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The “Short Blanket” Of Civil Justice: A Comparative Analysis of Summary Judgments

Giuseppe Lisella

Abstract

In Civil Procedure, the principle of “fair trial” is linked to the right of the parties of a process to have a fair decision on their case. However, given the limited human and economic resources at disposal, a system which offers the same accurate justice in each case shall be deemed to be unsustainable, because it restricts access to justice due to a gradual rising of costs and timings. For this reason, the English Civil Procedural system has experienced, in the late 1990s, a structural change through the so-called Woolf Reforms, which has modified its objectives and the legal theory behind it. The Italian one, indeed, is dealing with problems that afflicted the United Kingdom before the reform, and is doing it by adopting similar solutions, not without difficulties, linked, in particular, with the restrictive interpretation of the concept of “fair trial”, that is supported by the majority of the Italian scholarship.

The paper analyses comparatively the summary judgments inside both systems, in the light of the different interpretations of the concept of “fair trial”. It focuses on the changed idea of justice behind the process, that is no longer aimed at achieving the correct application of true facts to right law in all the cases (substantive justice), but at allocating the limited resources of justice fairly (proportionate justice).

1. Introduction

In recent years, the Italian Civil Justice system is experiencing a time of deep crisis. Due to the high number of processes and the complex and cumbersome nature of the legal framework, indeed, the length of Italian Civil proceedings has reached a worrying level.¹ Similar problems afflicted the English system before the so-called Woolf Reforms, too. Through them, the English legislator has experienced, in the late 1990’s, a structural change, that has significantly modified the objectives of Civil justice and the legal theory behind it, coordinating the need of a decision on the merits with reasonable use of resources and time. This is called “proportionate justice”.²

¹ R. Caponi, ‘The performance of the Italian Civil Justice System: an empirical assessment’ 1 ItLJ 2 (2016),15.

² J. Sorabji, *English Civil Justice After the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge: CUP 2014), 101.

The Italian legislator, in order to deal with the crisis by reforming the Civil Procedural System, seems to be adopting a similar perspective, even though without a systematic draft. However, the idea of “proportionate justice” collides with the restrictive interpretation of the concept of “fair trial”, that is supported by the majority of the Italian scholars. This conflict is particularly evident regarding the Italian version of summary judgment, introduced in 2009, in which part of the procedural steps are decided by the court (rather than by the law) and it is influencing the debate about the function of the appeal against summary judgment.

This essay starts from the different identifications of the concept of “fair trial” and analyses comparatively, in the light of this aspect, the summary judgments inside both the Italian and English systems, focusing on the changed idea of justice behind the process. It is proposed to point out the need of a changing perspective inside the Italian interpretation of “fair trial”, in order to a better functioning of the summary judgment, as well. The correct understanding of the legal theory behind the reforms and the evolution of civil justice seems to be, indeed, the only way to allow their correct functioning.

2. “Fair Trial” and Protection of Rights

In Civil Justice, the principle of “fair trial” is linked to the right of the parties to have a fair decision on their case, and it comprises two kinds of protections:³ the right to have a process (access to justice), and the rights inside the process. They are the essential prerequisite in order to have a decision justly delivered.⁴ Its most important international protection comes from Article 6(1) of the European Convention on Human Rights (ECHR), that protects civil procedural justice, while other provisions specifically concern criminal process. It establishes:

... in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

According to the jurisprudence of European Court of Human Rights⁵ (ECtHR), the right to a “fair trial” is specified in several rights, which may be divided in two bundles: those expressly mentioned and those which are implicit.⁶ The former are: the right to have a judge who is impartial and independent; the right to a public and fair hearing in a reasonable time; the right to the public pronouncement of the decision. The latter consist of the abovementioned right to access to justice, to an adversarial process, to the so-called equality of arms (comprising fair presentation and cross-examination of evidence) and to a reasoned decision.⁷

³ G. Verde, *Diritto processuale civile* (Bologna: Zanichelli, Bologna 2012), 4.

⁴ A. Zuckerman, *On Civil Procedure* (3rd ed Sweet&Maxwell, London 2013), 50.

⁵ Guide on Article 6 of the European Convention on Human Rights–Right to a fair trial (civil limb) at <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf>, 166.

⁶ A. Zuckerman, 55.

⁷ A. Zuckerman, 72.

In the English system, the notion of “fair trial” is provided for in two ways. The first one is deeply rooted in the common-law tradition.⁸ It originated from the 1215 *Magna Charta* (that, at Cap. 39, guaranteed a ‘lawful judgment of [...] peers’) and had been developed, during the centuries, in the variety of meanings which compose it through the English and the American case law and legislation.⁹ The second one is more recent and derives from the European Convention on Human Rights (ECHR). With the Human Rights Act 1998, the United Kingdom has formally incorporated into the domestic system the rights enshrined in the Convention (Articles 2-12 and Protocols 1 and 6 of the ECHR), which are now a parameter for interpreting domestic primary and secondary legislation.¹⁰

In Italy, the concept has developed in two phases, too. Although not expressly recognised in the original structure of the Italian Constitution, it was hermeneutically derived from a number of articles. These enshrine several principles arising therefrom (e.g.: Article 24 Const., that prescribes the right to legal action and legal defence; Article 25 Const., that recognises the legally-binding principle of natural justice etc.). The idea of “fair trial” has been included in the Constitution by the Constitutional Law 23rd November 1999, no. 2, which modified Article 111 Const. In particular, its first paragraph calls for a “fair trial ruled by the law”; the following provisions specify its content. With regard to civil procedure, the article establishes the rights to an adversarial hearing in front of an impartial and independent judge and to the law-ensured reasonable duration of the process.¹¹ Alongside the evolution of constitutional interpretation, the Italian system has been influenced by the ECHR, as well. In this respect, in the view of the Italian Constitutional Court,¹² pursuant to Article 117(1) Const., “fair trial” is, on the one hand, an interpretative criterion for the existing norms, and, on the other hand, a parameter for the constitutional judgment on laws.

Despite the historical origin and the international background of the concept (both for the Italian system and for the English one) are communal, in Italy its development has been characterised by a strict interpretation, that is expressed, inside the Constitution, by the phrase “ruled by law” (*regolato dalla legge*–111(1) Const.). Therefore, inside the Italian perspective, the “trial” to be “fair” must be rigorously governed by the primary law in detail (so-called, *riserva di legge*). This feature is prompted, historically, by the need to limit the arbitrariness of the judiciary, that characterised the Italian justice system during the Fascist period, and it is derived from the needs to identify precisely parties’ processual rights and to control the behaviour of the judge. Thus, according to this over-rigorous and over-formal approach, the “fair trial” requires ensuring that parties have a so-called full cognition in a trial stage at least. This type of judicial knowledge is the one that derives from a full-ruled process without limitation of evidence and with a high-level of judicial accuracy. On the contrary, the summary proceedings (where part of procedural rules comes from the court and where the accuracy is limited) are unsuitable to ensure the fair trial, unless a full cognition is not restored through a procedural stage with formal procedures.

⁸ A. Zuckerman, 50.

⁹ See V. Vigoriti, ‘Due process of law’, in S. Rodolfo, *Digesto delle Discipline Privatistiche–Sezione Civile* (Turin: UTET 1991), 228.

¹⁰ A. Zuckerman, 50.

¹¹ L. Comoglio, *Etica e tecnica del giusto processo* (Turin: Giappichelli 2005), 29.

¹² Cort. Cost. 22nd October 2007, No. 348-349, (2007) Gazz. Uff. 42

This peculiar idea of “fair trial” and the need of a legislative regulation have originated three different interpretative points of view. The majority of the doctrine adopts a restrictive perspective.¹³ In this respect, Article 111(1) Const. forms an “absolute” *riserva di legge*: the process must be ruled in every single aspect by the ordinary law. According to this viewpoint, the “fair trial” can be guaranteed only through the so-called “ordinary process”, governed by Articles 163 ff. Code of Civil Procedure (*codice di procedura civile*, c.p.c.), and, for cases about employment contracts, through the labour process, governed by Articles 409 ff. c.p.c. Both of them are indeed ruled in every single aspect of the procedure by law. Other authors¹⁴ believe, by contrast, that the constitutional norm would be an external barrier, only extrinsic and superficial. It means that the process is “fair” as long as it derives from the law, that can leave, without limits, parts of regulation to judge’s discretion. The third interpretative stance¹⁵ considers the assumption as a “relative” *riserva di legge*. This implies that the law shall rule only on essential elements of procedure, which are linked to the corollaries of fair trial. Thus, a process is “fair” as long as the law regulates aspects related to the corollaries of the “fair trial” (e.g. the fair hearing, the equality of arms). This short comparison already shows how the idea of “fair trial” differs in the two systems and why the Italian doctrine expresses reservations about the compatibility between this principle and the summary judgments, from both a comparative and an inner perspective.

3. Neutrality of The Concept of Justice and Changes in the English Civil Procedure: Summary Judgment

Processual models aim at ensuring the application of substantive rights: in accordance with the idea of “justice” permeating procedural legislation, their protection gets stronger or weaker. Thus, to be properly defined, the principle of “fair trial” should be read in the light of the meaning of “justice” and of its function. The concept of “justice” is a neutral one: it can take different meanings depending on the legal system in which it evolves. Therefore, “divine justice” and “private justice”, for example, are different faces of the same concept, but their pursuit yields different results.¹⁶ For this reason, the proper identification of this concept is a necessary precondition for understanding the function of justice and its issues, as well as for arranging successful reforms of the processual system.

In this respect, the English Civil Procedural system experienced a structural change through the Woolf Reforms, which modified its objectives and the legal theory behind it. Through this amendment, the United Kingdom has attempted to resolve (in England and Wales) significant issues of cost and delay which adversely affected the civil procedural system’s ability to secure effective access to timely and cost-effective justice. In particular, as a part of the scholars highlights,¹⁷ the Woolf Reforms have changed the idea of justice behind the process, so that the

¹³ See A. Carratta ‘Struttura e funzione dei procedimenti sommari’ in A. Carratta, *La tutela sommaria in Europa* (Naples: Jovene 2012), 2; L. Lanfranchi, ‘Giusto processo’, *Enciclopedia giuridica Treccani* (2001), 1.

¹⁴ S. Chiarloni ‘Giusto processo’, *Enciclopedia del diritto-Annali II* (2008) 403.

¹⁵ L. Comoglio, 255.

¹⁶ The notion of doing justice is capable of variety of interpretation. See A. Zuckerman, ‘A Colossal Wreck—the BCCI-Three Rivers Litigation’, *CJQ* (2006), 307.

¹⁷ J. Sorabji, 12.

civil procedural system is no longer aiming at achieving the correct application of true facts to right law in all the cases (i.e. substantive justice), but at allocating the limited resources of justice fairly (i.e. proportionate justice). Consequently, much greater emphasis is now placed on securing distributive justice via securing equitable access to the justice system for all potential litigants than was previously the case.

Undoubtedly, given the limited human and economic resources available, a system which offers the same accurate justice in each case shall be deemed to be unsustainable, because it restricts access to justice due to a gradual rising of costs and delays. Consequently, a compromise between accuracy and costs and a balance between speed and certainty are needed, in order to offer affordable and effective justice to the majority of court users, albeit at a lower level of accuracy.¹⁸ This approach has inspired the revolution that the English system has experienced in the late 1990s, which has been mainly aimed at strengthening the role of judges in case management, at facilitating a more economical administration of civil justice and at reducing the number of cases. The latter objective has been achieved¹⁹ by providing several alternatives to trial, which save time and resources. They can be generally divided in two categories: consensual settlements (e.g. Alternative Dispute Resolution – ADR) and pre-trial terminations without settlements. Among the latter, the summary judgment is particularly important for a comparative analysis with the Italian civil procedure.

The summary judgment (CPR Part 24)²⁰ is a simplified and fast procedure through which the whole cause or some issues can be decided before trial, on the basis of written evidence. A prerequisite for its application is the absence of real prospects for the party to succeed at any trial and of other compelling reasons for holding a trial (CPR Rule 24.2). Its compatibility with “fair trial” derives from its structure, because summary judgment guarantees equality of arms and it involves a determination on the merits by a court having jurisdiction after a hearing, in which all parties can present their case, provided that it does not become a mini-trial.²¹ Moreover, any procedural limitation applies to both parties. Article 6 ECHR does not call, indeed, for an absolute right to trial, but the latter must be balanced with others processual needs,²² e.g. the correct allocation of resources and the decrease of costs and delays. In this perspective, summary judgment is appropriate to guarantee the fair trial *per se*.

¹⁸ A. Zuckerman, ‘A Reform of Civil Procedure, Rationing Procedure Rather than Access to Justice’, 75 *J. Law & Soc.* (1995), 155.

¹⁹ A. Zuckerman ‘Civil Litigation: a Public Service for Enforcement of Civil Rights’, *CJQ* (2007) 1.

²⁰ Generally, on summary judgments, see N. Andrews, *On Civil Processes* (Cambridge: Intersentia 2013), 243; S. Sime, *A practical approach to Civil Procedure* (Oxford: OUP 2013), 271; Zuckerman (n 4), 378.

²¹ Zuckerman (n 4), 384. About the compatibility between Article 6 ECHR and summary judgment and strike out, see *DS & Anor v Gloucestershire CC & Ors* [2000] EWCA Civ 72: ‘For a summary judgment application to succeed in a case such as these where a strike out application would not succeed, the court will first need to be satisfied that all substantial facts relevant to the allegations [...]. Secondly, the court will need to be satisfied that, upon these facts, there is no real prospect of the claim [...] succeeding and that there is no other reason why the case should be disposed of at a trial. If by this process the court does so conclude and gives summary judgment, there will, in my view, have been proper judicial scrutiny of the detailed facts of the particular case such as to constitute a fair hearing in accordance with Article 6 of the Convention.’

²² I. Goldrein, *Commercial Litigation: Pre-Emptive Remedies* (London: Sweet & Maxwell 2011), 594; A. Zuckerman (n 16), 307.

Nevertheless, the institution has been subject to criticism, particularly due to this very vagueness.²³ Especially the Italian comparative doctrine criticises it, on the basis that the access to accurate justice depends on a summary judicial evaluation founded on general concepts. Specifically, it underlines that the lower quality of judicial accuracy, reducing it to the level of *fumus boni juris*,²⁴ without a so-called stage of full cognition, could not guarantee the fair trial.²⁵ In other words, to allow access to complete justice, the English system would confide too much in the ‘omniscience of courts’²⁶ (based on the appraisal of the facts), pretending that the quality of the court’s cognition would be equally good both in an alternative process without trial and in the ordinary process.²⁷

For these reasons, part of the Italian comparative doctrine believes that the compatibility of summary judgment with the right to a fair trial could not be released from the existence of a stage of full cognition, that would balance the accuracy limitation. This stage should be the appeal, that would function as a *novum iudicium* on the facts.²⁸ In fact, in case of unfair use of summary judgment by the judge of first instance,²⁹ the appeal would be the first stage of full cognition.³⁰ That is why its function in such a procedure could be evaluated differently than in ordinary processes. In this regard, the most relevant issues would be linked with rights of appeal and with its function, in particular, with the permission to appeal (CPR Rule 52.3 ff.) and with a possible re-hearing characterised by fresh evidence (CPR Rule 52.21).³¹ According to this interpretation, the appeal should be an “open appeal”, characterised by a wider access and by a rehearing; otherwise, there could be a breach of the principle of “fair trial”, because a limitation of procedural powers in the first instance would not be compensated by a certain right to a re-hearing in the appeal. Nevertheless, the analysis of the rules doesn’t show elements to justify this interpretation.

Pursuant to Rule 52.6 CPR, permission to appeal may be given when the appeal would have a ‘real prospect of success’ or if there is a compelling reason for the appeal court to hear it. In the cases covered by Rule 52.7 CPR, the appeal should be permitted in case it ‘raise[s] an important point of principle or practice’, too. The judgment about it is based on documents filed by the appellant and the respondent. In the Italian perspective, if the permission was refused, on the same legal issue there would be only summary assessments, the first on the

²³ See D. O’Brien, ‘The New Summary Judgment: Raising the Threshold of Admission’, *CJQ* (1999), 132; S. Issacharoff, ‘Too Much Lawyering, Too Little Law’ in A. Zuckerman, R. Cranston, *Reform of Civil Procedure, Essay on ‘Access to justice’* (Oxford: Clarendon Press 1995), 245; L. Mulcahy, *Human Rights and Civil Practice* (London: Sweet & Maxwell 2001), 351; J. Jacob, *Civil justice in the Age of Human Rights* (Ashgate, Routledge 2007), 115.

²⁴ C. Crifò, ‘La riforma del processo civile in Inghilterra’, *Riv. trim. dir. proc. civ.* (2000), 511-526.

²⁵ S. Turatto, ‘Summary Judgment e Nozione di Decisione Riconoscibile nella Prospettiva del Fair Trial’, *Int’l Lis* (2009), 84.

²⁶ S. Issacharoff, 255.

²⁷ *ibidem*, 251; 256.

²⁸ F. Fradeani ‘Appunti sulla Tutela Decisoria Sommaria in Inghilterra ed in Francia: Summary Judgment ed Injonction de Payer’ in A. Carratta, 132.

²⁹ *Sinclair v Chief Constable of West Yorkshire* (2000) LTL 12/12/00. See also S. Sime (n. 20), 276.

³⁰ F. Fradeani (n. 28), 132. He refers, in particular, to *E I Du Pont De Nemours & Co. v St. Dupont* [2003] EWCA Civ. 1368, that doesn’t deal with summary judgment, but with the appeal for “rehearing” inside the statutory appeal

³¹*id.*

claim or defence (on which the summary judgment was given), the second on the appeal. In such case, the necessary recovery of a full cognition inside a formal process would be lacking and the proceeding could clash with the principle of fair trial.

Moreover, from the Italian interpretative point of view it is questionable if, when permission to appeal is given, the process on appeal would be a rehearing (potentially with fresh evidence) instead of a review (as contrarily usually happens), even though in cases where the wrongness of decision derives from an incorrect use of summary assessment.³² Preliminarily, it is appropriate to draw a distinction, even though synthetically. Pursuant to Rule 52.21 CPR, an appeal is allowed if the impugned decision is either ‘wrong’ or ‘unjust because of a serious procedural or other irregularity in the proceedings’. Regarding summary judgment, the first case occurs when the lower court should not have accorded the use of such a procedure, the second one when the first judge correctly used his power to concede summary judgment, but he made mistakes in the procedure adopted dealing with the application. Each of the two cases leads to different effects. Usually, the Court of Appeal will, in the first case, send the matter back to the judge at first instance.³³ In the second case, it will determine the summary judgment application itself.³⁴ In the first case, the appeal can be a simple review; in the second one, it would be a rehearing. Rule 52.21 CPR states that the latter is possible only when a practice direction (PD) allows it or when the court considers the rehearing in the interests of justice. In this respect, the Italian scholarship seems to refer to the PD 52§9.1,³⁵ that (before being modified in 2016) allowed an automatic re-hearing when the decision is taken without holding a hearing or the procedure did not provide for the consideration of evidence. In accordance with this rule, the appeal against summary judgment would be, automatically, a re-hearing, and it would allow a restoring of formal procedures.

However, the reference to PD52§9.1 seems to be improper: first of all, this Practice Direction refers to Statutory Appeals and not to Summary Judgment; moreover, the summary judgment ensures a hearing in which both sides can present their case. Therefore, the access to a re-hearing is appraised only through the interest of justice, since there are no explicit references to Summary Judgment inside the practice directions. The admission of fresh evidence is discretionary, as well: CPR Rule 52.21(2) disallow it if the Court of Appeal does not order otherwise.³⁶

The rules, identified by the Italian commentators as the problematic ones, seem to leave no room for an interpretation corroborating an over-formal approach to fair trial in case of summary judgment. In other words, there are no legislative elements to justify the idea of an “open appeal”. Therefore, the abovementioned comparative interpretation does not appear

³² About the difference between review and rehearing, see A. Zuckerman (n 4), at 1177.

³³ *Orford v Rasmi Electronics & Anor* [2002] EWCA Civ. 1627

³⁴ A. Zuckerman (n 4) 1189, 1191.

³⁵ F. Fradeani (n 28), 133. He refers to *E I Du Pont De Nemours & Co. v St. Dupont*, that references to PD52§9.1 for allowing a re-hearing.

³⁶ In this respect, see the test for allowing new evidence in *Ladd v Marshall* [1954] 3 All ER 745 at 758. According to it, the fresh evidence:

1. could not have been obtained with reasonable diligence at trial
2. would have, if given, an important influence on the result of the case
3. is apparently credible

convincing. It seems to be, instead, based on incompatible premises. The idea of the essential correspondence between the full cognition (deriving only from a formal full-ruled process) and the fair trial, indeed, is not reflected either in the English processual system or in the ECHR one. As long as the summary procedure is compatible with the elements of fair trial as identified by the ECtHR, it cannot be criticised as a denial of access to justice³⁷ and there is no need to recover a full formal procedure. This latter element is confirmed by the fact that, inside the Civil Procedural Rules, an appeal to summary judgment is ruled identically to the one against decisions taken after a trial.

Moreover, the need to balance the procedural guarantee with the function of justice is part of the right to a fair trial, because it ensures a wider access to justice, lower costs and reasonable times. Specifically, the idea of proportionate justice, aimed at reaching a better allocation of resources to ensure a wider access to justice, would allow a stronger compression of the right to a fair trial, in order to decrease justice's costs and delays.³⁸ Indeed, it can be considered as guaranteed when there is no trial, too, as long as its core (e.g. the right to a public hearing, the right to an adversarial process) was not totally removed. This system, so-called multi-dimensional approach to civil justice,³⁹ coordinates the need of a justice on the merits with reasonable use of resources and time.

Furthermore, it can be observed that the reasonable time of a process is part of the right to a "fair trial". It would be unfair, indeed, to allow a party with a hopeless case to compel the others to go to trial.⁴⁰ Thus, it is necessary to regret the idea that a party should not be deprived, in any case, of an opportunity to litigate with full procedural powers. If therefrom derives – unjustifiably and unfairly – the violation of other party's right to adjudication in a reasonable time, the use of summary procedures is justified.⁴¹ This applies particularly in case one of the parties abuses the process, for example, through a malicious litigation, for the sole purpose of driving costs up to the detriment of a less wealthy party. Both these systematic needs would be undermined, if the law allowed an "open appeal".

4. Italian Mixed System of Civil Justice

Such an analysis of the Italian perspective about the English summary judgment is useful to understand the changes that the Italian civil procedural system is experiencing.⁴² The recent reforms of the Code of Civil Procedure have become necessary due to the state of crisis that the

³⁷ A. Zuckerman (n 4), 384.

³⁸ A. Zuckerman (n 4), 361; 378.

³⁹ A. Zuckerman (n 18), 148; A. Zuckerman (n 4), 309.

⁴⁰ A. Zuckerman (n 4), 378.

⁴¹ A. Zuckerman, 'Court control and party compliance- the quest for effective litigation management' in N. Trocker, V. Varano, *The Reforms of Civil Procedure in Comparative Perspective* (Turin: Giappichelli 2005), 143; A. Zuckerman (n 4), 303.

⁴² In general, about the relevance of a comparative analysis, see M. Taruffo, 'Il Processo Civile di Civil Law e di Common Law: Aspetti Fondamentali', 5 *Foro It* (2001), 345. About the contamination between civil and common law systems, see E. Imparato, 'Common law v civil law. Tra Formanti, Canoni Ermeneutici e Giurisprudenza Quali Contaminazioni?' 4 *Federalismi* 2 (2016), 31.

Italian civil justice is facing⁴³ and have moved this system from a pure civil law one toward a mixed one.

Three articles of the Code seem to be particularly relevant in this regard. First, Article 348 *bis* c.p.c. (introduced in 2012, so-called “filter in appeal”) rules that an appeal is inadmissible if it ‘does not have a reasonable chance of being granted’. The norm is similar to the English rule on permission of appeal. Secondly, Article 360 *bis* c.p.c. (introduced in 2009) aims at limiting the number of appeals to the *Corte di Cassazione* (the Italian Supreme Court). It states that an appeal is inadmissible if the impugned decision ‘decided issues of right pursuant to the Cassazione’s case law’ and the analysis of the appeal does not reveal ‘reasons either to confirm or to change the case law’. The norm represents, systematically, something of a first in the Italian system, as it introduces in a civil law country indirect effects analogous to the principle of *stare decisis*. In Italy, indeed, the right of a review by the *Corte di Cassazione* is guaranteed by the Constitution (Article 111(7) Const.) on grounds of violation of law; a limitation of access to this kind of review based on case law makes, *de facto*, binding *erga omnes* principles of law pronounced by the Court in earlier cases. Last but not least, the Italian version of summary judgment (called “summary procedure of cognition”), introduced in 2009 through Articles 702 *bis* ff. c.p.c., can be applied in three cases:

- a) when the case must be decided by a single judge (instead of a collegial composed court), the claimant applies for it and the judge considers it suitable for the process;
- b) when the law prescribes it;
- c) when the judge considers the issues being discussed in an ordinary process simple and he decides to switch to a summary judgment.

The summary procedure differs from the ordinary one in some respects, the most important being a less formal process for the gathering of evidence.⁴⁴ In particular, Article 702 *ter*(5) c.p.c. stipulates:

the judge, having heard the parties, omitting every formality unessential for an adversarial process, proceeds, as he deems appropriate, to take evidence that is relevant in relation to the requested decision and provides an order to accept or to dismiss the claim.

The summary judgment is a crucial element in the new Italian procedural system, for two main reasons. First, it introduces the idea of the judge as a case manager. It is, indeed, possible for him to switch the case from the summary procedure to the ordinary one (Article 702 *ter*(3) c.p.c.) and the other way around (Article 183 *bis* c.p.c.).⁴⁵ Such a decision depends on the concrete circumstances of the process: if the issues are simple and do not need a formal gathering of evidence, the faster procedure (the summarised one) should be preferred. Moreover, summary judgment fills with renewed vigour a key problem in the Italian legal

⁴³ R. Caponi (n 1),15.

⁴⁴ In the Italian system, evidences are requested by the parties and took by the judge (*see* Art. 188 c.p.c.); for example, witnesses are interviewed by the judge on the questions requested by the party (Art. 253 c.p.c.).

⁴⁵ *See in particular*, R. Caponi ‘Rigidità e Flessibilità del Processo Civile’, *Riv. dir. proc.* (2016), 1455.

theory on civil justice, whether leaving some part of procedural regulation to the judge's discretion guarantees, anyway, the principle of fair trial.

As explained earlier, in accordance with the Article 111(1) of the Italian Constitution, the process, in order to be fair, must be "ruled by the law". The abovementioned opposing interpretations of the norm may lead to different ideas on the function of the appeal in the Italian summary judgment. The part of the doctrine that adopts a restrictive perspective⁴⁶ considers, indeed, that the summary judgment, to be constitutionally legitimate, should be characterised by an "open" appeal, that would be the first real hearing and should be always a rehearing with fresh evidence. The interpretative stances⁴⁷ that consider the assumption a "relative" *riserva di legge* believe, conversely, that the summary judgment in the Italian system can exist without the need of an "open" appeal, as well as the law regulates any of the aspects linked with fair trial.

5. Function of the Appeal in the Italian Summary Judgment

The interpretation of the constitutional norm is of very practical and real importance: depending on the significance of the *riserva di legge*, the meaning of the regulation of appeal in summary judgment changes. From such a connection derive, nevertheless, several effects on civil justice's legal theory. In this respect, it shall be highlighted that the summary judgment has gained a central position in the Italian civil procedural system. This relevance can be deduced, in particular, from Article 54 of Law 18th June 2009, no. 69, through which the legislator redrafted the civil justice system on the basis of a tripartite scheme with three procedural way to decide the dispute. At the centre of this scheme lies the ordinary procedure (so-called "process of ordinary cognition"—Articles 163 ff. c.p.c), in which every procedural step is ruled rigorously by the Code of Civil Procedure. At the two sides, instead, lie the labour process (which is a simplified and fast procedure introduced in 1973 for process about employment contracts—Articles 409 ff. c.p.c), and the summary judgment. The latter is the only one of the three in which part of the procedural steps is ruled by the court, rather than by a statutory instrument.

The appeal of the summary judgment is ruled by Article 702 *quater* c.p.c, which, rather than being an organic regulation, disciplines only specific elements of the second instance judgment. The rule can be divided into two parts. The first one states that the decision, if not appealed within thirty days from its communication or notification, becomes *res judicata*. The second one concerns evidence: in particular, the possibility of delegating the gathering it to a member of the collegial composed court and the criteria for admitting fresh evidence. The latter changed in 2012. The original requirement of "relevance" of this category has been replaced with the one of "indispensability". Under the present system, new evidence and new documents are admissible on an appeal if the court considers them "indispensable" for the decision or if the

⁴⁶ See A. Carratta (n 13), 6; R. Donzelli, 'Sul "Giusto Processo" Civile "Regolato dalla Legge"', 4-5 *Riv. Dir. Proc.* (2015), 954.

⁴⁷ See R. Caponi, 'Sulla Distinzione tra Cognizione Piena e Cognizione Sommaria nel Processo Civile', *Giur. Cost* (2013), 39.

party proves they were not provided in the first instance for reasons for which he does not have responsibility.

The admission of new evidence is different in the ordinary process, in which (Article 345 c.p.c.) it can be allowed only when the party proves he is not responsible for not having provided it in the first instance. This article has been modified restrictively in 2012: previously, it allowed the admission for indispensability, too. In such a process, the concept of “indispensability” was interpreted, restrictively, as the impossibility to prove something through other means. This interpretation of the concept allows to read it in the light of a relation of *genus-species* with the idea of relevance, that means appropriateness to prove the facts of the process. Another great difference between the two appeals regards the access. Article 348 *bis* c.p.c. cannot be applied in appeals against a decision taken by way of summary judgment.

These two remarks could suggest the inadequacy of summary judgment in guaranteeing the right to a fair trial without an “open” appeal, access to which is wider and in which fresh evidence is more readily allowed.⁴⁸ As already underlined, in a restrictive interpretation, pre-established procedural formality would be a constitutive element of “fair trial” and an informal process would be constitutionally legitimate only if the losing party could comply with formalities in second instance. The key point, in this respect, is that parties would be more safeguarded if the judge was compelled to do something, instead of having the faculty to do something.⁴⁹ On this basis, it would be possible to interpret the criterion of indispensability in a broader meaning compared to how it was in the older wording of Article 345 c.p.c. Part of the doctrine, indeed, harshly criticised the substitution of the criterion of relevance with the indispensability one inside the 702 *quarter* c.p.c. (that would reduce fresh evidence in appeal) and suggests reading it as widely as possible, with a meaning similar to relevance.⁵⁰

Such an idea is unconvincing for various reasons, linked to the systematic endurance of civil process. For the sake of brevity, the following are the most significant. First, the summary judgment seems to be outside the traditional concept of summary jurisdiction;⁵¹ it is a full-cognitive process, not a legal arrangement aimed at the provisional anticipation of rights, as instead is e.g. the injunction process (Articles 633 ff. c.p.c.). The summarisation influences, in fact, only the way through which the judge acquires his knowledge of facts, not affecting the quality both of the knowledge itself and of proofs from which it derives, that is the same of the

⁴⁸ See A. Tedoldi, *Il Nuovo Procedimento Sommario di Cognizione* (Turin: Zanichelli 2013), 535.

⁴⁹ In this respect, the doctrine talks about “safety valves”. See P. Biavati in *Indagine Conoscitiva sullo Schema di Decreto Legislativo Recante Disposizioni Complementari al Codice di Procedura Civile in Materia di Riduzione e Semplificazione dei Procedimenti Civili di Cognizione (Atto n. 376)* at <http://documenti.camera.it/_dati/leg16/lavori/stencomm/02/indag/procedim_enti/2011/0719/INTERO.pdf>. In this respect, see L. Lanfranchi (n 13), 9.

⁵⁰ See in particular C. Consolo ‘Nuovi e Indesiderabili Esercizi Normativi sul Processo Civile: Le Impugnazioni a Rischio di “Svaporamento”’, *Corr. Giur.* (2012), 1134; A. Tedoldi (n 48), 577.

⁵¹ G. Arieta, ‘Il Rito “Semplificato” di Cognizione’ in *Studi in onore di Modestino Acone* (Naples: Jovene 2010), 737; M. Bove, ‘Il Procedimento Sommario di Cognizione di cui gli Art. 702- bis ss. c.p.c.’, at <<http://www.judicium.it/wp-content/uploads/saggi/36/bove%20%20procedimento%20sommario%20cognizione.pdf>>, par. 5; R. Caponi, ‘Sulla Distinzione tra Cognizione Piena e Cognizione Sommaria nel Processo Civile’, *Giur. Cost.* (2013), 239; A. Tedoldi (n 48), 363.

ordinary process.⁵² This appears from the wording of the Article 702 *ter*(5) c.p.c.: it calls for the criterion of “relevance” for the admissibility of evidence in the first instance. It is the same for the ordinary process (Article 183(7) c.p.c.). Hence, the amount of evidence that must be admitted by the judge is the same in both the procedures, because it derives from the same selection parameter. Moreover, the procedure is suitable to terminate the first instance and its decision can become *res judicata*.

So, the need to have an “open” appeal would not be justified, because court’s knowledge of the facts of the case (as well as the amount of evidence) is not limited in the first instance at all. Secondly, an extensive interpretation of the “indispensability” criterion could postpone in appeal issues pertaining to the first instance.⁵³ The summary judgment, indeed, is one of the instruments aimed at reducing costs and delays of Italian processes. Permitting an “open” appeal simply would move them from the lowest courts to the Court of Appeal.⁵⁴

Therefore, the appeal to a summary judgment should be considered, simply, an appeal and not the first trial. Differently from the English summary judgment (in which the number of parties’ evidence is reduced), indeed, the Italian one does not limit the judiciary cognition, but simplifies the gathering of evidence, reducing duration for causes in which there are simple issues at stake. So, the function of the appeal, in the summary process as well as in the ordinary one, is identical. Thus, the different regulation of the appeal against summary judgment seems to be not related to the need to protect the losing party, but to the legislature’s intention to foster the use of the summary judgment, ensuring a wider access to appeal against it (and not, instead, a new process).

Furthermore, it appears coherent with the abovementioned tripartite scheme of civil justice, because it permits to outline the different structure of the appeal in the three full-cognitive rites as a progressive one, whereas the limits to the access and to admission of fresh evidence are inversely proportional to the speed of each one. In other words, inside the Italian system, the structure of the appeal changes, depending by how fast and formalised the process in first instance is, while its function remains the same. The ordinary process (the slowest one, with a formal gathering of evidence) corresponds to an appeal characterized by stringent limits on the admissibility of fresh evidence and submitted to Article 348 *bis* c.p.c.; the appeal to the labour process (the speed of which is based on the principles of orality, immediacy and concentration, but in which every procedural stage is ruled by the law) allows indispensable fresh evidence, which is nonetheless limited by the so-called “filter” (pursuant to Article 436 *bis* c.p.c.); finally, the appeal of the summary process guarantees a wider access (because it is not limited by the “filter”) and allows fresh evidence following two criteria (indispensability of the evidence or

⁵² See Cass., Sez. Un., 10th July 2012, no. 11512 (Foro it. On line) and Cass., Sez. VI, 14th May 2013, no. 11465 (Foro it. On line)

⁵³ P. Biavati, ‘Appunti sul Processo a Cognizione Semplificata’, *Riv. trim. dir. proc. civ.* (2010), 195; L. Dittrich, ‘Il Nuovo Procedimento Sommario di Cognizione’, *Riv. dir. proc.* (2009), 1600; S. Menchini ‘L’ultima “Idea” del Legislatore per Accelerare i Tempi della Tutela Dichiarativa dei Diritti: Il Processo Sommario di Cognizione’, *Corr. Giur.* (2009), 1034.

⁵⁴ The crisis of the Italian civil justice is particularly evident in the appeal. The number of cases in appeal has increased sixfold in the last twenty years (around 120000 new causes per year). See Caponi (n 1) 20 f and Girolamo Monteleone ‘Proposte Concrete per Salvare L’appello Civile’ at <<http://www.judicium.it/wp-content/uploads/saggi/461/Girolamo%20Monteleone.pdf>>.

the proof that it was not provided in the first instance for reasons which the party is not to be held responsible for).

6. Conclusions

Such a comparative (although concise) analysis of the Italian and the English civil procedural systems leads to a number of conclusions regarding the changing of the procedural system. Italy, in fact, is dealing with problems that afflicted the United Kingdom before the Woolf Reforms, and is doing so by adopting similar solutions, not without difficulties, which are often linked to imprecise law-making and to the lack of an organic draft of reform.

An example on the second point is that the Code of Civil Procedure has been the subject of more than twenty legislative actions (some stronger, some weaker) in the last twenty years, which have proved to be ineffective either in resolving civil justice's endemic crisis or in limiting it. Despite these unsystematic reforms, it is possible to identify a general change of the basic legal theory from substantive justice toward the proportionate justice. Therefore, in order to understand the function of legal arrangements directed to reduce delays and costs, one ought to ask which is the aim that justice pursues, or rather which is the aim that it can pursue.

Justice's functioning depends on several interrelated factors and most of them are influenced by economic reasons. Two of them (the duration of processes and parties' costs of procedure) are directly influenced by the accuracy of procedural assessment.⁵⁵ While leaving the State's resources unchanged, inevitably both factors will increase or decrease, depending on the pretended accuracy of processual assessment. If the substantive idea of justice entails the widest possible assessment, the process' duration will increase, as well as the costs for parties, causing the crisis of civil justice and the restriction of the right to access to justice and to a fair trial. Metaphorically, this may be represented as a short blanket, that while covers the neck, exposes the feet and the other way around. The only alternative to guarantee a process with high-level accuracy, within accurate time frames and at low costs, should be to increase the public resources allocated to justice; in other words, to use a larger blanket. This would require more judges and more courts, in order to guarantee the functioning of substantive justice. However, realistically, it should be noted that this is not States' political strategy for justice (and for any public service), with resources being gradually reduced, mainly due to the economic crisis.⁵⁶ To exemplify this trend in Italy, it is useful to mention the Legislative Decree 7th September 2012, no. 155, through which 31 tribunals and 220 court's sub-offices have been closed down, in order to reduce public expenditure.

Thus, the only possible solution to ensure the fair trial in this situation seems to be the rationalisation of the civil justice system, deriving from the idea of proportionate justice. If the same level of accuracy cannot be ensured for each cause, it is necessary – in order to guarantee the reasonable duration of processes and the cost-containment – to reduce it in some cases. This perspective has been fully developed in the English Civil Procedural system through strong

⁵⁵ A. Zuckerman (n 18), 161.

⁵⁶ On the Italian procedural system, see M. Pacilli, *L'abuso dell'appello* (Bologna: BUP 2015), 7.

case management powers granted to the judge, which make it possible to reduce or eliminate assessment of certain issues. In this system, the summary judgment can be conceded where the case has no real prospects of success, permitting a lower assessment just based on documentary evidence.

The proportionate idea of justice, instead, has been differently (and, maybe, tenuously) developed in the Italian system. As explained above, the quality of assessment is the same in every type of cognitive process and the case management powers affect the conducting of the gathering of evidence and its formalisation, which is faster in the summary process for simpler issues. A stronger development, indeed, is hampered by the Italian restrictive doctrine, that prefers an over-rigorous and over-formal approach to the idea of “fair trial”.⁵⁷

Either way, despite differences between the two approaches, the core idea is the same: the use of procedural resources must be diversified according to concrete circumstances of the case. Furthermore, it seems utopian (in a *de iure condendo* perspective) to support the need of a substantive justice without identifying any need for a corresponding increase of public resources. In the same way (but in a perspective *de iure condito*), it does not appear functional for justice the attempt to interpret systems, which are moving toward a proportionate justice, in the light of substantial justice. The latter seems to be the most problematic point. The correct understanding of the legal theory behind the reforms and the evolution of civil justice is the only way to allow their correct functioning. Specifically, the central position of summary judgment in both the analysed systems requires the interpretation of norms in conformity with such an idea, without trying to compensate the reduction of parties’ powers dragging delays and costs in appeal. This seems to be the only way to guarantee the fair trial, of course, unless public resources on justice are increased. Till now this approach is totally developed in the English system (where the need of a recovering of a full cognition is not linked to the “fair trial”), less in the Italian one, where, through a restrictive interpretation of the concept of “fair trial”, the functioning of the recent reforms of the Civil Justice may be undermined.

⁵⁷ See G. Verde (n 3), 2