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SHOULD WE TEACH (A BIT OF) U.S. CIVIL PROCEDURE IN THE EUROPEAN LAW SCHOOLS?

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ABSTRACT

The occasion for this article moves from several suggestions emerging by the research and teaching work, mostly spent in the graduate courses in (Italian) civil procedure. Therefore, the perspective stems from a «continental» scholar and teacher; it would mean the traditional research focus on the country-specific area, usually taught in the same manner. As we can see, it generally happens all over European Law Schools. The main output, probably due to the Bocconi University of Milan, one of the leading international universities in Europe, has been first the Law students' interest in the common law procedural systems (the U.S. one, mostly). That interest was spontaneous, even if the lectures

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proposed not a few references to the common law judiciary system. However, that interest has been continuous, and it is still daily growing, even the students come entirely from the civil law (European) legal tradition. It has been as much spontaneous wondering about that, and quite quickly, the question has been one. Are there serious reasons why (a bit of) U.S. Civil Procedure should be taught in European Law Schools? The essay aims to explore the backgrounds of the positive response, and to some extent, to move toward a new season for the comparative civil procedure as well as an imperative mood of the legal education, even conscious of the limits set off by that traditional domestic area.

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INTRODUCTION

"Procedure is the most wonderful law school course to teach (…) The subject matter – which students suspect is going to bore them – actually deals with some of the most fundamental issues they will face as they begin to think about law as an institution".[1]

Principles, not rules; the global gambit to teach civil procedure sounds very nailed to show the occasion and the aim for this article. Civil procedure can be described as a fundamental milestone in the Law Schools all around the world. The importance of civil procedure reveals and explains our enthusiasm for doing this kind of research. Nevertheless, it needs to move back and to try to frame the question arisen by the title of this article within a much broader systematic context.

If it is abstractly placed, the implementation of the civil law teaching by some common law principles might represent a classical as an irrelevant question. On the contrary, the answer requires to elaborate (at least) on a couple of systematic premises.

Since this kind of implementation involves the comparative evaluation and brings the comparison with an essential method to teach, the first premise is the focus on the (not explored enough) field of the comparative civil procedure. To the aim of this essay, it seems useful to keep in mind that the global comparative legal community has long neglected the field of civil procedure.[2] On the one hand, the administration of justice has traditionally been deemed something strictly parochial. On the other hand, civil proceduralists are considered somewhat stranger to comparative law.

[1] John Sexton, *The Rules of the Game*, by Robin Pogrebin & Edward Klaris, NYU LAW SCHOOL 2006, 26.

[2] *See* Joachim Zekoll, *Comparative Civil Procedure*, in **THE OXFORD HANDBOOK OF COMPARATIVE LAW** 1328 (Mathias Reinmann & Reinhard Zimmermann eds., 2nd ed. 2019).

This is quite wrong. It is worth noting that American scholars have also highlighted the issue of the comparison in the civil procedure, despite few courses on that field that are taking the floor in American Law Schools.[3] On the other side of the earth, not few European Law Schools offer courses in comparative law, sometimes focused also on comparative procedural systems. It depends on the faculty's capacity, but the experienced sensation is that those kinds of courses are often structured too generally. And I would say also horizontally, as they are devoted to merely showing the differences between the (two) legal traditions.

For example, the main label of this difference is traditionally well-known as the *exceptionalism* of the U.S. legal system on procedural matters. It depends on the specific frame of the American procedural law, particularly for the first instance civil and criminal procedure: the trial by jury, notably. This specific tool of the American system still represents the main obstacle to approach an in-depth comparison with the continental legal systems, for several reasons sufficiently known by the scholars everywhere.[4] Nevertheless, this article aims to avoid sitting

[3] *See, e.g.*, Benjamin Kaplan, *Civil Procedure. Reflections on the Comparison of Systems*, 9 BUFF. L. R. 409 (1959); Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY. A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. OF COMP. LAW 545 (1995). More recently, following this way of thinking, *see* Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 134 (2008) ("Comparative civil procedure has been slow to find its way into American law school classrooms, legislative offices, and judicial chambers"). For the relevant experience that has been carried out since a decade by the New York University School of Law, see Sexton, *supra* note 1, at 31.

[4] This consideration is due to the extraordinary contributes on the field by Oscar G. Chase, *American "Exceptionalism" and Comparative Civil Procedure,* 50 AM. J. COMP. L. 277, 278 (2002) (noting that "(1) the formal procedures of dispute resolution found in any culture reflect and express its meta-physics and its values; and (2) dispute procedures, because they are so public, dramatic, and repetitive, are in turn one of the processes (rituals, if you will) by which social values and understandings are communicated and are therefore critical to the ongoing job of trans- mitting and maintaining culture"); Seymour M. Lipset, AMERICAN EXCEPTIONALISM. A DOUBLE-EDGED SWORD (1996).

on the fence, and by contrast, to try to understand whether the undoubtedly cultural and social differences behind the specific and internal rules in each legal family do not impede a new venue of the comparative civil procedure.[5] That is not the attempt to necessarily harmonize the world with general, and too abstract, uniform rules (or principles), basically failed in the last two decades, but differently to enhance the even domestic rules at an international level, as the title wants ultimately to show.

This article focuses primarily on pedagogical issues. However, in doing so, there will be an occasion and perhaps the need also to explore a few scientific ones. Part I begins by explaining how the particular context of an international and European Law School (based on the civil law model) might attempt to internationalize the even municipal content of the civil procedure courses. Part II, accordingly, aims to point out the unavoidable relationship between the (comparative) research and the teaching, as the necessary tool able to prove the right way to globalize, if and where it is possible, the most traditionally domestic field of the law. Part III approaches to the middle and turns first to clarify how (a bit of) the U.S. Federal Civil Procedure ought to be helpful to explain and

[5] There still is a commonplace about this kind of comparative setting. No doubt, to be honest, that the civil jury, the party-dominated pre-trial discovery, the passive role of the judge, and the party-chosen expert (as the Chase's identification) signee predominantly the American civil procedural rules, and reflect the America's ideology, as it is well-stigmatized by Seymour M. Lipset in "liberty, egalitarianism, individualism, populism, and laissez-faire". *See* Chase, *supra* note 4, at 277. Despite of only the 3 per cent of the lawsuits are finally decided by the jury, these differences with the civil law system probably are the reason (better yet, one the reason) of the skepticism in order to finalize a common procedural core worldwide compulsory. *See* Zekoll, *supra* note 2, at 1335. That is true, we believe, but first, we believe that there is not a crucial need to enhance this perspective, at least from the view of a civil procedure scholar.

Otherwise, as one might see in the next paragraphs, even though these differences remain and continue to characterize the U.S. civil justice, and to some extent irrespective from any previous skepticism, research and teaching civil procedure – as a classic municipal area – are able to benefit from a comparative evaluation indeed with the (so opined) opposite system.

learn the fundamental principles (and inherent rules) of the civil law scenario (mostly the Italian one, since our University location).

This Part provides the tools to understand if and how two specific common law ways of teaching (*by example* and *clinical*) seem to us not only particularly useful to the scope. But they also demonstrate the reduced gap between both legal systems in the educational perspective, even within the most municipal area, as we must consider the civil procedure law. The article closes by recognizing that indeed civil procedure shows how theory may turn in lawyering. The aim is to encourage to take new avenues for research and teaching the civil procedure in the European academic institutions (at least for the our one), by avoiding the too shallow commonplaces (as the irreducible gap between the two civil justice systems) and too easy international shelters (as considering the European regulatory system the enough way to internationalize the civil law municipal area). And, finally, the conclusion and aim are to enhance *legal education* as a new relevant tool for academic research in Europe, along the lines of the American tradition.

I. THE CONTEXT. TOWARDS A NEW VENUE FOR COMPARATIVE CIVIL PROCEDURE?

Having been asked to implement the (unavoidably) domestic course in civil procedure with an «international» perspective, the first issue was immediately revealed by what can be understood by the internationalization of a strictly domestic course, as it is civil procedure. This issue concerns at all to have clear in mind the best way to make civil procedure also «international». That is a daunting task, whether one considers the potential contradiction *in re ipsa* to dress a domestic field with the cloth of the international pattern.

However, everyone could have easily resolved the abovementioned issue by arguing with the growing incidence also on the domestic area of the civil justice and procedure of the so-called European

Law. This response could have eloquently shown, in our opinion, in the best case a partial response, really but the worst mistake. Despite of the ineffable question on what the European Law is actually, if we try to link it to the municipal law, the answer turns quickly on a couple of arguments. First, the continuous adjustment process of each domestic field to the European Union (EU) Directives, periodically delivered by the EU Parliament, cannot dress the civil procedure of the international pattern. This adjustment process is in fact a mere issue of domestic law (once again); but most of all, affirming that this process can realize the internationalization of the civil procedure would become an illusion.[6] And it would betray soon the students' training expectations.

Secondly, no one undervalues the European regulatory law. It has been developing since at least three decades, also in civil procedure. Brilliant studies have given significant results, although confined within the regulated legal spaces: which are not many, always the same (the most relevant ones), since the time of the Brussels Convention. Even more: not infrequently, the research focuses on whether and how each EU Member State domestically achieves such regulation, or how this regulation is authentically interpreted by the decisions of the EU Court of Justice, dealing with an exegetical analysis of the reasons that discount the domesticity, even lexical, of each municipal legal orders.[7]

Even more quickly, the requested implementation could have not satisfied (only) by the references to the so-called EU Law. The

[6] *See recently* Zekoll, *supra* note 2, at 1335, who remembers that the feasibility and the content of an European Code of Civil Procedure Law was opposed and finally abandoned by the EU Commission, and "the critics pointed to the cultural identity that they saw reflected in the existing diversity of domestic rules". For the U.S. perspective, see also Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgements Convention be Stalled*?, 52 DE PAUL L. REV. 319 (2002) (noting that "in many respects U.S. assertions of judicial jurisdiction are actually narrower than those in many civil law countries and even other common law countries"); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems*, 45 **U. KAN. L. REV.** 9, 19-24 (1996).

[7] *See, e.g.*, BURKHARD HESS ET AL., THE BRUSSELS I. REGULATION 44/2001. APPLICATION AND ENFORCEMENT IN THE EU (2008).

declination of a civil procedure course that wants to be founded first of all on the «fundamentals» but not avoiding a new international mood must be thought differently. Moreover, the thought runs towards this idea: taking for granted the country-specific pattern of civil procedure, might we consider the American judiciary system as a suitable ground to compare and better understand the Italian civil procedural law? We believe the same idea could find the creamy hummus in each country-specific civil law system.

The comparison between the two legal traditions is undoubtedly not a new profile, but, at the same time, it deserves to be *vertically* renewed, and added into the teaching of a domestic course. Otherwise, the conclusion that Legal Education belongs to civil procedure scholarship and research is a pacific question in the common law legal system (and recently in the U.S. one).[8] Discussing about Legal Education form a civil law perspective does not involve the purely

[8] *See recently* David B. Oppenheimer, *Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution*, 65 J. OF LEG. ED. 817, 838 (2016) (noting that the "approaches to active learning and teaching in context (…) ha[ve] worked well in civil procedure, pretrial practice (…), trial practice (…), and evidence"); JAY TIDMARSH, STRATEGIES AND TECHNIQUES FOR TEACHING CIVIL PROCEDURE (2012); Erik S. Knutsen et al., *The Teaching of Procedure Across Common Law Systems*, 51 OSGOODE HALL L. J. 2 (2013) (posing the question of "[w]hat difference does the teaching of procedure make to legal education, legal scholarship, the legal profession, and civil justice reform?"). *See also* David Bamford et al., *Learning the "How" of the Law: Teaching Procedure and Legal Education*, 51 OSGOODE HALL L. J. 45, 49 (2013) ("For countries in which civil procedure is currently included in the law school curriculum (…), critical reflection on the role procedure plays in the larger curriculum could enable civil procedure to serve that role better").

Interesting ideas, precursors of that kind of debate, can be read in Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 THE AM. J. OF COMP. LAW 419 (1966) ("There is a naturally direct reciprocal influence between the nature of a legal system and the pattern of legal education. The nature of a legal system and the pattern of legal education. The former promotes the method of the latter, which in turn per-petuates the original character of the system"); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990). We try to make evidence, half a century later, how the time is now ripe so that, with the due distinctions, the awareness that Legal Education is a common heritage for both legal families, less distant than they appeared.

didactic aspect of the law (and in particular of the procedure law), but the debate on the possible evolution of the teaching according to the contents and objectives aimed by the Law school. Objectives that can vary, in a temporal and even geographical space, which characterize and distinguish the mission that each Law School – also in the civil law area – is going to assume.

The debate on a possible new way of teaching civil procedure courses – that is, the debate on the courses' contents and how these contents can be taught – does not feed itself with typical self-referentiality nor it is based exclusively on the mutable correspondence of the needs of the lawyering practice, even though procedural matters are commonly defined as lawyering skills.

In fact, the teaching of civil procedure does not live *alone*, it does not translate into a mere syllabus of arguments, but at the same time it is not merely a matter of *practice* – that is, what is considered useful for the legal profession. Similarly, it does not refer to the choice of the textbook, despite the responsibility for such a choice comes to reflect, within the framework of a worldwide alphabetized academic system on the exam-test, unfortunately not a secondary moment.

Once a time, having been asked to change internationally the classical course in civil procedure, the attempt is therefore to understand, first of all, if there is a space for (re)conferring an active and responsible role to the Professor of civil procedure in European Law Schools; and then, eventually, to anchor the theme of students' formation, which derives from the way of teaching, to the dignity of a debate of even scientific relevance.

For these purposes, there is no better place than the American scientific and practicing scenario.[9]

[9] *See* Sidney B. Jacoby, *The Use of Comparative Law in Teaching American Civil Procedure*, 25 CLEV. ST. L. REV. 423, 433 (1976) ("[A] study of comparative civil procedure could assist in the examination of specific rules of American civil procedure and in the weighing of general policy problems"). Recently, see also

II. RESEARCH AND TEACHING: AN INDISSOLUBLE MARRIAGE.

To explain the above summarily mentioned idea on how to change, I believe that an (even) critical analysis of the state of research on civil procedural law proves to be fundamental, also dealing with an interesting diachronic evaluation. From research to teaching, we said precisely: which would mean that the teaching of something (and in the case of civil procedure) derives from the transmission of a knowledge that cannot be reduced to the brilliant presentation of a textbook, but from the suitability of the lesson, first of all to make the learner understand that whoever is in front of him knows something *more*.

This statement does not appear *proverbial* at all, and therefore of circumstance. Indeed, it comes from the experienced situation of a teaching model based essentially on that: the lesson belongs to the teacher, the students follow the lesson, having one or more teaching materials; the effectiveness of learning is immediately tested by the teacher (lecture and teaching materials for the best comprehension).

The hendiadys *from research to teaching* is, in our opinion, coessential of any professor of civil procedure around the world, but we believe it is even more prominent for the professor who is born, trains himself and works within the civil law context.

This consideration is not parochial, and it is not knowingly. We firmly defend the idea (or something more than an idea) that the Professor of Law (on civil procedural matters) does not teach *things*, but *rules*. Namely, those rules that exist well shaped in the common law systems, and that live – in both the legal families – permeated by the interpretation of the jurisprudence, by the assessment of the judge, with peaks of *creativity* (especially in Italy, as we will see) that come to assimilate in part civil law system to that outlined by Benjamin N.

Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 595 (2008).

Cardozo and who made the history of the Federal Rules, inclusive of the *stare decisis* rule.[10]

Accordingly, having suggested to give to a domestic course a path of internationalities, we believe that it should first rethink the classical legacy, as

> "[l]egal education for the civil law is centred on legislation, codification and doctrine, on a very high level of abstraction. The great respect for legislation is basic to the judge's approach even when he uses a statute as his starting point for a liberal interpretation of it. In contrast, legal education for the common law is founded on the primacy of the decided cases; it emphasizes the important role of the king's courts in the development and unification of law, and it inclines toward a strict

[10] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) ("The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles"). How pure, borrowing Cardozo's iconic thought, for which "*stare decisis* is the least working rule of our law", that the American professor necessarily lives the same research, even before teaching, such as critical-explanatory (criticizing) approach of the Supreme Court's rulings or the various district circuits, is shown by a double evaluation. In the first place, often and precisely in the articles inherent to the civil procedure (strictly understood as *power* and above all country-specific qualified) it can be clearly seen, already at a structural and methodological level, how the idea of the author develops around the same reasons for the various decisions, which are also graphically highlighted in the text, step by step, I would say. Secondly, if we pay attention to the U.S textbooks, it is noted that even the texts rightly considered sacred monsters of teaching in Law Schools are structured (some even strongly) precisely and only on the reasoned collection of how the law is *created* by the judge. *See, e.g.*, RICHARD H. FALLON JR., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015), on which they test themselves at Harvard Law School; *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE. CASES AND MATERIALS (11th ed. 2013), who *cut* the continent from San Francisco to New York.

> interpretation of statutes in order to minimize the legislative encroachment on the judicial prerogative".[11]

Rethinking this traditional axiom of comparison requires thus a turning point already starting from the Professor's essential activity, the approach to his own *research*. The *research,* therefore. The term is challenging, and it is above all a «hard» scientific connotation.

There is no doubt, we believe, the crucial consideration on which an American Professor of Civil Procedure and the European one is inevitably agreed. The training and the success of the Professor of civil procedure, which allows for teaching «timeless» and indeed rising from the changeability of today's lawmakers and judges, arises inevitably from a «trial» on the *fundamental principles*, or systematic and constitutional issues, which have marked and still mark the prerogatives and the skills of the scholars and lawyers. But if teaching civil procedure arises worldwide only from this preventive toll, which the law scholar and his assessment phenomenon must pay, it must be preventively tested by the research activity, the right place of the growing standing also for teaching. There is no worse teacher and practice than a bad theorist. Teaching mostly can only benefit from it, precisely and above all in that moment of «transmission» of that «something more» that not even the ideal textbook is able to gather. And this teaching remains unique, perennial, and above all different year by year, as it is clearly the Professor's.

We are quite convinced that these considerations can be all-embracing the American and the European Professor of civil procedure. But at the same time, these considerations still remain on a too general

[11] *See* Dainow, *supra* note 8, at 428-29. See also the historical essay of Stefan Riesenfeld, *Comparison of Continental and American Legal Education*, 36 MICH. L. REV. 31 (1937) and, more recently, Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61 (2003) (explaining that "[i]f there is a desire to reform American civil procedure so as to provide effective justice for the 'little guy', either by making changes within the traditional system or by developing alternative methods of dispute resolution, then the Continental experience may well be a worthwhile object of study").

level. We are indeed also convinced that there are several crucial points usually taught in every civil procedure course around the top Law schools in the world; the same table of content of the country - specific textbooks adopted by each Professor reflects thus that consideration.

It is nevertheless not enough, today, we are also convinced, mostly whether the perspective moves form the civil law *research* path. Because of, trying to achieve the goal to give to the civil procedure course of an international venue, we start to think primarily about redirecting the research.

This kind of reasoning could move from far away, involving the same historical genesis of the field since the crossroad of the Pandects' framework within the continental statutory law, balancing the original derivation from the Napoléon Code and the consideration of the civil procedure as a mere judiciary law. Those considerations seem, however, to us either well - known by the worldwide scholars in the field [12], either set off to the aim of this essay, which is, appropriately, to achieve the failure of that motionless reasoning and accordingly to explore new avenues of research and teaching.

Since the last decade (at least), we have been noting that the kind of research traditionally focused on the specific domestic issues of the civil process soon is going to reach the end. Moreover, it has been noted indeed by the Italian Supreme Court (for example), whenever it is called to decide strategic issues and decides to change its precedent. The growing introduction within the Italian decision 's structuring of significant common law principles gives for sure: either, for example, delivering in the civil law process system the issue preclusion doctrine; either, allowing the typical legal reasoning of the common law courts.

Accordingly, we thought that it should have also changed the research approach. As the sun appearing behind the clouds, we immediately realized that, likely starting from a different research approach, we also would be able to give to the traditional domestic civil procedure course, the right avenue of internationality. Moreover, it has also appeared somewhat different from the traditional course in comparative civil procedure. At the same time, that was and is what our students need: most of them are coming from national boundaries (or

[12] *See*, *e.g.*, the milestone offered by MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY (1965).

civil law context, as Spain, France, Germany or middle- east of Europe) but are also aiming to achieve an international skill applying many prestigious LLM programs, which are focused on the common law system. The increasing number of our double degree, in particular with American and Asian Law Schools (both inspired by the common law), inducted us to search a new path of teaching, even primarily of doing the necessary research.

The question was (and still is): how might we reach this twofold achievement? To offer a solid course in (domestic, of course) civil procedure, but not so far to introduce the common law principles in this strategic field? How to stimulate our students to compete around the world in applying to the LLM programs, knowing in advance the essence of the comparison? It must rethink our traditional mood in researching, and consequently, in teaching, being aware that a mere reference to the too general and incomplete rules of the so-called European Law could have not well finished the task.

The answer needed thus a sort of research check. The way seemed to us traced indeed by several overruling of the Italian Supreme Court. In few words, international research in civil procedure needs to achieve two goals: first, to be useful for both the terms of the comparison; secondly, to adequately circulate in a more significant scholars' circle, at the international level, and in appropriately reviews.

The first goal is the conceptual premise for the second. We are not surprised to see that lacks a significant comparison with Italian civil procedure law within the context of researches and studies in common law legal traditions. The usual litany due to the so-opined difference between each system of civil justice, has always served apodictically to reject any value of a targeted comparison between the civil law rules and those typical of the common law.

Recently, however, the scenario is changing. Today, the civil law scholar recognize the recurrent use of some crucial doctrines of the American civil procedure law by Supreme Courts, such as the growing extension of the *res judicata* subject similar to the American issue preclusion doctrine.[13] Similarly, the evolution of legal theories on the

[13] *See* Cesare Cavallini & Emanuele Ariano, *Comparative Civil Justice Through the Lenses of Res Judicata: Issue Preclusion beyond Boundaries*, working paper, 2019.

role played by the expert's evidence in civil proceedings can be described as gradually approaching to a convergence between the common law model based on the expert witness and the civil model based on the appointed expert.[14] Similarities are still more relevant with respect to class litigation and arbitration because Italian legal system not only provides a new structure system of class litigation but also tolerates the possibility to bring the class lawsuit in arbitration.[15] These are just a few examples, currently in-depth.

The door is thus opening towards a possible renewed season of legal comparison within the context of civil procedure. Even if the traditional municipal area of civil procedure law remains country-specific, in several cases the comparison with similar topics in the American legal system, such as the examples above mentioned, reveal itself as crucial in order to explain, motivate and contribute to improving the new trends pointed out by the judge's interpretation or the upcoming legal rules.

This approach to legal research could be useful also in the opposite sense, when we consider some crucial issues still discussed and uncertain within the U.S. civil procedural rules. Yet a case has been considered as a particular way to contribute the discussion on a specific U.S. domestic issue ruled by Federal Rules of Civil Procedure, still controversial within the federal circuits and not solved by the Supreme Court. This case shows how recognizing the policies which historically shape the intervention rules in the civil law procedural systems could be useful for understanding the crucial point – still debated – due to the Standing justifying an intervention of right above the Rule 24.[16]

What is getting back, we might wonder? An indissoluble marriage between research and teaching. The reasons are the following, and they ground for a change in the way we might teach civil procedure

[14] *See* Marcello Gaboardi *How Judges Can Think: The Use of Expert's Knowledge as Proof in Civil Proceedings*, 18 GLOBAL JURIST 1 (2018).

[15] *See* Marcello Gaboardi, *New Ways of Protecting Collective Interests: Italian Class Litigation & Arbitration Through a Comparative Analysis*, 2020 J. DISP. RESOL. ___ (2020).

[16] *See* Cesare Cavallini & Marcello Gaboardi, *How to Reduce the Gap? A Comparative View on the Policies Behind the Intervention Rules*, 39 REV. LITIG. ___ (2019). For a specific analysis of U.K. legal system, see Cesare Cavallini, *Why the Iura Novit Curia Principle Is Not Applied Yet in English Law*? 17 GLOBAL JURIST 3 (2017).

in the European Law School sensible for an international level of education.

III. HOW TO TEACH U.S. CIVIL PROCEDURE IN EUROPEAN LAW SCHOOL?

A) THEORETICAL FRAMES

First of all, we must start from the primary consideration that "the civil justice system is one of the major public arenas in which constitutionals questions are raised, litigated, and resolved. It is also the arena defined and framed by constitutional understandings".[17] This thought is the pattern that allows us to give up the natural feeling about teaching (and learning) civil procedure as an annoying moment of the law students' path, on the contrary returning the dignity of a crucial role both for theoretical education and practice.

What does theoretical education mean talking about civil procedure? What does it mean still now, while we try to shift the teaching model as a result of the new venue of the comparative research, as we noted above?

If we take as a general model of comparison the U.S. common law procedural system, with a civil-law system, such as the Italian one, teaching the so-called *fundamental principles* more so should characterize civil procedure course. A targeted comparison with the fundamentals of the U.S. procedural system, to begin with the constitutional foundations of the civil process in Europe with the concrete evolution of the U.S. Due Process of Law, or the renewed role of the claim and counterclaim with the discipline of the introduction of the (European) civil trial, and even the problem of *res judicata* extension, between the classical civil law theory and the different issue preclusion doctrine, realize at the same time a twofold goal.

No doubt that a comparative analysis encourages students to engage in critical evaluation. But first, we are convinced, it enhances a better comprehension of the country-specific principles and rules with a

[17] *See* Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking The First-Year Course*, 34 FORDHAM URB. L.J. 1325 (2007).

broader knowledge of the global gambit. Yet the mutual interest in a comparative research is proving how that new venue in researching can be useful in teaching, mostly whether the focus is on the *fundamentals*, without getting lost (in civil law) the excessive technicalities currently involved in the Code of Civil Procedure (Italian, French, and German, with a few difference).

The use of comparative law in teaching (domestic) civil procedure must not be considered an exhaustive model only because its approach is outside our usual boundaries. And it becomes just a «fashion teaching».

First, the inclusion of some U.S. principles and rules in the teaching of European (civil law) fundamentals requires and enhances, primarily, that the learning has to focus indeed on the «fundamentals».

Secondly, aiming to a comparative-shifting approach on the principles spotted in the Italian (or French, or German) Code of Civil Procedure, it realizes the pedagogical goal to show students how those fundamental principles qualify not only the civil law system, but even before the essence of the «civil justice», beyond boundaries. The goal is to make it clear where it comes from, what it uses for, how the range of protection of the rights is structured, without which the *right* is nothing:

> "[t]he early lawyer saw the law in the form of an action. Right and wrong grew out of such forms. Unless there was a remedy there was no right".[18]

One can observe, at this point, how that approach to civil procedure teaching does not overlap with the comparative course in this field, usually taught in many Law Schools around the globe. Comparative Civil Procedure and Civil Procedure with many comparative venues (in the case, on the U.S. system) are a different way of teaching, because of they are a very different way of research. They are probably a separate area. Nevertheless, we are talking about two different teaching models that are not mutually exclusive.

[18] Cuthbert W. Pound, *Teaching Civil Procedure*, 4 CORN. L. REV. 143 (1929).

On the contrary, differently from the U.S. Law Schools programs (as we can see), Civil Procedure generally does not take the floor at the first-year course, and mostly has not only five or six credits, but (at least in Italy, more than twelve). Comparative Law (often and hopefully inclusive of the civil justice principles) is instead generally taught during the first or second year (out five, of course), while civil procedure appears on the scene, not before the third, and in some cases, in the fourth year. This courses' framework has undoubtedly more advantages than not. It allows making students more facilitated to learn not few (U.S.) foreign principles as an additional tool for the comprehension of the inevitably domestic civil procedural rules. But, most of all, it allows giving up the traditional way to teach comparative law as a general overview of the heterogeneous legal systems, as civil law and common law are traditionally lectured, with «horizontal» showing the individual differences and commonalities.

In a few words, comparative law tackles directly the country-specific rules, as well as the civil procedure ones, definitely adding a new, diverse, and useful tool to the comprehensive student's need. Moreover, it might be easier to teach and to learn whether the general course in comparative law precedes.

The answer to the question on how to internationalize the classic course in civil procedure, even keeping in mind the inevitably domestic pattern of it, begins to be possible, and to some extent, fascinating. he positive response on we should introduce several U.S. civil procedure topics within the framework of the (European, Italian) one, can be remarkably justified first by the strict link between the new researching venue (as above mentioned) and the relatively teaching. If it is worthy to research, it may be the same to teach, and finally to learn.

That response, however, must be completed, and indeed civil procedure can represent the original hummus – also for European Law Schools – to stand at an international level not only for the new comparative content but also for the implementation of the clinical teaching. Once a time, of somewhat the U.S. civil procedure courses are traditionally structured or implemented.

B) TEACHING (ALSO) BY EXAMPLE?

Having defined how international could be the domestic pattern (and course) of civil procedure, as the unflappable marriage between research and teaching might show, we are sure that also the same civil procedure teaching model should be different from the traditional one, at least if one keeps in mind several courses taught in the European Law Schools. The international implementation, at all, if one agrees with the way above traced and suggested, confirms this assumption.

It has been growingly experienced, in our teaching activity, that indeed the classical mood to learn civil procedure – as it means memorizing rules and doctrines – has also been the reason for one the most annoying moment passively suffered by the law students. Accordingly, another daunting task, considering that traditional mood to teach civil procedure in European Law Schools, has been to wonder and understand whether a change might be useful for the students and, at all, which different mood should inspire the change. In other words, the crucial issue if it is possible to stand the country-specific field of civil procedure at an international level should have an answer not only within the content of the course but also in the light of the same way of teaching. Teaching (also) by example, of course. That does not still mean the clinical frame, but it prepares it.

There is no doubt that civil procedure in the European scenario represents the cornerstone of a system of *right*. The subject matter of the lawsuit – that is, the cause of action – is traditionally described as an individual «right» recognized by the law. In the European civil law legal framework, the citizens engage the resources of civil justice only whether they have (or, better yet, they assert to have) the right to stand *with* and *in* the claim and to obtain the final adjudication by the judge. The civil procedural rules are thus the governing law of this specific feature of the civil law legal tradition, that is well-known as the *judicial declaration of individual rights*. Accordingly, while this reminds of the traditional distinction between rights and remedies, as the specific framework of the common law civil justice system, there is non-chance for a civil law professor to give up his teaching content from several or many explanations of legal rules, doctrines, definitions and so on. The

frame of the picture must be preventively drawn down, and the frame shows a conceptual architecture, which is impossible to misunderstand.

Meanwhile, the challenge to renew the civil procedure course in Europe is to achieve the balance between such a classical frame and an international picture, just the way traced. That way, as we say, cannot be hampered by the traditional distinction between *rights to remedies*, such as the classic refrain of the two legal families, and such as the conceptual background of the possible different way of teaching civil procedure in the U.S., basically grounded in particular on the case-law, due to the jurisprudence crucial role and the *stare decisis* principle.

This myth must be dispelled. Firstly, just on a theoretical plane, the distinction between *rights and remedies* seems to us not so essential to understand the actual difference between teaching and learning civil procedure. On the one hand, the fact that the legal remedies within the common law traditions depend on the judicial decisions does not mean that those legal systems do not know individual rights. It has been noting that "the law of judicial remedies determines the nature and the scope of the relief to be given to a plaintiff once the plaintiff has established a substantive right by appropriate in-court procedure".[19] This conclusion reveals how really reduced should be considered the gap between the common law and the civil law legal systems with respect to the civil procedural framework.

On the other hand, the growing active role played by the civil law judge in determining new (and very innovative) trends of jurisprudence is getting near the *stare decisis* principle. Even this approach remains at the *function* level since it is unbelievable that it might grow as a source of the law, the result is the same: the law is actually rewritten by the judge.

[19] *Cf.* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF RESTITUTION. DAMAGES, EQUITY, RESTITUTION 1 (3th ed. 2018). Given the crucial role played by common law courts in determining the existence of individual rights, the judicial decisions signee the attribution of individual remedies, so that individual rights are encompassed by them.

Secondly, having so recognized the terms of the *status quo* of the jurisprudence pattern in both systems and tested it in the research activity, a shift into the teaching and learning civil procedure is quite compelled. The first moment of that shift may be, appropriately, the teaching, also *by example* the classic frames of civil procedure in the civil law scenario (the European Law Schools). The reference runs indeed towards a U.S. model of teaching, such as a particular debate - subject in the U.S. literature.[20] Interestingly, reframing European civil procedure courses at the international level, specifically through targeted grafts of U.S. legal system, means taking a partial reverse path to that happened in the U.S. Law Schools since Field and Kaplan's book on *Cases and Materials* was edited in 1953, accompanied by Hart and Wechsler's book on *Federal Jurisdiction*.

In other words, while shortly after the Federal Rules promulgation there was the occasion but also the need to change the way of teaching civil procedure, defining "the basic scope of the Civil Procedure and Federal Courts courses to the present day"[21], this is the day to change also the classic way to teach civil procedure in the civil law area, shifting the traditional only theoretical lecture, textbook and other materials with the right injection of a *teaching by example*, related to the *grand-arrêtes* promulgated by the (Italian, French, and German) Supreme Court and doing themselves the picture of the civil justice system. More theory for the U.S. civil procedure teaching, more practice for the European ones.[22]

We try to be clear, of course. We have to explain the actual meaning that teaching *by example* could reach in a civil law

[20] *See, e.g.*, Lonny Sheinkopf Hoffmann, *A Parting Reprise (Teaching Civil Procedure)*, 47 ST. LOUIS U. L J. 43 (2003); Mary Brigid McManamon, *The History of The Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998).

[21] *See* McManamon, *supra* note 20, at 430.

[22] *See* Robert. G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. R. 319 (2008) (noting that "theory" encompasses "the policies, principles, and values used to justify procedural rules").

(international) context; it must not be confused with the *clinical* way of education, even it advances and prepares it, as a pedagogic choice.[23]

Traditionally, there are at least three associated meanings of teaching *by example*.[24]

> 1) The analysis and application over memorization of rules and doctrines;
>
> 2) The attention to details over a general overview of the field (smaller number of civil procedure subjects);
>
> 3) The civil procedure and its ethical context: how theory turns in lawyering.

Nevertheless, teaching civil procedure *by example* within the civil law area involves other implications and, then, needs other tools. If we have no doubts as to whether teaching *by example* can implement the traditional learning for European students, at the same time that way must not overlap the conventional teaching on the fundamental principles (and related rules) which are entirely governing the civil law public justice systems. On the contrary, indeed upon a solid comprehension of these fundamentals, often taught by lecturing the so-called *written law* (as the traditional civil procedure textbook eloquently shows), teaching *by example* is able to effort that comprehension, mostly representing how less formalist those principle and linked rules are, whether involved in a selected case on a particular topic.

It is worth noting that this could happen *a fortiori* within the civil law legal context, because of the abovementioned considerations of the typical civil justice framework based on the preassigned rights of the parties instead of the common law remedy system. Teaching *by example* allows thus to show how procedural principles and connected rules make those rights effective, how the civil justice system realizes the perfect instrumentality of those rules to make real and enforce the declaration

[23] *See infra* Part 3.

[24] *See* Hoffman *supra* note 20, at 44-5.

and adjudication by the judge. In one word, teaching also *by example*, lead the students to understand if, why, and how the civil justice system as a public good is *useful*.

Yet, teaching *by example* seems to us an essential tool for the above traced internationalization of the domestic civil procedure courses in the European Law Schools. Indeed, it reaches a twofold advantage. It allows to implement the domestic rules with the comparative evaluation of similar (or different) legal issues , highlighting possible global learning. Therefore, if the comparative pattern (in the case, the U.S. Federal Civil Procedure) can be an adding way to comprehend the *ratio* of the country-specific rules (the main ones, of course) and at the same time to obtain a global overview on the civil justice system, teaching *by example* evidences the growing role of the jurisprudence in the European area of civil procedure.

Let us take an *example* to explain our thought better. The example may concern a real issue focused on the *res judicata* subject and emerges from a specific decision by the Italian Supreme Court. This decision signifies a recent overruling statement since it introduces - to the extent of the judiciary's role in the European framework of the source of law - a sort of civil law issue preclusion doctrine within the Italian civil procedural law.[25] While it seems to us unavoidably crucial having to inform students of this overruling, it represents a perfect occasion to modify our way of teaching. In doing so, on the premise due to the traditional lecture on strict boundaries of the *res judicata* theory for the Italian system, the teaching approach that kind of overruled decision focuses accurately on a twofold directory: to ensure first the relevance of *the case* for a better comprehension of the aforementioned theory, in terms of the growing role assumed by the judge also in civil law system; secondly to internationalize the domestic rules on *res judicata* facing indeed the U.S. issue preclusion doctrine, well-known as a central doctrine and a selected topic in the U.S. civil procedure course.

[25] *See* Cavallini & Ariano, *supra* note 13.

The outputs may significantly enhance the students' comprehension. What better than (an issue of) *res judicata* could show the crossroad between the traditional municipal area of civil procedure, on the one hand, and on the other hand the suggestions carried out by the U.S. (res judicata) doctrine, at all whether those suggestions can be glimpsed in the (domestic) jurisprudence of the Italian Supreme Court?

And, finally, how better than also a teaching *by example* can realize the scope of the internationalization of the «municipal» civil procedure, at least on the fundamental topics of the field?

This article makes a positive response. There is, however, much enough, since a renewed and international course on the «municipal» civil procedure in the European Law Schools must not forget what *civil procedure* means for a law student: somewhat that reminds to the law in action, to the crucial practice to become a *serious* lawyer.

We would like, in that sense, to remind to the recent claim emphasized by Heather K. Gerken, on which "the dominant frame for debating legal education's future mistakenly pits practice against theory and reflects too narrow an understanding of what it means to be a lawyer".[26] We also would like to add, from a European civil law system, that this debate seems to us wholly partial, whether one of the most crucial field where it usually grows – civil procedure courses, indeed – unavoidably needs to become less municipal and more open-minded towards an international setting. And mostly if this setting, coming from the European civil law area, provides to the U.S. common law framework of civil procedure, its teaching model, and its educational ambition.

The difference we would also like to share burns from the civil law context, say, the Italian one, but at the same time is coming from the Bocconi mainstream on the international level, at all in the courses' content rather than the faculty's member. It is not an issue of nationality;

[26] *See* Heather K. Gerken, *Resisting The Theory/Practice Divide: Why The "Theory School" Is Ambitious About Practice,* 132 HARV. L. REV. FORUM 134 (2019).

it is an issue of mind challenging. In doing so, beyond the domestic frame of almost all teaching fields, the challenge is primarily to verify if an international mood is achievable.

Accordingly, we tried to shift also the most municipal area – as it is unquestionably the area of civil procedure – towards international content, starting from the research activity as a *test-bed* of such as our ambition. It also seems reasonable to verify whether (or not) the traditional theoretical way of teaching civil procedure in European Law Schools ought to be powered by the traditional tools experienced in the U.S. Law Schools. We refer, of course, to the *teaching by example*, but we also refer to the *clinical teaching*, as probably the distinctive not less than the controversial skill rooting on the "theory/practice divide".[27] In other terms, the positive response to the question posed in the title involves, no doubt, several clinical frames not less than the theoretical architecture of the civil procedure. Even long this way, we should teach (a bit of) U.S. civil procedure in the European Law School.

IV. TOWARDS A GLOBAL CLINICAL TEACHING CIVIL PROCEDURE

Clinical teaching manifests itself as a crucial way of teaching civil procedure. This way can be described not only as a means of applying legal principles and rules but also as a means of enhancing critical thinking and legal argumentation. Within the context of civil procedure, clinical teaching allows law students to adopt a broad – or, better yet, comprehensive – vision of procedural matters. Legal principles and rules cease to rest on the books and begin to live in action. When legal rules must be applied, law students are asked to construe the

[27] In this sense, Yale Law School's thought on the growing importance of the practical aspect of teaching is very interesting and consonant with the outline of this article. And mostly it seems to us reducing the gap between the legal families, focusing on what the (procedural) law is, and not merely should be. *See* Gerken, *supra* note 26, at 144 (noting that "a true scholar follows her idea wherever it leads. So, too, the day you really become a lawyer is the day you realize that the law doesn't – and shouldn't – match everything you believe").

general principles and legal categories they have learned in university courses. They are asked to determine the scope and concrete meaning of legal rules. They are called upon to confront themselves with the uncertainty and changeability of legal rules over time. They learn to tolerate the possibility of a wide range of legal meanings as well as the coexistence of opposed legal theories and understandings in legal debate.[28]

Therefore, the clinical approach to civil procedure entails not only accurately describing the scope of legal rules but also engaging with an array of legal opinions and arguments. In particular, law students are asked to examine case law through the lens of critical thinking. Even if teaching by example often requires the analysis and understanding of case law with respect to several legal issues, it suggests an approach to case law that can be described as strictly academic – that is, merely descriptive and comparative. For example, teaching by example allow law students to understand the scope of judicial precedents and compare them with existing legal rules. To the contrary, clinical teaching imposes law students to critically thinking. In fact, clinical teaching focuses on the analysis of realistic – meaning abstract but probable – cases. Such cases become the touchstone to determine how problematic it would be to apply a judicial precedent or legal rule to a given case.

[28] *See, e.g*, Wiliam N. Jr. Eskridge, *Metaprocedure*, 98 **YALE L. J.** 945, 948 (1989) ("Clinical education has demonstrated that real case studies (…) are better tools than appellate decisions for teaching the doctrine and mechanics of procedure"); Erwin Chemerinsky, *Why Not Clinical Education?*, 16 **CLINICAL L. REV.** 35 (2009) ("There is no better way to prepare students to be lawyers than for them to participate in clinical education. Clinics provide students the opportunity to practice law under close supervision and thus can provide students education in the lawyering skills and professional values that they will be using as attorneys"); Lewis F. Jr. Powell, *Clinical Education in Law School*, 26 **S. C. L. REV.** 389, 392 (1974) ("The student who has spent years in the library, without opportunity to put his learning to practice, often finds in clinical education an effective antidote to that long slide into apathy that so frequently characterizes the third year of law school"). *See also* Paul Bergman, *Reflections on US Clinical Edication*, 10 **INT'L J. LEGAL PROF.** 109 (2003).

The application of law entails not only discovering the meaning of legal rules or precedents but also asserting it to support specific individual claims or opinions. The law is applied to decide cases, thereby *picking a side*. Such a decision depends on two concepts that are interrelated but analytically distinct. The first is the concrete meaning of applicable law. Once legal rules must be applied has been determined, law students like lawyers or judges are asked to explore the implications of these legal rules for the decision of a given case. If legal rules reveal two or more meanings, law students cannot simply conclude that legal rules raise several meanings. Instead, law students are called upon to manage the relationship between applicable legal rules and their concrete meanings by adopting a critical view. They must balance the alternative meanings of applicable legal rules against the specificities of case. While some meanings can be considered as irrelevant with respect to a given case, other meanings can be considered as guiding in order to decide the case. Finding such a guidance brings the inquiry into the meaning of legal rules to its end.[29]

The second concept is the purpose for which legal rules must be applied when law students live clinical experiences. Clinical education requires law students to respond to the same challenges created by the professional management of cases. Just as there is no lawyer without underlying objectives to be pursued, there likewise is no judge without seeking to impose her ideological preference on the law. Similarly, law students are asked to determine legal opinions or theories they endorse in a given case.[30]

With respect to civil procedure, clinical teaching revolves around the same educational core. For example, clinical teaching emphasizes the

[29] *See* Bamford et al., *supra* note 8, at 48 ("As students develops a critical appreciation of the way in which the rules operate, the policy choices inherent in them, and the way in which they interact with one another, they can begin to develop a sense of ownership and responsibility for the rules").

[30] *See, e.g.*, Oppenheimer, *supra* note 8, at 819 ("Legal educators have been reminded and remonstrated repeatedly that by divorcing practice from theory in our teaching, we are failing to educate our students adequately").

role played by *moot courts* or *mock trials* in learning to apply legal rules and employ legal argumentations. Moot courts and mock trials require law students to have compelling claims for judicial orders based on a given case. In moot courts or mock trials law students cannot choose to support or emphasize legal opinions or theories they prefer. They are asked to represent a given client (for example, the claimant or the respondent), thereby arguing for the more palatable opinion or theory for their represented client. Legal representation requires lawyers to analyse the distinctive purposes for which their clients have decided to bring a civil lawsuit in court. So, they are asked to reconstruct the factual and legal context in which their clients claim their rights.[31] They are also asked to reframe the individual expectations of their clients as specific legal claims. Individual expectations can result in legal claims to the extent that lawyers characterize the relevant facts as the cause of action. In so doing, individual expectations cease to be considered as individual preferences and begin to be considered as individual rights to remedies.[32]

Shifting attention from individual expectations to individual rights requires lawyers to apply legal rules. The application of law often implies that lawyers confront with existing legal debates. Legal rules can pull in opposite directions by allowing different interpretations. Judicial precedents can represent controversial and eminently debatable decisions to depart from settled law. In these cases, lawyers are burdened to explain which direction they intend to take – that is, which legal theory or interpretation they intend to share. Sometimes, they can also be asked to suggest new interpretations when relevant facts raise new legal issues. Interpreting existing legal rules and suggesting new legal meanings equally require lawyers to employ legal arguments. Legal argumentation is one of the most important lawyer's activity. Lawyers are asked to shape their legal arguments in an effective and coherent fashion.

[31] *See* Chemerinsky, *supra* note 28, at 35 ("Law, which inevitably abstract in a classroom, becomes real when the student has to advise a client, negotiate a deal, or argue to a judge").

[32] *See* Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 **CLINICAL L. REV.** 1 (2000).

Clinical teaching methods into civil procedure courses must face similar challenges. Law students faces serious challenges with respect to the interpretation of legal rules and the employment of legal arguments, just as lawyers are asked to identify the scope of legal rules and employ legal arguments in order to represent their clients in court. The success of clinical teaching methods into civil procedure depends on how two challenges are faced.[33] These challenges clearly present to us during several academic years at Bocconi University Law School. Along with civil procedure law courses, Bocconi University Law School offers legal writing courses.[34] While the former courses are imbued with cognitive, critical, and evaluative contents, the latter courses emphasize lawyering skills. Legal writing is a reductive qualification because legal writing courses require law students to increase their practical expertise overall. They are asked to learn how to write legal documents and how to employ legal arguments. They are also asked to learn how to identify strategic objectives and how to deliver and perform an effective legal strategy. It is worth noting that while civil procedure law course are held in the third (of five) year of study, legal writing courses are held in the last year of study. Therefore, students of the last year can be reasonably considered as more trained and experienced.

While civil procedure law courses focus on the analysis of legal systems, the understanding of legal rules, and the critical approach to legal problems posed by existing legal rules and their interpretation, legal writing courses focus on practical activities such as drafting agreements and counselling on matters of civil litigation and arbitration, participating in non-judicial handling of disputes and their settlements, and simulating civil litigation and arbitration.

[33] *See* Chemerinsky, *supra* note 28, at 39.

[34] The programs of course are available, respectively, at http://didattica.unibocconi.eu/ts/tsn_anteprima.php?cod_ins=50016&anno=2020&IdPag=6203 and http://didattica.unibocconi.eu/ts/tsn_anteprima.php?cod_ins=50200&anno=2020&IdPag=6203.

Legal writing courses at Bocconi University Law School are both theoretical and practical.[35] They also encompass three learning parts.[36] The first part concerns the pre-trial counselling activities. The second part focuses on the non-judicial handling of disputes activities. The third and last part devotes particular attention to the simulation of trial.

Pre-trial counselling activities. Law students learn how to write three kinds of legal documents: a letter of demand, a settlement agreement, and a legal advice. By drafting a *letter of demand* law students learn how to state a legal claim such as the demand for restitution or performance of obligations based on the recipient's alleged breach of contract or legal wrong. By drafting a *settlement agreement* law student learn how to balance the opposed claims of disputing parties by employing their legal knowledge and conciliatory skills. By drafting a *legal advice* law student reinforce and refine their skills in legal argumentation by giving a professional opinion concerning relevant topics of civil procedure law in relation to a specific set of facts. In this part of legal writing courses law professors pursue two educational objectives. On the one hand, they encourage the student's substantive competences by explaining applicable legal rules and their impact on each kind of legal document. On the other hand, law professors are called upon to write a model of each kind of legal document in the classroom together with the students. Drafting the model includes three steps that are particularly relevant here. First, law professors describe an example such as a dispute between two parties to a contract. Second, law professors require students to identify the factual and legal problems that are involved in the example. Third, law professors write step by step the assigned legal document on a blackboard or digital device together with students.

Finally, law professors decide to control the levels of learning by assigning students the specific task of writing similar models of legal documents by their own within a given deadline. The deadline varies

[35] *See supra* note 34.
[36] *Id.*

from case to case in accordance with the intricacy of the assigned example, the terms of the existing legal debate, and the complexity of the assigned legal document. The correction of papers is generally opened to all students. A public correction allows each student to learn the most frequent errors and to benefit from the correction of papers written by other students.

Non-judicial handling of disputes activities. These activities are similar to the pre-trial counselling activities. This part of legal writing courses develops through lessons and exercises. Law students are asked to devote particular attention to those methods such as mediation and arbitration to resolve a dispute without bringing a lawsuit in court.

Clinical education revolves around legal knowledge and practical exercise even when law students are asked to confront with non-judicial handling of disputes. For example, law students are asked to learn how to write a request for mediation. According to Italian law, the mediation can describe as an important feature of the legal system. Since 2010, Italian law dictates individuals and organizations who are entitled to bring a civil lawsuit in court to submit a request for mediation to the public institutions that are expressly designated by existing legal rules as institutional mediators.[37] The increasing importance of mediation within the context of Italian law suggests to give careful attention to the legal issues related to mediation proceedings. For these purposes, it is particularly important that law students also learn how to play the role of mediator. This is another crucial element of mediation proceeding in which arise several important questions. Therefore, law students are also asked to draft a settlement agreement based on hypothetical claims of disputing parties. In so doing, clinical education allows law students to

[37] *See* Anna E. Carpenter, *The Project Model of Clinical Education: Eight principles to Maximize Students Learning and Social Justice Impact*, 20 **CLINICAL L. REV.** 39 (2013); Stacie Caplow, *From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 **NEB. L. REV.** 872 (1996).

balance opposed positions in order to improve dialogue between disputants and help them to reach an agreement.

Lessons and exercises aimed at teaching how handle disputes before a civil lawsuit is brought in court enrich the lawyering skills of students. Such an enrichment depends on learning the variety of techniques such as facilitating both interaction and communication between parties to guide them toward their own resolution.[38] Moreover, employing the lens of mediator allows students to learn how to reach an agreement through joint sessions and separate caucuses with parties that ordinary negotiation lacks. In fact, even if mediation is an informal and flexible dispute resolution process, the mediator is generally asked to improve dialogue between parties in accordance with a given timetable expressly determined by the mediator.[39]

With respect to non-judicial handling of disputes, clinical education requires law professors to explain applicable legal rules governing the mediation procedure, draft in class some models of legal documents such as the request for mediation and the settlement agreement, and assign students the task of writing a legal document themselves.[40] As noted above, this part of legal writing courses develops in the same ways in which the first part develops. Both theoretical and practical issues are at stake. Law students work in the classroom and at home. While they collaborate with professors and other students in the classroom, they are asked to apply their legal knowledge on their own during home exercises.

The simulation of trial. Finally, the third part of legal writing courses focuses on mock trials and moot courts. They allow students to experiment concrete problems concerning the decision to bring a civil

[38] *See* George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 **J. LEGAL ED.** 162 (1974).
[39] *See* Barry, *supra* note 32, at 15.
[40] *See* Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 **UCLA REV.** 577 (disagreeing with "those who view clinical education as solely an answer to the problem of skills training").

lawsuit in court.[41] This part of clinical education is more articulated than other two. Simulating a trial requires in the first instance that law students practice writing procedural acts. Therefore, the third part of legal writing courses focuses initially on the structure and content of summons and complaint. In subsequent lessons the analysis focuses on the respondent's statements. Devoting significant attention to the initial stage of trial is extremely important because it allows students to learn how to plan – that is, formulate and coordinate – their pleadings.

First, law professors examine how the initial stage of trial develops in concrete cases by explaining existing legal rules and practices. In fact, civil procedure law often provides a set of requirements to be satisfied by the parties. The question of how claims and defenses must be written in civil proceedings is answered by exercises. Law professors decide to present in the classroom an imaginary dispute between two or more parties, to analyze the legal issues arise from the factual context of the dispute, and to write step by step summons and complaint as well as the respondent's statement. These procedural acts are crafted gradually and collectively. Clinical education allows students to analyze the set of relevant facts and the applicable legal rules. Students are directly involved in writing every procedural act. They are supported in understanding every single legal issue can arise from the hypothetical dispute.

Second, students are involved in a mock trial or moot courts in order to apply the normative and practical frameworks they have studied. Mock trials as well as moot courts are governed by the following strict rules.

Rule 1. *Students are divided in three groups*. The number of members of each group can vary depending on the number of enrolled students. Generally, two groups consist of five students each. They represent respectively the plaintiff and the respondent in the trial. Hereinafter we refer to these groups as the "Plaintiff" and the

[41] *See*, *e.g.*, Oppenheimer, *supra* note 8, at 818.

"Respondent". Instead, the third group consists of three students and plays the role of the court. For this reason, we refer to this group as the "Court". It is worth noting that these students can be exclusively appointed by professors. Such a rule allows students to face another serious challenge – that is, students learn to work with colleagues they have not chosen. This is an extremely important lawyering skill because the teamwork between two or more lawyers is commonly required in the professional context.

Rule 2. *The appointment of group representatives*. Each group is asked to appoint a representative who is entitled to serve other groups with relevant procedural acts as well as to receive relevant procedural acts from other groups. Representatives are also entitled to direct and organize the group's activities.

Rule 3. *The draft and the timetable for the mock trial*. When the three groups are appointed, law professors are asked to communicate to the students the imaginary facts on which the mock trial will be based. Those facts represent a hypothetical model of a dispute between two or more parties involving specific legal issues such as breach of contracts, unfair commercial practices, or torts. For present purposes, we refer to those facts as the draft. The more the draft is detailed, the more the mock trail is realistic, and students are involved in the proceedings. Along with the draft, law professors are asked to communicate to the students the timetable for the mock trial. The timetable establishes three important deadlines. The first is the deadline by which the "Plaintiff" is asked to serve the "Respondent" with summons and complaint. The "Respondent" is served with the summons and complaint by email. Students have 15 days to complete their job. The second deadline must be met for serving the "Plaintiff" with the statement of the "Respondent". In this case, students have 10 days to send the statement by email because the "Respondent" was informed about the draft since its original communication to all the students. Finally, the third deadline must be met by the "Court" for emailing to the professors a preliminary draft decision. Other two groups cannot know the content of this preliminary draft.

Rule 4. *The appointment of supervisors*. It is worth noting that each group is supported by a supervisor. Generally, the supervisors are experienced lawyers who are asked to support the members of group in efficiently organizing their work, correctly interpreting the position of represented party, and coherently developing legal and factual arguments. The appointment of supervisors can be described as crucial because they are asked to *accompany* the students step by step in drafting procedural documents and preparing the discussion.[42]

Supervisor are entitled to support students in several ways. They can clarify factual and legal doubts as well as encourage students to discuss the relevant legal issues. For example, a deeper inquiry into the justification for developing certain legal theories is an important incentive to empower students and improve the result of their collective and individual work.

Rule 5. *The hearing and the final decision*. The day after the delivery of the preliminary draft decision, the "Plaintiff" and the "Respondent" are asked to present evidence and arguments on the matter at issue to be decided by the "Court". The purpose of the hearing is to provide the opportunity for each side of the dispute to present its position and legal arguments. Moreover, the hearing allows students to confront themselves with the members of their group as well as the members of the opposed group. In particular, the "Plaintiff" is asked to organize the presentation of its legal arguments and claims according to the content of summons and complaint. Likewise, the "Respondent" is asked to present coherently its legal arguments and counterclaims according to the content of its statement.

The "Plaintiff" and the "Respondent" are also asked to debate orally on the main objectives of the dispute. The discussion can be described as consideration of one or more debated issues in open and usually informal debate between the "Plaintiff" and the "Respondent". Nevertheless, the discussion is not only an exchange of views on some

[42] *See infra* this Part.

debated topics. But it is a way that fits well with the blueprint of clinical education. The discussion allows students to test their learning and abilities. They confront themselves with the difficulties of legal debate and argumentation. They are asked to pick a side and shape their positions in an effective and coherent fashion. The discussion is generally divided in three moments: (a) the presentation of pleadings; (b) the reply to the presentation of pleadings; (c) the counterreply to the previous replies. Each group has 20 minutes for the presentations *sub* (a), 20 minutes for the replies *sub* (b), and 10 minutes for the counterreplies *sub* (c).

To the contrary, the "Court" cannot disclose its position on the matter to be decided even though it is entitled to obtain explanations and clarifications on the factual and legal arguments the groups have discussed. The "Court" scrutinize legal arguments and claims. Because scrutinizing the interplay between the position of "Plaintiff" and the position of "Respondent" can be particularly problematic, the "Court" is entitled to examine the outcomes of the discussion together with the appointed supervisor. Within 5 days the representative of the "Court" is asked to serve the "Plaintiff" and the "Respondent" with the final judgment.

V. CONCLUSIONS

Teaching by examples and clinical teaching clearly evidence the crucial role the comparative analysis of civil procedure law can play within European and American Law Schools. The teaching experience at Bocconi University allows us to recognize that the specificities of legal systems such as the American and Italian legal rules on civil procedure cannot impede to balance similarities against differences in a way that matters.

However, these teaching experiences can be described as the outcome of scientific researches on procedural matters through the lens of comparative analysis. As noted above, legal scholars are asked to confront their own legal systems with other ones and venture beyond

national legal boundaries.[43] The comparative analysis of law recognize differences among legal systems without forcing legal argumentation to find inappropriate similarities. Recognizing differences does not impede legal scholars to feed their dialogues and debates through national boundaries.

This attention to cross-border analysis of law reveal itself as a way of implementing the critical approach to legal rules and the scientific contamination among legal theories. Such a paradigm must include teaching, by applying those educational methods that other universities have successfully experienced.

[43] *See, e.g.*, Jacoby, *supra* note 9, at 424 (noting that "the use of different civil law concepts will illuminate some general policy considerations of our system").