceedings: see Taniguchi.

APR and of including phenomena that may not be "abuses" in a proper sense. But if we consider as APR only the specific instances in which the law literally speaks of "abuse", we run the opposite risk of being left with few and not significant cases. Moreover, doing that we would probably leave "out of the door" a number of relevant instances of APR (Hess's report is specially clear in pointing out this problem with reference to Germany and Austria). On the other hand, it is worth considering that some conducts that in civil law are not explicitly defined as "abuses" are nonetheless qualified as such in common law systems. This is a good proof of the fact that names should not be considered more important than things, when the problem of APR is dealt with.

Because of its intrinsic limits, this report cannot develop a complete analysis of the instances of APR that are regulated by the law under different names. However, some examples may be useful. For instance, filing a complaint in a situation in which the plaintiff lacks any legal interest in pursuing that case may be considered as an abusive act. Moreover, a number of abusive conducts occur when procedural rules are badly applied (see specially the case of UK described by Fentiman), i.e. when a party violates or wrongly applies procedural rules that she could have properly applied just by using a minimum of reasonable care. Violating a procedural rule is not abusive *per se* in any case, since not every mistake is an abuse (as many reporters have stressed). However, an unjustified gross procedural mistake may be considered as abusive, specially when its effects are unduly harmful to any other party, let alone when the law is consciously misapplied just in order to harass or to harm another party. Therefore the problem arises of how to distinguish "simple" violations of procedural rules (that may be considered as "innocent" or "justifiable" mistakes) from "abusive" violations of procedural rules (i.e.: instances of "bad faith", "harmful acts", "unjustifiable breach of rules", "gross mistake", "fraudulent conduct", and so forth). The interpreter should use a more general and different standard according to which some violations of procedural rules may be considered as abuses, while other violations are not abusive.

On the other hand, an act or conduct that does not entail a misapplication of a procedural rule (because it is "within" the range of discretion ascribed by the law to that subject) may be abusive, for instance when it is done in order to achieve illegal or improper purposes. In such situations general clauses of fairness, due process, good faith or alike, may be used as an interpretative canons in order to

detect and to assess abusive practices even when they are "hidden" behind the breach of procedural rules that do not refer explicitly to APR, or even behind the veil of formally legitimate procedural acts.

D.

These remarks are based on the assumption that the conceptual category of "abuse" may be defined *per se* and may play a significant role in the domain of the administration of justice. Such an assumption, however, is far from being obvious.

First of all, one may wonder whether there is any chance to speak of abuse when procedural rules are considered. One may argue, in fact, that procedural rules are very analytical and detailed and require strict compliance by all those who deal with them. A strict procedural rule may be properly applied or not – according with this argument – but there is never a matter of loyalty, good faith or fairness in the application or misapplication of such a rule. When a procedural rule is set forth by the legislator – this argument runs – it already embodies all what is needed for its proper enforcement and it already implies the occurrence of its violations and provides with the corresponding sanctions. No room is left – therefore – for meta-legal or ethical consideration: as Goldschmidt said, procedure is "free of morality" (see the quotation in Hess; see also Taniguchy for similar remarks concerning pre-war Japan). This attitude goes back to a classic and traditional way of dealing with the topic of procedural abuses: a widespread idea, based on the French concept of *abus de droit*, was just that "abuse" is typical of a few areas of substantive law, and specifically of some domains covered by general clauses of fairness and good faith, while the close and analytical character of procedural regulations (and specially of procedural codes) leaves no room for practices that could possibly be considered as fair or unfair, as correct or abusive, independently of – or going beyond – their strict qualification in terms of formal compliance or noncompliance with a rule.

At present it may be said, however, that such a vision of procedural regulations is very abstract and probably unreliable. It refers back to an ideal picture of European procedural codes of the 19th century, but it does not fit with modern procedural regulations. In fact, the idea of a code of civil procedure as a perfectly organized mechanism working by itself, or as a sort of perfect automaton leaving no choices to the persons involved, is completely outdated (moreover: such a picture never was a faithful representation of the reality in any system of justice). On the other hand, this idea has no correspondence

with the actual experience of common law systems. Therefore, it cannot be taken as a general assumption in comparative analysis.

At the present time we are well accustomed in every procedural system (although to a different extent in single cases, depending on the nature and structure of procedural regulations) to deal with problems concerning the discretion of the various subjects involved in proceedings[5]. Discretion does not belong only to the court, although we usually speak mainly of the court's discretion. The parties use discretion, when they decide about procedural moves at the several steps or phases of the proceeding, and their lawyers also use discretion when they make decisions concerning tactics and strategies, and procedural devices and machineries. In a sense, in fact, a procedure may be interpreted and analyzed as a sequence of choices made by various subjects at the several steps of the development of proceedings. In such a perspective, a procedural mechanism cannot be considered as a complete and close automaton: it is a set of rules that are aimed at organizing the order and the range of the choices that may be – and actually are – made by the protagonists of the procedure. In any proceeding, in fact, even when he faithfully and correctly applies the rules, every subject involved has to make choices: the law determines when a choice has to be made, and usually it defines also the alternatives among which such a choice should be made (alternatives may be more or less numerous from case to case). However, the real choice is left to the subjects who are entitled to decide how to proceed at the several steps of the proceeding. To speak of choices means to speak of (stricter or broader) discretion, and discretion means that procedural conducts are not strictly and completely determined by rules. It also means that under a rule, precise as it may be, different practices may take place. Therefore, the space is open for a more complex and multifaceted or multi-layered assessment of procedural moves: not only "legal/illegal", but also "fair/unfair", "good faith/bad faith", "harmful/harmless", "correct/incorrect", "useful/useless", "fraudulent/honest", and so on. Probably the historical evolution that is emphasized by some reporters (see e.g.Taelman) from a lack of sensitivity to an accurate attention for the problem of APR is linked to the shift of general perspectives in the consideration of the nature and

[5] The term "discretion" is used here in a very broad sense, including any situation in which a subject is in a position to make a choice concerning an act or conduct, within a more or less broad range of alternatives. Then it includes *administrative discretion*, but also the discretion of courts in managing judicial proceedings and the discretion of parties and lawyers in the prosecution of their case.

structure of procedural regulations and in the perception of how rules affect the actual behavior of the persons involved in a procedure. So to say, a rule is now perceived more as a guideline for concrete and more or less discretionary choices, than as an authoritative statement that is able to "determine" in a strict sense its own application. On the other hand, a rule can be abused not only when it is formally violated, but also when it is used for improper purposes (see e.g. Taelman).

In such a modern approach to the nature of procedural regulation it is rather easy to understand that a procedural act or conduct may be well considered both from the standpoint of the legally "right/wrong" application of a rule, and from the different standpoint of the fairness or correctness of the choice underlying it. "Fairness", "correctness", "good faith", and so on, do not coincide with "lawfulness" or "legality", and "abuse" does not squarely coincide with "unlawfulness". Nonetheless, or just because they are not equivalent to "formal legality", ideas of fairness, correctness, good faith and due process are meaningful standards for the evaluation of procedural behaviors.

Therefore it may be concluded that, notwithstanding Goldschmidt's authority, in procedural law there is a wide room for the consideration of abuse and – unfortunately – for frequent abusive conducts.

E.

There is also a further problem concerning the possibility of conceiving APR. It raises when we pay attention to the fact that we are speaking of procedural rights, and not only of "neutral" and "technical" moves that some people make inside the machinery of a proceeding. Moreover, in many cases rights are strictly connected with the enforcement of constitutional or fundamental guarantees, such as access to court, right of action, due process of law, right of defense, and so forth. Therefore one may wonder whether it is possible to figure out any instances of abuse in the context of the application of fundamental guarantees (see e.g. Hess; Hazard). For instance, if I am vested with the right to file a complaint in order to enforce a substantive right, and my access to justice is protected by a constitutional principle, how can I commit an abuse just by exercising my right of action? Moreover: since the due process clause (or the right of defence, as sometimes it is called in civil law) includes the right to offer evidence in order to support a claim or in order to contrast an adverse claim (the so-called "right of proof" and "of contrary proof"), how can an abuse of such a right be conceived?

One may say that when the matter is of implementing a fundamental guarantee, there is no room left for APR. Since the modern developments of constitutional guarantees are in the sense of broadening their meaning and reinforcing their impact upon a growing number of procedural aspects, the consequence should be of excluding the possibility of APR in many areas of civil procedure. It might even be said, taking this argument in a somehow extreme form, that the idea of "abuse of procedural rights" is self-contradictory, just because if we speak of procedural rights in the strong sense of guaranteed procedural rights, then we should not speak of abuse. In an even different perspective, Geoffrey Hazard says that guarantees are "mirror images" of APR, stressing that guarantees are just aimed at avoiding or preventing abuses.

Moreover, there is also a widespread concern about the possibility of conflicts between the implementation of procedural rights and the problem of APR. This concern derives from the fact that in many systems the realization of constitutional guarantees is still "in progress", and in some cases there are doubts and uncertainties about their real meaning and scope. One may be afraid that the concept of APR is used as a means to limit or to prevent the full development of such guarantees. So to say, attention must be paid not to hamper the development of procedural guarantees by emphasizing excessively the possibility of their being abused.

Such concerns are relevant and deserve attention. However, it does not seem that they may prevent from taking into serious account the problems of APR, just because the abuse may be committed under the label of a "fundamental procedural right" and the enforcement of such rights should not be unduly limited.

One the one hand, it may be said that there is no necessary contradiction in speaking of the abuse of rights. A right may be exercised in many different ways, and with different purposes. Therefore there is also the possibility of distinguishing "fair" and "correct" procedural conducts from "unfair" and "abusive" ones. For instance, that I am vested with the fundamental right of access to justice does not mean that I am entitled to file any claim without any legal interest (i.e.: to pursue frivolous contentions: see Hazard), just with the aim of harassing another person. In such a case, it may probably be said that I abuse my right of access to justice. Similarly: I am vested with the right of defence in all its features, but if I file dozens of frivolous and unfounded motions just in order to provoke delays and costs, or to prevent the court from taking the case into consideration, it may be said that I am abusing my right of defence (see e.g. the case of repetitive *habeas corpus* motions quoted by Hazard).

These arguments lead to the conclusion that there is no inherent contradiction between procedural guarantees and APR. Guaranteed rights may be used in incorrect ways and with improper purposes, and therefore they may be abused (see e.g. Oteiza). On the other hand, procedural guarantees do not cover and do not legitimate abusive practices. They are aimed at protecting rights, not at legitimizing unfair and harmful conducts. In a sense, then, the discourse concerning the interpretation and application of constitutional guarantees and the discourse about APR belong to different contexts and – at least theoretically – should neither overlap nor conflict each other. So to say, a guarantee ends when the abuse begins (and *vice versa*). It is clear, however, that the relationship between APR and fundamental guarantees is multi-faceted. Guarantees should prevent procedural abuses, but they can be abused by themselves: asserting a guarantee is not enough, unfortunately, to prevent abuses. On the other hand, abuses should be prevented just in order to make the guarantees effective, since proceedings in which abuses occur do not correspond with the standards of fairness and due process. Therefore: guarantees and APR do not exclude each other. The matter is much more complex and deals with the degree of realization of guarantees and the degree of prevention of abuses in the various legal systems.

A different problem concerns the possibility that the risk of abuses is used as an argument against the full development of constitutional guarantees. In some cases this may be a real danger, but this is a problem of policy (if not of politics). This problems arises when someone is trying to block or to limit the realization of constitutional guarantees and she is in search of arguments to support such a policy. But if the danger of APR is used "against" the full implementation of the guarantees, this is a wrong and a bad argument: using it may be defined as an "abuse of argument". A careful analysis of guarantees and APR should help avoiding the incorrect use of the danger of APR as an obstacle to the enforcement of procedural guarantees.

F.

Although it may be assumed that some general ideas concerning APR are present in every procedural system, a major difficulty is to define the concept of "abuse" in clear and uniform terms. Definitions of APR are usually very vague: they speak of "gross procedural unfairness", of "breach of loyalty", of "bad faith", of "fraudulent conduct" , of "dila-

tory tactics", of "improper purposes" and so forth, or – on the opposite – of the violation of general principles or standards of due process, fair trial, good faith, etc., as said above. On the other hand, as we also have already emphasized, in several systems there are no general definitions of APR. Instead, there are specific rules sanctioning some acts that may be considered as abusive (see mainly the case of Germany and Austria), or judgments in which courts say that various types of procedural conducts are abusive (as for instance in UK).

Moreover, the connections between APR and other principles and values may also be difficult to determine. There is, in fact, a widespread tendency to exclude any direct relationship between APR and general values of morality or ethics. Taniguchi's report is the only one referring an example of a procedural behavior that was considered abusive on the basis of standards of general morality under "a strong Confucian influence". Several reports (see mainly Hazard and the reports concerning UK) simply deny the existence of any relevant connection between APR and general ethical concerns. The impression is that APR is conceived as something existing only "within the boundaries" of the procedural context, without any relationship with ethical general standards. Correspondingly, APR tends to be defined only in terms of "internal" rules of fairness and correctness that are typical of the legal and judicial context. Ideas as "due process" and "procedural fairness", in fact, belong to the context of the administration of justice rather to the more general and vague context of morality. Correspondingly, APR includes just the conducts that are in contrast with the guarantee of due process.

On the other hand, APR is frequently connected with dilatory practices (see e.g. the French rules quoted above, although they speak separately of abuse and delay). It probably means that, more or less clearly, APR is to some extent conceived as a class of acts and conducts conflicting with the efficiency of the administration of justice. Dilatory practices may be considered from the point of view of the disadvantage imposed to the other party, but they may also be negatively considered by themselves, that is: as "objective" obstacles to the efficient functioning of judicial proceedings. In several cases, therefore, APR is not (only) defined in terms of the procedural relationship between the parties (the "adversarial abuse", according with Fentiman's definition), but also in terms of their contrast with the general interest to a fair and expeditious resolution of judicial disputes. From this point of view, the prevention and sanction of APR may be interpreted as a policy serving general values such as avoiding delays and waste of money and having a fair and efficient administration of justice (see mainly Oteiza, with reference to a special sensitivity towards procedural efficiency now existing in Latin American systems, and to the corresponding efforts made in order to prevent APR). A consequence of assuming this standpoint may be that APR should not be defined necessarily in terms of a harm or an inconvenience provoked to a party, but also (and sometimes perhaps only) in terms of impediment to an efficient and speedy administration of justice (see Taelman for the interesting remark that the growing sensitivity to APR in Belgium is due to the "phenomenal backlog" in the judicial disposition of cases).

II. Types of APR

A distinction may be drawn within the whole area af APR between the abuse of litigation as such and the abuse of specific procedural devices. Moreover, a further specific field of abuse is that of international litigation.

A.

The abuse of litigation as such deals globally with the abuse of the right to obtain legal protection from a court. It may be committed by plaintiffs ("abuse of the right of action") and by defendants as well ("abuse of defence"). This kind of abuse is present in every procedural system and, although its general definitions may be different to some extent, they have a common core that may be easily identified.

In general terms, the abuse of the right of action occurs when a plaintiff files a complaint without any legitimate interest to do it (Taelman speaks of pre-procedural carelessness referring to the inadequate preparation of the case). It happens in several cases in which the action is taken without any legal or factual ground (see e.g. Andrews, Taelman, Taniguchi), or by asserting a frivolous contention of violation (Hazard), or with the purpose of obtaining a mere legal advice from the court or with any other improper or illegitimate purpose (see Mancini, Hess and Andrews), or in order to harass or intimidate the other party (Taelman). This sub-class probably includes also the case of fictitious disputes that is present in several systems but that has been specifically pointed out in the experience of the European Court of Justice (see Mancini). Other cases concern attempts to violate the *res judicata* principles by relitigating issues that were already decided (see e.g. Beaumont, Taniguchi and Mancini), or the attempt to litigate

a claim beyond the deadlines provided by the statute of limitation. These kinds of abuse of the right of action are present, roughly speaking, in all the countries considered. Sometimes, as for instance in France and UK, the courts give more specific definitions of such cases, while in other countries the courts and the legal literature refer to more general standards. At any rate, these definitions give a rather clear general idea of APR referred to the right of action. Some reporters emphasize more specific and interesting cases of this type of abuse: for instance, Hess speaks of the "predatory" stockholders' actions and of injunctions asked by associations as possible specific types of abuse of the right of action.

In a sense, since the right of defence may be considered as the symmetric counterpart of the right of action, more or less the same concepts may be applied *mutatis mutandis* to abuses committed by defendants. Therefore, the unjustified or clearly unfounded resistance against well grounded claims may be considered as abusive (according to the orientation of French courts), as well as any defence lacking the factual and legal conditions specifically required by the law (see e.g. Andrews, Oteiza).

It is worth stressing here that international litigation is pointed out by some reporters (see mainly Hess and Fentiman) as the domain in which abuses of procedural rights may be specially relevant. The areas that seem to be more fertile from this point of view are the issues of jurisdiction with the possibilities of forum shopping, and the connected problem of the admissibility of anti-suit injunctions (as it is mainly the case in UK and Germany).

B.

The identification of the abuses of single procedural devices may be much more complicated because they deal with particular procedural rules and specific instances of violation. This explains the fact that all the reports give only more or less numerous examples of this kind of abuses and do not attempt to build up a complete and analytical typology. *A fortiori* such a typology cannot be developed here. However, some major and more frequent examples can be taken into consideration with reference to the main phases of a civil proceeding. In some cases, however, procedural codes are rather analytical in regulating specific instances of abusive conducts (see e.g. the Brazilian 1973 code of civil procedure quoted by Oteiza).

The challenge of a judge may be abusive if it is made just in order to delay the proceedings (see e.g. Hess, Taniguchi).

The contradictory behavior of a party may be considered as abusive, when a party in a proceeding contradicts her own extra-judicial behavior or an extra-judicial act, as for instance a settlement (see e.g. Hess; similar abuses are sanctioned by French courts and in Japan). However, an abusive contradictory behavior may take place even inside the same proceeding (see e.g. Taniguchi).

The improper creation of a favourable procedural context by means of manoeuvres carried on before or inside the proceedings is sometimes pointed out as abusive (Taniguchi).

Injunctive remedies are a domain in which abuses may be specially frequent, both because of the summary nature of the proceedings and the easiness with which motions for preliminary injunctions may be filed many times within the same proceeding. Therefore an injunctive relief may be denied as abusive when there is no "serious issue to be tried" or there is no full disclosure of all the information needed (see Fentiman, with reference to UK) or it is merely vexatious.

Something similar may be said about the summary judgment procedures that are widely used in some countries (as for instance Italy and Germany) for the quick collection of debts. In these cases a judgment can be delivered *inaudita altera parte*, and the debtor may be taken by surprise and deprived of her right to oppose the judgment (see e.g. Hess), if the creditor acts unfairly.

Filing repetitive motions to postpone or to reschedule the trial may be abusive (Taniguchi), as it is generally the practice of filing dilatory motions (Taelman). A well-known case in Italy concerned, some years ago, a lawyer who repetitively filed motions raising issues of jurisdiction, that the Supreme Court was automatically obliged to decide, with the aim of exploiting the dilatory effect of this mechanism (which was then abolished by a 1990 statute).

Another extremely fertile domain for abuses is the offer and taking of evidence. Several sub-types of abuse can be identified in this domain. First of all, the practice of making excessive requests of discovery is one of the most important and frequent abuses occurring in common law systems (see specially Hazard, emphasizing abuses of discovery demands concerning personal life. See also Andrews; Fentiman; Beaumont). Similar abuses are identified also by French courts, mainly with reference to expert evidence, and are rather frequent in other civil law systems as well (Hess, Taelman). On the other hand, several abuses may occur when a party attempts to prevent the other party from obtaining or using relevant evidence, as for instance when a party destroys or conceals an item of evidence, or in any other way she