Interview on Teaching Legal Skills Worldwide and the New Perspectives of Teaching Legal Terminology.

Joe Veneziano, Senior Lecturer of Property and Commercial Law of the College of Law, New South Wales, Australia, answers to Antonella Distante.

Antonella Distante - Direttore della Rivista

Professor Veneziano, if you had to outline some of the major features of the academic training provided by your Institution, what would you remark, taking into account the role played by students and their concrete needs?

Certainly I would say that the principal feature is clearly reflected in the name given to the pre-admission courses of The College of Law and that is, "Practical Legal Training". By "pre-admission" I mean those courses that a new law graduate must complete in Australia or New Zealand (where the College operates) before being enrolled as a practising lawyer. The emphasis of our courses is on the "practical" aspect of legal practice. At the end of 4 or 5 years of pure academic studies the new law graduate is expected to apply academic knowledge to concrete legal problems that a client may present.

The College of Law has been operating as a professional legal training institute since 1974 and is based on the Canadian British Columbia's model of "pre-admission" training. The new graduate is expected to draft complex contractual clauses, advise on commercial and corporate transactions, develop skills as an advocate and commercial litigator as well as become familiar with the ethical rules that apply to our profession.

I always tell my students that, just like their future clients, I am not interested in their broad academic legal knowledge. I know (or at least I am entitled to assume because of their brand new degree) that they have it. Rather I want to see how effectively and efficiently they are able to apply that knowledge to solve problems that may present in their future legal practice. Clients want speedy and cost-effective results to their problems and we want our students to develop skills that will allow them to deliver those results. We want "new" lawyers who can communicate.

All the legal educators at the College, like myself, are also practising lawyers, usually as consultants to law firms. This reinforces the professional links between the educational and the practical elements of our courses.

Can you please give us some introductory elements to the legal profession in Australia?

Australia is a federation of 6 States and two Territories. Each State and Territory has its own court structure and representative body of lawyers admitted to practice within its jurisdiction. But there is also an overlay of federal courts with their own specialized areas of jurisdiction (for example, corporate law, intellectual property, taxation etc.) and there is a strong movement towards "uniformity" in the application of laws in specific areas. Australia is a very large continent with a very small population (about 22 million). Because of its size, there is a keen awareness to ensure that such "vastness" should not impede the smooth application and enforcement of laws. Communication Technology has been adopted at many levels of the judicial system such as the use of videoconferencing facilities to interview witnesses who cannot attend a particular court hearing.

Australia, having been settled by England in the 18th century, has adopted its Common Law and the adversarial method in court hearings and trials, unlike the inquisitorial system prevalent in Europe. "Precedents" (or judgments of senior courts) are essential knowledge because of the accepted concept that judges should look to the past and follow prior binding decisions. The Latin expression for this concept being, of course, stare decisis et not quieta movere *(to stand by past decisions and not disturb things at rest).*

A judge should resolve current problems in the same manner as similar problems were resolved in the past. Or at least this is the theoretical assumption.

If I can identify the most striking difference between civil and Common Law I would name the greater relative importance which, in the Civil Law system, is attributed to the opinions of jurists as compared to prior decisions of the courts.

I often like to quote to my students (if for no better reason than to challenge their deeply engrained beliefs of the "superiority" of the Common Law) what was written by an English academic, Prof. John Gray, in 1909:

> *The greater part of most textbooks at the Common Law, and the whole of many of them are not devoted to the statement of [opinions of men learned in the law]; they do not contain or profess any original or independent thinking or conclusions; they are simply collections of statutes and precedents; their merit or demerit lying solely in their good or bad arrangement.*

The judge is seen as the "disinterested" umpire who will regulate the debate between the parties in court and will at its conclusion deliver his or her decision, subject naturally to the application of the stare decisis *concept. Judges are normally appointed at the conclusion of a (usually) successful career as either a barrister (this being more common), solicitor or an academic.*

Most States have a divided profession of barristers and solicitors where the former specialize in advocacy and appearing in courts and tribunals and the latter in commercial transactions, corporate advising and general land transactions (such as sale/purchase of houses or leases).

A fast growing sector has been that of in-house legal counsel who specializes in commercial/corporate advising and whose client is of course a corporation.

You have mentioned the adversarial system of resolving disputes at Common Law. What do you see as its principal advantages and disadvantages?

Very interesting question, particularly because it encourages me to take my answer beyond the strict parameters of legal rule making and into social and cultural history… and we know, don't we, how much lawyers want to display their wide learning!

Dispute resolution procedure in English Courts (and subsequently in other Common Law Countries like Australia) has tended to reflect the values and traditions of its ruling society including (and how can anyone not mention it when talking about the English) the sport of cricket.

The presence of a presumably "fair" umpire. Each side is given the opportunity to attack and to defend. Strict rules are imposed and enforced as to, for example length of a game or choice of players. Most of all, the cricket game is required to be fully comprehensive. There must be no doubt as to what is meant to happen at any particular stage of the game. That is meant to be fairness, transparency, equity. Or at least those are the objectives and the perceived advantages of cricket as a "gentleman's game".

The adversary system has strived to do the same as far as court disputes are concerned. So that one can say that one of the principal advantages of that system is the apparent transparency of its operation. "Closed courts", meaning not open to the public, are usually not acceptable. The procedural court rules are revised regularly, aiming for consistency, the application of equitable principles and the use of simpler language which does not intimidate the ordinary citizen.

The umpire in a cricket game and the judge in a court must be and be seen to be totally impartial. He or she is not to take sides. He or she does not represent the State or the Government. There must be no actual or apparent conflict of interests as far as the judicial officer is concerned. The lawyers for the two fighting parties may use any "weapons" they wish but at all times court rules must be complied with as well as professional ethical regulations.

What about the disadvantages?

I would say the most serious one is that the adversarial system is expensive and time consuming. Parties to a legal dispute will want to "acquire" the most able and therefore (usually, but not always) the most expensive legal representatives. It is expensive also because the rules, as I said earlier, must be and must be seen to have been complied with at all times. And those rules are quite often changed at various levels of judicial administration.

Since the judge must be totally impartial (and be seen to be so) if a lawyer for a party wishes to cross-examine a witness for three days then the judge must let that happen if that judge does not want their judgment to be reversed on appeal.

The Common Law judge must remember that at the trial he is not a participant in the dispute: he is a detached observer and must not enter the arena.

Briefly summarized: the search for truth, in the adversarial system is limited to the evidence that the parties place before the court.

Usually a Common Law judge has no power to require, for example, a second expert opinion, in addition to the one tendered by a party to the dispute. Unlike the judge under the inquisitorial system who is subject to no such constraints and whose role is (or should be… let's not be too idealistic) the single-minded pursuit of truth and justice. The Common Law judge cannot assist in any way a party to a dispute who is not ably represented or not legally represented at all. As the English would say; that is not cricket.

One more point I would like to make. Much depends at an adversarial trial on the performance of the day of a party's lawyers and witnesses. And we must remember that a losing party, under the Common Law system, does not obtain very easily (if at all) a "replay" of the legal encounter. If you lose before a single judge, at first instance, unless you are able to raise esoteric points of law, that is the end of the line. There are no more appeals.

Is there any balance between practice and theory? What is the approach of the legal profession towards "legalese"?

The balance between practice and theory is not experienced by "new" lawyers until after graduation and the attendance of a pre-admission course such as ours. Universities tend to concentrate on the purely academic approach. It always comes as a shock to my students when in one of our many workshops I tell them that I am not interested to hear their explanation how a certain legislative provision has been interpreted by our most senior court, the High Court, but rather how they would (a) explain in "simple" language and (b) advise clients who might be affected by such a provision.

The use of what is commonly called "legalese" is strongly criticized at all levels of the legal professions in Countries such as USA, Australia, UK and Canada. There is a strong push in those jurisdictions towards "plain language" drafting of court and commercial documents. I certainly support such an approach. Lawyers should not be allowed to hide their ignorance or incompetence behind a thin veil of archaic terms.

It is possible here to cross boundaries and move into "foreign" land, foreign, that is, in the sense that it concerns social and cultural issues.

English is a simple language to learn. Not that much grammar to learn. But English is also a very difficult language to use and speak. Why? Precisely because it has few rules. The English language is flexible and willing to embrace and adopt foreign words and expressions.

English is used, as we all well know, by business people all over the world. It is for that reason that "legalese" is strongly criticized. Common Law courts in England, to take that Country as an example, compete with other Civil Law Countries to be chosen by parties in settling their business disputes. Common Law business lawyers compete with other Civil Law business lawyers to be engaged by corporations to draft their agreements and advice on their commercial transactions. The language that is used, it follows, must be clear, concise, precise, not liable to ambiguity. And most of all, sophisticated business clients do not want to pay for the length of their documents but for their effectiveness. "Legalese" is clearly not acceptable.

We teach our students that long sentences are harder to read than short ones; we encourage them to use the active voice (i.e. "the department must disclose all relevant information" and not "all relevant information must be disclosed by the department"); to

avoid the tendency to turn verbs into abstract nouns (i.e. "refer" and not "make reference").

An interesting historical digression:

Attempting to make the law more readable and more accessible has not only been an objective in the 21st century. A commission was appointed in Scotland as long ago as 1425 "to see and examine the bulkis of law of this realme… and mend the laws that needs amendment"[1]. So, as we can see, nothing is new under the sun…even in Scotland where the sun is not known for appearing at very regular intervals!

Do you find that academic institutions are interested in providing the right means of communications in terms of legal skills?

Well, the short answer to that question is no. And that applies in my experience not only in Australia but also in England and USA, as far as I am aware.

Undergraduate university studies concentrate on theory not practice. They emphasise greatly principles not their application in legal practice. A university professor will discuss the guiding rule to be found in a particular important judgment but not how a practising lawyer may make use of that rule. Perhaps I am being unduly critical. After all, it is the job of undergraduate law courses to introduce students to the mysteries of the law… and that is, by itself, already a big task. Legal skills can only be taught once those principles have been properly mastered. And it is for institutions such as the College of Law to indeed teach those skills.

I like the fact that in your question you have used the expression "right means of communications" because in fact that is what law graduates need to be taught after they graduate. They need to be trained in how to communicate with future clients who, as I remind my students, are not interested in their legal knowledge (no matter how wide and deep it may turn out to be) but in how effectively they, as lawyers, resolve their problems. And in order to resolve those problems the "new" lawyers must learn how to obtain the proper and correct instructions from those clients. They must, in other words, learn to communicate at an effective level.

That is why at College of Law we also train our students in Legal Interviewing, Legal Drafting and Negotiation.

To conclude: theoretical and technical expertise is useless to a practicing lawyer unless also accompanied by ability to communicate clearly and effectively.

[1] See: http://openscotland.net/Publications/2006/02/17093804/1

Do you believe that the academic offer should entail a more systematic study of the legal terminology?

Yes I do think that academic courses should offer a detailed analysis and discussion of the relevant legal terminology. I think this should be the case whether it is an Italian law student studying legal English or an American in a Common Law course.

Words are, as we all know, the tools (if not the weapons also) of a lawyer. Of course such a study should not only include a brief explanation of the particular term but should also relate it to other areas of the law as well as the term's historical development.

Let's take an example in the Common Law area. The legal term "equitable injunction" means an order that a court of law may issue in England or Australia against a party to a dispute. But those two words carry with them a wider significance; they refer to the historical development from about the 14th century onwards in England of the principles of Equity. Those principles were gradually adopted by the Monarch's Chancellor to alleviate the too strict application of general Common Law rules, which were broadly the equivalent of continental Europe's Napoleonic codes.

Once again we can relate this to the social and cultural environment of a Country such as England. Equity became a very busy jurisdiction with the coming of the Industrial Revolution that, as we all know, benefited England long before Italy or Spain for example. Accordingly, it was good business for the courts of Common Law to show to business people that, if they had any dispute about an agreement, an Equity judge sitting in London would be available to apply more, shall we say, "flexible" principles and at the same time ignoring the strict application of the Common Law rules.

Certainly there is no value for a law student to simply memorise legal rules without understanding the, shall we say, DNA of the many legal terms that make up those same rules.

How and to what extent has the legal profession in Australia adopted Communication & Information Technology in its practices?

I have mentioned earlier the fact that Australia is a vast and mostly empty continent. Twenty-two or so million people occupying an area larger than Europe. As well, Australia borders Countries in South-East Asia such as China, Indonesia, Malaysia with much larger populations and economies, which are growing at a comparatively faster rate than other Western Nations.

The Australian legal profession has been forced to deal with the so called "tyranny of distance", a brilliant expression unfortunately not created by me but by a well known Melbourne University historian.

That tyranny concerns not only the vast distances between the capital cities of the six States and two Territories (and the empty spaces between) but also the fact that the nearest major Asian capital, Singapore, is about 8 hours flying time away. Bejing in the People's Republic of China (about 12 hours flying time) is a very popular destination for Australian business executives, considering the amount of Australian minerals that are sold to that large Nation.

And so, Communication & Information Technology arrived just at the right time for this "small" and very young continent Nation. Australian law firms have established offices in many Asian Countries and taken advantage of computers and all that comes with them. Today it is possible for a lawyer in Sydney to have a meeting with a business client in New Delhi (referred to him/her by the local partner in charge of the Indian office) by videoconferencing; later the first draft of the required agreement will be emailed to that same client who may reply also by email with their comments followed perhaps by another videoconferencing session.

Australian courts, particularly the senior federal Court, has embraced and adopted the use of CIT to the extent that in specific occasions it is possible for a lawyer in Perth acting for one party and another in Brisbane to conduct a hearing "before" a judge who happens to be in Melbourne.

The advent of CIT has been (and I do not think I am exaggerating here) the salvation of Australia and its economy. The Country feels closer to the rest of the World (and quite possibly it is) and is able to take advantage of that perceived proximity, which, of course, is not real but only "virtual".

You were born in Italy and completed the V Ginnasio in Padova. You have subsequently studied law at Sydney University and practised as an in-house legal counsel for Unilever Australia and the Australian Industries Development Bank.
I guess we could say you are comfortable in two cultures as well as in two languages.
Do you think that the approach of Anglo-American business lawyers to their practice is affected in any way by the Anglo-American social and cultural

environment in which they live?

Yes definitely, there is a relation between the way an Anglo-American lawyer practising in business/corporate law approaches his or her work and their social/cultural environment.

To begin with, in a Common Law Country one speaks about the laws of the Country not the laws of the State. The word "State", unlike in a Civil Law jurisdiction, is very rarely used to denote that overall institution that rules over the ordinary citizens. The English or Australian business lawyer is much more comfortable in accepting the "supreme" (and historically dictated) independence of the judiciary. There is overall no perceived conflict between one institution such as Parliament and the Nation's judges. The latter will administer and interpret the former's laws but the judiciary's real independence is accepted at all levels as being a very valuable asset.

When an Anglo-American business lawyer drafts a commercial agreement he or she will make sure that it contains all the provisions that are meant to protect their client and that those provisions do not "conflict" with any previous judgment of a senior court. In fact, lawyers have been sued successfully for "professional negligence" because when drafting a clause in an agreement they have not considered a recent judgment which would have impacted on that clause's application.

As judges have said many times, the agreement must speak for itself. That is, unlike the Civil Law lawyer, one cannot rely on codes that will imply various terms.

But that is a very broad statement. A competent Anglo-American business lawyer must also be aware of legislative provisions, which one could say are equivalent to the Civil Law codes. One example of that would be the relatively new English Companies Act 2006. It is certainly not a code (with its universal application and principles) but such an Act of Parliament must be considered as it regulates the business activities of a corporation in England.

Common Law Countries have accepted principles that came with Industrial Revolution of the 19th century such as the freedom of parties to contract and in whatever form they wish. Therefore, as I said earlier, courts have ruled that contracts (particularly business ones) must speak for themselves.

If a business contract (particularly between two commercial entities) is found to be deficient, in whatever way, for one party after it has been signed then, overall, it is just "too bad" for that party.

Let me give you an example of this "strict" approach in Common Law Countries.
In the 1980's I was acting for an Australian mining company that sold coal to Japan. A valuable contract (particularly for the exporter) had been signed at $X per ton. The coal market went down a few years after the contract was signed. The Japanese asked for a review of the contracted price. They were shocked when the Australian reply was a courteous "no thank you". The Japanese lawyers told me that approach was not realistic nor fair because when business conditions change then so should contracts and there was no benefit for Australian exporting companies in forcing Japanese importers to "impoverish" themselves.
I leave it to your readers to decide which is the more realistic approach.
An example of the widely accepted power of the judiciary in a Common Law jurisdiction.
In Australia there is a clear taxation and legal benefit to call an agreement between two commercial entities that enter into a jointly run business, a "Joint Venture" rather than a "partnership". It is not surprising then that many business lawyers name agreements of this type "joint venture".
Yet, the courts have held (and this is of course a binding decision, although it is not in a law or code) that a judge may decide that a document named in writing "joint venture" by the parties is really, in effect and substance, a "partnership".
Now, I think that in many Civil Law Countries such a commercial uncertainty would not be acceptable. It is in Australia. Why? The answer I think is not law-based but rather socially influenced and it reflects the social "respect" in an Anglo-American Country towards judges who are, of course, the equivalent to the cricket umpires I referred to earlier.
Perhaps we should introduce cricket to Italy!

Is online education used in the training of "new" lawyers in Australia?

Yes, very much so. At the College of Law, with well over 4000 students annually, we have many combinations of professional training pre- and post-admission courses. And all of them are structured around a mixture of online learning, by the use of a "Learning Portal" through which the students have access to a variety of interactive learning resources, which include:

- *online activities, such as exercises and tutorials with "built-in" feedback;*
- *online research and discussion groups in which lecturers and students take part.*

It is important to emphasise however that such online learning is integrated into a structured "face to face" programme that include:

- *individual and group mentoring and feedback by lecturers;*
- *face to face skills workshops in Legal Interviewing, Negotiation and Mediation;*
- *practice trials/hearings before lecturers in the role of judges;*
- *simulations (such as sale of property transactions);*
- *Legal drafting workshops.*

The benefit of the online course is that it can be undertaken anywhere the student has Internet access and is most suited to students who prefer to study in their own time to a set timetable. There is a choice of a full time course (15 weeks) or part time (30 weeks).
All students work at different rates but they are generally advised they need to spend at least 30-35 hours per week in full time mode and 17-20 for part time.
Now, I am very interested in finding out about the role that Legal English educators generally see themselves playing in Italy and in particular your School Englishfor.

I am very grateful to Prof. Veneziano for his interesting and detailed intervention. It gave us the chance to attain a general overview on the legal system and profession in Australia, taking also into account some important aspects related to legal education. It is a great pleasure for me to give some brief references about the role that legal English educators play in Italy. Such a question would entail a long and structured reply but as far as possible I would like to remark at least some essential aspects. First of all it is to be underlined the distinction between two different approaches: on one hand, the one of those studying legal English as legal counsels, and on the other hand the one of translators having to get familiar with legal issues in order to learn the language of law for translation purposes. The interest of this last category is based on their need to get concerned on legal Italian in order to be able to transfer a text, e.g. an agreement or an article of association, from English into Italian and so they need to use the right forms in Italian. To this extent, the role played by educators is fundamental in order to provide the right instruments to be addressed to different categories of students. Within this framework the activity of need analysis is essential and every educator, operating

throughout this field, should act in step with the specific needs of course participants. For this reason, I believe that a good teacher should be concerned on these issues. He/she should become a course designer only after having learned how to provide a detailed plan of his/her courses in order to demonstrate his/her apt teaching skills.

This last aspect is our way of supplying courses of English for Special Purposes and, in this regard, the role played by research is of pivotal importance: the activity of course designing is based on study and research and our centre of research, *Englishfor*, is deeply involved in a long and demanding process of development. The major activities are, among the others, synthesised in our Internet site *www.englishfor.it*, a means to disseminate our strong will to enhance our skills and knowledge: a first instrument is, for instance, the e-journal where this interview is published, "Englishfor", whose subtitle can be translated into "The Journal of English for Special Purposes". It has been set up to give a chance to professionals, teachers, students, experts to present their works on interesting issues related to different sectors of English. Another attempt to promote research is the monthly section of the site called "Word Detecting" whose aim is to gather and then explain some selected expressions that hit our interest while performing our usual data mining activity throughout international press and other relevant documents. There are further activities devoted to favour our improvement as educators and first of all as researchers. It is a quite challenging and demanding activity but it is worth doing to the extent we are willing to attain our targets: offering a service in line with the requirements of high-quality products. We are committed to earmark financial resources to attain these crucial results and we have to devote plenty of time to achieve such aim but our strong will and maybe our out-of-common enthusiasm give us the spur to go on pursuing our mission countering all the difficulties this challenge naturally entails.