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# Laws and Stories: An Ethnographic Study of Maltese Legal Representation

by

David E. Zammit LL.D.  
University of Durham

ABSTRACT of Ph.D. Thesis  
Submitted in 1998

This thesis is the outcome of anthropological fieldwork in Malta, focusing on the process of legal representation during court litigation. Paul Ricoeur's (1984) theory of narration is applied to enhance understanding of legal representation. It highlights the social uses of narrative as a discursive vehicle mediating between litigants' subjective experience and paradigmatic legal rules. It is argued that legal representation can be fruitfully investigated from the standpoint of the story-telling relations involved.

The relations of production, exchange and consumption of evidence before the Maltese courts are then explored. It is shown how clients' stories are often attempts to control socially distant lawyers by engulfing them in patronage relationships. Lawyers' diffident reactions are in turn derived from their efforts to balance between patronage and professional ideals of detachment. This is reflected in the way lawyers draft judicial acts during litigation, where 'patron' lawyers tend to give most weight to the 'subjunctive stories' of clients. This same tension between paradigmatic legal rules and 'subjunctive stories' also characterises the production of testimony in court. Both court-room litigation and adjudication operate to produce a single narrative version of the facts. This reflects the moral pressure which stories place on judges, compelling them to reinterpret the legal rules. Finally these observations are embedded within Maltese society and their theoretical implications elaborated.

This thesis demonstrates how court litigation is the site of disguised processes of abstraction and contextualisation, where the abstracting of 'paradigmatic narratives' founds legal entitlement and the narrative contextualisation of legal rules leads to their re-interpretation. This indicates that legal rules are closer to social experience than is often thought and illuminates the relationship between legal and anthropological representation. Recent anthropological trends to resort to narrative modes of description are seen to be implicitly juridical.

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Study of Maltese Legal Representation**

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**David Edward Zammit LL.D.**

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**A thesis submitted to the University of Durham for the degree of  
Ph.D. in the Faculty of Social Sciences**

**Department of Anthropology  
University of Durham  
1998**



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## Declaration

I hereby affirm that none of the material contained in this thesis has previously been submitted for a degree in Durham University or in any other one.

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## Chapter 1: Literature Review

“An area which has been little developed is the application of the anthropological perspective to the study of modern Western legal systems. While the sociology of law has explored fields such as the roles of lawyers and legal institutions, the operation of law in relation to different social classes, and so forth, the comparative perspective of anthropology has been little applied in the context of modern industrial society” (Seymour-Smith 1992).

### 1. Introduction

This thesis is the outcome of anthropological research of a rather unusual kind. Rather than taking an exotic society as its primary target, it focused on a certain type of work and the people who carry it out. Highlighting Maltese legal representation foregrounds lawyers, clients and litigation and may appear to relegate culture to the role of an explanatory context. Moreover, while law has been the subject of sophisticated theorising for thousands of years, it has here been studied through techniques evolved for understanding ‘primitive’ or ‘savage’ societies. This research was also conducted by a partial insider within the milieus observed. Clearly these paradoxical choices must be justified in terms of the theoretical perspective selected and the nature of the field itself.

These choices will be addressed in the first three chapters of this thesis. These will: (a) indicate the utility of studying legal representation on the basis of a selective review of contemporary socio-legal research; (b) describe the theoretical hypothesis motivating the adoption of an anthropological approach to this study; and (c) discuss the methodological issues encountered in this thesis. This initial chapter will therefore re-trace the theoretical itinerary along which I have moved. This has involved a shift from the study of law to that of lawyers; and from a restricted focus on lawyer/client interaction to a holistic study of legal representation in its cultural context.

## 2. The Exclusion of Law.

The starting point is a curious discrepancy. Law is, in most contemporary societies, indigenously perceived as the principal tool of government. Yet an analysis of the specific social effects of legal rules and processes hardly figures within many of the major theoretical paradigms of social science. This assertion will be illustrated by briefly referring to the theories of Marx and Foucault. The reason for selecting these theorists is that they have been highly influential and are probably the most explicit in excluding the study of the specific social effects of law from their central research agendas.

Marxist social theory views law within the framework of the division between the (economic) base and the (cultural) superstructure, in which the former is the prevailing mode of production of material life which ultimately determines super-structural cultural expressions. The most reductively materialistic Marxist interpretation considers law as part of the superstructure and therefore having a purely reactive role, with no social effects of its own. More sophisticated re-formulations have refined this theory, arguing that the determining effect of the mode of production only occurs in the last instance, that production is not simply an economic concept (Wolf 1982) and that law can itself promote economic change (Horwitz 1995). However these approaches still tend to divert attention away from the study of law to that of the more 'basic' social phenomenon of economics.

The closest Marxist theory comes to discussing the specific social effects of law is in relation to the concept of mystification. Marx argued that the economically dominant class controls the means of mental production, so that it also dominates in the cultural sphere. He therefore saw law's operations as primarily a form of mystification: working to prevent a real understanding of social power relations because laws are framed within the constraints of the ideas of the dominant classes. This perspective has stimulated socio-legal research (Hay 1977). However the specific manner in which law exerts its mystifying influence remains unclear. Moreover, an easy equation between

economic and ideological dominance may lead scholarship to exaggerate the monopoly over the production of law enjoyed by the economically dominant class and to neglect the influence of the ideologies of dominated classes. Research has shown that legal systems refract many different ideologies (Sumner 1979).<sup>1</sup> Talk about mystification may obviate symbolic struggles (Scott 1985) in the legal field between the different beliefs of various social groups.

Foucault's theory also tends to downplay the social significance of law. His argument is embedded within a historical study of changes in European styles of punishment from the eighteenth century onwards. He claimed that the rise of the prison and the decline in spectacular modes of punishment marks a shift from a social order centred around the symbolic affirmation of repressive legality to one pervaded by diffuse, concealed and normalising disciplinary mechanisms (Foucault 1977). Recent history is that of the progressive replacement of legal rules by social norms as the dominant way to produce social order. Like Marx, he therefore conceived the primary effect of law in contemporary societies as a mystifying discourse which diverts attention from the actual disciplinary mechanisms through which social power is exercised. He insisted that we must 'cut off the head of the King' (Foucault 1980) and liberate ourselves from the spell of legal terminology if we are to conduct a proper analysis of power in contemporary societies.

Foucault's theory has been criticised for marginalising law by concentrating on repressive, criminal law and ignoring fields like commercial law. In these fields, law appears to play a productive, facilitating, role which goes beyond simply disguising social power relations (Hunt & Wickham 1994). While this

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<sup>1</sup> Indeed, E.P. Thompson (1990) has argued that in order for law to exert a mystifying effect, it must also constrain the activities of the economically dominant class.

criticism has in turn been attacked,<sup>2</sup> it is clear that the perspectives of Marx and Foucault converge. Their theories tend to exclude the study of the specific social effects of law from the centre stage of social research. They do so because they view law as both detached from and determined by more basic economic forces, or disciplinary power mechanisms. They are open to the criticism that law is more deeply implicated in conditioning fundamental economic processes and social power mechanisms than any neat separation between base and superstructure, or law and power, can accept.<sup>3</sup>

Moreover, while these perspectives downplay the social significance of law, they agree that it must be understood in the context of broader social processes. They suggest that the primary effects of law lie in its cultural impact, particularly its ability to mystify. But they are vague regarding the means by which this mystifying effect is achieved. They also tend to over-emphasise the extent to which law reproduces the ideology of the dominant social class, while ignoring the possibility that law might reflect different ideologies and be itself a site of ideological contestation between different social groupings.

This analysis identifies some causes for the curious exclusion of law from much contemporary social research. Once the irrelevance of law seems in-built into key theoretical paradigms, then this becomes a self-fulfilling prophecy; a background assumption conditioning further research within these paradigms. Yet this also underlines the importance of studying the specific social effects of law, with the aim of clarifying the way it is related to other social processes and identifying the nature of its cultural impact.

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<sup>2</sup> Anthony Beck (1995) observes that far from being peripheral to Foucault's thought, law is central, since power in contemporary societies is exercised: "by virtue of the very heterogeneity between a public right of sovereignty and polymorphous disciplinary mechanisms" (Foucault 1980). However, this view still seems to link the social effect of law to its ability to conceal disciplinary mechanisms.

<sup>3</sup> This point has been made by Stephen Lukes, who observes that one could not create an economic organisation like a limited liability company without the intervention of the super-structural regulations of company law (Lloyd & Freeman 1985: 1019-1024).

### 3. Focusing on Legal Representation.

The theories I have just considered are pitched at very broad levels and their neglect of the specific features of law is related to their generic orientation. Consequently it seems that one way to refine our understanding would be to single out a particular aspect of legal rules and processes. This would make possible an 'ascending analysis of power' (Foucault 1980), which moves from the particular to the generic so as to explore the wider ramifications of the phenomena under investigation. In this context, research of a broadly 'cultural' sort seems particularly promising (Merry 1990).<sup>4</sup> However these theories also imply that good critical analysis must avoid using mystifying legal terminology to describe legal rules and processes. This indicates the utility of an approach which is not limited to deciphering legal texts; focusing instead on the daily labour by which law is produced in small-scale settings. Because the aim of such research is to explore the specific social effects of law, it seems appropriate to concentrate on points of intersection between what we usually conceive of as the legal domain and wider social processes.<sup>5</sup>

There are of course many such points of intersection.<sup>6</sup> This thesis will focus on legal representation in the courts, by means of an ethnographic study of the daily work of Maltese lawyers. Studying legal representation means looking at the relationships and activities through which the stories initially told by clients to lawyers are translated into 'facts' during litigation. This includes such events as client conferences, in which clients' stories are

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<sup>4</sup> As one legal anthropologist put it: "In the legal arena, it is not possible to draw a sharp distinction between the domination provided by cultural meanings and that provided by violence, between forms of control residing in the ability to shape consciousness and those residing in the exercise of force" (Merry 1990: 10).

<sup>5</sup> Such research would treat neither law or society as unproblematic, but would seek to explore the dialectical manner in which each is produced in confrontation with the other.

<sup>6</sup> For instance, the process of drafting and promulgation of legislation represents an area in which one can observe the conversion of political ideas in the wider society into laws in the legal field. The same holds for law enforcement, in which legal rules have to be realised in the field of social action.

communicated to their lawyers; lawyers' inscription of these stories when formulating judicial acts; the production of evidence in court and its evaluation in judgements.

Consequently this study will chart the transformations clients' stories undergo as they pass across the boundaries socially delimiting the major institutions usually considered to be the 'core of the legal system' (i.e. the hierarchy of courts and associated administrative units). Lawyers can here be seen to occupy a culturally intermediate position between their clients and the courts and their legal representation as the attempt to symbolically mediate between these two charged poles. In this tense arena, legal rules may be stretched to accommodate particular clients and clients' desires may be transformed to comply with what can be obtained through the rules.<sup>7</sup> This is, in short, a zone of intersection and confrontation, where legal rules produce their social effects and social processes animate and reinterpret legal rules.

There are various other reasons for selecting legal representation as an object of ethnographic study. Some are subjective, relating to my own access to the field.<sup>8</sup> Others are intrinsic to the theoretical hypothesis and will be considered in more detail in the next chapter. Such research would also focus on the details of daily legal work and would therefore avoid an overly generic and mystifying approach. Moreover since legal representation involves the re-telling and transformation of stories, it seems particularly suited for an ethnographic and cultural analysis. This is firstly because ethnographic description seems a good antidote against the sorcery exercised by legal language. Secondly, if the specific social effects of law are to be found in the cultural field, then studying the processing of clients' stories during legal representation may be a good way to explore these effects.

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<sup>7</sup> From the perspective of these points of intersection between legal 'systems' and over-arching social contexts, systematic and self-referential descriptions of law appear questionable and alternative conceptions of law possible.

<sup>8</sup> This will be explained in chapter three.

Lawyers figure very prominently in managing legal representation and a good ethnographic study in this field cannot avoid analysing the training, occupational stratification and the wider social role played by lawyers. This thesis will therefore attempt to thread a fine line between the study of Maltese lawyers and that of their work. In so doing, it will seek to explore the inter-relationship between who lawyers (socially) are and what they (socially) do. Here it would be a mistake to overly privilege any side of the equation; either by viewing lawyers' social role as a simple and direct effect of their work (Forgacs 1988: 304), or by seeing their work as purely dictated by the social relationships they are involved in.

Through emphasising the study of legal representation, however, this thesis places the accent on understanding the way legal work is carried out in a particular social context. One reason for this is that it makes it easier to perceive clients' involvement in this process. Another is that it avoids objectifying lawyers unduly, by creating an imaginary community of lawyers which would be the target of research. Moreover, while the social role of lawyers has often been studied, their work in interpreting and applying legal rules has rarely been subjected to the same critical scrutiny from social scientists. Research has tended to focus on the interactional features of lawyer/client relations, neglecting connections between client conferences and the later stages of litigation and adjudication. This point will now be illustrated by a review of recent socio-legal research on lawyer/client relationships, which will indicate the greater analytical power of an ethnographic and holistic study of legal representation.

#### 4. Socio-Legal Analyses of Lawyer-Client Interaction

Sociologists, linguists and other social scientists working within the area of socio-legal studies have paid a lot of attention to lawyers' interactions with their clients. Their studies highlight important aspects of the processes involved, particularly the relationship between power and representation. Yet they also suffer from deficiencies, which partly derive from hidden theoretical and methodological assumptions which influence their research.

Many of these studies focus on the way in which lawyers transform disputes, through their representation of clients. For instance, in their analysis of the way in which American divorce lawyers interact with their clients, Sarat and Felstiner (1986) emphasise the different agendas of both parties. Lawyers view the dispute in terms of its monetary consequences, while clients are often more interested in other matters, such as emotional vindication. Lawyers must therefore invest a lot of time in schooling their clients to accept their view of what the really important issues at stake are. In the process, they try to lower clients' expectations, re-defining both the dispute and even clients' selves so as to exclude those aspects which cannot easily be inserted into the legal categories. Clients react to lawyers' efforts to narrow and re-define their cases by trying to obtain their lawyers' support for their own claims. They attempt to create emotional ties with their lawyers, who are wary of this. Clients persistently try to introduce the history and moral implications of their marriage relationships into their conferences with their lawyers. Lawyers in turn respond by partially legitimating their clients' stands, but do not in practice act on them. The effect of lawyers' attempts to separate the emotional aspect of the divorce from the material ones, leaves clients feeling ambivalent and schizoid. They tend eventually to accept their lawyers' settlement of the dispute; but they feel angry and mistrustful of lawyers and the legal system.

Sarat and Felstiner have further developed these themes in two other articles. In one, they look at the effect of these processes on clients' views of the legal system (Sarat & Felstiner 1989). They observe that while American divorce lawyers do act as intermediaries between the legal system and their clients, their brokerage activities are restricted to the sort of transformation of clients' lives and expectations which they discussed in the previous article. These lawyers do not, however, attempt to translate legal rules into concepts which their clients can handle. Consequently lawyers operate so as to translate clients' lives in order to be able to describe them in terms which mesh with legal categories; but they do not translate these legal categories so as to render them comprehensible to clients. This 'one-way translation'<sup>9</sup> of lawyers enables them to prevent clients from gaining independent access to (and knowledge of) the public discourse of the law. Such independent access could undermine lawyers' claims to specialised expertise and their control over the case. Instead lawyers propagate cynicism about the system, suggesting that it does not work in terms of the legal rules. In this way, they imply that their own usefulness lies less in their knowledge of the law, which a well-educated client might acquire, than in the insider contacts and connections which they possess.

In the second article, (Sarat & Felstiner 1988), these issues are explored from the perspective of C. Wright Mills' analysis of 'vocabularies of motive'.<sup>10</sup> They show how American divorce clients resort to vocabularies of motive in an effort to explain their own behaviour and that of the other spouse. While clients are very concerned to explain the motivations of their spouses' *past* activities, lawyers consider these to be legally irrelevant and do not really support their interpretations. However, when they attempt to impute the

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<sup>9</sup> Lawyers' brokerage is 'one-way' according to this model, since it departs from a particular interpretation of the legal rules and attempts to translate clients' experiences to fit into this interpretation. Such a model does not envisage the rules themselves changing in response to clients' stories.

<sup>10</sup> Mills argued that distinct vocabularies of motive characterise different social strata and are utilised in different social situations (Mills 1940: 904).

*present* actions of their spouses to negative traits in their characters, lawyers intervene in order to promote an alternative interpretation. They suggest instead that these actions are situationally determined by the stage which the divorce has reached. Through ensuring clients' agreement with their vocabulary of motive, lawyers obtain authorisation to take the legal steps which they perceive as necessary. Thus lawyers' transformation of clients' understandings of their disputes extends to persuading them to re-interpret the behaviour of their own spouses.

The ultimate dominance of the lawyer's view of the dispute is an assumption which underlies all the three articles which have been reviewed. This 'one-way translation' model of lawyers' brokerage ensures that they are always seen as the active agents who transform and re-phrase disputes against the backdrop of the impotent resentment of their clients. In this model, the legal rules constitute an unalterable backdrop, conditioning lawyers' interactions with clients, while themselves remaining unaffected by these processes. This assumption also pervades other studies.<sup>11</sup> Thus Blumberg (1975) observes that the American criminal defence lawyers he studied are embedded within networks of organised complicity linking them up to prosecution lawyers, judges and administrative personnel within a closed court community. These social networks are a strategic response to the organisational problems of the criminal courts and lawyers find that forming part of them is a necessary condition for success. However, the other side of the coin is that through these networks lawyers come to be more responsive to the needs of the court community than to those of their clients and they therefore become "double agents" (Blumberg: 1975: 328) who seek to persuade their clients to plead guilty and have a vested interest in limiting the scope and duration of the case. In this context, clients experience legal representation as a 'confidence game' played at their expense.

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<sup>11</sup> Ingleby (1988) confirms many of the observations of Sarat and Felstiner, showing how English divorce lawyers transform the way their clients view their cases so as to push them towards a mediated settlement and away from litigation.

Bogoch and Danet (1984) also adopt a 'one way translation' model of brokerage in order to make sense of the interaction between an Israeli legal aid lawyer and her client. They analyse this encounter in great linguistic detail so as to show the strategic way in which this lawyer used language in order to assert control over the conversational agenda, suppressing her clients' views so as to ensure the domination of her interpretation of the dispute.<sup>12</sup> Through these tactics this lawyer managed to acquire power at the expense of her client. They were so blatantly employed because they occurred in the context of a legal aid case. This lawyer was a member of a bureaucracy and did not stand to gain through being more responsive to her client. A private practitioner might be expected to show more understanding of clients' perceptions of the case.

This conclusion indicates a significant problem with many of the studies which have been reviewed. It seems that most of the proponents of the 'one way translation' model of legal representation have not been sufficiently sensitive to the context in which their own studies have been carried out. In the research of Sarat and Felstiner, for example, it is initially stated that American divorce lawyers are the subject of research. However there is little attempt to relate the conclusions reached to the specific context in which research was carried out. Rather their conclusions, although based on the observation of a few cases, are often presented as iconically encapsulating general truths about lawyers and the law. Yet context clearly *does* explain many of the observations which are made, entering into the picture in various ways. To put it succinctly, there can be many different types of lawyers, a great diversity of cases and clients and broader cultural and social variations which might explain observed behaviour.

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<sup>12</sup> Thus they show how she interrupted her client frequently, especially when he was in the middle of an utterance: used directives, coercive requests and formal language: questioned the client's own knowledge: asked apparently random questions and laid claim to an intimate knowledge of her client's background.

A related criticism is the conspicuous absence of the lawyer's point of view from these studies. We hear a lot about the clients' emotions and very little about those of their lawyers. However attention to the practical constraints under which lawyers labour might expose important contextual factors affecting the quality of legal representation. Exploring lawyers' perspectives might also reveal short-comings in the 'one way translation' model of legal brokerage.

These points are brought home if one considers other studies, such as the one carried out by Flood on corporate lawyers in Chicago. His approach is characterised by its greater sensitivity to the practical dilemmas lawyers must face. He argues that from the perspective of the lawyers he studied, the management of uncertainty is the most prominent feature of legal work (Flood 1991). Corporate lawyers feel uncertain due to a variety of factors, which range from their own subservient position within large law firms dominated by a few senior partners to the ambiguity of the legal rules themselves. An important cause of uncertainty is the behaviour of large business clients, who may withhold important information from their lawyer, leaving him in the dark as to the real issues which are at stake in business negotiations. This is consistent with the attitude such clients adopt during conferences with their lawyers, when they often question their expertise and assert the primacy of knowledge of the marketplace over knowledge of the law. In this context, lawyers have to struggle to assert themselves and resort to various tactics to reduce uncertainty. They do not always succeed in imposing their definition of the situation and often have to accept that of their clients.

Flood's research depicts lawyers in a very different way from the articles previously reviewed. Stressing lawyers' vulnerability to client pressure raises doubts about the universal validity of the 'one way translation' model of legal brokerage, since it suggests that lawyers' perceptions of the issues at stake will not necessarily prevail over those of clients. Griffiths's (1986) research on Dutch divorce lawyers also departs from this model. In fact, he goes even further than Flood in claiming that lawyers are not only subject to clients'

pressures, but may also transform their explanation of the legal rules in order to cope with these pressures. His thesis is that lawyers are best viewed as 'double intermediaries', who not only transform clients' stories so as to engage with legal categories, but *also transform the legal rules when they explain them to their clients*. This process of transformation can occur in very subtle ways.<sup>13</sup>

However, while Griffiths accepts that lawyers may modify their *explanation* of the obtaining legal position in response to clients' pressure, neither he nor Flood go quite so far as to state that lawyers' *interpretation* of the legal rules may change in response to clients' pressures. Consequently although Griffiths describes lawyers as 'double intermediaries', he does not completely depart from the 'one way translation' model of their activities. In his scheme the legal rules themselves remain largely uninfluenced by lawyers' interactions with clients. At best, these interactions may condition the type of legal advice lawyers might give to clients. But they could have no impact on the way in which lawyers interpret the legal rules when representing these clients during court litigation.

Despite their differences, the studies reviewed reflect a broad consensus of opinion that lawyers are best described as mediators between their clients and the legal system. They derive the theoretical interest of studying lawyer/client interaction from the way the power struggle between lawyers and clients illuminates the wider issue of the social impact of legal systems. At this stage it is useful to consider the recent research of Travers, who adopts a polemical attitude towards these assumptions on the basis of his field research with a firm of criminal defence solicitors in the North of England (Travers 1991). His arguments can be summarised as follows:

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<sup>13</sup> For instance, lawyers can change the law simply by remaining silent about legal possibilities, or by presenting their opinion as the attitude of the courts. In this way lawyers actually exert influence by effacing themselves.

1) Conventional sociological studies of lawyer-client interaction have overly theorised the subject. A preoccupation with grand sociological themes exoticises the subject unnecessarily, leading researchers to ignore the practical, improvisatory, character of the actual work involved. He sought to remedy this in his own research through adopting an ethno-methodological approach to observe the daily work of a legal firm.

2) On the basis of his fieldwork, he concludes that accounts such as that of Blumberg (1975) are wrong in presenting a cynical view of lawyers as 'double agents' engaged in a 'confidence game'. He gives a detailed analysis of a case he witnessed in which a lawyer persuaded a client to plead guilty, overcoming her client's initial resistance to this plea. This analysis shows how the lawyer's advice was motivated by the desire to obtain the best possible deal for her client in a context where the outcome of the case was never in any doubt and where a guilty plea enabled the lawyer to minimise the adverse effects her client would face (Travers 1992).

3) Travers also attacks the claimed significance of power for understanding lawyer/client interaction (Travers 1994). His argument is that lawyers *are* in a position of interactional dominance vis-à-vis their clients, but that there is nothing surprising or sinister about this, since it is a natural result of the fact that they are legal experts, possessing more knowledge of the law than their clients do. An analytical focus on power obscures the practical features of legal work and adds nothing to our understanding of it. Moreover, clients do not normally see themselves as involved in a power struggle with their lawyers. Finally, the interactional dominance of lawyers is variable, diminishing in proportion to clients' intelligence and experience of the system.

These arguments directly attack the consensus of opinion underlying the other studies reviewed. If correct, the theoretical significance of studying legal representation is considerably reduced. A critique of them will therefore provide the basis on which to refine and develop my own perspective on the study of legal representation.

## 5. A Holistic Perspective on Legal Representation

My assessment of Travers's ideas will depart from a re-evaluation of his use of ethnomethodology. It seems that he sees ethnomethodology as something more than a technique for social investigation focusing on the micro-processes through which everyday reality is constructed. He argues that while conventional sociological accounts over-theorise the subject, ethnomethodology allows direct observation of the practical basis of everyday decisions. Thus it can be used to rebut 'ironical' accounts of lawyer/client interaction such as Blumberg's (*op.cit.*). This approach is more sympathetic to lawyers' perspectives; exposing the practical constraints they face and the hidden work performed for clients. Yet the argument is fundamentally flawed in suggesting that it is possible to observe any human activity without recourse to some implicit theory regarding the purpose of that activity.

The ethnographic truism that perception is always mediated by culture is confirmed by Travers's own resort to an explanatory theory for the actions of one lawyer he observed. He claims that she: "had to make the best she could out of a situation where the ultimate outcome for the defendant was at no time in doubt" (Travers 1992: 35). Similarly his caution against undue exoticisation of lawyer/client interaction must be seen against the background of his own research, where words like 'mundane' and 'boring' are bandied around until they acquire an exotic halo.<sup>14</sup>

The problems with this approach become clearer when looking at the practical examples given. Travers cites Sarat and Felstiner's work as an example of an overly theoretical approach. Yet their conclusion that American divorce lawyers try to persuade their clients to abandon emotive discourse

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<sup>14</sup> Indeed some degree of exoticisation seems indispensable if socio-legal studies are to fulfil their critical potential. This is because, as Bourdieu (1977) observes, the ultimate disguise of processes of domination are precisely notions of what is 'ordinary' and 'natural'. In this context the only way to expose hegemonic power structures may be through questioning what is 'ordinary' and 'taken for granted'.

surely identifies a practical concern which forms part of their everyday work. Even more telling is the example of lawyer/client interaction which he provides when criticising Blumberg's description of such encounters as 'confidence-games'. He argues that this case confirms the superiority of an ethnomethodological approach, since it shows that lawyers may persuade their clients to plead guilty without betraying professional ideals of defending them to the hilt. However a close analysis can easily account for the differences between his conclusions and Blumberg's. Indeed, Travers's rebuttal of Blumberg depends on exposing the *hidden* work lawyers do for their clients, thus confirming Blumberg's argument that legal work leaves room for suspicion in clients' minds that confidence games are being played at their expense. Moreover Travers admits that he studied a firm of solicitors whose distinguishing characteristic is unusual sympathy towards their clients' point of view, evoking the possibility that Blumberg's insights might apply to the way *most* criminal defence lawyers handle their clients.

Ultimately the deficiencies of Travers's analysis of legal representation derive from his conception of power. Here his argument revolves around the related claims that (a) focusing on power adds nothing to our knowledge of legal representation and (b) there is nothing sinister about lawyers' power, which is a natural outcome of their knowledge of the law. This last claim can usefully be approached from the standpoint of Sherr's research (1986), which set out to assess the quality of lawyers' communicative skills by testing the ability of a set of graduate lawyers to interview clients during their first meeting. Sherr makes practically no reference to power in his analysis, preferring to refer to an idealised model of how lawyer/client interaction should proceed to ensure optimal communication between the two sides. As a result, he can only interpret many of his findings as a failure in communication on the part of lawyers, while they would be perfectly intelligible as attempts to acquire power vis-à-vis clients by withholding information.<sup>15</sup>

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<sup>15</sup> Sherr observes regretfully that the lawyers he studied do not inform their clients of the work they intend to do for them. that they tend to exercise excessive control over the conversational agenda, often cross-examine clients and use difficult language.

Once one accepts that power is an important feature of legal representation, this raises the second issue of the way in which to conceive power. Hannerz (1992) also derives lawyers' power from their legal knowledge. Unlike Travers, who sees this as natural and reassuring, Hannerz suggests that the routine, systematic and unintentional qualities of professional power are *the* factors which ensure domination. On the one hand Travers argues that there can be nothing sinister about a power which is so routinely exercised that most clients do not consider themselves to be involved in a power struggle with their lawyers. On the other, Hannerz points to the contrast between the insecurity of clients, whose contact with lawyers is generally a 'one-off' experience, and the routine character of legal work for lawyers. The latter unintentionally dominate their clients while maintaining a view of their work as simply part of the division of labour (Hannerz 1992: 121).

Hannerz's conception of power corresponds to that underlying much contemporary social research. Lukes, for instance, describes power as the ability to shape the mental landscape of the dominated by making certain possibilities unthinkable and thereby imposing misunderstanding of the objective situation (Lukes 1993). Bourdieu also portrays symbolic power as an invisible power which can be exercised: "only with the complicity of those who do not want to know that they are subject to it or even that they themselves exercise it" (Bourdieu 1992: 164). As opposed to a hierarchical view which identifies power with legitimate authority, this conception emphasises the fact that power is exerted over human beings (Aron 1964) and is therefore socially negotiated (Simmel 1978). For this reason, power is primarily seen not as an object to be possessed; but rather as something which must be communicated through cultural media like discourse (Foucault 1990), or even silence.<sup>16</sup> This stress on the communicative nature of power intersects with the work of linguists and other cultural analysts who have also emphasised the power-laden nature of communicative relations (Bakhtin

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<sup>16</sup> As in Lukes's (1993) conception.

1994).<sup>17</sup> The resulting perception of power foregrounds rhetoric and persuasion more than imperative commands and authority.

In this context, it is interesting to note that Travers's own case-studies are replete with instances of discursive struggle, in which lawyers try to persuade their clients to follow their advice against the resistance of the latter. However, rather than describing these as attempts to exert power, Travers prefers to write about the: "interactional pressure" (1994: 24) exerted by lawyers, who are in a position of: "interactional dominance" (*ibid*: 26). A close reading of his writings reveals two further reasons for this careful avoidance of the descriptive terminology of power. The first relates to the way in which a power analysis tends to shift from the study of lawyer-client interviews to: "that of law as a macro-institution" (*ibid*: 28). He argues that moving from one to the other is incorrect, not least because it gives a distorted characterisation of lawyers and legal work.

The problem with such reasoning has been identified by Bourdieu, who observes that one cannot understand the form of small-scale linguistic exchanges (such as those between lawyers and clients), if one does not take into account larger structural discrepancies in power:

"That is what is ignored by the interactionist perspective, which treats interaction as a closed world, forgetting that what happens between two persons –between an employer and an employee or, in a colonial situation, between a French speaker and an Arabic speaker-- derives its particular form from the objective relation between the corresponding languages or usages, that is, between the groups who speak those languages" (Bourdieu 1992: 67).

This integrative capacity of power, which connects minor events to larger social forces constitutes the most important objection to Travers's attempt to detach research on the everyday business of legal representation from the study of larger social power relations. By contrast, a more fruitful way of

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<sup>17</sup> Here I have in mind Bakhtin's focus on the way speakers *compromise* between what they would like to convey through their words and what is realistically possible given the linguistic effects of existing power relations.

exploring legal representation is provided by Johnson (1972). In his study on the sociology of the professions, he argues that the increasing specialisation brought about by the division of labour also increases the social distance between lawyers and clients and gives rise to uncertainty as to how legal needs are to be determined and catered for. This uncertainty may be resolved in favour of the lawyer or his client depending on larger power relationships between lawyers and different categories of clients.

Comparing Johnson's approach to Travers's brings out the second reason for the latter's avoidance of power. In fact, while Johnson sees uncertainty as a central feature of lawyer/client interviews, Travers emphasises that the outcome of these interviews is never in any doubt. This is because the lawyer's perception of the issues at stake and the necessary legal response must necessarily prevail over that of the client, given the lawyer's greater knowledge of the legal rules. Like the previously reviewed studies, Travers therefore promotes a 'one-way translation' model of legal representation; in which the lawyer translates his client's story to fit into unchanging legal descriptive categories. Johnson's analysis compels us to explore the other possibility: what if uncertainty is also resolved in favour of the client; so that it is the lawyer's interpretation of the legal rules which alters to accommodate the client's perception of the issues involved and the necessary legal response? In this 'two-way' model of legal brokerage, neither the distribution of power between lawyers and clients nor the interpretation of the legal rules are seen as fixed *a priori* by the legal system. Rather, both are socially negotiated between particular lawyers and clients in a manner which reflects broader power relationships.

To comprehend the practical processes to which the 'two-way' model of legal representation refers, it is useful to refer to the analytical framework constructed by Mather and Yngvesson (1981). They identify two ways in which the linguistic description of a dispute can be transformed after it has been brought before a third party to be resolved. The first, which they call

'narrowing', is fundamentally a conservative act, occurring when the dispute is re-phrased in terms of established linguistic categories. This process of narrowing is equivalent to the sort of changes which lawyers must bring about to clients' perceptions of their cases in terms of the 'one-way translation' model. The second type of dispute transformation is 'expansion'. This is a radical phenomenon, occurring when a dispute is re-phrased in terms of categories which were not previously accepted by the third parties hearing the dispute. It corresponds to the reinterpretation of legal rules which can occur when, in response to client pressure, lawyers are led to regard laws in terms of clients' stories, rather than translating clients' stories in legal terms. Table one illustrates these divergent models of legal representation:

**TABLE ONE**

<p><b>DIAGRAM A:</b> (The model of Sarat &amp; Felstiner)</p>	<p><u>'One-way Translation'</u> <b>Legal Rules</b> → <b>Lawyer</b> → <b>Client's Story</b> (Unchanged) (Dominates) (Translated)</p>
<p><b>DIAGRAM B:</b> (The model of Griffiths &amp; Flood)</p>	<p><u>Modified 'One-way Translation'</u> <b>Legal Rules</b> → <b>Lawyer</b> ↔ <b>Client's Story</b> (Unchanged) (Tries to control) (Translated)</p>
<p><b>DIAGRAM C:</b> (Johnson's model)</p>	<p><u>'Two-way' Model</u> <b>Legal Rules</b> ↔ <b>Lawyer</b> ↔ <b>Client's Story</b> (Reinterpreted) (Tries to control) (Translated)</p>

In Table One, Diagram A presents the 'one-way translation' model. Here the legal rules are seen to determine lawyers' relations with their clients. Lawyers' power is based on their knowledge of the rules. They intervene to transform, by a 'narrowing' translation, clients' perceptions of the case. The interpretation of the legal rules is uninfluenced by lawyer/client interactions. Diagram B maintains, but modifies, this model. Here it is accepted that clients may also put pressure on their lawyers, leading to changes in their

explanation of the legal position. However lawyers' interpretation of the legal rules remains unaffected by this process. By contrast, Diagram C accepts that both 'narrowing' and 'expansion' may occur. Lawyers may also change their interpretation of the legal rules so as to accommodate clients' stories. This 'two-way' model envisages that clients may also exercise a cultural power of persuasion over their lawyers.

The greater analytical usefulness<sup>18</sup> of the 'two-way' model lies in the way it avoids pre-judging the outcome of lawyer-client interaction. Since power is not considered as the exclusive possession of those who know the legal rules, our attention is directed to the cultural power which may be exerted by clients and through language. Here the analytical tradition which detaches the study of lawyer/client interaction from the wider process of legal representation, can be seen to perpetuate a view of the legal rules as an inflexible backdrop determining the outcome of such interaction. Only by making the interpretation of the legal rules part of the analysis of lawyer/client interaction can we avoid the limitations of the 'one-way translation' model. It is therefore necessary to explore the interaction between the interpretation of legal rules and that of clients' stories throughout the entire process of legal representation. Research in this field should be holistic: relating lawyer/client interviews to the drafting of judicial acts, court litigation and adjudication.

This literature review also indicates a number of other criteria which should orient research on legal representation. It seems clear that legal terminology should be avoided when describing the power relations involved. Instead one should aim for a cultural analysis focusing on linguistic negotiation and the

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<sup>18</sup> As confirmed by its ability to explain aspects of Travers's own analysis which he left in the dark. In fact, the case-study which he used in order to attack Blumberg's description of law as a confidence game was clearly a case of dispute expansion. Travers notes that the client in this case resisted her lawyer's attempts to persuade her to plead guilty and that the lawyer did not advise her to plead guilty to the facts as presented by the prosecution, but to a similar set of facts which only constituted a technical offence. He also observes that this offence was one which the Magistrate's Court had not encountered before and there was some initial confusion as to whether to allow it. Here the client's resistance to the insertion of her case into narrow legal categories can be seen to have led to a change in the legal categories, towards a closer match with the client's understanding of her case.

ways in which clients' stories and legal rules are mutually re-interpreted in confrontation with one another. By investigating the nature of the cultural competence which actors in the field acquire in their daily practice, insights should be obtained on the broader power relations which motivate their interactions. Particular attention must also be paid to the context in which legal representation is carried out. This is composed of large-scale cultural and social trends. But it also consists of the specific characteristics of the legal system, lawyer, client and case concerned.<sup>19</sup>

These criteria highlight the utility of research of an ethnographic kind in this field. Culture is a traditional subject of anthropological inquiry and ethnographic writing avoids legalistic descriptive terminology. Anthropological approaches are also inherently comparative and possess the sort of sensitivity to the context of observation which was lacking in many of the studies reviewed. Finally, ethnographic writing mediates between the analysis of small-scale practices and more general and theoretical themes. It is therefore an ideal vehicle for research which seeks to identify general characteristics of law on the basis of the holistic study of particular cases of legal representation. The next chapter will show how an anthropological approach is also dictated by the specific theoretical hypothesis which has inspired the research carried out in this thesis.

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<sup>19</sup> It is revealing that Sarat and Felstiner, who studied American *divorce* lawyers, describe them as dominating their clients, whereas Flood, who studied American *corporate* lawyers, emphasises the pressure which their clients exert on these lawyers.

## Chapter 2: Rules and Stories

### 1. Introduction

The previous chapter explained the utility of a holistic study of legal representation in its social context. A 'two way' model was recommended, which could accept that clients' pressure may induce lawyers to reinterpret the law to accommodate their claims. Instead of embracing legalistic conceptions of power, research should explore the practical choices involved in acquiring and exercising cultural competence from the standpoint of their intended power effects.

The present chapter will argue that focusing on narrative provides the necessary analytical tools for conducting this research. Narrative is a cultural medium employed at various stages of legal representation: from initial client conferences to the stories lawyers tell in court and the story of the case embedded in the final judgement. By studying the practical choices involved in telling persuasive stories, re-telling them before the court and in the judicial consumption of stories, one can comprehend the power effects which motivate these choices. Moreover the argument will not be restricted to the claim that legal representation is best considered as the set of relations involved in telling, translating and receiving stories. Narrative analysis also offers a new way of looking at the legal rules themselves: one which promises to explain how rules are reinterpreted as the 'two way' model of legal brokerage suggests and why this happens in some cases but not in others.

The discussion will consequently depart from an overview of theories of narrative and its uses in legal representation. This will illustrate the significance of narrative analysis for research in legal settings. Finally, it will be argued that the anthropological perspective adds an important dimension both to studies of legal representation and to narrative analysis, which makes it particularly suitable for this type of research.

## 2. Two Theories of Narrative.

Narrative can usefully be approached by way of the theories of Jerome Bruner; a psychologist who has tried to identify the characteristic features of narrative, which he sees as a particular way of thinking and speaking about the world. In his earlier writings (Bruner 1986), he characterises this narrative mode of thought by its opposition to what he calls the 'paradigmatic' mode utilised in the natural sciences. The narrative and paradigmatic modes are completely distinct and irreducible to one another. Various features distinguish the two modes, such as different criteria of verifiability. Whereas a good story convinces one of its life-likeness, a good paradigmatic argument convinces one of its truth. Narrative is concerned with establishing particular connections between specific people, their intentions and their actions. Paradigmatic thinking is concerned with general rules which hold true in all circumstances. Narrative deals with the 'vicissitudes of human intention' and therefore simultaneously constructs two landscapes: a landscape of action dealing with the actual activities of protagonists and a landscape of consciousness, which concerns their mental states. Stories persuade by connecting these two landscapes.<sup>1</sup> Paradigmatic thought is not concerned with the landscape of consciousness, but only with logical, scientifically ascertainable, connections between universally accepted facts.

These differences are in turn related to the specific way in which language is used in constructing narrative accounts. Bruner again draws contrasts with scientific uses of language in: a) the ways in which words are chosen; b) the ways in which they are combined and c) in the discourse structure of narratives. While scientific language selects words on the basis of their clear and univocal reference to reality, story tellers must try to select referents

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<sup>1</sup> Bruner observes: "In any case, the fabula of a story -its timeless underlying theme-seems to be a unity that incorporates at least three constituents. It contains a plight into which characters have fallen as a result of intentions that have gone awry either because of circumstances, of the 'character of characters', or most likely of the interaction between the two...for what one seeks in story structure is precisely how plight, character and consciousness are integrated" (Bruner: 1986: 21).

which fit the subjective landscape on which the story is being unfolded, with due regard for the action they aim to represent. When combining words to form narratives, story tellers tend to prefer metaphors and poetic language which evoke new possibilities and make the world strange. In this way the reader is invited to participate in the production and comprehension of the story's intention. Thus, while paradigmatic language tries to give a single meaning to events, stories: "initiate and guide a search for meanings among a spectrum of possible meanings" (Bruner 1986: 25). This same characteristic also unites the various features of narratives as discourse.<sup>2</sup> Thus, narratives create space for alternative meanings: evoking different possibilities by 'subjunctivizing reality'. Bruner re-worked these ideas in a later publication (1990), listing five central features of narrative:

1. Inherent sequentiality: Narratives are composed of constituent elements, such as particular characters or incidents. Their significance is generated by their place in the whole sequence of events (the plot); which in turn can only be grasped if one understands the individual elements composing it.

2. Factual indifference: Bruner claims that the meaning of stories is internally generated and stories need not refer to any extra-linguistic reality in order to achieve their power. Histories and fictional novels share the same narrative form. While this seems to derive from a human predisposition to organise experience in narrative forms, this does not mean that narratives simply reproduce the narrative structure of lived experience.

3. Forging links between the exceptional and the ordinary: Bruner points out that human cultures must contain mechanisms for negotiating communal meanings. Because stories relate isolated incidents and characters to larger, ongoing social dramas, they contain an: "apparatus for dealing

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<sup>2</sup> Bruner argues that narrative discourse aims to create implicit meanings, rather than explicit ones; emphasises subjective views of reality through fore-grounding the landscape of consciousness and evokes multiple ways of viewing reality by intertwining various voices.

simultaneously with canonicity and exceptionality” (Bruner 1990: 47). This apparatus is employed in order to: “render departures from cultural norms meaningful in terms of established patterns of belief” (*ibid.*). This claim is supported by referring to the way in which people resort to stories when asked to explain unusual behaviour. Such stories attempt to explain behaviour by referring to intentional states which mitigate deviations from canonical cultural patterns and make them comprehensible.

4. Dramatic: To explain this feature of story-telling, Bruner refers to Kenneth Burke’s discussion of dramatism, which emphasises the role of ‘trouble’, or: “deviations from the canonical that have moral consequences” (Bruner 1990: 50). Since stories explain the exceptional against the background of the commonplace; they necessarily stress the canonical moral rules in terms of which action is ordinarily understood in order to describe deviations from them. Consequently: “stories, carried to completion, are explorations in the limits of legitimacy” (*ibid.*) and “to tell a story is inescapably to take a moral stance, even if it is a moral stance against moral stances” (*ibid.*) This is why narratives generate drama and emotion.

5. Constructing two landscapes: Here the previously mentioned theme of the dual landscapes of consciousness and action is evoked; with reference to modern tendencies to foreground the landscape of consciousness.

Finally Bruner confronts the thorny issues raised by the co-existence of such apparently ‘true’ stories as historical accounts and fictional ones. His approach is based on his earlier discussion of the way in which stories create subjunctivity, or the possibility of many different readings. He sees subjunctivity as also characteristic of ‘true’ stories, as is suggested by: “the perpetual revisionism of historians” (*ibid.*: 55). It ensures that the status of stories: “remains forever in the domain midway between the real and the imaginary” (*ibid.*) Stories are used for social negotiation and must therefore be open to many alternative readings in order to persuade as many people as

possible. People are ready to accept that human reality, unlike scientific accounts, is relative and uncertain.

My own perspective on narrative will be constructed by contrasting Bruner's views with those of Paul Ricoeur (1984), with special regard to the referential dimension of narrative.<sup>3</sup> Where Bruner sees 'factual indifference' as characterising narrative accounts, Ricoeur follows Aristotle in seeing narrative as '*mimesis*', or the imitation of existing human action. He explains the features of narrative in terms of its function, which is that of mediation in three analytically distinguishable realms:

Mimesis1: This is the initial 'borrowing from' the real world, without which narrative accounts would not be able to justify deviations from it. At this stage, reference is made to the general vocabulary and symbolic systems in terms of which human activity is normally understood. Because human actions are never ethically neutral, but are always interpreted with reference to norms and values, stories are also concerned with ethics.

Mimesis2: This is the stage where narratives create their own patterns of meaning, by configuring reality. They do so by mediating between:

- i) Individual events and the story as a whole.<sup>4</sup>
- ii) The temporal status of each event in the story on its own and the time of the story as a whole.
- iii) A series of heterogeneous factors, such as agents, goals, means, interaction, circumstances and unexpected results.

While Bruner opposes narrative to paradigmatic thought, Ricoeur sees the transition from mimesis1 to mimesis2 as lying in: "the passage from the paradigmatic to the syntagmatic" (1984: 67). He therefore sees narrative as

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<sup>3</sup> Although Ricoeur devoted a lot of attention to understanding the relationship between time and narrative, this will not form a focus of my analysis.

<sup>4</sup> See the first feature of narrative in Bruner's list.

developing *on the basis of* paradigms, which he defines as the generally accepted social norms and symbolic categories in terms of which human actions are understood. Narrative invokes these norms and values internally in order to explain departures from them. Conversely, specific incidents or characters within a story may be recounted in order to affirm general rules. There is therefore a dialectical interplay between generic paradigms and particularistic accounts *within the narrative itself*. This constant see-sawing between the two poles of generic paradigms/roles and particular events/individuals is aptly described as 'discordant concordance'. Ricoeur is careful to observe that different stories are located at different ends of this spectrum. Moralistic tales are located closer to the paradigmatic pole, whereas subversive stories are found at the particularistic end. However, all stories mediate between these two poles and contain elements of both.

This point is further developed in regard to the ways stories as a whole are classified. It is argued that the emergence of particular story types is one way through which new paradigmatic ways of understanding human action arise. New paradigms crystallise when a number of narratives converge around a particular theme.<sup>5</sup> Subversive stories both create new paradigms and constitute deviations from existing paradigms. Moreover, the interplay between paradigmatic understandings and particular circumstances *within* stories is what enables them to simultaneously challenge and affirm paradigmatic understandings externally.

Mimesis3: Narratives are not isolated, self-contained texts, detachable from the social relations within which they are produced and consumed. As against Bruner's claim that narratives are 'factually indifferent': "an ability to communicate and a capacity to refer must be simultaneously posited" (*ibid*:

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<sup>5</sup> This can be exemplified by the way in which a series of films, such as the Rocky series, have helped to create the archetype of the brutalised ex-Vietnam soldier who seeks revenge against American society for his maltreatment. In this way, an originally deviant account becomes part of the standard repertoire of paradigmatic understandings which is available to movie-goers and against which new deviant interpretations will have to evolve.

78). Ricoeur sees a contradiction in assuming that narratives can influence the way people understand the world unless one assumes that they somehow refer to it. He prefers to speak of a process of narration rather than narrative texts, thus highlighting the need for readers' co-operation if this process to fulfil its aims. Successful narration requires an intersection between the world referred to in the text and that of the reader. The persuasive effect of particular narratives will depend on their ability to activate, by replicating, the paradigmatic cognitive categories of specific groups of readers.<sup>6</sup>

Ricoeur also convincingly explains the problem of reference. The differences between fictional stories and historical accounts are derived from the positions they occupy at opposing ends of the paradigm/narrative continuum. While histories are closer to the paradigmatic pole, stressing generic and widely accepted ways of explaining behaviour, fictional accounts are closer to the narrative pole; insofar as they subjunctify reality and reveal alternative interpretations of it. However fictional accounts must also somehow refer to reality, even if such reference is only intended to subvert it.<sup>7</sup>

This overview exposes critical differences relating to the alleged 'factual indifference' of narrative accounts and the relationship between paradigmatic and narrative understanding. If Ricoeur insists on the dialectical interplay between stories and paradigms, Bruner posits an unbridgeable gulf between paradigmatic and narrative modes of knowing:

"It has been claimed that the one (mode of knowing) is a refinement of or an abstraction from the other. But this must be either false or true only in the most unenlightening way" (Bruner 1986: 11).

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<sup>6</sup> Ricoeur observes that the interplay between tradition and innovation which constitutes the cultural impact of particular narratives is a process which can only be completed in the mind of the reader. It is the *reader's* paradigmatic ways of explaining behaviour which the narrative must engage with.

<sup>7</sup> It is observed: "Even extreme alienation in relation to reality is still a case of intersection (between the reality mirrored in the story and that of the reader)...the shock of the possible, which is no less than that of the real, is amplified by the internal interplay, in the works themselves, between the received paradigms and the proliferation of divergences...Thus narrative literature is a model of practical actuality by its deviations as much as by its paradigms" (Ricoeur 1984: 80).

However the way in which these theorists define the paradigmatic mode is conflicting and ambiguous. In Bruner's earlier text (1986), he speaks of 'science', implying that paradigmatic reasoning is that found in so-called 'hard' sciences, like physics or mathematics. In this view, the paradigmatic is equivalent to a logical and scientific mode of understanding, which finds expression in rule-like univocal statements due to the universally valid and directly referential nature of its assertions. In his later writing (1990), Bruner is less concerned with the paradigmatic mode. Here he writes about the role of narrative in justifying deviations from the sort of canonical cultural norms which Ricoeur terms paradigms in his analogous description of the way stories mediate between the particular and the generic.

In the latter use of the term, the paradigmatic is therefore equivalent to generally accepted categories for making sense of human states and actions; be they rules, character types, or roles. An example would be the norm found in North African societies that a man preferably marries his father's brother's daughter. Such a norm is both a generally-held perception as to how young unmarried men act, a description of the way many such men do act and, if framed as a rule, can become a prescription as to how such men should act.<sup>8</sup> Its generic terminology reflects its status as a generally held belief which also does not refer to the specific actions of one individual but to the usual practices of a whole social category. It is unclear whether Bruner considers such canonical cultural norms to be paradigms or not.

The explanation for this divergence may lie in the types of stories that the two theorists looked at. Ricoeur is concerned both with supposedly true stories as well as fictional accounts. By contrast, Bruner largely focuses on modern

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<sup>x</sup> Bourdieu (1997) has remarked on the ease with which the transition from describing an observable norm of social behaviour to re-formulating this norm as a rule directing action, enables social theory to shift from describing social action as patterned to describing it as rule-governed. He therefore views honourable behaviour as a disposition instead of a case of obedience to the 'law' of honour.

novels of accepted literary value.<sup>9</sup> However, the ability to create a persuasive narrative is clearly useful in various occupational contexts, ranging from that of the professional historian to that of the lawyer. Unlike modern novels, the narratives employed in these contexts generally claim to be true and this claim will influence the form of these narratives. Historical accounts, for instance, usually avoid 'subjunctivizing' reality, by evoking an endless spectrum of possible interpretations. Instead they seek to persuade the reader that their interpretation is the correct one. Paradigmatic knowledge, even of the scientific sort, forms an integral part of historical or legal narratives.<sup>10</sup> Admittedly much modern fiction is not characterised by such an affirmation of the value of accepted paradigmatic understandings, tending to subjunctify reality. Yet Ricoeur's model can explain the different roles played by paradigmatic understandings in historical accounts and in modern fiction in terms of the diverging aims of the producers of these narratives. Bruner does not really explain these variations.

Thus Ricoeur's view of paradigms and associated model of a dialectical interplay between stories and paradigms identifies a crucial feature of narrative accounts. The picture that emerges is one of a spectrum of narrative forms, blending into paradigmatic norms at one pole and employing subjunctivising language at the other. This is not a static picture, but a dynamic one: seeing narrative as an indispensable communicative medium for engaging with, producing, or reinterpreting paradigmatic norms. This is because it can either transform everyday experience to conform with paradigmatic rules or carry out the contrary operation.<sup>11</sup>

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<sup>9</sup> He justifies this on the grounds that these stories are widely considered to reveal great story-telling ability and should therefore be treated as the central case of story-telling in general.

<sup>10</sup> Think of the way lawyers draw upon medical evidence when constructing a narrative account of a homicide.

<sup>11</sup> Judging by a recent interview. Bruner himself is keenly aware of the need for such a mechanism for moulding the group of paradigmatic norms which are known as legal rules. He remarks on legislators' reliance on precedent and interpretation to adapt laws to changing situations (Shore 1997: 21).

### 3. Legal Story-Telling.

To mention law at this stage is to recall my promise that narrative analysis can explain the processes by which rules are developed and reinterpreted. This can be done if one takes the step of considering the legal rules themselves as a specific sub-set of the class of generic, paradigmatic, norms which Ricoeur sees as locked in a dialectical relationship with narratives. The sense in which legal rules can be considered as paradigmatic norms will be clarified by a brief example of an ordinary legal rule. I have before me a copy of the Italian Civil Code (Di Majo 1997). Opening it at random, I find section 17 which states, on translation:

“A juridical person cannot buy immovable things, nor accept donations or inheritances, nor receive any legacies unless authorised by the Governmental Authority. Without such authorisation, the purchase or the acceptance have no effect” (Section 17, Book 1, Codice Civile).

Now this rule shares many of the characteristics of the earlier discussed cultural norm concerning marriage with the father's brother's daughter. It has an abstract and generic scope: referring to all juridical persons and not simply to one particular one. It foregrounds the 'landscape of action' and not that of consciousness. Rather than trying to subjunctify reality and evoke alternate interpretations, every word used in this rule is carefully chosen and has a specific technical meaning which makes it difficult to re-interpret.<sup>12</sup> The import of this rule would be acknowledged by most, if not all, Italians. By seeming to describe a general feature of the social world, it effectively seeks to prescribe general obedience to its injunctions.

Once the paradigmatic status of legal rules is affirmed, then narrative can be seen to occupy an intermediate position between law and social experience and its significance would lie in its ability to mediate between these two poles. Narrative achieves this aim through its ability to create a continuous

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<sup>12</sup> Terms like 'juridical person' or 'immovable property' are themselves defined by other legal rules.

discursive space between legal rules and individual accounts. In legal representation, the creation of such a continuum is indispensable if legal frameworks are to engage with and respond to clients' experiences. Only through the creation of a common discursive space can clients' experiences mould legal rules by reinterpreting them. Conversely, it follows that conservative attempts to preserve existing legal frameworks would try to prevent the creation of this continuous discursive space by censoring, fragmenting, or otherwise restricting efforts to narrativise clients' experiences. This view implies that the internal content of the stories produced in legal settings would be marked by a dialectical interplay between generic legal rules, other culturally specific paradigmatic understandings and particular, 'subjunctive' experiences. This interplay would take different forms depending on the intended social effect of the story concerned.<sup>13</sup>

These points can be illustrated by referring to the earlier quoted legal rule. Any attempt to bring this rule to bear on a particular practical situation requires the creation of a paradigmatic story, the simplest form of which would run along these lines: 'a company bought a house with (or without) the authorisation of the Governmental Authority'. A story like this is predominantly characterised by its conformity to the central meaning of the paradigmatic legal categories, making the application of the rule easy and unproblematic. While this story refers to a particular event, this is conceived purely in terms of the generic legal categories; without any reference to idiosyncratic details or intentional states which might suggest alternative interpretations of events. The difference between this conservative, paradigmatic, story and a subjunctive narrative is easy to imagine. In any particular case, for instance, it might not be clear whether a juridical person in terms of section 17 exists or not. Does a co-operative have such a personality? What about a band-club? What if some of the associates in a

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<sup>13</sup> One would expect judges, for instance, to produce stories oriented towards the legal, paradigmatic, pole. On the other hand, lawyers might tend to resort to subjunctivising discourse in order to question existing interpretations of legal norms.

band-club committee think that the club has bought a house when others think it was bought by one of the members? Clearly the particular, subjective features of the actual experience of clients will lead lawyers to interrogate the meaning of the legal rules and to develop their interpretation of them.

The relevance of this approach is confirmed by the repetition of its salient points in recent attempts to relate narrative analysis to legal theory. Thus Winter's (1989) aptly named article: "The Cognitive Dimension of the *Agon* between Legal Power and Narrative Meaning," argues that the significance of narrative lies in its ability to mediate between individual/social experience and legal rules. In this way, narratives have the potential to transform one into the other. At the same time, emphasising their necessary incorporation of cultural norms underlines the way in which narratives are constrained by them. It is not possible to say anything one wants to in a story, because this must conform to certain culturally embedded norms if it is to be persuasive. Moreover, although rules can be transformed into stories, they are not themselves a type of story, since they possess different characteristics, such as generalisability, unreflexivity and reliability in communication

A more empirical approach is that of Bennett and Feldman (1981), who carried out research on the tactics by which lawyers persuade juries of the credibility of their version of events during criminal trials. They argue that these tactics can only be fully understood if one relates them to the different narratives which prosecution and defence try to construct. The way in which lawyers examine witnesses, for example, cannot be understood if seen as a series of isolated questions. But the answers elicited make sense in terms of their contribution to underlying story-frames. These story-frames channel, co-ordinate and explain all that goes on in court.<sup>14</sup>

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<sup>14</sup> They insist that racist bias in adjudication occurs because different social groups have different notions of causality and therefore of what constitutes a persuasive story. Bias is expressed and mediated through the story form, which unconsciously triggers it off. Similarly journalistic accounts which focus solely on court-room drama are missing the wood for the trees since the significance of court-room tactics does not lie in themselves but in their contribution to the underlying stories which really determine the outcome.

Bennett and Feldman's account has inspired other studies to apply a narrative approach to the study of adjudication. Jackson (1991, 1994) has shown how apparent contradictions in case-law can be justified by the different narrative frameworks in terms of which apparently similar cases are understood. He argues that this occurs because distinct stories implicitly evoke different ethical reactions. He provides additional support for the view that legal rules and stories are locked in a dialectical and mutually constitutive relationship by drawing attention to the role narratives play in legal exposition and the narrative form in which the provisions of early legal codes were drafted. However he disagrees with Bennett and Feldman's view of lawsuits as determined by the conflict between two opposing narrative frames (Jackson 1994). Instead he claims that the pragmatics of court-room interaction<sup>15</sup> are independently narrativised, taking the form of narrativised models of successful advocacy which jurors and judges will evaluate during the process of adjudication. These models have an impact independently of the stories told in the case and may determine the outcome of the lawsuit.

Twining (1994) has also criticised Bennett & Feldman's approach. He claims that they exaggerated the role story-telling plays in law-suits. There are many genres of legal argument which employ paradigmatic reasoning. However narratives do play a significant role in legal processes, as demonstrated by the way judges use stories when adjudicating factual evidence in court. Twining considers three possible descriptions of the utility of narratives in allowing a persuasive presentation of the 'facts' which:

- a) Presents the facts as conforming with the relevant legal rules.
- b) Makes implicit appeal to extra-legal norms of morality or common-sense.
- c) Develops and enriches legal doctrine by interpreting the legal norms in terms of extra-legal norms.

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<sup>15</sup> By referring to the 'pragmatics of court-room interaction'. Jackson is talking about the way lawyers, witnesses and judges behave and interact: which he views as a separate dimension of court-room activity which participants evaluate independently from the stories told during litigation.

So as to assess these claims, two of Lord Denning's judgments are compared. In 'Candler vs. Crane Christmas', the narrative presentation of the facts allowed Lord Denning to develop the law of tort. It did so because his narrative implicitly appealed to important legal principles in order to argue that the scope of certain rules should be extended to apply to the case in question. At the same time, this narrative could itself be generalised, so that in time a new legal rule (or paradigm) would develop out of it. In 'Miller vs Jackson', however, the narrative presentation of the facts did not engage with important legal arguments and was presented in an overly particularistic way, creating doubts about the propriety of the judgement. From this Twining concludes that narrative may indeed play several roles in legal argument, so that all the three descriptions he considered are potentially valid. Since they often need to make implicit appeals to morality or common sense, those who wish to challenge the existing legal position are more likely to resort to narrative than those who simply affirm the existing rules.

Additional confirmation of the importance of the rule/story dialectic is provided by a recent article by Miller (1994), which applies narrative analysis to the study of legal representation. Here she follows in the footsteps of Cunningham (1989); who views legal representation as an act of translation by which lawyers try to translate their clients' stories into the conceptual categories of the laws and vice versa. However Miller attempts to move beyond these studies because the metaphor of translation suggests that lawyers mediate between two completely different languages which do not intersect and limit themselves to explaining words in one language in terms of the other. Since neither of the languages is altered by the translation, this metaphor does not allow for the possibility that the legal rules themselves might be reinterpreted in response to clients' stories. Also, it naively assumes that clients are always powerless, that their stories must always diverge from those of lawyers and that clients want lawyers to tell *their* versions. Most damagingly, the translation metaphor obscures the way: "legal story-telling, at its best, is *more* than either lawyer or client story-telling" (Miller 1994: 527).

Miller's own description of legal representation rests on the insight that stories bridge the gap between clients' perceptions and the legal rules. Because stories create a discursive continuum between these two poles, they can be a vehicle for the expression of clients' power; enabling them to appropriate the meaning of the legal rules in their own interests.<sup>16</sup> Clients' narratives have the potential of enriching legal doctrine by providing a different perspective on the legal categories. This in turn affects the role of lawyers, who can no longer assume that their interpretative outlooks will necessarily prevail over those of their clients and must now view legal representation as a process for which clients are co-responsible.

By explicitly linking the rule/story dialectic to what I have called a 'two way' conception of legal representation, Miller highlights the uses of narrative analysis to explore the way lawyers and clients negotiate power in specific cases of legal representation. This builds on the insights of the previous chapter. Yet these studies neglect another important dimension of legal representation, which is that of the specific cultural context and social relationships conditioning particular cases of legal representation. A final shift of focus is consequently required. This will involve adopting an anthropological approach to the narratives produced, exchanged and consumed within legal representation; as this explains specific stories by reference to the over-arching social contexts in which they arise.

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<sup>16</sup> She illustrates this by referring to a case she defended, showing how attention to the clients' story meant giving the client more power to participate in the decisions that were taken in regard to his case and also led her to view both the legal rules and the factual evidence in a new light.

#### 4. The Relevance of Anthropology.

This section will explain the reasons for the adoption of an anthropological approach, focusing on the study of *Maltese* legal representation. The argument will have three main branches. Firstly, it will demonstrate how legal anthropology has already explored legal representation in a way which pays greater attention to the socio-cultural context. This will be followed by a review of anthropological studies of narrative, which will argue that this same stress on the cultural and social context adds a crucial missing dimension to narrative analysis. From this perspective, narrative analysis can be seen as a form of social analysis which explores the interconnections between legal rules, cultural norms and subjective experience. Finally the relevance of anthropological research will be discovered in the nature of ethnographic writing itself. Since ethnographic writing incorporates the rule/story dialectic within itself, reflexively examining the tension between these two poles, it is a particularly appropriate vehicle for analysing this tension.

##### (a) The View from Legal Anthropology:

While narrative analysis has not figured within the central research agenda of legal anthropology, this sub-discipline has constructed a broad framework for understanding particular cases of legal representation by relating them to their social and cultural context. This can be illustrated by looking at anthropological analyses of evidence, of legal representation as an activity, and of the invocation of legal rules. To start with legal evidence, a concern with the cultural context in which this is produced has long characterised legal anthropology. Thus Gluckman's (1955) research among the Barotse described the ways in which culturally specific understandings influenced the assessment of evidence by the '*kuta*', or local court. Gluckman argued that that the over-lapping and multiple social bonds which connect individual Barotse to each other lead the local courts to broaden their criteria of relevant evidence beyond those facts which gave rise to the issue in question to

encompass the total history of the relations between the litigants. Local conceptions of reasonable behaviour, derived from Barotse morality and social experience, also function as a yardstick by which evidence could be evaluated. Similar points have been made by many other anthropologists.<sup>17</sup>

Anthropologists who have focused on Western legal systems have further shown how differing modes of describing evidence can be the tools of social conflict *within* Western societies themselves. For instance, Merry's (1990) study of court-room discourse identified a discursive struggle as to which of three genres to use in describing facts: legal discourse, moral discourse or therapeutic discourse. Court personnel view the lawsuits brought by working-class plaintiffs as a waste of their time. They try to classify these disputes in moral or therapeutic terms, in order to remove them from their jurisdiction. On the other hand, plaintiffs resist these classifications by using legal discourse in order to describe their claims.<sup>18</sup>

This stress on the wider cultural context also informs anthropological views of the work involved in legal representation. The key metaphor here is that of brokerage. Thus, Campbell (1964) remarks that lawyers in Greek rural society act as intermediaries between shepherds and the State authorities. This view of legal practitioners as brokers draws attention to the existence of historically evolving divisions of a political (Silverman 1977), economic (Cohen 1969) or cultural (Geertz 1969) sort, against which specific cases of brokerage must be understood. So Silverman's (1977) study of a central Italian village, relates the demise of 'all-purpose' land-owning patrons

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<sup>17</sup> Such as Feifer (1967) in regard to Russian Courts. Said Amir Arjomand (Starr & Collier 1989) about Iran and Lawrence Rosen (1989). In Rosen's research characteristic aspects of the Moroccan legal system, (like the emphasis on oral witnessing and on the social background of the parties), are derived from the way truth and the individual are conceived in Moroccan culture.

<sup>18</sup> Analogously, Conley and O'Barr (1990) have shown how different social groups differ in their aptitude to utilise the 'rule oriented' way of describing their claims which is most likely to result in a favourable outcome in self-represented claims before tribunals. Individuals who have little previous experience of litigation or the commercial world tend to use a 'relational' mode of description which usually fails to achieve the desired results.

catering for all the outside needs/links of their peasants to the increasing integration of these localities within the Italian state. This perspective sees legal representation as indicating significant socio-cultural divisions, which can be read off from particular cases of legal representation. The broker's own position becomes problematic, since he may be closer to either of the two sides and the social effect of his activities is highlighted. While Barth (1969) argued that brokers operate to reduce social differences, others (Bailey 1973)<sup>19</sup> claim that the opposite occurs, since brokers have an interest in maintaining the divisions which provide their own *raison d'être*.

In trying to comprehend the social effects of legal rules, anthropologists have also explored the interaction between narratives and rules by stressing the contextual background of particular legal cases. The issue has arisen in connection with the central legal anthropological debate between 'processualist' and 'rule-centred' approaches. 'Processualists' follow Malinowski (1989) in rejecting explanations of social behaviour as the observance of a body of norms. Instead they propose that people are always seeking their own selfish interests and manipulating the rules in order to achieve them. This means that conflict is treated as endemic within human societies and order seen as the result of the reciprocal obligations produced by interaction. By contrast the 'rule-centred' paradigm draws its inspiration from such as Radcliffe-Brown, in seeing social life as rule-governed.

This opposition has produced contrasting approaches to the study of law-like phenomena in other societies.<sup>20</sup> While work continues to be carried out in either the rule-centred (Hamnett 1977) or processual (Gulliver 1979; Caplan

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<sup>19</sup> Reference is also made to Robert Paine's paper entitled: "Second thoughts about Barth's models."

<sup>20</sup> Rule-oriented approaches tend to foreground the identification and description of a separate class of legal norms which are broadly analogous to legal rules in Western societies. More processual approaches have emphasised the study of disputes in their full temporal and social context.

1995) approaches, contemporary research has expressed dissatisfaction with, and tried to surmount, this opposition (Starr & Collier 1989, Rouland 1994). One of the most successful attempts has been that of Comaroff and Roberts (1986), since instead of simply superimposing 'rules' or 'processes' as objective analytical categories, they explore indigenous perceptions of customary rules. A study of Tswana beliefs reveals that the contradiction between rules and processes is embedded within their own ideology, which sees human affairs as both rule-determined and inherently negotiable.

This paradox is explained by the varying invocation of customary norms in different cases. Norms are explicitly invoked where litigants have generic goals, desiring to re-define their social relationships. An example would be marriage cases, where spouses attempt to challenge the prevailing normative framework in terms of which the central issues of their cases are defined. Here explicit invocation of norms accompanies spouses' attempts to broaden the relevant facts: narrating the entire history of their relationship to imply that different rules should regulate the case.<sup>21</sup> In these cases, the customary rules are experienced as to an extent<sup>22</sup> *negotiable*. By contrast, when disputes concern specific claims for determinate objects, litigants usually agree about the applicable normative framework. Thus norms are not explicitly invoked in many property disputes; argument focusing on whether the facts are such as to bring these norms into play. The normative customary rules will here be experienced as rigidly *determining* the final outcome.

Because they embed their research within the total fabric of Tswana society, Comaroff and Roberts can explain the indigenous ideological contradiction between rule-determined and manipulative views of human behaviour by showing how it reflects individuals' experiences of different types of cases.

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<sup>21</sup> Thus men do their best to show that they never really married women whom they wish to repudiate.

<sup>22</sup> Comaroff and Roberts show how this ability to negotiate the rules is limited by litigants' own previous manoeuvres, which they cannot contradict, and by the total socially accepted system of relationships and rules which define the language of manipulation itself.

While affirming previously reviewed research in stressing the uses of narrative to reinterpret the rules, they further identify cases in which narratives are typically used in this way and others where they are not. Tswana experience the rules as negotiable or determining depending on the case. Consequently: "rule-oriented and processual modes of settlement are *systematically related*" (Comaroff and Roberts 1986: 244). They should not be opposed, since:

"Far from constituting an 'ideal' order, as distinct from the 'real' world, the culturally inscribed normative repertoire is constantly appropriated by Tswana in the contrivance of social activity, just as the latter provides the context in which the value of specific norms may be realised or transformed. In short...norm and reality exist in a necessary dialectical relationship" (*Ibid*: 247).

This quotation reveals that what is here at stake is the social significance to be attributed to legal rules; their precise role in regulating human actions. If rules and social processes are dialectically linked in Tswana society, then might this not throw light on the way in which rules structure action in societies which are closer to the 'Western' type? Here too it may be a mistake to see human action as governed either wholly by laws or by manipulative self-interest. Narrative analysis, which highlights the mediation between general rules and particular interests, might help us break out of this opposition. If persuasive stories invoke legal rules, this may be because these rules figure as part of the context in terms of which desired actions are conceptualised. If so, then the social effect of legal rules should be sought in the ways in which they are narratively embodied.

In raising these questions, legal anthropology looks beyond particular cases of legal representation to interrogate the wider socio-cultural processes which condition them and to which they contribute. As this review illustrates, socio-cultural context can explain the form and volume of the evidence produced, how and by whom it is legally represented, and whether or not stories are used as a means to reinterpret legal rules. Anthropology examines the relationship between conceptions of legal rules and beliefs concerning the nature of social order and, ultimately, that of human beings.

(b) Anthropological Perspectives on Narrative:

The social uses of narration are emphasised in anthropology. Thus, Carrithers (1992) observes:

“(Narrative thought is) a capacity to cognize not merely immediate relations between oneself and another, but many-sided human interactions taking place over a considerable period... So narrative thought consists not merely in telling stories, but of understanding complex nets of deeds and attitudes” (1992: 82).

According to this description, stories provide the sort of social understanding used to interpret one's own actions and those of others. Narratives explain the meaning of individual actions/thoughts by placing them in culturally intelligible relationships with the wider context of time (including one's own past and future actions and intentions) and the external world (including physical/moral categories/laws and the actions/reactions of other people). Narratives can provide social understanding because they incorporate and mediate between so many heterogeneous elements; mirroring and ordering the complexity of social life. Carrithers argues that narrative understanding enables people to interact by providing a frame within which such interaction can occur. Negotiating the terms of a shared narrative framework means negotiating a social relationship between the persons concerned.<sup>23</sup>

Consequently anthropological approaches to narrative see the content of particular narratives as directly responsive to the specific social and cultural contexts in which they are produced, exchanged and consumed. This suggests that the most fruitful approach to the study of narratives is one which constantly tacks back and forth between an analysis of the specific social context within which particular narratives are exchanged and the study of the content of the narratives themselves.<sup>24</sup>

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<sup>23</sup> Such a relationship need not be direct and face to face, but can be an ‘exploded interaction’ occurring over wide temporal and spatial gaps.

<sup>24</sup> This is the approach of many anthropologists to linguistic facts. Bourdieu (1992), for instance, argues that one must eschew idealistic views of language which see it as a sort of universal capacity all human beings are equally endowed with. There is, rather, an *economy* of linguistic exchanges,

An interesting connection between story content and social contexts of narration is traced by MacIntyre (1984). He explores differences between Homeric narratives and modern novels. In Homeric epics individuals are not distinguishable from, and unselfconscious about, their roles. Their actions are predictable: soldiers act as soldiers and kings as kings. Reference is rarely made to characters' thoughts and feelings, only to their actions. Thus what counts in the moral evaluation of a character is not the inner 'landscape of thought', but the outer 'landscape of action'. At issue is whether a character succeeds in performing the actions required by his role and his (subjective) self is therefore absorbed in his (social) role. By contrast, modern novels play on the distinction between internal desires and external expectations. They celebrate the inner self which confronts, questions and rejects its social role; fore-grounding the 'landscape of thought' more than that of action.

These differences reflect variations in social organisation. In Homeric societies, narrative patterns were clear and predictable because there was less individualisation than at present and greater consensus about the way individuals in particular social settings should act. The morally praiseworthy virtues were therefore those which preserve this social structure by leading characters to perform the actions demanded by their roles. In the modern 'Western' world, however, greater emphasis on the inner self of individuals reflects societies where moral consensus is less evident and where each individual is expected to construct his own moral universe. Thus, contemporary societies produce 'subjunctive', incommensurable, narratives.

MacIntyre's depiction of Homeric society may over-emphasise its social cohesion, taking epics at their face value. Yet his approach is useful because it highlights the close relationship between narrative contents, moral norms and culturally-specific conceptions of selfhood. This narratively constructed

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where words can be possessed in greater or lesser quantities, accumulated, exchanged and so on. Speakers aim to make a profit when they engage in linguistic exchange and the profit made depends on their social backgrounds and the social relationship existing between them. Davis (1988) has also spoken of the 'social relations of the production of history', relating divergent historical accounts to their social contexts of narration.

linkage between individual lives and moral norms is a fruitful locus of anthropological research. Basso (1988), for instance, has shown how the Western Apache Indians he studied used stories as a means of indirect moral instruction; exploiting the shock of recognition engendered by the realisation that a casually told story actually relates to oneself. Kavouras (1994) has also described how the people known as '*trimistira*' on the Greek island of Karpathos use their ability to construct and manipulate stories<sup>25</sup> in order to criticise activities transgressing shared moral understandings, thus operating as agents of social control.

While the way narratives create self-hood has also been explored from purely psychological angles (Freeman 1995), it is the social uses of particular narrative constructions of self which have interested anthropologists. Thus, Rosaldo (Bruner & Turner 1986) shows how the Ilongot hunt is also a 'hunt for stories', given the active male pursuit of incidents which can be meaningfully woven into hunting narratives to shed a favourable light on their selves. Meyerhoff (Bruner & Turner 1986) has also pointed to the uses of story-telling in creating social visibility for ageing and forgotten American Jews. Machin (1996) has taken these ideas a step further by showing how different stories can enable people to convey a different and even contradictory sense of self in different social contexts. He uses the evocative metaphor of 'navigation' to describe this process, which is therefore seen as complex, uncertain and unfinished. These studies find the anthropological utility of narrative analysis in that:

"by attending to how the story is related, narrative analysis seeks to uncover the multiple meanings that reflect the connections between an individual's life and problems and public, historical, social structures. In so doing, the social nature of personal troubles is clarified through connections to public forces" (Lempert 1994: 438).

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<sup>25</sup> The narrative competence of the '*trimistira*' derives from their ability to draw upon shared community knowledge and moral norms to define themselves as characters who conform to the traditional roles and who are therefore entitled to criticise others.

An anthropological approach does not lead away from a study of the literary qualities of narratives. Rather, it explains why particular literary tactics are chosen. Thus in a discussion of Venezuelan political violence, Coronil and Skurski (1991) show how the state acted as a scriptwriter; crafting stories which enable ruling elites to gain political support. The crude inattention to detail and lack of realism of these political script-writers left many traces indicating the falsity of the story. Paradoxically, however, state interests were best served by the obvious inadequacies in the story told:

“Our interpretation of the Amparo massacre suggests that the Venezuelan state asserted its authority in a theatrical mode, constructing a drama whose plot re-enacted the civilising myth of the state as the scriptwriter. This simulacrum --the representation of the illusion of representing the real-- rests on the controlled tension between fact and appearance, between attention to evidence and disregard for conflicting information, and thus on the willingness to allow cracks in the performance to reveal the arbitrariness of authority. Fear grows out of these cracks” (Coronil & Skurski 1991: 310).

Social analysis can therefore explain the *lack* of literary ability of narrators, demonstrating anthropology’s power to enliven literary analysis.

There have already been anthropological analyses of the narratives produced in litigation. Fiume (1996) has explored the judicial confessions of Sicilian women, accused of poisoning their husbands in the eighteenth century. Her approach is two-pronged. On one hand, she interprets these narratives by exposing the broader socio-cultural context they presuppose, characterised by fragile nuclear families, the importance of neighbourhood and a specific moral economy of conjugality. On the other, she shows how these stories also reflect specific court-room relations of narration. Thus their content also responds to the questions asked by judges, throwing light on their attitudes.<sup>26</sup>

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<sup>26</sup> These stories show how judicial perceptions belied the formal legal dissociation between witchcraft and poisoning. In fact, judges subjected these women to the same punishment (i.e. death by burning) previously meted out to witches.

(c) Anthropological Representation:

My final reason for adopting an anthropological approach is rooted in the nature of anthropological knowledge itself. It hardly bears repeating that anthropology pays attention to the social and cultural context of interaction, or that it aims for holistic description, especially of cultural perceptions, in explaining human activities. As shown, all these features of anthropology constitute arguments in favour of the adoption of such an approach; particularly in view of the special requirements which such a study should, in my opinion, fulfil. However, an even more compelling reason stems from the similarities between legal representation and anthropology; especially the shared centrality of what I have termed the rule/narrative dialectic.

These similarities can be introduced by reflecting on ethnographic film. In a thought-provoking article (MacDougall 1994), the anthropologist film-maker MacDougall has questioned the general belief that ethnographic film is the anthropologist's own story about an indigenous people. He shows how such films can serve the purposes of the apparently objectified 'others', often in ways which the anthropologist film-maker is completely unaware of. This happens, for instance, when Australian aboriginals use the film to instruct younger generations on the sacred sites they must care for. MacDougall argues that we must consequently be wary of assuming that we know who the story 'belongs' to. We should be open to the possibility that representing the stories of others may involve the anthropologist herself; so that the film is: "no longer outside the situation it describes, (being) inside someone else's story" (MacDougall 1994: 35). When one compares this article to that by Miller on legal representation,<sup>27</sup> it seems clear that they both share a view of narrative as potentially subversive of the established categories of their respective disciplines of law and anthropology.

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<sup>27</sup> See the previous section of this chapter, on 'Legal Story-Telling'.

This analysis therefore highlights the way both anthropologists and lawyers have to represent the stories of clients/informants and to align them with general paradigms, whether these consist of legal rules or anthropological theories. In the case of anthropology, this tension is heightened since its principal tool of investigation, participant observation, is itself guaranteed to produce a fund of stories which constitute the anthropologists' field experience. These stories must then be converted into knowledge of a paradigmatic sort. Carrithers describes this process in this way:

"Consequently anthropological knowledge begins as personal knowledge about particular people in a particular place at a particular time (1992: 148)...Upon this basis is then erected a superstructure of paradigmatic knowledge" (*Ibid*: 150).

Anthropological writing therefore incorporates within itself the dialectical tension between generic paradigms and particular stories which I have viewed as central to an understanding of legal representation. Moreover, recent ethnographies reflexively exploit this tension to explore the limitations of anthropological research. Thus, Abu-Lughod (1993) has deliberately shunned any attempt to generalise extensively about the social structure or the culture of the Bedouins. Instead, she has simply tried to reproduce the stories which female members of the family she lived with told her. In this way, she argues that the Western reader is left relatively free to react to the common existential dilemmas she shares with the Bedouin and the distancing effect of powerful ethnographic discourse is neutralised. Indeed, the only space for general paradigmatic theories in her book lies in the titles of the chapters. These are given names such as 'Honour' or 'Patrilineality'; so as to provocatively evoke time-worn anthropological themes in the context of vivid personal stories which ironically counterpoint them. It is hardly surprising, in this context, that she has been criticised for her neglect of theoretical generalisation (Lindholm: 1995), or that there are concurrent calls to 'put the law back' into anthropology (Biolsi 1995).

This shows how the interplay between rules and stories is reproduced at the level of theoretical debate itself. But precisely because anthropology mirrors

law in having to negotiate the gap between narrativised experience and paradigmatic knowledge and because it reflexively analyses this process, it is an ideal tool for the study of legal representation. Here the very act of anthropological writing can be seen to offer grounds for reflection on and knowledge of the process of representation.

## 5. The Theoretical Hypothesis.

At this point it is possible to be relatively brief. In this thesis, I adopt an anthropological approach to the study of Maltese legal representation. I do so by means of a holistic analysis which follows the ordinary course of a law-suit and focuses on the way in which evidence is elicited, censored, exchanged, represented and consumed during each stage of the case. In the process, I am particularly interested in the dialectical relationship between stories and legal rules. This relationship will be explored by looking at the particular social and cultural context within which specific narratives are produced. In this way, the social uses of narrative will be foregrounded, particularly the connections between legal rules, moral norms and subjective experience. At the same time, such an analysis will form the basis of broader reflections on the social effects of the Maltese legal system.

## Chapter 3: Studying Legal Practice

“Perhaps British Colonialism has produced a new sort of being, a dual man aimed at two ways at once: towards peace and simplicity on the one hand, towards an exhausted intellectual searching on the other” (Bianchi, Cassola & Serracino Ingloft 1995: 39).

### 1. The Origins of My Research Project.

The theoretical appeal of anthropological research on legal representation should, by now, be clear. However traditional conceptions of anthropology raise doubts about my credentials for carrying out this research. These conceptions glorify the alien identity of the anthropologist within the culture he studies, seeing this as indispensable for the production of anthropological knowledge. By contrast, I am Maltese, having a law degree and a warrant to practise as a lawyer in Malta. Moreover anthropologists traditionally research a ‘culture’ or ‘society’, while studying legal representation foregrounds a set of work practices. Tackling these objections requires saying as much about my own life-history as about contemporary anthropology.<sup>1</sup> This will set the stage for an explanation of the fieldwork methods used, which will be described within the narrative context of my research. These methodological issues will in turn justify the selection of the specific mode of organising and expressing research findings employed in this thesis.

I shall therefore begin with my story. Yet to say this is to acknowledge my own role in constructing the narrative which follows. One must keep in mind that this story is being produced in an attempt to engage with the paradigmatic rules structuring the writing of an anthropology thesis. This is

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<sup>1</sup> Ethnographies increasingly acknowledge the role played by the ethnographer’s own biography in the production of her research findings (Okely & Callaway 1992). Okely observes: “In Britain questions of reflexivity and personal aspects of fieldwork were made most apparent during the 1985 ASA conference Anthropology at Home (Jackson: 1987). because the anthropologists were obliged to be self-conscious about the similarities or contrasts in the context of fieldwork in their native country” (Okely & Callaway 1992: 11).

not 'The Complete Story', but a highly selective version of events, told from my present standpoint in the form of a series of iconic episodes.

The first episode of this account starts with me as a six year old transplanted to England by his parents. My father was studying for *his* Ph.D. and –given the closely bonded character of the Maltese nuclear family– my mother and I also came to accompany him. For a child who only knew how to speak in Maltese, the experience of fourteen months in an English school was initially traumatic. Apparently I took to shouting in an attempt to make myself understood. Not surprisingly, I was not very popular. Certain experiences from that period remain imprinted in my memory; such as the burning sensation of being pushed on to a clump of nettles. However the situation altered when my mother decided to take me in hand and teach me English. As I gradually mastered the language, I ceased to be such an obvious target for bullying. I developed a taste for reading, becoming more introvert than before. Maltese was forgotten in my absorption with this new English world.

The second episode of this tale sees me back in Malta, attempting to understand what my Maltese schoolmates were jabbering about. To my dismay, I now found Maltese unintelligible and had to re-learn it gradually. Once again I experienced the sensation of being an outsider, aggravated by the fact that everybody expected me to understand and to join in. Yet it took three years to re-learn Maltese and the process was never fully completed. To this day, I am prone to make silly mistakes, confusing the gender of words. At times, it seemed impossible to really integrate into Maltese society, just as I could never be English. This experience carved out within me what Okely<sup>2</sup> has termed a 'hybrid identity', from the perspective of which all fixed identities seemed questionable.

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<sup>2</sup> Okely has described the importance of her own identity as a child born in Malta in nourishing her awareness of difference and sympathy with groups who are not incorporated within dominant hegemonies. Her point was that even apparently residual traces of a different identity (such as being born in Malta) may create such "spaces of hybridity" (Talk given to the Anthropology Programme of the University of Malta in March 1997).

The third episode takes us forward another thirteen years or so. I was now a law-student at the University of Malta, with no clear idea of the shape of my future career. Having joined the course with the explicit aim of keeping options open, this began to seem like a big mistake. Law did not excite me and I did not get on with many of my fellow students. We were supposed to memorise hundreds of sections of the law codes, yet it was not clear to me how these sections could possibly influence the lives of ordinary people. My insecure questioning attitude was the very opposite of the self-confident arrogance which people expected from a law student. Indeed, telling people that I studied law gave them the chance to project their fantasies about lawyers on to me. Middle-class Maltese credited me with immense cunning and deceptive skills, while the working class treated me with hostility and suspicion. People wondered aloud about my career prospects whenever I told inadvertent truths or acted insecurely, openly informing me that I did not seem like a lawyer and doubting my ability to practise law.

In the middle of these doubts and hesitations, the opportunity arose to spend a summer doing anthropology fieldwork in a Maltese village. The experience of 'doing fieldwork' showed me how doubts and questions could be exploited in order to produce social knowledge. It seemed that I had discovered work which was enjoyable, provided real insights into the working out of social life and allowed me to be creative. I decided to leave the law course and read for a B.A. in Social Anthropology, only changing my mind on realising that it would be possible to read for an M.A. if I stuck it out for a year or two more until I acquired my law degree

On completing the law course, my inability to assume a lawyer's identity seemed even more obvious. After six years of studying law, it was impossible to advise clients purely on the strength of the abstract theories I had learned. This perception was reinforced by the professional socialisation I had undergone as a law student. The process of 'becoming' a lawyer was presented as consisting of two phases. In the first six years, the University degree is obtained. In the following two to three year period of '*prattika*' (i.e.

practice) a law graduate attaches himself to an established lawyer as a glorified office-boy. In return for helping with the more mundane tasks of lawyering, he gains the opportunity to observe his lawyer-patron advising clients, drafting judicial acts and engaging in litigation in court. A rigid demarcation is maintained between the two phases and only those law graduates who undergo the second phase begin to earn the right to be considered as 'real' lawyers by members of the profession. Law students are constantly told that '*il-prattika kollox*' (legal practice is what counts), and that: '*meta tohrog mill-universita tkun ghadek ma taf xejn*' (when you emerge from University, you as yet know nothing).

On commencing my studies in anthropology, I became aware of the gulf which separated me from my former class-mates who were doing their '*prattika*'. They were increasingly involved in a professional world which I had resolutely steered clear of. Yet simultaneously anthropology too seemed to be moving closer towards this professional world. My studies taught me that there was a growing tendency for anthropologists to study their own societies (Jackson 1987, Hastrup 1996) and that there has also been a parallel shift in the objects of study. Like the lawyers, anthropologists too have begun to emphasise the importance of studying and observing practice. Thus, Bourdieu, for example, has criticised classical anthropological studies for ignoring the specific 'practical logic' (Bourdieu 1997:80) which motivates social action.<sup>3</sup> This situation can only be remedied if anthropologists develop a theory of practice, which pays attention to the practical motivations of social action without neglecting the 'objectivist' perspective.

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<sup>3</sup> This is because anthropologists project on to the people they study their own relationship to local culture, which is that of a detached, 'objective', observer. On the other hand, the people studied have an instrumental view of culture which they primarily encounter in relation to their subjective practical concerns. Being produced from an 'objective' theoretical position, anthropological descriptions of social action systematically distort the real motivations of action. Bourdieu compares these accounts to a description of a man digging a hole in terms of the ever-rising mound of soil which he deposits around him. This mound is completely invisible for the digger, because his practical activity forces him to concentrate on the hole.

These shifts in the focus of anthropological study reflect emerging global trends which have also led anthropologists to query the validity of the traditional conception of culture. The view of cultures as 'bounded wholes' (Kristmundsdottir 1996: 65) is an integral part of the claim that they cannot be studied by indigenous anthropologists.<sup>4</sup> Yet this claim is not tenable in the light of studies which draw attention to intra-cultural variation (Okely 1996), or which reveal international processes impinging on local realities. Thus, Albert (1997) has shown how anthropologists engaged in international advocacy on behalf of indigenous peoples<sup>5</sup> are well aware of the deficiencies of the traditional view of cultures as: "theological monads haunted by history's corrosive process" (Albert 1997: 61).

In the light of these developments it seemed that '*prattika*' was actually a form of indigenous participant-observation used by law students in order to familiarise themselves with the professional world of legal practice. My previous problems with assuming a lawyer's identity had kindled an interest in describing and exploring this professional world; the more so because I felt estranged from it. When choosing a field in which to conduct research, I understood that my law degree could be used to provide a privileged access to the world of legal practice which could serve the purpose of ethnographic description. My Maltese identity was only an obstacle if I projected a degree of homogeneity on to Maltese culture which both my personal history and

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<sup>4</sup> On this point, it is interesting to follow the debate between Kristmundsdottir and Hastrup in the pages of *Social Anthropology*, the journal of the European Association of Social Anthropologists (Vol 4 part 1, 1996). Kristmundsdottir accused Hastrup of rejecting the possibility of indigenous anthropology on the basis of an essentialist view of cultures as separate, internally uniform, entities. Hastrup denied holding such a view of culture and claimed that her arguments had been misunderstood. She had not intended to question the possibility of doing anthropology 'at home', but to affirm the impossibility of simultaneously speaking as an insider and an anthropologist, given that "anthropologists have to distance themselves analytically from whatever local world they are studying" (Hastrup: 1996: 78).

<sup>5</sup> Here: "the anthropologist's 'observation' is no longer merely 'participant'; his social 'participation' has become both the condition and the framework of his field research" (Albert 1997: 58).

anthropological training led me to question.<sup>6</sup> Nor did I lack evidence of my incomplete socialisation into the professional world of legal practice. In brief, if naiveté is an anthropologist's prime qualification, I was not lacking in it.

Pull factors also operated. Excitingly most 'Western' legal systems were *terra incognita* for anthropology. Sociologists and linguists had also encountered serious methodological difficulties in conducting research. These have been instructively reviewed in an article tellingly entitled: "Obstacles to the Study of Lawyer-Client Interaction: the Biography of a Failure" (Danet, Hoffman, & Kermish: 1980). This recounts the failure of a research project based on structured interviews with lawyers and clients. This was due to a number of factors, ranging from lawyers' lack of interest to concerns regarding professional secrecy. One lesson the authors derive is:

".....it may be wise to start by carrying out what are often called 'anthropological' observational studies, intensive observations of how lawyers spend their work days over a relatively long period of time. This approach also has the advantage of gaining greater trust and goodwill on the part of the attorney" (*Ibid*: 920).

Thus, various factors motivated my decision to carry out anthropological research on Maltese legal representation. These included the opportunity to apply participant observation in a field which was accessible to me, where such research methods had rarely been used and to which they seemed well suited. In the course of my research, however, I employed a variety of research techniques and also redefined my understanding of participant-observation in line with my growing familiarity with the field. So as to explore these issues more fully, it is necessary to tell the story of my research. As this is, in a sense, the aim of this thesis as a whole, only the broad outlines of my fieldwork experience will here be described.

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<sup>6</sup> Indeed the gap between Maltese and English cultures has been internalised and reproduced within Malta itself: which is a former colony of England. The Maltese constantly compare the relative advantages of Maltese culture, seen as backward but authentic and English which symbolises modernity. This way of thinking is captured by the quotation at the beginning of this chapter. Thus, anthropological comparison resonates strongly with indigenous concerns.

## 2. Initial '*Prattika*' in 1995.

My research took place within a period of roughly two years stretching from March 1995 to May 1997. I do not remember my fieldwork as a continuous flow, but as a series of dead-ends; returns to the drawing board and new beginnings. To do justice to the episodic quality of my fieldwork experience, I shall attempt to describe these shifts and turning points .

Initial fieldwork took place between March and May 1995. During this period my research was modelled on the traditional pattern of '*prattika*'. I attached myself to the office of an established Maltese lawyer who had been one of my professors during my days as a law student. This lawyer, whom I will here call Doctor Camilleri,<sup>7</sup> had taken an interest in me and encouraged me during the law course. He had a large practice and was considered a lawyer who could handle any type of case, unlike some who had specialised too narrowly. He was an ideal contact for my purposes, since he could show me how legal representation occurred across a wide social spectrum. I therefore told him about my research plans, requesting permission to attend his office and making it clear that he would have the right to veto anything I wrote. He generously made no objections to my proposal. At this point it seemed best to keep a low profile and concentrate on developing my understanding of Dr. Camilleri's work rather than developing other links. This was because '*prattika*' normally creates a close relationship of trust between the lawyer and his apprentice. The latter acquires confidential information which could be very useful to competitors. Attempts to contact other lawyers might therefore have been considered as a form of treachery.

Following the normal pattern of '*prattika*', I therefore spent every weekday morning in court. I followed Dr. Camilleri around as he passed from one court-room to another, handling an array of different cases. At around noon,

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<sup>7</sup> This is a pseudonym.

he would generally take a coffee break in one of the cafés which surround the law-courts and are known lawyer haunts. Afterwards we would return to court, where he would wind up the day's litigation. Then we would walk to his office, which was situated in Valletta, close to the courts. Here he would settle pending paperwork with his secretary.

In the evenings, Dr. Camilleri would listen to the clients who had come to him for advice in his own 'inner' office.<sup>8</sup> During these sessions, Dr. Camilleri would inform the client that I would like to be present. He generally told them that I was a lawyer, often adding with a smile that I was making an anthropological study of lawyers and clients. Clients would take this as a joke. They almost always accepted my presence, although Dr. Camilleri made it clear that they could refuse. By accepting me, clients showed their respect for Dr. Camilleri, which extended to anyone whom he chose to befriend. It was a statement that they had nothing to hide and were eager to promote the advance of learning. Since I had been introduced as a lawyer, they also saw me as a useful contact for the future. Often they would ostentatiously shake my hand on being introduced, thus trying to seal the relationship.

I would sit next to the clients opposite Dr. Camilleri's desk and observe the interaction; trying to store everything up in my head. I tried to keep notes a couple of times, but the clients looked at me so suspiciously when I did so that I soon stopped doing so. Even taking notes in the interval between the departure of one set of clients and the entry of a new set seemed to disturb incoming clients. So I took to scribbling indecipherable mnemonics on my notebook, relying on memory to fill in the details later on.

This initial phase of my fieldwork stands out in my recollection as an extremely 'participant' period. This was because I was conforming to all the requirements of the '*prattika*' relationship in quite an exemplary manner. I was

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<sup>8</sup> This was separated from the outer office by a closed door which effectively ensured that each client would not be over-heard by the others waiting patiently outside.

spending so much time rushing around the courts and the legal office that I had little time to calmly observe what was going on around me. Dr. Camilleri seemed pleased with my progress and started little by little to introduce me to the world of legal practice. He recommended that I change my clothing when coming to court with him. Previously, I had simply worn a shirt and trousers. But Dr. Camilleri advised me to wear a black tie, a white shirt and a black suit and my lawyer's 'toga'.<sup>9</sup> These new clothes entitled me to stand in the lawyers' section of the court-room,<sup>10</sup> endowing me with the identity of a lawyer and enabling me to observe the litigation in progress from close quarters.

Although I had made it clear that my primary goal was to carry out my fieldwork, I was becoming more and more involved in the legal work carried out in Dr. Camilleri's office. Work also came my way simply as a result of my presence in court wearing the 'toga'. Twice lawyers recommended to judges that I be appointed a legal referee<sup>11</sup> to deal with a pending case. I accepted on both occasions, since I was growing increasingly bemused by the sheer variety of lawsuits encountered and thought that a close involvement with these two cases might allow me to concentrate on the real issues at stake.

It was becoming obvious that I had become over-involved in legal practice to the point where there was not enough time to distance myself from the field. Paradoxically, in other respects, I felt too distant from what was going on around me. Dr. Camilleri's practice was a large one and Maltese court-cases tend to proceed in fits and starts, taking years to be decided. Meanwhile, lawyer's work consists of servicing ongoing cases and advising clients on

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<sup>9</sup> In Malta lawyers are obliged to wear a black cloak, known as a 'toga' when they appear before a judge in court litigation. Lawyers usually go to the collective locker-room in the lawyers' chambers and put on their *togas* the moment they enter the court, only taking them off when they leave. *Togas* therefore serve to differentiate lawyers from laymen within the court building.

<sup>10</sup> See chapter eight for a description of the spatial set-up of Maltese court-rooms.

<sup>11</sup> Legal referees are court appointed experts who hear pending testimony and write a report opining on the points at issue in a case. While this opinion can be used by the judge in his final judgement, he is not obliged to agree with it. See chapter nine for a more detailed description of this role.

their strategic options. During sporadic court appearances, lawyers might question a witness or present a document. They might also give speeches explaining their position or attacking that of an adversary. Court work therefore presented itself as a series of disconnected, piecemeal, activities. Each of these activities was only explicable with reference to the story of the case to which it referred, which I did not know. Nor, given Dr. Camilleri's constant oscillation from one case to another, did I have enough time to unearth it. I also worried that I was intruding too heavily into the life of this one lawyer, who already had enough work to keep him busy, without having to tackle the constant negotiation required to explain my presence.

This period came to an end in the summer of 1995, when my job at the University of Malta's Law Faculty<sup>12</sup> was upgraded. At the time the faculty was passing through a period of administrative reorganisation which involved the restructuring of the law courses and the teaching curriculum. As part of my job responsibilities, I was requested to formulate a catalogue of course descriptions of the teaching carried out by law lecturers. Although it was quite intensive, I was happy to be involved with this task. It gave me the opportunity to utilise the summer period, when legal work normally grinds to a standstill, for the purpose of my field research. It also gave me useful contacts with many of the key players in the Maltese legal scene; ranging from ordinary lawyers to public prosecutors, judges and magistrates. In this way, I gained a deeper understanding of the way in which law lecturers perceive law.<sup>13</sup>

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<sup>12</sup> In 1994, I had applied for and obtained the post of part-time assistant lecturer in the Faculty of Laws. In the summer of 1995, my work responsibilities were upgraded. I was required to assist with teaching, supervision of students and the Law Faculty's project on human rights in the Mediterranean.

<sup>13</sup> I also contacted one of the University lecturers, who was engaged in historical research on the Law Faculty and offered to help him in this project in exchange for access to the historical documentation he and his team had gathered. This documentation ranged from old minutes of faculty meetings to course curricula and records of the careers of particular law teachers. It provided me with valuable insights into the history of the Maltese legal profession.

### 3. My "Multiple Native Strategy" in 1995/96.

With the start of the 1995/96 forensic year, I changed my fieldwork strategy, choosing to scale down my court visits with Dr. Camilleri. A focus on legal offices was partly dictated by my inability to understand what was going on in court; itself a result of the fast-paced and fragmented nature of court-work. In legal offices, by contrast, I could hear clients' stories in full and in their own terms. Here I could observe the subtle negotiations between lawyers and clients, at the intersection between their conceptions of what it is possible and desirable to do. Moreover, my court visits were giving me an excessively well defined identity as an aspiring young lawyer and linking me closely with Dr. Camilleri in the eyes of the court community. This was prejudicing my ability to project myself as a student or a researcher: to elicit other views and observe a variety of contexts. In short, my field of research seemed unduly restricted by the constraints of the '*prattika*' relationship.

To overcome these constraints I took other steps distancing me from the '*prattika*' relationship; deciding to conduct similar fieldwork in other legal offices. I contacted another lawyer: Dr. Borg, and a notary: Dr. Zarb;<sup>14</sup> requesting permission to observe them at work. Both accepted and from then on I divided my evening observations among these three legal professionals, paying particular attention to Dr. Borg. Since Dr. Borg opened his office at around 7 p.m. and rarely closed before 11 p.m., most of my fieldwork in this year was done at night. Attending different offices allowed me to make comparisons between them.

In the mornings, I started to visit the courts on my own and did not wear my '*toga*' when I went there. As a result, I no longer had access to the lawyers' section of the court-room. However, this was made up for since I could now sit among the general public and observe the way in which they experienced court sittings. Since I was not following anyone around, I could select a case

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<sup>14</sup> Again, these are both pseudonyms. See chapter four for the difference between lawyers and notaries.

which interested me and observe the litigation there for as long as it took. Meanwhile, there were now two court-cases in which I was the court appointed legal referee. Here I had a professional role, acting as a sort of substitute judge. These cases gave me a professional understanding of the dynamics of litigation which complemented the layman's perspective acquired through my other court visits. During this period, I was also involved in teaching in the Law Faculty.<sup>15</sup> Teaching provided insights into the mentality of law students and the specific attitudes towards knowledge, representation and power which they absorbed in the course of their studies.

My fieldwork was an intensive experience because I also tried to observe my family, friends and my own self. I was always eager to note down any reference to the legal system I came across. The local media provided me with a lot of information, which I tried to analyse. Moreover, some of my friends were now practising lawyers and we used to meet in local bars. These meetings were a chance for them to relax and exchange information about the working of the system. This was necessary due to the sheer mass of detail they had to master in order to perform competently. It is next to impossible for any one person to know all the laws, regulations, cases and bureaucratic practices which structure legal work. Thus, these meetings showed me the difficulties lawyers face in establishing themselves.

To sum up, my fieldwork strategy during the 1995/96 forensic year involved abandoning the social framework of '*prattika*' and adopting what the native anthropologist Mascarenhas-Keyes has called a 'multiple native strategy'. This meant exploiting different facets of my own social identity so as to:

“...transcend an a priori ascribed social position in the society in order, like the Outsider, professionally to relate to the whole spectrum of native social categories” (Mascarenhas-Keyes, in Jackson 1987: 180).

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<sup>15</sup> I taught two modules on legal anthropology and gave tutorials in philosophy of law and civil law.

In the course of the year, various identities were ascribed to me in the different domains in which I moved. In court I was initially regarded as a young lawyer engaged in '*prattika*' with Dr. Camilleri. I was therefore given friendly paternalistic advice by the more established lawyers and regarded as a colleague by other young lawyers. To a certain extent, I maintained this professional identity when I went to court in connection with my duties as a legal referee. Here I was regarded as a legal professional in my own right by both the lawyers involved and their clients. However I acquired a different identity when I started attending court without the '*toga*' and sitting with the general public. While I was sometimes thought to be a client; I was blatantly taking notes on the goings on and this was something clients do not do. My first clue as to the way judges regarded me came when one judge observed to me that he liked to explain himself clearly when journalists were present in his court.<sup>16</sup> I was quite pleased with this identity, which legitimated my presence in court, and did not disabuse this judge.

Those lawyers who already knew me also found my behaviour difficult to explain. It was inconceivable to them that a lawyer should go to court unless he had some legal work to do there and no lawyer, given the option, would choose journalism in preference to legal work. Lawyers also largely base their status on the amount of their work; largely gauged by the busy image they project in court. By taking the time to observe court sittings in which I did not have a professional role, I was advertising my lack of legal work and this meant that I had not managed to 'catch on' as a lawyer. Many of them consequently regarded me as a failed lawyer, treating me with mixed pity and contempt. I found this identity much more difficult to come to terms with than that of a journalist and it took an effort to avoid internalising their view of me.<sup>17</sup> Yet this also gave me a certain obscurity which facilitated my research.

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<sup>16</sup> Journalists are normally the only persons who come to court and take notes on the proceedings.

<sup>17</sup> Fortier (1996) has described similar ambivalent feelings towards the identities she was ascribed in the field. She describes how her agnostic beliefs were no obstacle to studying a Catholic community, because everyone unquestioningly *assumed* she was Catholic (Fortier, A: 1996: 311). Like her, I relate the strength of such assumptions to the hegemonic status of the belief systems they reflect.

Differing identities were also ascribed to me in the legal offices I attended. Unlike Dr. Camilleri, Doctors Borg and Zarb, expected me to sit on their side of the desk facing the clients. They occasionally asked me to confirm their opinion on the case, especially when clients seemed loathe to accept their advice. Because of my position, my formal clothes<sup>18</sup> and the fact that I supported the lawyer, I was seen as being broadly 'on his side'. Moreover, clients were often told that I was a lawyer. Some were bemused that a lawyer was sitting there without doing any work. They asked me why I had not yet started to practise, finding this rather mysterious. Indeed, some were very suspicious of me and tried to say as little as possible in front of me. Most clients, however, welcomed my presence. Some did so because they saw me as a rather naive, well-brought up young man. They would try to teach me about the wickedness of the world; cautioning me against behaving like the other lawyers and deceiving people. Others saw me as a '*studjuz*' (i.e. a scholar) and were eager to convey their life experiences to me. I was a godsend to them because I gave them the opportunity of telling their stories to a willing ear; something their lawyers did not always have the time for.

Managing these different identities required tact and generated anxiety. In court, I felt that my project was a presumptuous one. Why did I believe that I could write anything of value about a system which had been so profoundly studied by eminent legal scholars? One lawyer warned me that I was 'playing with fire'. Another complained that I was going to 'make us look like a banana state'. Others claimed that there was nothing to observe and that my research was an exercise in futility. My departure from the normal pattern of '*prattika*' also created problems because it meant that I might acquire valuable information about the strategies of opponents. The lawyers I contacted were aware of this and warned me not to turn up at the office on those days when

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<sup>18</sup> I always made it a point to wear formal clothes whenever I attended legal offices. I felt that casual clothing would have implied a lack of respect to the lawyers who were helping me and that formal clothes helped legitimate my position in their offices. Since I was not actually involved with legal work, this felt rather like engaging in a "dramaturgical exercise" (Mascarenhas-Keyes in Jackson 1987: 182). Similar feelings have been reported by Okely (1993:43).

they were seeing clients whose opponents in litigation were represented by other lawyers I had observed.

There were other ethical problems which were intrinsic to my research project. Thus I seemed not to be reciprocating the assistance which lawyers were giving me. With time I realised that this impression was rather misleading. After all I provided company to lawyers and also endorsed their advice to clients.<sup>19</sup> Indeed my very presence in the office signalled the prestige of the lawyer to his clients, showing that he had followers who were eager to learn from him. However, I remained uncomfortable about the fact that I was simply 'observing' in a context where everyone around me was working furiously and trying to cope with vital personal problems. In this setting, my research could seem a vacuous waste of time.

This impression was reinforced by lawyers' reactions to my research. The most sympathetic asked me with obvious doubts whether I had observed anything useful. One lawyer saw me as a heaven-sent opportunity to have a bit of fun by parodying my attitude. He made no secret of his conviction that my research was simply '*hmerijiet*' (i.e. childish nonsense) and used to silently fix his gaze on me whenever I entered the office. He would continue to look straight at me for a long while without saying a word. After some minutes this could be quite an unnerving experience. Eventually I understood that this was his way of mocking my attempt to exercise the 'anthropological gaze'. This made me more aware of the rather arrogant pose that I was adopting. In trying to become a pure observer, I was perhaps distancing myself excessively from the people I was studying.

I used to show draft copies of chapters to the lawyers who collaborated with my research. Believing this to be an important exercise in intellectual

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<sup>19</sup> Some lawyers found it a relief to be able to tell me what they really thought about a client after having to pretend to agree with his views. I grew used to comments like: "this client is a bit obsessed with her case." or "that man is lying, you know." Often I was asked for my views on the psychological or social problems involved, as lawyers assumed that I had a special expertise in this area.

honesty, I made it clear that I was ready to amend anything they disagreed with. Lawyers would waive aside any suggestion that they would change anything, claiming that they had faith in my ability to write objectively. They would then look at what I wrote in complete silence and pass some comment like: 'this is certainly not something a lawyer would write'. Some would seize on some detail I wrote, asking if I had really observed this. Others questioned my objectivity; arguing that in order to write as I had one had to refer to many more statistics. Despite their good will, it was clear that they considered my writings as dealing with insignificant details of marginal relevance to the real tasks of lawyering. The fact that I wrote about matters such as the idioms used in disputing confirmed the marginality of my research in their eyes.

Additional unease was caused by the task of anthropological representation itself. I did not want to feed on the sometimes tragic details of clients' private lives, nor to exploit them by laying their lives open to the scrutiny of a wider audience. I consoled myself with the thought that I was not interested in individuals as such, but only on the light they could throw on broader social trends.<sup>20</sup> My research would preserve clients' anonymity and might help them by reporting their views on the legal system and exposing processes by which they were disempowered.

The tensions and anxieties resulting from the pursuit of a 'multiple-native strategy' were themselves an important source of knowledge. In this I follow recent trends in anthropology which: "exploit the intrusive self as an ethnographic resource rather than a methodological hindrance" (Okely & Callaway 1992: 226). My sense of the dangerous yet vacuous nature of my research, for instance, seemed to result partly from my internalisation of lawyers' views on ethnographic writing. Because their own work entails creating authoritative representations of their clients, lawyers are highly

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<sup>20</sup> My relations with my family and friends were not badly affected by my research. I made my intentions clear from the start and I am grateful to my lawyer friends for their assistance with my work. Yet a note of unease did creep into these relationships: largely because nobody (not even I) knew when I was conducting fieldwork and when I was simply interacting as a family member/friend.

conscious of the power of written descriptions and they are also pre-disposed to favour representations which can be easily fitted converted into legal terminology and to ignore those which cannot. For this reason, lawyers tended to identify the value and possible danger of my research in that it was going to result in a written document; a book in fact. Yet on reading my writings, they discovered that these were describing such legally irrelevant features as emotions, gestures and metaphors. Lawyers were therefore obliged to conclude that my research dealt with trivia.

Finally, I also learned important lessons about being a lawyer directly through my body (Okely 1992, Mitchell 1997). In the course of my fieldwork, I incorporated particular ways of moving in court. I learned how to look at clients, how to deal with court personnel and how to speak if I wanted judges to listen to me. In other situations, I learned what clients feel when they have to wait in the street for an hour until their lawyer comes to open his office; or when they sit mutely in the court while lawyers stand and argue their cases. The lessons I learned here were particularly effectively learned because they were not explicitly taught but implicitly experienced (Bourdieu 1997). The emphasis lawyers put on textual and linguistic reality further disguised the significance of this indirect physical socialisation, making it more effective.

#### 4. Rediscovering Law in 1996/97

By the close of the 1995/96 forensic year, I wrote up some of my observations in legal offices. This allowed me to review the research I had carried out. On reflection it seemed that in moving away from the constraints of '*prattika*', I had been too eager to distance myself from a lawyer's perspective on his work. What I had written largely consisted of phenomenological observations of discourse and behaviour. References to legal rules and written documents were conspicuous by their absence. Although I could not accept the views of those lawyers who denigrate any attempt to describe the legal system in non-legal terms, it seemed advisable to complement my research by a closer exploration of the legal issues involved in each case.

In an attempt to come closer to the lawyers' point of view, I asked Dr. Camilleri for access to some of his clients files. These files were kept in Dr. Camilleri's outer office, under the watchful eyes of his competent secretary. There were literally hundreds of them and they contained all the written documents relating to each client he had. This meant that they contained a vast array of information, ranging from the applications which Dr. Camilleri made to the court on his client's behalf, writs of summons, by which he initiated law-suits, written submissions to the court, prohibitory warrants, letters and other legal documentation. Even more significantly, they contained documents used as evidence, including affidavits in which clients seemed to be telling their stories in their own terms and as they had experienced them. Reading through these files gave me a bird's eye view of the evolution of a case over time. In other words, they provided precisely that knowledge of the story of the case which had eluded me in the course of my earlier '*prattika*'.

These files also exposed the differing viewpoints of the lawyers, clients and witnesses involved in each case. Thus they served to map out contrasting

perspectives on the issues concerned, suggesting avenues for research on the interaction between these different perspectives. I became particularly intrigued by the relationship between clients' perceptions and lawyers' views of cases, reflected in different documents. As I pored over these files, I began to understand the way the legal rules define the field within which lawyers and clients elaborate their strategies. It seemed to me that viewing rules as irrelevant to the final decision is just as mistaken as believing they rigidly determine outcomes. Throughout the summer of 1996, I devoted my time to obtaining and reading these files. Dr. Camilleri and his secretary displayed great trust in me by allowing access to this material; which was of a confidential nature and daily utilised in the course of their work.

As the 1996/97 forensic year started, it seemed appropriate to take a short visit to Durham to consult with my supervisor on the research I had carried out so far and the ways in which I should carry it forward. As a result of this visit and my growing awareness of the utility of a more participant type of observation, I decided to concentrate on issues which resonated more closely with the concerns of lawyers and their clients. This would also help me to carry out a series of in-depth interviews with judges, lawyers and clients and to collect information from court officials. It also seemed important to carry out more observation of court litigation, balancing my previous focus on legal offices. Finally I decided to continue my observations in legal offices, while diversifying them even further by contacting another lawyer and asking him for permission to stay in his office and collect even more client files.

Between November 1996 and May 1997, I proceeded to put this strategy into effect. The biggest problem with observing court proceedings was that I did not know the underlying issues at stake. To eliminate this difficulty, I restricted my observations to one court-room, presided over by a Magistrate<sup>21</sup> whom I knew as a law student. He allowed me to observe the proceedings and I started spending two days a week doing so. He also gave me access to

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<sup>21</sup> In Malta, the judges of the inferior courts are called Magistrates. See chapter four for a description.

the written transcriptions of the evidence given some weeks after the sittings which had been observed. This enabled me to compare my field-notes with the official record of the case, which proved extremely helpful. I complemented my previous observations in lawyers' offices by also contacting a new lawyer, Dr. Vella, who had a predominantly rural and working-class clientele. Having obtained his permission to observe his interactions with clients, I was well placed to insert my earlier observations within a wider comparative context.

To make my research more relevant to the concerns of lawyers and clients, I decided to pay special attention to the problems encountered during personal separation lawsuits and to lawyers' objections to affidavits as a way to reduce court delays. Both issues were hot discussion topics which lawyers and clients were eager to talk about.<sup>22</sup> They could be used as a point of entry to explore the wider politics of legal representation, since they showed how the tensions inherent in legal representation were worked out in specific practical contexts. These topics provided the basis for around ten in-depth interviews I conducted with judges and lawyers. The relevance of research on separation and court delays was obvious to them and these interviews allowed them to express their opinions.

Interviewing clients was far more difficult. Contacting clients I got to know in lawyer's offices was not really an option. They might easily have been put off by such attempts; which could have been considered an intrusion into their private lives. Since they associated me with their lawyers, such distrust would have badly influenced their relationships with them. The risk of alienating the clients of lawyers who had helped me seemed too great to run. In selecting clients to interview, I therefore chose people I knew through my normal social

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<sup>22</sup> See chapter nine for an analysis of the 'affidavits question,' as lawyers referred to it and also for a discussion of personal separation. Malta does not legally allow divorce and personal separation is the legally sanctioned alternative. It is almost equivalent to divorce, with the crucial difference that separated spouses are not allowed to remarry. Separation is a common discussion topic due to the way it brings out divergent moral stances towards the Catholic Church, tradition, the family and Maltese identity. The present government is expected to bring legislation introducing divorce very soon.

contacts. I also tried to interview clients who were waiting in the court corridors. However, this was not a very successful strategy because clients were on their guard in the litigious arena of the courts and had no way of verifying that I was really an independent researcher. In the end, I relied on a voluntary organisation which carries out social work among a group of separated persons for access to clients whom I could interview. As a result, the best client interviews I conducted were those with separated persons and were biased towards their views of the legal system.

Another feature of this last phase of my fieldwork was increased contact with the court administration. This was necessary because I wanted to collect statistics on such matters as the number and types of cases which were pending before the courts. I therefore approached officials at the Ministry of Justice and obtained a lot of information from them. The Acting Registrar of Courts also gave me access to internally generated data. In this way, I obtained access to the files of fifty cases which had been filed on the same day from the Court Registry. This gave me a more comprehensive understanding of the types of social problems which generated litigation in Malta and the different ways in which various lawyers drafted the writ of summons which includes the initial statement of the object of the law-suit and the story which lies behind it.

Finally I continued to arrange sittings for the two cases in which I was a legal referee. In regard to one of these cases, judicial authorisation was obtained to write the final report giving my conclusions on the merits of the case. I treated the writing of this report as an opportunity to obtain an insider's view of the process of adjudication itself and took notes of the difficulties faced in forming my opinion and the strategies adopted to frame my conclusions. This was certainly the most 'participant' period of my fieldwork!

No account of my fieldwork is complete unless I also include my failures. These were themselves instructive. For instance, I had to give up the idea of taking photographs in the court corridors on realising how tightly controlled

this space was. I also tried to smuggle<sup>23</sup> a tape-recorder into court to record the litigation. However my equipment was not sensitive enough to register voices clearly from underneath my jacket. My attempts to observe a jury trial from beginning to end foundered when I realised that this would take around three weeks of full-time court-room observation at a stage when I had to conclude other pending research. I would also have liked to obtain more interviews from clients; but this was difficult to do because of factors I have already mentioned. As a consequence, I am uneasily aware that my research is rather biased towards the lawyers' perspective. However, I have tried to include other viewpoints and am comforted by the thought that all observation is necessarily perspectival.

As my fieldwork drew to a close, it became more and more difficult to continue to use the 'multiple native strategy'. This was because the small size of Malta and the even smaller size of the court community meant that the various identities I had employed started to collide with one another as people who knew me in one context met me in another. I suspect that many lawyers had not taken my research very seriously. They never really believed that I was going to carry out my stated aim of studying the everyday tasks of lawyering. However, with time and as they read my writings, they became more aware of what I was actually doing.<sup>24</sup> This started to affect my observations and to promote greater reflexivity among lawyers.<sup>25</sup> At one point, for instance, a lawyer who had taken a keen interest in my research entered a court-room where I was carrying out my observations. While arguing the case before the judge he frequently looked at me taking notes at

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<sup>23</sup> I originally tried to obtain permission from a judge to record sessions; however he told me that I must clear the matter with the Court Registrar. The Registrar in turn told me that this was the Judge's responsibility. Finally, I decided to risk using a tape-recorder since court proceedings were public and nobody had explicitly prohibited me from doing so. However it seemed prudent to keep it hidden.

<sup>24</sup> At one stage, Dr. Camilleri jokingly warned a young lawyer who promised me an interview to: "take care lest you find yourself in a book." Although he became more cautious when speaking to me, he continued to allow me access to his office and to his files. I am particularly grateful for his trust, since he knew the risk he was taking.

the back of the hall; seeming to assume a scholarly style of argument for my benefit. On another occasion, I saw a client who I had interviewed the day before as an independent researcher while I was explaining the progress of a case<sup>26</sup> to a judge whom I had also previously interviewed!

Having completed my rather unorthodox fieldwork, I now realise that my research fell into three temporally distinct stages. In the first, I attempted to fit into the traditional social role of a young lawyer doing his practical apprenticeship. This plunged me into the world of professional practice to the point where I felt that my ability to maintain a necessary analytical distance was imperilled. Haunted by the Malinowskian image of the fieldworker as a stranger in an exotic society, I then attempted to distance myself from the world of professional practice. This was accomplished by taking a series of decisions which involved the manipulation of my identity so as to make me a 'multiple native', capable of adopting different social roles within my own society. While this strategy was largely successful, it meant that I objectified my society so that I could not comprehend the role played by the legal rules in Maltese legal representation. It also generated a lot of anxiety on my part as I had to live with an ambivalent social identity which constantly violated people's expectations. In the third phase of my fieldwork, I again moved closer to a more participant type of research which tried to relate to indigenously perceived problems and take lawyers' perspectives into account while retaining the benefits of the multiple-native strategy. During this phase, however, it also became more difficult to act as a multiple native, as my identity as a researcher became known to more and more people.

Because I was carrying out fieldwork in a distinct zone within my own society, it was not possible to 'bracket out' the field of research from other areas of my life (Fortier1996). Hastrup has argued that the truly privileged position of the

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<sup>25</sup> On one occasion, a lawyer I know even took down his own field-notes and gave them to me to help my research!

<sup>26</sup> This was one of the cases in which I acted as legal referee.

ethnographer resides in the way fieldwork allows her to adopt a point of view which is distinct both from her own subjective opinions and from those of the people she is studying:

"The ethnographer is neither I nor you, but assumes a strangely unknown position as 'she' or 'he'...Also in her own culture, or in a parallel culture, the ethnographer --as the representative of the third culture (i.e. the culture of anthropology itself)-- will inevitably live and work in the third person. As such she is a friend to the locals and a stranger to herself" (Hastrup in Jackson 1987: 105).

This quotation expresses my experiences perfectly. I would only add that my ethnographer self threatened to take over all the other aspects of life until no area was exempt. It is for this reason that writing this chapter has proved therapeutic. Perhaps the only way to return home for one who has objectified his own culture is to objectify the process of objectification itself.

## 5. The Organisation of this Thesis

The organisation and writing style of this thesis reflects my theoretical concerns and field research. Because I have resorted to an eclectic array of research techniques, I have also adopted a variety of writing styles. By mixing theoretical argument with field accounts, stories, statistics and judgements, I hope to reach a proper balance between personal narratives and paradigmatic knowledge. The topic of each chapter builds on that discussed in the preceding one. Thus, the theoretical introduction given in the first two chapters is complemented by the present one, which explores methodological issues. The fourth chapter then outlines the social context within which Maltese legal representation takes place. It provides a general description of Malta and its legal system, paying special attention to the occupational stratification and professional formation of lawyers.

The next four chapters aim at an extended description and analysis of the process of legal representation, dealing with distinct and consecutive stages

of this process. The fifth chapter focuses on legal offices, which is where the process normally starts. This chapter draws on my fieldwork in legal offices to describe and analyse lawyer-client interaction from the standpoint of the story-telling relations involved and what they say about clients' perceptions. The sixth chapter concentrates on lawyers' reactions; showing how differing understandings of their social role influence their response to clients' stories and the drafting of judicial acts. In the seventh chapter the focus shifts to the court-room telling of stories; exploring the dynamics of the production of testimony and how they refract the relationships between lawyers, clients and judges. Chapter eight then looks at the way stories are 'consumed' by judges during the process of adjudication. This is done by means of a reflexive analysis of the process of judging one case in which I acted as a legal referee and also by analysing the way another case was judged.

The final two chapters place the issues discussed in a wider context. Chapter nine does so by relating them to court delays. This chapter shows how the differing practical involvement with stories of clients, lawyers and judges have cumulative social implications which explain current political tensions concerning court delays. The concluding chapter explores the way legal representation is both conditioned by Maltese society and itself influences it. Finally, it returns to the theoretical points raised in the first two chapters in order to review them in the light of the research findings.

## Chapter 4: Litigation in Malta

“Let us listen to the words of Paillet: Endow a man with all spiritual gifts. Give him too all the gifts of character. Ensure that he has learned everything and remembers everything he learned; that he has worked for thirty years of his life; that he is at the same time a scholar, a critic and a moralist; that he has the experience of the old, the ardour of youth, the infallible memory of a child and maybe with all these qualities you will form a perfect advocate. Endowed with these gifts, consecrated to the well-being of humanity, generous and always overflowing with blessings because he is a gentleman of goodwill, the advocate becomes a real social force” (Ullo-Xuereb 1898 :8).

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“It seems that the Labour Government has in less than a year not only brought about peace and quiet in our country, but has also inspired confidence that in forthcoming years we will continue to live a life of peace and quiet, with almost no criminality. When I say a life of peace and quiet, I mean civil peace and quiet, commercial peace and quiet, in short peace and quiet for everyone, except, poor things, for the advocates. I am saying this because according to research carried out by the Nationalists by means of Radio 101, for the first time in I don’t know how many years, this year, the new advocates who graduated or are about to graduate, have not found a job. Now I do not know where they used to find jobs before, the advocates who graduate every year.

I suppose that maybe some of them used to be given jobs as legal consultants with some company or other. But obviously these consultants are not changed every year. Apart from that, if a company ever needed to change its legal consultants, I think that this year, with the Nationalist Party in Opposition, it has more advocates to choose from. How would I know! It’s really a case that wherever you cut blood is going to come out. I’m sorry for the advocates, but at the same time I am pleased if the advocates don’t have work. It is a sign that there is peace and quiet” (*Maria l-Maws*: 7/9/1997).

## 1. Introduction

The texts which open this chapter seem, at first glance, to have little to do with one another. The first is taken from the published version of a speech given by Professor Xuereb, a Maltese law professor, to young lawyers on the occasion of their graduation on the 6th June 1898. It was given in an ornate Italian, studded with Latin quotations and paints a glowing portrait of lawyers as defenders of the powerless. The second is an article written almost a century later, in the Malta Labour Party's Maltese weekly: '*Kullhadd*'. The writer conceals her name under the humorously vulgar pseudonym of '*Maria l-Maws*' (i.e. Mary the Mouse). While Professor Xuereb quotes foreign authors, '*Maria l-Maws*' prefers to cite popular sayings.<sup>1</sup> If the professor glorifies graduating lawyers, the anonymous journalist rejoices that they are not finding work. The professor sees lawyers as a social force. The journalist insinuates that they are a political force, supporting what she views as a corrupt Nationalist party.<sup>2</sup> Professor Xuereb praises learning. '*Maria l-Maws*' parades her ignorance; which authorises her to speak for ordinary people and to contrast their proverbial wisdom to the litigious learning of advocates.

A deeper reading discovers traces of a common cultural context in the dialogic relationship between these perspectives. The journalistic article not only counterpoints the Professor's speech because they are opposed reactions to the rite of passage of the graduation of law-students. More subtly, its invocation of populist Maltese wisdom in support of a criticism of lawyers can only work in a context where lawyers are associated with an elite knowledge expressed through Italian. Professor Xuereb's speech is therefore part of the cultural background against which '*Maria l-Maws*' reacts and to which she implicitly refers by negating. Moreover, if referring to a speech

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<sup>1</sup> Her article was entitled: "*Minn fejn taqta' johrog id-demm.*" a Maltese saying literally translatable as: 'wherever you cut, blood is going to flow.' It is equivalent to: 'you can't make an omelette without breaking eggs'.

<sup>2</sup> I have omitted a paragraph from the newspaper article because it made potentially libellous references to the alleged wrongdoing of two Nationalist lawyer-politicians.

delivered a hundred years ago can help us interpret a contemporary newspaper article, then this can only be due to the persistence of distinctive Maltese attitudes towards lawyers over a long period of time.

An appreciation of this distinctive Maltese context is necessary to grasp the full force of the journalistic article. One needs to know something about the Maltese political situation, the precise role of the Labour and Nationalist parties and why the Nationalist Party is associated with lawyers. Nor should the wider cultural context be neglected. The sense of limited good which pervades the article and the specific resonance of being described as a pitiable person, or a '*miskin*', can only be grasped within this perspective.<sup>3</sup> It is also significant that both quotations refer to '*avukat*', or advocates, rather than lawyers. This highlights the culturally distinctive features of the legal system itself, which must also be focused on.

Thus these quotations provide a provocative point of departure for a chapter which aims to outline the context of Maltese legal representation. This is, in a sense, the aim of this thesis as a whole. However this chapter will limit itself to providing a general description of Malta and its legal system which will be further developed in the chapters which follow. My purpose is to supply the preliminary sociological background possessed by readers of accounts such as that of '*Maria l-Maws*'. A brief overview of Malta and its legal history will be followed by a more detailed description of various aspects of the legal system. This will look at the institutional organisation of the courts, the roles of various legal professionals and the progress of litigation. Then the focus will zoom in on lawyers by exploring occupational trends among advocates and the effects of legal training.

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<sup>3</sup> Pity is very close to contempt in Maltese eyes. To be called '*miskin*' (pitiable) is a powerful social declaration of your vulnerability and the superiority of those so defining you. '*Maria l-Maws*' uses this term sarcastically to stress that lawyers are far from being downtrodden, being more than capable of looking after their own interests.

## 2. Malta and its Legal System.

The Maltese archipelago is densely populated, with a population of 366,000 in an area of 316 k.m.<sup>2</sup> Centrally located in the Mediterranean,<sup>4</sup> the archipelago comprises the main island of Malta, the smaller island of Gozo and the largely uninhabited Comino. Most people (i.e. 320,000) live on Malta.

The islands have had a long and turbulent history. In the last two thousand years alone, they have been occupied by Romans, Byzantines, Arabs, Normans, Spanish, crusading Knights of Saint John, French and the British. The period of Arab domination (870 to 1090 A.D.) is significant because the Maltese language is based on Arabic, mixed with Italian and English loan words and written in a Romance script. The origins of the legal profession can be traced to the succeeding period, in which Malta was a Sicilian dependency ruled first by Norman and then by Spanish feudal lords.<sup>5</sup> The crusading order of the Knights of Saint John also left their mark. After settling in Malta in 1530 and successfully weathering a long Turkish siege in 1565, they ran the islands as an independent principality, building the capital of Valletta and founding the University. They created a separate Maltese legal system, with its own legislature, courts and law-codes. A legal career was one of the few avenues for social mobility open to the Maltese, who could not become Knights. Italian was the language of administration of the Knights and that of the small Maltese elite, while Maltese was the popular dialect.

The Knights were expelled by Napoleon in 1797, who established French rule. However the Maltese rose against the French, requesting aid from the British fleet. This eventually resulted in Malta becoming a British colony and military fortress in the Mediterranean in 1800. In the early nineteenth century,

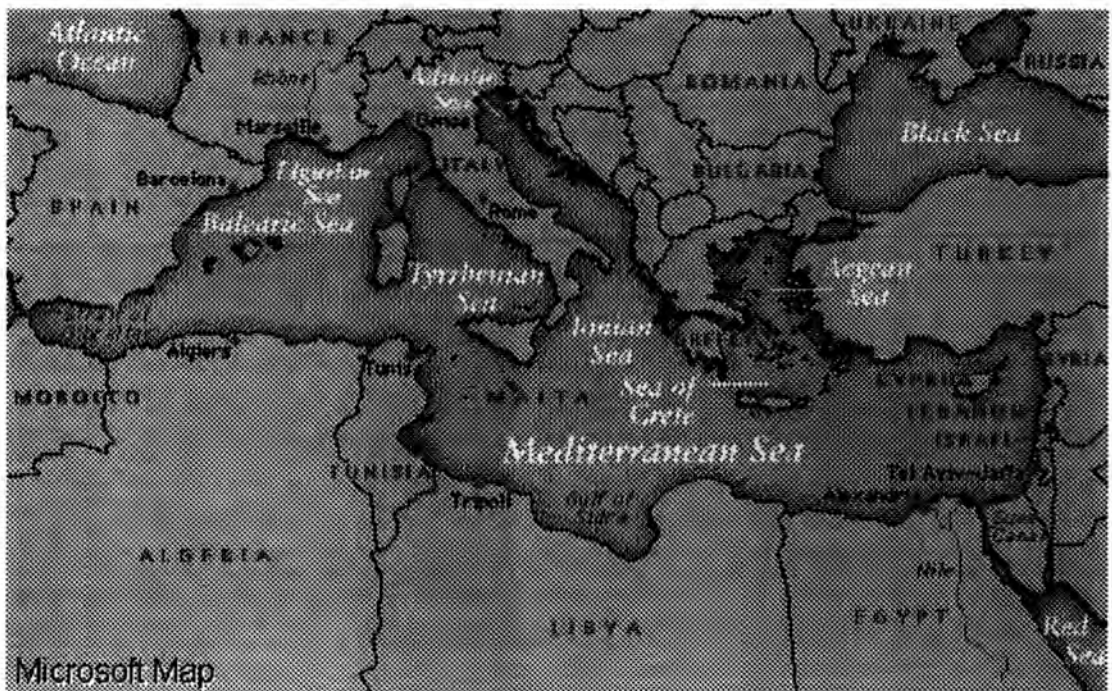
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<sup>4</sup> The Maltese Islands are 93 km from the nearest part of Sicily and 288 km from the closest part of Tunisia. Gibraltar is 1826 km to the West and Alexandria 1510 km to the East.

<sup>5</sup> It seems that a group of notaries were the first legal professionals in Malta (Bresc 1975: 151). There is historical proof of the existence of lawyers by 1486 (Bonello 1996).



Above is a map of the Maltese Archipelago. Below see a map of the Mediterranean sea, with Malta clearly indicated in the middle (Source: Microsoft Encarta 97 Encyclopedia).



successive British governors tried to reform the system of administration of justice so as to eliminate delays and introduce institutions like the accusatorial system and 'viva voce' trials. These reforms were introduced against the resistance of many lawyers (Harding 1980: 127). During the second half of the century, new legal codes were promulgated in the fields of criminal, private and procedural law. In a pattern which has continued to the present, private law was based on continental models, while public law was modelled on British common law. The late nineteenth century saw increasing British efforts to replace Italian by English as the language of administration and education in Malta. These efforts were supported by pro-imperialist Maltese and opposed by the traditional elite led by lawyers and clergy. This latter grouping saw its defence of Italian as a patriotic stance affirming Catholic Maltese culture against the attacks of the Protestant English.

This 'Language Question', as it was known, proved a catalyst stimulating Maltese political agitation. Eventually this produced the present political set-up, characterised by the alternation of power between two large political parties. Thus the Nationalist Party grew out of the pro-Italian grouping; whereas the Labour Party derived from an alliance between pro-British imperialists and an increasingly politicised working class. In this context, lawyers were considered the backbone of the Nationalist Party and seen by pro-British groupings as an obstacle to social and linguistic progress.<sup>6</sup> Matters warmed up after the grant of representative government in 1921, with pro-British forces pushing for the promotion of both the English and Maltese languages, while the Nationalist government of the 1930's tried to enhance the role of Italian. This brought about a reaction in 1936 when the British Governor revoked the Constitution and replaced Italian by Maltese in the law-

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<sup>6</sup> In 1931, a pro-British Maltese told a Royal Commission that the nub of the Language Question was: "whether the legal profession is to be brought into line with the interests of the rest of the population, or whether the rest of the population is to continue to be sacrificed for the convenience of the legal profession. The correct solution to the problem is obvious" (Hull 1993: 257).

courts. The Second World War, when Malta survived heavy bombing by Axis forces, effectively ended the 'Language Question' by discrediting Italian.<sup>7</sup>

After the war, Maltese parliaments started to refer to English and commonwealth statutes as models when drafting new legislation (Ganado 1996: 231). Malta's post-war political history has been that of a succession of Labour and Nationalist governments. The Nationalist Party (PN) is a Christian Democratic party. Its supporters are the pro-Church middle-classes together with the traditional elite and most businessmen. It has continued to be dominated by lawyers and Labour supporters often describe it as the 'Lawyers' Party'. The Malta Labour Party (MLP) has traditionally been a working-class political movement, closely allied with the largest trade union and strongly supported by dockyard and factory workers.

Following the failure of his proposal to integrate Malta with Britain in the 1950's, the charismatic leader of the Labour Party, Dom Mintoff, shifted towards demanding complete independence and also led his followers into a bitter confrontation with the powerful Catholic church. In 1958, his government resigned *en masse* in protest at the British authorities. The next decade was characterised by Nationalist administrations. In 1964, the British granted political independence to Malta while retaining a large military base and control over important sectors of the state apparatus. The Independence Constitution established the framework of the present legal system, creating a parliamentary democracy with a single legislative chamber. Effective power is vested in the hands of the elected government, which is responsible for the executive branch of the state. Elections are held every five years under a system of proportional representation. The Constitution contains provisions safeguarding human rights and judges' tenure and salary. The present court

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<sup>7</sup> On the outbreak of hostilities, the British Government interned several pro-Italian Maltese. These included the leader of the Nationalist Party, the Chief Justice and a prominent lawyer who was editor of the Church-owned newspaper. They were transported to Uganda for the duration of the war.

buildings in Valletta were inaugurated by the Nationalist Administration in 1970. The sixties also saw the development of the tourist industry in Malta.

The period 1971-1987 saw three successive MLP administrations dominated by Dom Mintoff. In 1974, the constitution was amended to create a republic and in 1979 the British military base was closed down. Mintoff's administration created a secularised welfare state, nationalised parts of the economy, and pursued a radical non-aligned foreign policy, developing links with Arab countries. His government generated intense opposition, reacting with strong arm tactics. There was an atmosphere of tacit confrontation with the legal profession and the government lost a number of human rights cases. In 1987, the PN won the elections, governing until 1997. They adopted a policy of national reconciliation, developing the tertiary economic sector and building up the infrastructure; steering Malta towards eventual E.U. membership.<sup>8</sup> In 1997, a Labour administration was again voted into power. The new government has frozen Malta's E.U. membership application, claiming that membership would harm the Maltese economy.

Having outlined its history, it is useful to briefly review other key features of contemporary Maltese society. To start with language, Maltese and English are the main media of communication. Most Maltese know both languages, shifting strategically between them for different purposes and reserving Maltese for the expression of political and religious beliefs.<sup>9</sup> Many also know Italian and linguistic usage among the legal profession is still characterised by a tendency to use a more Italianate Maltese than common elsewhere (Hull 1993: 131). The state provides free education up to and including the tertiary level, while secondary education is compulsory for all. In 1996, there were 6368 students following courses at the University of Malta.

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<sup>8</sup> They liberalised entry into University, increasing the number of law students. They also enacted voluminous legislation and made strenuous efforts to solve the problem of court delays which was perceived as having reached worrying proportions.

<sup>9</sup> Hull observes: "the language of power and prestige in Malta is English" (*ibid.*: 363)

Tourism plays a prominent economic role. Over a million tourists visit Malta yearly and earnings from tourism contribute substantially to foreign earnings. Another important economic sector is industry, especially textiles and the manufacture of electronics components. There is a large ship-repair firm, which has been operating at a loss for years. There is also a small agricultural and fisheries sector; but most food must still be imported. Quarrying and house construction are widespread forms of economic activity; housing being the principal target for Maltese investment. The built environment has greatly expanded recently, swallowing up the countryside (Inguanez 1996). Various specialised services are also being developed in fields like yachting, company and ship registration. The public sector is large, as is the black economy. Unemployment is comparatively low. In July 1997, there were 6,855 registered unemployed out of a total labour force of 148,848.<sup>10</sup> In 1996, G.D.P. per capita stood at \$12,000.

The family is an important source of enduring social ties. Divorce is not as yet legally allowed. Statistics show that requests for personal separation are still low compared to the number of marriages and European divorce statistics. In 1992, for instance, there were 2377 marriages and 136 requests for personal separation.<sup>11</sup> However, the importance of the extended family has declined in recent years and demographic trends favour the nuclear family with two children (Tabone 1995).

The Catholic religion has played a pivotal role in Maltese social life, where:

“Ninety eight percent of the population are members of the Catholic faith and, of these, eighty-five percent practise their faith at least once a week” (Mitchell 1997: 81).

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<sup>10</sup> Of the 141,993 gainfully occupied persons in 1997, only 15,078 were self-employed while the rest were employees. 86,854 persons worked with the private sector, while 49,030 worked in the public sector. This statistic is taken from the Malta Central Office of Statistics Webpage. Visit the Malta Government Website for further information.

<sup>11</sup> These statistics were given in response to Parliamentary Questions.

While these figures suggest a hegemonic Catholic community, one should note traditional working class Labour Party hostility to the formal Church organisation. There has also been a rise of charismatic cults and Jehovah witnesses together with a decline in church attendance (Sant-Cassia 1993: 306). Historically, the Church was politically active; spear-heading the rebellion against French rule; defending the status of Italian and combating MLP anti-clerical socialism (Koster 1981).<sup>12</sup> The British colonial policy of religious non-interference, together with a sense of political powerlessness engendered by colonialism also provoked increased religious activity (Zammit 1984). Thus, the Church has been a focus for a sense of Maltese identity.

The political role of the Church was not restricted to the national political stage. At the level of ordinary village life, the parish priest was for long the principal political reference point. Moreover, the village 'festa', provided a medium for the expression of factional conflict within the village (Boissevain 1965, 1980). Religious activity symbolically structured political activity since the village patron-saint was presented as an intermediary between man and God. This provided a model for political activity; in which powerful political patrons (generally drawn from the professional classes) were political saints interceding with state authorities to protect their clients (Boissevain, *ibid.*).

Despite the avowedly anti-clientalistic policies of Maltese Governments, political patronage is pervasive. Partly for this reason and because of cross-cutting family ties, social class differentiation, while undeniably existing,<sup>13</sup> is downplayed. A recent study concludes: "class struggle in the Marxist sense is either absent or incorporated within a welfare state approach" (Sultana & Baldacchino 1994: 38).

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<sup>12</sup> The Church's feud with the Malta Labour Party bore many similarities to the battle for ritual supremacy observed by Kertzer (1980), between Church and Communist Party in Emilia Romagna.

<sup>13</sup> Reference is particularly made to Zammit's (1984) study of perceptions of class among Dockyard workers. The manual workers he surveyed saw Maltese society as made up of two distinct classes; while supervisory workers perceived a society divided into three or more classes.

### 3. Court Organisation and the Progress of Litigation.

The Maltese judicial system centres around three tiers of courts (Aquilina & Micallef 1992). At the base of the hierarchy are the Magistrates' Courts, which decide minor civil and criminal cases and act as a court of inquiry for all criminal cases. Above them are the Civil Courts, presided over by judges and deciding civil and commercial cases; together with the Criminal Court, where a judge and a lay jury decide important criminal cases. At the top of the hierarchy are the Constitutional Court and the Courts of Appeal, generally presided over by the Chief Justice and two other judges. There are also various special tribunals. Mention should be made of the Ecclesiastical Courts; utilised by couples wanting to annul their marriages in a manner recognised by the Catholic Church. Gozo has its own Magistrates' Court, with an expanded jurisdiction. The main professional roles within the system are :

1) Judges. They are appointed by the government of the day but their salary is protected and they cannot be easily dismissed. Judges are appointed from lawyers who have practised their profession for at least 12 years. In 1997, there were fifteen judges in all.

2) Magistrates. Their position is almost the same as that of Judges, with the difference that they preside over cases lodged before the Inferior Courts. Magistrates are appointed from lawyers who have practised for at least 7 years. In 1997, there were fifteen magistrates.

3) Advocates. They are the principal category of persons allowed to submit written or oral pleadings during court litigation. In Malta, there is no distinction between solicitors and barristers. Lawyers are termed advocates<sup>14</sup> and have direct contact with their clients. Still, advocates are supposed to be 'friends of the court' and should therefore avoid misleading the courts in order

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<sup>14</sup> For this reason, I consider the two terms 'lawyer' and 'advocate' as practically interchangeable in the course of this thesis. I do, however, try to use the term 'advocate' when I wish to convey a stronger sense of the culturally distinctive character of lawyers in Malta.

to advance their clients' law-suits. Advocates must obtain the LL.D. degree (a doctorate in law) from the University of Malta and the professional warrant. Obtaining this latter qualification requires passing an additional examination and engagement in '*prattika*' with a practising lawyer for at least one year following graduation. In October 1994, there were 321 practising advocates.<sup>15</sup> They are considered in more detail further on.

4) Notaries. Notaries do not engage in litigation. They give legal advice, do research and draft and publish public deeds. They receive almost the same professional training as lawyers and must also do a year's '*prattika*' before sitting for the exam, leading to their professional warrant. While notaries are generally independent private practitioners, their role differs from that of lawyers since they are not supposed to display allegiance to any of their clients. Thus, the public role of notaries is stressed more than that of advocates, though they are even more likely to engage in private practice. There were 98 practising notaries in October 1994.

5) Legal Procurators. These are a separate professional category responsible for reviewing the written pleadings submitted to the courts by advocates during litigation. In October 1994, there were 30 practising legal procurators.

6) Other Officials. Various other officials compose the administrative set-up which underpins the judicial organisation. This is headed by the Court Registrar, who is assisted by various clerks and secretaries. Each adjudicator has his own clerk. Finally mention should be made of the court marshals and ushers, who can be considered as a sort of court-police who notify judicial acts, call laymen into court and execute warrants.

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<sup>15</sup> Statistics on the number of practising lawyers, notaries and legal procurators are taken from the 'Legal and Court Directory' of 1994/95. This is a publication of the lawyers' professional association: the '*Camera degli Avvocati*', listing all practising legal professionals in its records. If there are any legal practitioners not listed in this Directory, the number is likely to be small since this publication provided free and legitimate advertisement of legal services.

Having described the key elements of the judicial system, it remains to show how they come together in an ordinary law-suit. Litigation normally proceed in three distinct phases. In the initial stage the client contacts his lawyer; telling his story and asking for advice. Normally the lawyer will try to reach an agreement with the other party. If this fails, the lawyer will then file a '*citazzjoni*', or 'writ of summons' in the court registry, opening a law-suit. This '*citazzjoni*' is a written statement of the plaintiff's legal claims, which is accompanied by a declaration of the facts in issue and a list of the documents and witnesses to be produced as evidence. It is notified on the defendant who, if he opposes these claims, has a few days in which to contact a lawyer to file his written reply, or '*nota tal-eccezzjonijiet*'. This is drafted and filed in precisely the same way as the '*citazzjoni*', in rebuttal of the claims made therein. With this exchange of documents, the written phase of litigation terminates. The first hearing is usually fixed for a month from this date.

During the oral phase of litigation the lawyers present their respective arguments, produce documents and examine witnesses. This phase is described later on.<sup>16</sup> However, it is important to note that judges may order that evidence be submitted in the form of an affidavit or that it be heard before a legal referee rather than being orally produced before them. Furthermore the actual oral hearing is rarely completed in one sitting. Adjournments are often granted before final judgement is given. To explain the sort of delays which arise, an example of the course of an actual law-suit will now be explored. This case was instituted by a wholesaler who was trying to obtain payment for the equivalent of a thousand pounds sterling worth of merchandise sold to the defendant. I selected this case at random from a pile of cases in the court registry. The sum of money involved was a low one and it is generally recognised that minor cases generate the greatest delays. Still, this case does indicate why delays are inextricably associated with litigation

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<sup>16</sup> See chapter seven of this thesis.

in Maltese popular perceptions. Below are listed the dates of hearings and the motives for adjournments in the case under review:

<u>Date of Hearing</u>	<u>Motive for Adjournment</u>
12/1/1994	The initial hearing. As neither of the parties' lawyers turned up in court, the case was adjourned to:
23/2/1994	Once again, no-one turned up. The court adjourned the case ' <i>sine die</i> '. <sup>17</sup> The plaintiff reacted by filing a written application requesting the court to re-appoint the case for a hearing. The court re-appointed the case for:
22/6/1994	The case was adjourned to:
7/12/1994	The judge was indisposed. The case was adjourned to:
15/2/1995	After representations by the plaintiff's lawyer, the judge ruled that a copy of his ' <i>citazzjoni</i> ' should be stuck to the door of defendant's house by court marshals, formally notifying him of the existence of the law-suit and preventing him from pleading that the lawsuit was void since he had not been properly notified.
27/2/1995	The case was adjourned to 2/5/1995. Defendant was to be informed that this was to be the final adjournment.
2/5/1995	The case was adjourned to 30/10/1995. Defendant was to be informed that this was to be the final adjournment.
2/6/1995	Defendant made his ' <i>nota tal-eccezzjonijiet</i> ', claiming that the law-suit was improperly instituted.
30/10/1995	The case was adjourned to 29/1/1996 for submission of remaining evidence.
29/1/1996	The lawyers did not turn up. The case was adjourned to 29/4/1996 for submission of remaining evidence.
29/4/1996	Adjourned to 8/10/1996.

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<sup>17</sup> Literally 'without a date'. In this way, the judge signalled to the lawyers that if they did not act quickly the case was going to be thrown out of court.

- 8/10/1996                      Plaintiff took the oath and testified, confirming the facts as stated in his '*citazzjoni*' and declaring that he had no more proof to bring. The case was adjourned to:
- 10/12/1996                      The court observed that the defendant's lawyer had never appeared in court to plead on his behalf. The case was adjourned '*ghas-sentenza*' (for the final judgement) '*in difetto ostacolo*' (in the absence of an obstacle) to the:
- 28/2/1997                        Judgement was given because defendant's lawyer had failed to appear in court. The Court ordered defendant to pay the debt due to the plaintiff.

In this case, therefore, it took *just over four years* to order the defendant to pay the debt he owed to the plaintiff. In those years, the defendant's lawyer never appeared in court to plead his client's case. The only action he took on behalf of his client was to file a written statement of defence, a year and a half after the initial '*citazzjoni*' was notified on his client and then only after the judge, following a special procedure, had ordered a copy of the '*citazzjoni*' to be fixed to the door of his client's residence! The plaintiff's lawyer was more active. Yet he was often absent from the scene and this absence might have caused the case to be thrown out of court. Moreover, apart from the drafting of the '*citazzjoni*', his actions on his client's behalf were limited to requesting the court to re-appoint the case, to use a special procedure to notify defendant and eliciting the oral testimony of the plaintiff himself. Thus this straightforward and largely uncontested case,<sup>18</sup> in which a single witness was heard, took twelve court sittings to be decided!

The causes of court delays are complex and some will be examined further on. One can, however, note some of the causes which operated in this case. Firstly, there was the absence of the lawyers. Most Maltese lawyers have to cope with a large number of court cases, which are often heard

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<sup>18</sup> The only contestation the defendant made was limited to the claim that the case should not have been instituted against him personally, but against the company he owned. However, apart from this procedural plea, he did not contest the existence of the debt nor that it was due by him.

simultaneously in different courts. So they might not manage to make it to the court-room to plead in a particular case; particularly if the sum involved (and therefore their fees) is a low one. In this case, it also seems that the defendant's lawyer did not have substantial arguments to make in rebuttal of the plaintiff's claims. He probably believed that his client was bound to lose the case and that he could only assist him by putting off this inevitable outcome. If so, his absence should not be interpreted as indifference, but as an active and successful representation of his clients' interests. Consistent with this interpretation is the way defendant's lawyer did not file his statement of defence during the legally stipulated period after the filing of the plaintiff's '*citazzjoni*'. He only did so after a special procedure had been invoked to ensure that he could not later assert the lack of proper notification of the lawsuit.<sup>19</sup> One should also note the practice of adjourning cases to a date which is months in the future. This results from the excessive workload of the courts. Delays also reflect judicial tendencies to threaten stiff action against delaying lawyers while effectively adapting to their dilatory habits.

Court delays have multiplied in recent years. Statistics supplied by the Ministry of Justice show that on the 1st January 1995, there were 983 lawsuits pending before the Court of Appeal. 439 new lawsuits were introduced during that year and 305 decided or otherwise disposed of. By the 31st December 1995, there were consequently 1117 pending cases. The Civil Courts started the year with 8619 pending cases. 3623 lawsuits were introduced and 3256 disposed of, so that there were 8986 pending cases at the end of the year. Statistics for 1997<sup>20</sup> indicate that by the end of January 1997, there were a total of 22,861 cases pending before all the Maltese courts. Of these, 1067 cases were pending before the Court of Appeal; 8318 before the Civil Courts and 11,150 before the Magistrates' Courts.

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<sup>19</sup> The legal necessity of personally notifying judicial acts on litigants is a fertile field for delaying tactics by lawyers, who use all their ingenuity to claim that this requirement has not been observed.

<sup>20</sup> These figures were given by Justice Minister Charles Mangion in a reply to a Parliamentary Question. They were reproduced in the Maltese daily newspaper: "The Times" of March 5th 1997.

#### 4. Occupational Distribution of Legal Professionals.

Having looked at the institutional framework of the judicial system and described the ordinary course of litigation, the occupational distribution of the various legal professionals will now be charted. Statistical information on this point complements previous accounts because it roots the legal system more firmly within the Maltese social context. Data has been drawn from the 'Legal and Court Directories' of the 1992 and 1994/5 forensic years (*Camera degli Avvocati*: 1992, 1995). These directories were produced by the '*Camera degli Avvocati*', which is the professional association of Maltese advocates. They are intended for the benefit of practising legal professionals and their clients, who need to contact one another regularly. Although the details they provide can be considered reasonably accurate, they are not comprehensive.<sup>21</sup> However the names of most practising lawyers, including those who work with government or private business, are listed in these directories.

These figures establish the numerical preponderance of advocates over other legal professionals. In fact, in 1994, there were 15 judges and 15 magistrates, 30 legal procurators, 98 notaries and 321 lawyers listed. This numerical dominance reflects the cultural prestige enjoyed by advocates. Moreover, the profession has been expanding at a very high rate. Between 1992 and 1994, the number of advocates increased by 75 (an increase of 30%) and that of notaries by 13 (an increase of 15%).<sup>22</sup> There has also been an increase in

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<sup>21</sup> I know of no lawyer involved in litigation who is not a member of the '*Camera*'. Since it controls the locker room where lawyers' '*togas*' are kept and since the legal directory offers the most legitimate way of advertising one's services, membership is quite advantageous. Most other forms of advertising are prohibited by the '*camera*', on grounds of professional ethics. There are, however, a number of LL.D. graduates who have either never applied for the professional warrant, or otherwise do not engage in legal practise. For example, a number of teachers fall in this category. These individuals are generally not listed in the directories, since they are not members of the '*Camera*'.

<sup>22</sup> This expansion reflects the educational reforms of the Nationalist Government, which multiplied the number of law students. It does not seem to have brought about unemployment. In fact, a recent survey concludes that: "All sampled Law graduates found work directly after graduation" (Baldacchino 1997:101) This may reflect the widespread consensus among employers, reported by the same survey, that the job of a law graduate cannot be carried out by a non-graduate.

the proportion of female advocates, which rose from 22 (8.9% of all advocates) in 1992 to 51 (15.9% of all advocates) in 1994.

One can further explore the situation by looking at the ways in which lawyers and notaries advertise their services. In fact the 1994/95 directory provides information about the offices and office-hours of different legal practitioners and their employment status. On this basis, the legal professionals active in 1994 can be divided into the following occupational categories:

**TABLE TWO: BREAKDOWN OF LEGAL PROFESSIONALS (1994)**

	Advocates		Notaries	
	M	F	M	F
Full-time politicians	10		2	
Employed with listed law-firms	76	13	1	
Not practising	17	3	7	3
Maltese sole practitioners	120	15	62	9
Gozitan sole practitioners	7		5	
Part-time Govt. employ. & private practice	3	1	1	
Full-time Government employees	25	17	6	2
Full-time employ. with private company	11	2		
Part-time employ. with priv. co. & practice	1			
<b>TOTAL NUMBER</b>	<b>270</b>	<b>51</b>	<b>84</b>	<b>14</b>

These categories bear further explanation:

1) Full-Time Politicians: This includes the 10 advocates and 2 notaries who in 1994 are or have been m.p.'s and who have not listed an office address or office hours in the directory. While this indicates that these legal professionals have largely abandoned their legal practice for politics, one should note that the boundary between a political and a legal career is very tenuous in Malta. Most individuals combine the two and give increased emphasis to one instead of the other at different phases of their lives. Many legal practitioners engaged in private practice are also part-time politicians. At the time of writing, 22 of the 69 members of Parliament are advocates or

notaries and one is a law-student.<sup>23</sup> While legal professionals are fairly evenly distributed throughout the two political parties, lawyers dominate the P.N. leadership, as reflected in the way all its post-war leaders have been lawyers or notaries. By contrast, post-war MLP leaders have, with one brief exception, been non-lawyers. Lawyers also assume a range of political roles which do not require election to Parliament, such as participation in local councils, political party committees or local band/football club committees.

2) Government Employees: In 1994, 13% of the total number of lawyers were directly or indirectly employed by the Maltese Government and a few combined government employment with private practice. Government employment includes employment with the Attorney General's Office, which drafts legislation, or the civil service, or with Government-controlled companies, banks and regulatory bodies. The perceived status and salary of government employed lawyers is lower than that of private practitioners. This is reflected in the high proportion of female lawyers in government employment,<sup>24</sup> the tendency to combine government employment with private practice and the complaints of the Attorney General's Office, which in 1995 reported that public calls for applications were:

"even failing to attract law graduates freshly out of University, who seem to manage to find jobs in private practice with conditions even better than those of senior legal officers at the Office" (Attorney General 1996: 1).

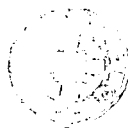
3) Private Company Employees. While lawyers employed with private companies enjoy a greater prestige than government employees, one should note that they still seem to constitute a small minority.<sup>25</sup>

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<sup>23</sup> According to a list of m.p.'s obtained from the Malta Government's Department of Information on Friday, May 30th 1997.

<sup>24</sup> 34% of government employed full-timers are female as opposed to an average of 15% women among legal practitioners in general. This is comparable to the U.S. situation (Abel 1989).

<sup>25</sup> The low number may also indicate that such lawyers are less inclined to advertise their services in the legal directories: since they may not have their own clients or engage in any litigation at all.



4) Not Practising. This comprises 30 lawyers and notaries who have not got a private office or fixed times in which to meet clients. Many of these are recent graduates, or persons employed in other sectors, such as the University.

5) Employed with Listed Law-Firms: The increase in law-firms was noticeable between 1992 and 1994. This is reflected in the separate listing of law-firms in the 1994 directory, when 28% of lawyers were employed in them. Table Three outlines the recent growth in both the number and the size of law firms:

**Table Three: Law Firm Sizes in 1992 and 1994:**

	NUMBER OF LAWYERS PER FIRM.					
	TWO	THREE	FOUR	FIVE	SIX	EIGHT
<b>NO. OF FIRMS (1992)</b>	5	4	4	1	2	1
	NUMBER OF LAWYERS PER FIRM.					
	TWO	THREE	FOUR	FIVE	SEVEN	ELEVEN
<b>NO. OF FIRMS (1994)</b>	6	4	6	2	3	1

By 1994 there were 89 lawyers and one notary<sup>26</sup> employed with law-firms. This suggests that Maltese lawyers are influenced by the U.S. model, where large law-firms, often employing hundreds of lawyers and increasingly structured according to industrial models have emerged (Abel 1989). However when one considers the size of Maltese law firms, it seems that most are best considered as informal associations of professionals. Information collected confirms that many of these firms are actually informal agreements to share office space and some facilities, while keeping distinct

<sup>26</sup> The absence of notaries from law-firms reflects the nature of their duties. Notarial work is relatively well-defined and more repetitive than that of lawyers. There is less scope for dividing labour here.

the finances and clientele of each lawyer/partner. 19% of the total number of lawyers working in law-firms have separate individual private offices. Also, the names of all Maltese law-firms are those of their leading partners and these are often close family relations of one another. On the other hand, it is also true that 81% of legal professionals working with law-firms do so on a full-time basis and have no private practice. The very largest firms have adopted a more formal structure, where clients are allocated to different lawyers in terms of the nature of the case and the lawyer's specialisation rather than the personal relationship between the lawyer and her client. This suggests that Maltese legal practice is in a transitional state, with larger firms possessing a more impersonal administrative structure gradually replacing small informal partnerships of practising lawyers.

6) Sole Practitioners. This includes all those lawyers and notaries who engage in private practice as self-employed individuals, which constitute the largest number of lawyers and notaries. In fact, 44% of the total number of lawyers listed and 78% of the total number of notaries fall within this category. The differences between self-employed legal professionals and law firms can be explored by looking at the number and location of their offices. 99 out of the 142 lawyer sole practitioners and 65 out of the 76 self-employed notaries had at least one office outside the capital city of Valletta, where the courts are located. Also, 38% of lawyer sole-practitioners and 45% of notary sole practitioners had more than one office. By contrast, law firms, are almost solely based in Valletta.<sup>27</sup> 61 out of 89 firm-lawyers are employed full-time by law-firms which do not have an office outside the city.

These statistics indicate a growing division within the Maltese legal profession between those lawyers who primarily minister to large-scale commercial, fiscal and maritime legal practice and those who look after the smaller civil and commercial cases found in the villages and suburbs (including Gozo) together with criminal cases. The former generally belong to

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<sup>27</sup> The 1994/95 directory cites only 3 non-Valletta based law firms, employing 9 lawyers.

one firm with a large Valletta based central office, permitting greater specialisation in particular branches of law, but tending to prevent them from developing a private practice of their own. They represent a new class of what Gramsci termed 'organic intellectuals' (Forgacs 1988: 305), catering to the economic needs engendered by the recent growth of the Maltese services sector. The latter compensate for their lack of specialisation by developing a practice in as many peripheral zones as possible. These lawyers therefore specialise in clientele rather than in legal expertise. They develop a network of contacts with as many people and handle as many different cases as possible. Unlike many firm lawyers, they are always involved in litigation. Due to their highly developed brokerage skills and the large clientele they acquire in peripheral zones they are also most likely to enter politics. They conform to Gramsci's characterisation of the traditional Southern intellectual (*ibid*: 308).

The emergent picture is therefore one of a profession gradually beginning to divide into two parts. On the one hand, are self-employed private practitioner lawyers and notaries, while on the other are the law-firms. Future trends seem set to promote the continued growth of law firms at the expense of self-employed lawyers. Between 1992 and 1994, the largest proportion of the new intake of lawyers found employment with law firms: 24 lawyers joined law-firms, 20 became sole practitioners and 13 became Government employees. Thus the market for sole practitioners seems to be reaching saturation point, with law-firms and Government emerging as the main new providers of work for new lawyers.<sup>28</sup> This trend ties in with the proportionate increase in female advocates, since these are even more likely to work with the Government or with law-firms instead of becoming sole practitioners.<sup>29</sup> However, it remains to be seen whether and to what extent these trends will continue. Presently the boundary between sole practitioners and law firms remains blurred.

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<sup>28</sup> A recent survey of Maltese law students by the University's Centre for the the Development of Worker Participation (W.P.D.C.) found that: "a considerable number of law graduates are employees, and not necessarily employed as legal experts" (Baldacchino 1997: 100).

<sup>29</sup> 29 new female lawyers graduated between 1992 and 1994. 11 found government employment, 9 joined law firms and only 7 became sole legal practitioners. The other 2 did not practice.

## 5. Learning the Law.

Legal training will now be investigated. This is more than the value-free acquisition of technical skills, being part of a process of professional socialisation through which lawyers acquire certain attitudes towards clients and the legal rules. In Malta, the main entry-barrier to the legal profession is the University course leading to the degree of Doctor of Laws (LL.D.), which must be obtained if one is to practise as an advocate. It is almost unheard of for an LL.D. graduate to fail to obtain her professional warrant to practice.<sup>30</sup> Thus, the legal education received at the University plays a crucial role in reproducing professional attitudes. Rather than providing an exhaustive description of all the sociologically relevant characteristics of Maltese legal training, this section will give a general outline and then focus on some features of particular relevance to the other chapters of this thesis.

The structure and curriculum of the law course have often been modified. However, its central elements have remained firmly in place. The course lasts six years. Linguistic ability is stressed as an entry requirement; with students having to prove competence in English, Maltese, Italian and at least one other language. Upon entering the course, students have to pass a final examination every year to be promoted to the next. These exams consist of four written examinations and four oral exams in the main subjects taught during that year. They are gruelling because they cover a vast area and there is little choice of questions to answer. They serve pre-eminently to test the memory and self-confidence of students. Various subjects are taught during the first five years of the law-course, ranging from international law to forensic medicine. However the emphasis is on giving students a thorough grounding in civil and commercial law. The first year of the course is considered as a

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<sup>30</sup> This warrant is awarded following a separate professional examination, held in the year following graduation. Only students who prove that they have done some '*prattika*' are allowed to sit for this exam. '*Prattika*' is focused on in chapter three and also in the other chapters of this thesis.

filtering year, in which subjects of 'theoretical'<sup>31</sup> interest like legal philosophy are taught and many students fail. As more years pass, a lower proportion of students fail and the teaching becomes progressively more 'practical', culminating in the fifth year when students are taught procedural law.<sup>32</sup> In the final year of the course, students must prepare and defend a thesis to be allowed to graduate. The law course is also characterised by the heavy teaching load and six or seven hours of lectures per day are not uncommon.

The course structure and student intake have varied over the years. In the 1970's and 1980's, Socialist reforms restricted student entry by a '*numerus clausus*' and introduced a student-worker scheme in terms of which students had to spend six months in the year as employees and six months at University. In 1987, the Nationalist Government liberalised entry and abolished the student-worker scheme. Thus the total number of LL.D. students soared from 95 in 1984 to 281 by 1994. More recently the University has re-structured the LL.D. course, by means of a series of reforms which were fully implemented in the 1995/96 academic year. These involved the introduction of a modular system of teaching and assessment side by side with the final examinations. The course was also split into two: an initial B.A. in Legal and Humanistic Studies followed by the LL.D. course proper. During the first three years of the course, students must now take a number of humanistic modules. There are no final examinations at the end of the second year, but there are eight at the end of the third year, when the B.A. terminates. An overall 'C' grade must be obtained in the B.A. for students to be allowed to continue to the successive three year LL.D. course.

While it is still early days to pronounce on the effect of these reforms, one should note that they have mainly involved additions to a course structure

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<sup>31</sup> Here 'theoretical' means that these subjects do not directly equip lawyers to handle specific legal tasks, although they might provide indispensable background information.

<sup>32</sup> After the fourth year of the course, students graduate with the Diploma of Notary Public. Those students who wish to practise as notaries may terminate their University studies at this point.

and curriculum which have remained fundamentally the same. As a result, it seems that the workload of students has increased, while they also have a more varied educational background. In the third year, an added hurdle has been imposed in the requirement of an overall 'C' grade in the B.A. This seems to have slightly reduced the overall number who graduate with the LL.D. degree. In recent years, attrition rates seem also to have increased<sup>33</sup> and the proportion of female students has risen from 27% of the total in 1984 (26/95 LL.D. students) to 55.5% in 1994 (156/281 LL.D. students).

To understand Maltese legal training, however, it is not enough to look at student statistics and the formal course curriculum. As Dahrendorf (Aubert 1975: 294) has pointed out with reference to Germany:

"The subject matter taught and, even more, the ways in which students learn and spend their time generally, are subtly affected by the place occupied by law faculties in German social structure. In this process the teaching of law loses its professional specificity" (*ibid.*, p. 304).<sup>34</sup>

In Malta, as in Germany, lawyers constitute a dominant social elite. Law students often come from elite backgrounds. One study found that a third of Maltese law students have a parent who is a University graduate (Baldacchino 1997: 104). Students from private schools predominate and it is common for them to explain the decision to study law by the fact that there is already a lawyer in the family. Law students seek to distinguish the LL.D. course, which is considered as somehow 'special'. They also seek to distinguish themselves through adopting a more formal clothing and being more politically and socially active than other students. Elite membership is

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<sup>33</sup> In 1985, there was a total intake of 16 new LL.D. first years. In 1991, 14 of these graduated (an attrition rate of 12.5%). In 1987, there was an intake of 97, 76 of whom graduated in 1993 (a rate of 22%). In 1989, there was an intake of 103, 80 of whom graduated in 1995 (a rate of 22%). In 1991, there was an intake of 129, 95 of whom graduated as notaries in 1995 (a rate of 26%). I have generated these statistics out of the student records kept by the Faculty of Laws.

<sup>34</sup> Dahrendorf's argument was that a shared experience of legal education served to link members of the German elite. Few of those who have a legal education actually practise as lawyers in private practice. Thus, Law Faculties are seen by law students as ways of gaining elite membership rather than legal knowledge. This explains student indifference to legal training and the specifically social and political (as opposed to legal and technical) skills they cultivate.

signalled through such practices as patronising the '*Casino Maltese*', the traditional club of the Maltese pro-Italian elite; or through post-graduation rides to Valletta in horse-drawn carriages as in the photo on the following page. While such practices portray a strong group identification, one should note that there is also a high degree of aggressive competition among law-students, expressed through the formation of rival cliques which conceal useful information from one another. Thus while it is true that law students develop strong internal friendship networks, the image of a homogenous and united body is mostly constructed for external consumption.

As in Germany, Maltese law students often claim that legal education is boring. Dahrendorf saw this as reflecting the lack of interest of German students in legal education *per se*, which they valued solely for the elite status it conferred. However, in Malta, this claim can be a way of emphasising professional prestige; since the boring nature of law is seen as a confirmation of its practical importance. To explain this attitude, it is necessary to see how law-teaching is influenced by legal practice itself. Dahrendorf did not do this, since most German lawyers did not traditionally engage in private practice.<sup>35</sup> However, it seems crucial to an understanding of legal education in Malta, where the prestige (and salary) of the sole private practitioner is high. Most ambitious law students envisage engaging in private legal practice of some sort (Baldacchino 1997: 101) and are keen to acquire legal know-how.

This emphasis on private legal practice is shared by law lecturers, who have usually been practising lawyers engaged in part-time teaching at the University. As a result, the teaching law students receive is subtly influenced by the effective dominance of private legal practice as an ideal to aspire towards. Law lecturers socialise students quite explicitly by constantly oppos-

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<sup>35</sup> One sociologist observes:

"If Germans talk about the 'legal profession,' they think first not about practicing lawyers but rather about all those who have passed two state examinations to become 'full-fledged jurists' (*Volljuristen*). These are then qualified to become a judge, a public prosecutor, a civil servant, a company employee, or an advocate." (Blankenburg & Schultz 1995: 92).

JOHN A. MIZZI recalls the hijack of an Egyptian airliner from Athens to Malta ten years ago, in which 60 people lost their lives



An illustrated report by DARRIN ZAMMIT LUPI, who recently spent a few weeks in Bosnia-Herzegovina, shows the destruction of a country after four years of war



KEITH SCIBERRAS throws more light on the artistic activity of Antonio Grech (1758-1819), who was in great demand as a decorative painter

# THE SUNDAY TIMES

No. 893

NOVEMBER 19, 1995

18c

## Balkan peace talks enter crucial phase

BALKAN PEACE TALKS entered their most crucial day yesterday with American swiftness saying the offered resignation of Bosnian Foreign Minister Mohamed Saeedbey was a "positive development".

The move could pave the way for a greater Croatian role in a future Bosnian government, the sources said.

Under the new government structure being negotiated for Bosnia, "the co-operation level has to be integrated so one of the top leadership positions has to come under a Croat," a source close to the talks told Reuters.

"It's a positive development" that Saeedbey chose to offer his resignation, the source said, although he said it was not certain if the resignation offer was official. "Some people were surprised by the move," he added.

Saeedbey is one of the best known Bosnian spokesmen and a master "of sound bite diplomacy" who has passionately argued his embattled country's case.

One source close to the talks said that last minute wrangling between Bosnia's Muslim-led government and Serbia over the fate of two Bosnian Serb leaders indicted for war crimes - Radovan Karadzic and Ratko Mladic - appeared to have been resolved.

But he gave no details and it was unclear if the peace accord would insist the Serbs surrender Karadzic and Mladic to the international war crimes tribunal at The Hague, as the tribunal's chief prosecutor and the Muslims have demanded.

Secretary of State Warren Christopher, who cut short an Asian trip on Friday to shepherd the US led negotiations through the final round, was expected to tell the Muslim,

Croat and Serb factions they must finally make the crucial remaining decisions on a peace agreement or admit that the intensive process that began on November 1 at Wright-Patterson Air Force Base here had failed.

The US aim is to exert maximum pressure on the parties to close a deal by tonight that would end the nearly four year Bosnian war.

President Bill Clinton could come to Dayton for the installing of the agreement, which would be a major foreign policy achievement for his administration. How and when to bring him into the process, however, is still being debated.

The peace process resumed early yesterday. Christopher held a meeting of the US delegation headed by chief negotiator Richard Holbrooke and then met European negotiator Carl Bildt and British, French, German and Russian officials, who together with Washington form the contact group on Bosnia.

Saeedbey told Reuters early yesterday he had offered his resignation to Bosnian President Alija Izetbegovic to make room for the appointment of a Croat in the post and thus bolster the country's newly formed federation of Muslims and Croats.

Many diplomats have been predicting a peace deal is at hand, provided the talks survive yesterday's session, which were expected to be the most gruelling of the 10 days of talks so far. The State Department insisted on Friday night that many major issues remain unresolved and peace was far from a done deal.

Clinton has pledged to send 20,000 troops to Bosnia, once a peace treaty is in place. (Reuters)

Malika Kesmanovic - page 4

## Police foil hold-up at Dingli

AN attempted hold-up on the Dingli residence of a fruit importer yesterday at about 8.15 p.m. was foiled by the police who had received prior information.

The police were on the look out when three men, armed with pistols and shotguns, entered the residence. After members of the Special Assignment Group asked them to surrender their weapons, the three men fired in the direction of the police officers who, according to a police statement, had no alternative but to shoot back. Two of the men were arrested while the third man-

aged to escape on foot, and later by car.

None of the policemen were injured, and nothing was stolen.

"The success of this operation," the statement added, "was due to the timely co-operation from the public, who are helping the police in the fight against crime, but was also due to the ability, courage and dedication of the members of the SAG who at great risk to their lives confronted these armed robbers and arrested them."



## De Marco in first 'structured dialogue' meeting with EU

FOREIGN MINISTER Guido de Marco leaves for Brussels tomorrow to take part in the first structured dialogue meeting between Malta and the European Union.

He will meet with the General Affairs Council and discuss topics aimed at bringing Malta closer in line with the EU, with a view to eventual membership.

The agenda for the meeting will cover the participation of Malta in Community programmes and financial protocols, the Middle East peace process, structured dialogue and accession procedures for the PECO, the former Yugoslavia, the Inter-governmental Conference and the Barcelona Euro-Med Conference.

Professor de Marco will also deliver a lecture on "Challenge of the south - the Mediterranean and a Mare Nostrum" at the Royal Institute of International Relations.

Professor de Marco returns to Malta on Wednesday.

## 73 lawyers, 95 notaries among new graduates

by Ingrid Zerafa

EUPHORIA reigned among law students who were among 400 who graduated yesterday in various disciplines from the University of Malta.

Prior to the graduation ceremony at Tal-Groqg many of the 73 new lawyers gathered in front of the Phoenix Hotel in Litorana to celebrate their big day.

The enthusiastic lawyers shouted, sang and whistled as they paraded around the island on a 12-wheeled cargo truck before they went to University.

Following the lawyers were the new notaries public who went to university in 20 horse-driven cabs.

In contrast to the lawyers, there was an air of distinct composure as the notaries made their way to the graduation.

Six graduates received a Diploma in Youth Studies, seven in Social Work, 10 in Applied Social Studies, eight in Public Administration, four in Political Studies, three in Probation Services, 95 Notary Public, 14 Master of Arts degrees

for the first time. Speaking at the graduation ceremony, BA (Hons) graduate David Gatt said the simulation systems used at university at present were outdated.

"One cannot use the same systems used when the university was attended by only a few hundred students," he said.

He added that not enough impor-

tance is given to prepare students to work and theorise, and the practical were to a certain extent detached.

Law graduate Paul Borg (Hons) said universities should be more involved in society to encourage social, economic and political development.

(Continued on page 18)

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### Christmas Supplement

A CHRISTMAS SUPPLEMENT will be published with *The Sunday Times* of December 3. To be considered for inclusion in the supplement, all copy should reach the Editor, *The Sunday Times*, PO Box 25, Valletta CMR 01, by November 25.

Great wines speak for themselves...



I am very interested in the Sauvignon Blanc grape variety and the Delicata Sauvignon is one of the most European ones I've tasted outside of the Loire Valley, good crisp clean grassy style.

MICHAEL SCHNEIDER, WINE PRODUCER, MOSEL, SAAR, RHEIN, GERMANY

An extremely well produced range of wines, in particular like the Red Label Rose and white wines. There is nothing more to wish for in a producer.

PETER BRODT, WINESHIPPER, 100% RHEIN, WINE MAKER, D. D. 100, SAAR, GERMANY



ALL WINES WERE RECORDED AT THE INTERNATIONAL WINE SHOW HELD IN LONDON IN MARCH 1995.

-ing 'theory' to 'practice', claiming that 'theory' is fine as far as it goes, but practice is a completely different matter. In this way, their own practical experience as advocates is valorised and distanced from the academic knowledge which students may find easier to acquire. Stressing the gap between theory and practice is therefore a way of empowering professional lawyers in regard to their students. It also serves to encourage students to establish the apprenticeship relations of '*prattika*' with practising lawyers, since this is the only route by which to acquire practical knowledge. Moreover, as the curriculum is structured to gradually move students away from an initially high dose of 'theory' towards a increased emphasis on 'practice', it strengthens the sense of the superiority of 'practical' knowledge (or practising lawyers' knowledge), inculcated into law students.

The practical orientation of law lecturers means that their reference point, when deciding how and what to teach, is the utility of this knowledge to a sole practitioner. Consequently law teaching is oriented towards the creation of a lawyer who is an all-rounder with a thorough grounding in private law and militates against the creation of specialists. Law is not primarily taught as part of a liberal education which can help students develop their talents, but as a body of practical knowledge to be absorbed and remembered. The continuous expansion of the curriculum, crammed teaching timetables and stress on examinations reflect attempts to include all the topics which a sole practitioner would conceivably have to know to be able to advise clients on all their legal problems. Since sole practitioners often do not have the time to consult their law books, the development of an ability to incorporate the law by memorising large numbers of legal provisions is also highly prized.

Law lecturers also transmit coded messages to students by their own attitude to time. Because most lecturers are engaged in legal practise, they are rarely present on campus and sometimes have to cancel lectures. When they appear on campus, they are generally surrounded by a circle of law students, who bombard them with their requests, almost as if they were their clients. Lecturers convey the message that they have no time to waste on trivialities

and that they can only listen to legitimate queries because they are in a hurry to get back to work. Often they explicitly invoke their lack of time, by for instance telling students that legal research is interesting 'if one has the time for it'. In this way, students are taught to regard time as a limited good, which should be reserved for the really important tasks of legal practice. One effect of these disguised messages is that students learn to regard a busy lifestyle and a lack of time as signs of power and to associate weakness with having to wait for someone. They consequently display their own power by showing that they have no time to waste on particular lecturers. Through persistent absenteeism and late-coming for lectures, some students try to assert their own claims to pre-eminent power. In such ways students try to escape the passive position of 'clients' who have to wait for their lawyer/lecturers and begin to assert a lawyer's identity of their own.

The role of 'viva voce' examinations highlights other aspects of the system. During these 'orals', students have to find the self-confidence to defend themselves before three examiners who often include judges or magistrates. Like lawyers, students dress formally for the occasion and try to present themselves in the best possible light. Their examiners sit at their ease behind a desk, while the student sits in front of them and answers the questions put to him by one of the examiners (the prosecutor). Meanwhile another examiner will calmly note his performance, acting as the judge. Finally, the third examiner acts as the defence attorney by smiling at the student and putting him at his ease.<sup>36</sup> If the organisation of 'oral' exams resembles a law-suit so closely, then this suggests that students become lawyers by winning their own cases, thus earning the right to shift from the subordinate status of clients to the dominant one of lawyers. This perception explains the didactic attitude of law lecturers who stress memory-testing examinations. This is an authoritarian mode of teaching, which views students as recipients to be filled with legal knowledge. It ties in well with a view of students as clients, who

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<sup>36</sup> On some occasions, this role of defender is even more clear, because this lecturer will make hand signals to the student to lead him towards the right answer.

have to win the right to speak about the law by showing that they have in effect transformed themselves into lawyers. This transformation can only be effected through incorporating the law in such a way as to be able to reproduce it by drawing solely on their own mental resources.

Consistently with the above, lawyers come to assess the worth of their own legal training primarily by reference to the time they have invested and the amount they have suffered in it. Their comments hint at the volume and complexity of the legal doctrines which they had to learn, while also confirming the prestige of legal study, which was capable of extracting the tribute of so many years of precious time from them. References to the 'suffering' involved in the course share a similar basis. Lawyers reminisce about the tension and frenzied studying of their final examinations so as to evoke the arduous crossing of a *'rite de passage'*, thus re-creating and enlarging the distance between lawyers and laymen (Bourdieu 1992: 123).<sup>37</sup>

Through legal education, law students acquire the practical attitudes to legal rules and clients' stories which they adopt as lawyers. While legal training might appear primarily to entail the study of actual rules, stories are indispensable here. This can be illustrated by looking at an extract from a transcription<sup>38</sup> of a civil law lecture produced by law students in 1990:

"It is true that with regard to contracts the connection between the injury and the damages is more immediate; in the sense that, if I agree to sell you a particular thing and I don't deliver it to you, the damages that you claim would normally be related to the non-delivery of that particular thing. You had a contract which you had to perform in order to use that particular thing –the equipment that I promised which you cannot use. Therefore, if I am responsible for the damages myself, then you claim damages from me. The connection is generally clearer. When it is a question of tort there is no earlier relationship and therefore this is purely accidental. A person may be walking near a swimming pool. He slips because

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<sup>37</sup> Characteristically, one practising lawyer who is also an M.P. recently remarked in Parliament that: "the LL.D. course at University is difficult and requires a great deal of dedication" (Taken from the speech by John Attard Montalto, reported in the Maltese daily *'In -Nazzjon'* on the 1st April 1996).

<sup>38</sup> Transcriptions are produced by law-students who record lectures, type them and distribute them among members of their cliques

the floor is slippery. He falls into the swimming pool and fractures his head... So when there is a direct connection between the injury and the damages, then of course, the immediate and direct effect. It would not be the case that he had to stay at a particular place and then he became enamoured of a nurse who went there, because this is not immediate although it has happened."

What I would like to underline here is the way in which the lecturer oscillates between enunciating the legal rule<sup>39</sup> and telling stories which illustrate its meaning. Three distinct narratives are smuggled into this explanation of legal doctrine. These concern: (a) the non-delivery of promised equipment, (b) a man who slips while walking past a swimming pool and (c) a patient who falls in love with his nurse. These stories are clearly of a 'paradigmatic' type, which serve to exemplify the practical applicability of the legal rules. Lecturers abstract skeletal narratives from the richness of lived experience to throw light on the meaning and application of legal rules. In this way, they also tacitly import specific sociological understandings. The picture of Maltese society which is transmitted to law-students is one which highlights the commercial and tourist sector, where equipment is bought and swimming pools common. Thus, students are taught to apprehend the abstract wording of legal rules through the medium of paradigmatic stories. These stories will later be used by them to justify the legal claims of their clients.

Law students are also encouraged to use impersonal forms of speech and to organise their essays around legal categories rather than narratives, which would tend to foreground subjective opinions. The effect aimed at is one where the legal framework is impersonally expounded so that the solution to the essay problem appears to be simply the one demanded by the rules. Here the creative intervention of the student is largely utilised so as to deny its own existence. In these essays, the voice of the law student is a muted one which expresses itself through the choice of particular quotations from

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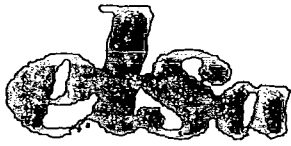
<sup>39</sup> The rule that damages are to be compensated only if they are directly and immediately caused by illicit behaviour.

rules, cases and authors and through the overall organisation of the work.<sup>40</sup> When law students do refer to their own opinion, they generally add some expression acknowledging their own insignificance. References are made to 'my humble opinion', or to: 'adding my weak voice to the opinion of these illustrious writers'. The use of these expressions shows how law students are led to connect the right to articulate the law with the suppression of their own subjective individuality and also with the acquisition of the legal experience possessed by practising lawyers. Most law students share these assumptions which induce them to place a low premium on personal creativity<sup>41</sup> and to stress the hierarchical divide between lawyers and clients. For this reason, they record lectures and produce printed transcriptions, which are often memorised '*verbatim*'. There also seems to be a significant amount of plagiarism among law students. Many seek to excel primarily through the volume of the knowledge they accumulate rather than the originality of their contributions to it. Thus, law students suppress their *own* subjective narrative voice, in the process of shifting from the passive role of clients to the active one of lawyers. This explains the genesis of lawyers' attitudes to their client's stories, which will be explored in the next chapter.

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<sup>40</sup> The way students conceal their subjective voice behind quotations can be seen from the circular on the following page, put up by final year law students in 1995. It advertises the holding of a dinner to celebrate the end of the final examinations. It is written in three languages: Latin, Maltese and English. The English text is mostly factual and refers to such details as the location and date of the meal. The Maltese text, by contrast, consists of two lines printed in a small font near the bottom of the page stating in a sort of rhyming couplet that: "only pigs are invited because this is the final meal." This creates a sense of informal humour evoking complicitous involvement within a small group. Finally the Latin text occupies a grandiose central position. Yet its first term is not really Latin, but the invented word: '*ziblatio*', produced by combining the Latin word '*jubilatio*' (festivity) with the Maltese word '*zibel*'. '*Zibel*' means 'rubbish' if used as a noun and 'getting drunk' (literally 'becoming rubbish') when used as a verb. The students are announcing their final feast, but they are also proclaiming that they intend to get drunk! The beauty of the joke lies in using the most formal language to convey the most vulgar message.

<sup>41</sup> The WPDC survey (Baldacchino, *op.cit.*) requested the law graduates interviewed to rank different aspects of University life. From the six aspects listed, students ranked the "Development of Creativity and Originality" in the bottom place: as the aspect of University life which contributed least to their occupational competence (Baldacchino 1997: 102).



The European Law Students' Association



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THE LAW SOCIETY

WITH TEARS IN THEIR EYES

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TEMPUS: 2100

IURNUM: TI TUESDAY 24TH APRIL 1997



*mistiednin biss il-majjali,  
ghaliex din l-ikla finali"*

(Anon.)

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CONTACT ANYONE FROM  
THE ELSA OR GHSL BOARDS**

## Chapter 5: Self-Scripting in Legal Offices

### 1. Introduction

This chapter will study the process of legal representation by focusing on lawyer-client interviews in Maltese legal offices. Such interviews are a necessary prelude to court-room litigation, representing an appropriate point of departure. However it is important to keep in mind that clients encounter lawyers in many settings and for a variety of reasons which are only imperfectly described as seeking legal advice.<sup>1</sup> A special focus on office interviews is required both by the theoretical hypothesis which informed my observations (and was itself shaped by them) and by the specific nature of legal representation itself. Compared to medical doctors, lawyers rely much more on their clients' stories to understand their situation; which they must also re-present before the court. Moreover, my theoretical hypothesis leads me to focus on those moments when narratives are most thoroughly and completely invoked and this generally occurs in the space of the office and during initial interviews. Such moments are crucial because they condition later encounters, when clients' stories need not be elaborated at such length.

The starting point is a detailed case-study of one lawyer/client interview drawn from my field-notes. This is followed by a more general discussion of the discursive dynamics of these interviews. This draws on anthropological theory to explain the social significance of clients' stories as ways of creating patronage relationships. Clients' attitudes are explored in the final section, which discusses popular perceptions of lawyers to explain why clients try to involve them in patronage relationships.

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<sup>1</sup> Often the advice sought is social or commercial as much as it is legal. One must also distinguish those clients who want advice in relation to a specific issue from those who are involved in litigation. The latter category can be sub-divided into clients who are having their initial interviews and those who are 'following up' on ongoing cases. Finally although the most intensive lawyer/client interaction occurs in lawyers' offices, they also interact in other settings, such as the court-room itself.

## 2. The Case of the 'Honorable Businessman'

"It is nine o'clock on a cold February night. The orange glow of the Valletta street lights only serves to highlight the emptiness of the city street. Dim baroque facades loom, half seen through the office window. The Dickensian aura is accentuated by the furnishing of the legal office, where everything seems to testify to the dead weight of the past. Century old legal tomes jostle with piles of papers, files and documents. Images of the Crucified Christ decorate the walls and the grumbling<sup>2</sup> of clients waiting in the corridor has a tired, patient, tone. Even the computers, a symbol of modernity, seem slowly to be getting encrusted with dust. However the atmosphere is tense within the inner sanctum of the lawyer's office; where a middle-aged couple are recounting recent events regarding the winding-up of a family-run company they partly own. The uneasy blend of suspicion and deference which defines their attitude to the lawyer, their clothes and speech style all testify to their rural origins. The lawyer, whom I will call Doctor Borg, is a well-built man in his thirties who conveys a sympathetic and reliable impression. He listens patiently, alternately weary and empathetic, only occasionally interrupting the clients. I have been introduced to them as a young lawyer and am sitting on Dr. Borg's side of the paper-loaded desk, symbolically aligned with the Law.

The husband describes how a creditor had informed him that the mal-administration of the company directors was increasing the debts it owed. Apparently they already amount to 50,000 Malta pounds. The husband is very upset. He tells the lawyer: 'We have to take action. I am very worried'. Fixing his eyes steadily on the lawyer, he declares: 'we have decided to appoint you as our agent. You will take care of everything for us. Because I can't stand any more of these upsets! Where necessary we have to take action. Because I always walk straight and I can't stand people who try to take my property from me'. He repeats this theme with variations throughout the interview, thumping on the desk with his fingers to underline his point. 'If we must trample on other peoples' feet, let's do so. Because I really respect you, Dr. Borg, but you have only one defect. You're too kind with these people. I walk straight and I can't take such behaviour'. He continues to elaborate this stance at such length that he comes across as a very vindictive person. He seems to realise that I am shocked by his harsh attitude and, to justify himself, adds: 'if necessary, I am prepared to give things to people for free, but I can't tolerate people who try to take my property for nothing'. Dr Borg agrees at intervals, saying: 'of course, o.k.' The client occasionally looks at me for confirmation of his views, as if he were frustrated by the lawyer's silences. I feel embarrassed at this and look at Dr Borg, in order to ward off any suspicion that I might be trying to steal his clients. I note with satisfaction that the client takes the hint and continues to address his lawyer.

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<sup>2</sup> During the colonial period. British administrators used to complain about Maltese grumbling, or 'gemgem'. Zammit (1984) relates this attitude to the prevailing state of powerlessness. My own fieldwork suggests that clients try to project a dissatisfied image in order to exert pressure on their lawyers. Grumbling also deflects attention from one's successes, averting jealousy and competition.

Then the wife asks the lawyer in an outraged tone: 'How can they (the company directors) do this?' Dr. Borg replies: 'they have to be careful. According to the new company law, they can't do this so easily. Can you see it, lady? It's that fat book on the shelf behind you. Directors are personally liable for such debts. These sorts of actions should become impossible'. The wife is not convinced: 'why are you saying *should*?' 'Well it depends on a judge noticing these changes', the lawyer replies. 'They should do so, but God knows when they will'. Then the husband takes the baton again, repeating the whole story and dramatising his anger and anxiety. Dr. Borg only disagrees twice. When the husband claims that he has not taken enough action, he observes sharply: 'when was the last time you came to this office?' Also, when the husband says: 'I can't bear to receive any more legal papers at home', Dr Borg replies: 'Look, in order to start a case, you have to come with me to the Registry to sign the writ of summons. Do you see? I will take action; but you have to come here'. The husband seems to accept this, but continues to elaborate his grievances until the lawyer cuts him short by asking abruptly: 'O.K. is this what we'll do?' The client agrees, fixing his gaze on the lawyer and saying: 'but Dr Borg, let me love you', as a parting shot".

{Fieldwork Diary: February 1996}

One reason for starting with this excerpt from my field-notes is that it illustrates the deficiencies of the 'one-way translation model' of lawyer/client interaction discussed in my first chapter. It seems obvious that to describe this episode purely in terms of the lawyer's domination over his clients does not do justice to the complexity of the power relations involved. It is clear that these clients are trying to put pressure on the lawyer to take more care of their case and it also seems that their efforts are partially successful.

Narrating their story allows these clients to attract Dr. Borg's sense of pity and moral indignation at their plight. The husband describes his anxiety as something he is physically incapable of bearing with. He describes himself as an upright person who is being destroyed by rogues. This narrative depiction of self derives its morally persuasive force from the way it appropriates and creatively develops Maltese understandings of social relations. These stress the importance of forming personal relationships of reciprocal obligation with significant others as a means of fulfilling individual ambitions.<sup>3</sup> This is

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<sup>3</sup> It is no coincidence that one of the seminal texts in network analysis, Boissevain's 'Friends of Friends' (1974), was based on fieldwork in Malta. Its central argument is that the study of the

metaphorically expressed through the active verb '*qabad*', meaning 'to grab hold of' and used for such socially approved activities as finding a girlfriend or attracting a clientele. Simultaneously, however, the creation of such relationships is seen as a potentially corrupting threat to individual autonomy. Particularly feared are the obligations such relationships create, since they allow others to influence one's actions and this can place one in a dishonourably passive position.

The link between honourable moral purity and individual autonomy is explicitly made in metaphors such as that of '*il-mixja*' (the walk). This can be used to refer to a person's 'walk through life', (i.e. her life-course as shaped by herself) or to the way a person 'walks with others' (i.e. the way in which she treats others). The significance of talking about an individual's walk in the context of a morality of self-fulfilment or inter-personal behaviour lies in the way this metaphor highlights individual liberty, the ability to choose one's own route, as a precondition for morally correct action. Not surprisingly, entanglement in social obligations is described by the passive verb: '*inqabad*', which refers to such other socially disapproved states as falling foul of the law, being caught in a lie or being an unmarried mother. Thus one contradiction which runs through Maltese culture is that between honourable individual autonomy and the acknowledged social utility of creating networks of personalised obligations with others.<sup>4</sup>

This is the contradiction this businessman is confronting. His desire to take legal action requires that he terminate his relationship with the company directors. This is why he evokes his honourable autonomy, as symbolised by his 'straight walk' and the fact that he is prepared to give free gifts but not to be robbed by others. This invocation of autonomy aims at authorising his

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personalised moral relationships individuals create can explain social behaviour by making visible a field of social action which lies between the state and the individual. Such networking is nourished by the relative weakness of state institutions in the Mediterranean.

<sup>4</sup> My treatment of metaphors is inspired by that of Brandes (1992), who explores the systematic relations between metaphors. Lederach (1991) has similarly analysed conflict talk in Costa Rica.

desire to make the company directors pay for their mistakes. He therefore extends the walking metaphor and gives it a new twist, saying: "if we are obliged to trample on other peoples' feet, let's do so."

There is yet another level of irony to this narrative, which refers directly to the lawyer/client relationship. Indeed, the businessman's desire to act autonomously itself places him in the passive position of a client. This irony is both revealed and denied by the businessman's reference to the 'straightness' of his 'walk'. The term used for 'straight' is the Maltese word '*dritt*'. While meaning morally correct action, this term can also refer to a legal right and, in a conservative usage, the whole spectrum of law and morality conceived as a unitary set of norms. By using such expressions, this client is also claiming to act in a manner which is legally correct. '*Dritt*' is being used as a vehicle to translate honour into legal entitlement.<sup>5</sup> This client wants the lawyer to legally intercede for him on the basis of his recognition of the honourable nature of his conduct. In this way the potentially dishonourable nature of the lawyer/client relationship to the client is denied.

Thus this extract shows how clients strategically utilise the: "inescapably moral" (Bruner 1990: 50) aspect of what might seem to be the purely communicative activity of telling their stories. His narrative self-depiction as an upright man being destroyed by thieves authorises this client to implicitly threaten his lawyer: raising his voice and thumping on his desk. This is very different from the deferential attitude such rural clients usually adopt. Thus, narratives can invoke moral norms to release emotions which discursively empower clients vis-à-vis their lawyers. They operate as what Tannen (1989) calls 'involvement strategies', obliging lawyers to operate within the framework of their client's perceptions.

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<sup>5</sup> In this case it seems that if one is *Dritt* (morally upright), then *Dritt* (the Law) gives one the *dritt* (right) to walk *dritt* (straight) over others, thus stepping *on* them. The underlying notion is that the law authorises a morally upright person to terminate personal relationships.

Still this businessman can only go so far in asserting his own honour. He must be careful not to openly offend his lawyer, as the latter might refuse to represent him. Thus he presents his frustration at the delays he is experiencing in the form of a complaint about Dr. Borg's excessive kindness. One should also note that the businessman's wife co-operates with him in jointly authoring a narrative to put pressure on the lawyer.<sup>6</sup> In the story they jointly enact, their roles are complementary. The husband expresses anxiety and aggression. When his rhetorical flow runs dry, the wife intervenes in a less aggressive, moralising, tone. She is more insistent than her husband, and extracts more legal information from the lawyer. Consequently, by exposing him to their 'joint performance', these clients compel the lawyer to explain his advice before different audiences, obtaining a more comprehensive understanding of their situation.

In the face of this pressure, Dr. Borg's most effective strategy is refusing to noticeably respond to his clients' story. By listening wearily and giving occasional monosyllabic responses, the lawyer conveys to them that he has heard such stories many times before. Thus, he detaches himself from the narrative within which clients try to frame their interactions and eludes the pressures placed on him within it. His occasional expressions of empathy are the minimum necessary to maintain clients' confidence while avoiding entanglement in their messy, emotive, stories.

The success of this tactic can be gauged from clients' reactions. Highly significant are the businessman's attempts to look at me rather than his lawyer while telling his story. This is perhaps the most common experience I had while conducting research in lawyers' offices. Clients would turn and address their stories to me, obviously hoping to obtain more feedback than their lawyers gave them. Meanwhile, the latter would try to get clients to stop talking. In this case, the husband's attempts to engage my interest, his

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<sup>6</sup> This is consistent with the behaviour of other couples I have observed in legal offices.

insistent repetition of his story and his wife's suspicious questions all indicate their dissatisfaction with the lawyer's response.

To provoke Dr. Borg, both spouses come close to questioning his professional authority. The husband does this directly, stating: "we have not taken enough action." His wife adopts a suspicious attitude. However the lawyer counters both these moves. He meets the husband's direct challenge head on, questioning his dedication in pursuing his interests. The wife's arguments are defused by patronisingly showing her the law books; displaying his learning, while implying that she is only capable of appreciating its outward manifestations, or the *size* of the books. When she continues to question him, he invokes his insider knowledge of judges'<sup>7</sup> attitudes, like the lawyers observed by Sarat and Felstiner (1989). By refusing to explain the delays experienced, the lawyer distances himself from responsibility for them.

Consequently, in this case, the businessman and his wife co-authored a narrative to pressurise their lawyer to take action. They utilised the capacity of stories to foreground moral norms to create sympathy for the story-teller. This strategy also allowed them to appropriate the legal rules in their support. Their attempt to convert honour into legal entitlement was countered by Dr. Borg, who tried to restrict clients' attempts to narrate their experience. The outcome was that these clients got their feelings across to their lawyer, compelling him to justify himself and to promise to take more action. On the other hand, they were also made aware of their dependence on him and of his ability to detach himself by ignoring their story. While this case-study is fairly typical, it should be clear that it reflects the attitudes of particular types of clients and lawyers. As will be seen, it is not characteristic of interactions involving top urban businessmen, or lawyers who adopt a more 'legalistic' client-handling style.

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<sup>7</sup> It is significant that Dr. Borg refers primarily to *judges* instead of *courts*. Rural clients might easily confuse lawyers with the courts in which they practise. Referring to judges serves to distance the lawyer even more from involvement in a system which his clients perceive as hostile.

### 3. The Social Uses of Clients' Narratives

The focus will now expand to encompass the field of discursive strategies which underlies individual cases. One issue left unexplained by the previous account is that of the truthfulness of clients' stories. In a sense my analysis may seem to have prejudged the matter. I have spoken of 'involvement strategies', and 'tactics' because this corresponds to the reasons for which stories were produced by clients. These stories were not narrated by people who were trying to recall the past before oral historians. They were told by clients to their lawyers in attempts to master difficult practical situations.

The strategic telling of stories was obvious to me because I could observe the way clients' behaviour altered the minute they entered lawyers' offices. While still in the outer office, they would either maintain a suspicious silence or chat about neutral topics. I grew used to listening to discussions about the price of housing, politics and the building industry. In short, clients would talk about everything except their cases.<sup>8</sup> Once inside the inner office, however, their behaviour would change dramatically. I watched one businessman shift from a leisurely debate on the merits of old Maltese silver to an intensely serious avowal of the honour of his family as he moved from the outer office to the inner one. At times, even the language changed, as the English used for technical topics was replaced by the Maltese reserved for personal matters. Another time a female teacher calmly discussed the educational system with me in the outer office. Yet on entering before her lawyer, she burst into floods of tears as she recounted her mistreatment by her parents.

Yet, accounts like these have a double-edged quality. While their timing and manner of telling betray strategic purposes, it is often equally clear that they evoke genuine emotions and that clients believe them to be true. Indeed a source of frustration for clients is when stories they consider true are valued only for their strategic significance by their lawyers. This is one reason why

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<sup>8</sup> They were clearly scared that their words would reach the ears of their opponents in litigation.

clients keep trying to tell their stories even when lawyers 'switch off' and pay them little attention. It also explains why most clients were pleased with my presence in the office. When lawyers ignored their stories, they would address them to me, since I seemed readier to endorse them.<sup>9</sup>

An event which occurred during my fieldwork led me to speculate on the truthfulness of stories. I was observing the interviews of a separating wife with Dr. Camilleri, in a case which I will call that of the 'Impotent Husband'. This woman pressurised Dr. Camilleri to open a law-suit instead of trying for a contractual settlement. She became angry and emotional when telling the story of her marriage, contrasting her husband's obsessive nature to her own reasonableness. She described his obsession with buying a Ferrari Cinque sports car when they did not need such a showy car. Pointing to her father, who was also present, she observed that her husband had always resented him because he was impotent and her father was more of a man. Having established a narrative context stressing her husband's abnormality, the wife talked about his behaviour during the separation itself. When listing their property for division purposes he had even mentioned flower bulbs he planted in the garden. She insisted that this was crazy behaviour, which made it impossible to reach a reasonable agreement with him.

As I was following these interviews, I was also attending Dr. Borg's office. One of his most assiduous clients was a separating man. He described his wife as a dangerous woman who was constantly quarrelling with him, posing a physical threat to his life. She kept trying to get her hands on his property. However he told Dr. Borg with a satisfied smile that he was not going to be swindled and that he had made a detailed list of everything he possessed. He

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<sup>9</sup> I felt uncomfortable, since I knew listening to these stories helped clients elude their lawyers' efforts to focus their attention elsewhere. I used to compromise by giving the client some attention and then ignoring him and looking at the lawyer. When I told one client about my research, she looked delighted and said: "Good! Make sure you come to us (clients), as only we can tell you what really goes on." At this, her lawyer interrupted, telling me: "No, come to us (lawyers)." He told the client that: "you can't tell him the truth because you cannot be objective!" Friends engaged in '*prattika*' told me their lawyers trained them not to pay too much attention to clients' stories.

produced a large file and handed it over, boasting of the way he had used his business expertise to produce a comprehensive report.

While I did not initially make the connection, later events confirmed<sup>10</sup> that the man was actually the 'Impotent Husband' Dr. Camilleri's client had complained about. On discovering this, I felt they had made a fool of me since both parties had convinced me of the credibility of their respective stories. Each story had so thoroughly engaged my sympathy that I could not recognise either spouse after having heard the other. On reflection, however, I realised that both stories could in a way be true. The righteous anger the wife showed before Dr. Camilleri translated into the aggressive behaviour her husband complained of. Conversely what the wife saw as the abnormal obsession of her husband to list even the smallest pieces of property he owned, became an understandable defensive reaction in his version. Equally clearly, however, both parties had focused on those aspects which put them in a more sympathetic light. The husband's description of his wife's frustrated behaviour had not mentioned that he might be responsible for her feelings, just as his wife did not mention that she was intimidating her husband. It follows that true stories can also be strategically fabricated and told.

Once one abandons the false opposition between verisimilitude and strategic telling, then lawyers' attitudes become more comprehensible. While being cagey about endorsing clients' stories, lawyers are also vehement about the need to respect them. 'It is *his* story', they told me; highlighting the way clients' stories construct their own sense of self-hood and observing that objectively incredible stories might be subjectively true for clients. This also conforms to the way Maltese talk about a story. The indigenous term, '*storja*' differs from the English 'story', since it is also the only term for 'history'. There is less expectation that a story will be false.<sup>11</sup> Indeed lawyers only claim a

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<sup>10</sup> When Doctors Borg and Camilleri had a discussion about trying to settle this case, Dr. Borg requested me to stay away, since: "there could be a problem of confidentiality here."

<sup>11</sup> Because it means a history, a '*storja*' is thought to take a long time to recount and to revolve around dramatic incidents. One who unduly dramatises ordinary events is said to be 'trying to create a *storja*'.

client is lying when he contradicts his own narratives. In such cases they are adept at the art of communicating their opinion without alienating clients. Thus after one of his witnesses had altered his testimony in court, his lawyer later told a client: "as a rule, when people are telling the truth, they don't change their version because the Magistrate starts to shout at them."

Consequently lawyers' ambivalent attitude to stories<sup>12</sup> reflects the way they mediate between reality as experienced and as strategically re-figured. This confirms Ricoeur's (1984) analysis which, as chapter two showed, acknowledges both the poetic activity by which narratives configure the world and the way they refer to reality in order to persuade. It was also seen how Bruner (1990) relates the emotional impact of narratives to their inescapably ethical descriptive terminology. This is why stories evoke the genuine emotions of clients although strategically fabricated by them.<sup>13</sup>

On the basis of this analysis it is possible to summarise the discursive features of the lawyer/client interviews I observed. Particularly noticeable is the way clients use narratives to evoke culturally paradigmatic moral norms which present their selves in an upright light. These stories empower them vis-à-vis their lawyers; aiming to induce the latter to represent them in terms of their views of their cases. This can be exemplified by other client interviews I observed. In one case, which will be called that of the 'Friendly Landlord', a lessor wanted to increase the rent his tenants paid him. He told a story which cloaked what would otherwise have seemed his naked exploitation beneath an account stressing the previous gentlemanly relationship existing between him and his tenants. Analogously, in the case of the 'Impartial Widow', a woman who wanted to repatriate her dead husband's savings told her notary that this was in order to be able to leave the money equally to her children on her own death. A story like this is effective since the avoidance of favouritism

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<sup>12</sup> Lawyers told me that criminal lawyers have a different attitude towards clients' stories. While civil lawyers ask their clients what their story is, criminal lawyers suggest a story to them, asking: 'could this be what happened?' I could not verify this, since my fieldwork was carried out with civil lawyers.

is especially praised in Maltese culture; given the bitter family quarrels which often follow the reading of a dead parent's will. These narratives are used by clients to construct a discursive bridge between their experiences and the legal framework; asserting a continuum between moral norms and legal rules.

Lawyers generally avoid responding to these stories, treading the fine line between a sceptical attitude and total rejection of them. This is because while lawyers must listen to their narratives to win clients' trust and adequately represent them, they also consider them as potential time-wasters threatening their professional independence. Consequently they tend to provide minimal endorsement to these narratives, occasionally passing ironical comments whose contextual absurdity indicates they are not 'taken in'. Thus his lawyer told the 'Friendly Landlord' that it was not legally possible for him to 'screw' his tenants; while the notary told the 'Impartial Widow' that she could gamble away her husband's savings if she wanted to.

Furthermore, lawyers often resort to a stance of selective inattention; seeming to ignore their clients while actually taking note of what they say. They 'switch on' again the moment clients say something they consider legally relevant. This can be illustrated by one separation case in which the lawyer read some legal papers while his client droned on about the way his wife had turned his daughter against him. However the lawyer came alert again when the client said his daughter had sent a card saying she still loved him. He told him to bring this card to court with him as it was useful evidence.

Even when lawyers confirm their clients' stories, they usually do so in terms which subtly transform them; making the infringement of legal rather than moral norms the central issue. Thus, one client of Dr. Camilleri's owned a restaurant in a popular tourist resort. He had been given a police license to place tables in the street and had built a little wall around these tables, enclosing the dining area. The Planning Authority had now served notice on

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<sup>13</sup> I am therefore wary of Bailey's (1983) account of the 'tactical uses of passion', which might suggest

him to remove this wall, claiming it had been illegally constructed. He was contesting this before the Authority's Appeal's Board. Before the hearing, he seemed very upset, telling his lawyer and myself that this would ruin him. Nobody would want to eat in his restaurant when pedestrians could walk between the tables and dogs defecate near diners. He hinted darkly that business competitors had tipped the Authority off. Yet when Dr. Camilleri agreed with him, he said: "once they gave you permission to place the tables in the road, they could not prohibit you from building the wall." Thus, while the lawyer endorsed his client's story, he also transformed it from a vendetta narrative into one about the legal principle that the scope of official authorisation extends to subsidiary actions entailed by the activity authorised.

The effect on clients is to socialise them into the way lawyers view their cases. They become aware of the difficulty of communicating their stories to busy lawyers who do not have much time to listen. This induces clients to exercise a certain self-censorship; shortening their stories and also re-shaping them to catch lawyers' attention. They adopt a more strategic attitude to their own stories; insisting on them on in the face of lawyers' inattention and summarising them to achieve maximum communicative impact. The outcome is short, emotionally charged, statements iconically encapsulating their narratives. Thus, after a court awarded her a low maintenance rate, one separating woman told her lawyer: "so, that's it? He wins as usual?" Also, another client said "I don't see why something which my mother gave me, should come to him." These statements function as "morals" evoking the stories to which they refer. Clients also learn which stories provoke a favourable response from lawyers. Since photos and other material evidence provoke a more favourable reaction than accounts of their emotions, they learn to produce stories which revolve around this material evidence.

Moreover, while the ordinary course of lawyer/client interaction is marked by clients' attempts to narrate their experiences and lawyers' minimal

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that genuine passions are not tactically evoked.

confirmation of their stories, there are endless variations in practise. These depend on the social background of the client, the lawyer's style and the nature of the case itself. To start with clients and to give a crude outline of the situation, those coming from a lower class, rural and lower middle-class background tend to be keenest on creating stories showing them in a favourable light. These are the stories which are met with minimal confirmation and inattention by many lawyers. At the same time lawyers are protective of those clients they see as particularly deserving cases, such as young separating females, and pay them more attention.

With top businessmen, the interaction is completely different; more closely resembling a relationship between equals, or even one where the lawyer is on the defensive. Here it is lawyers who try to sell their legal advice to clients, who do not easily accept it. In one case, for instance, one of Malta's biggest businessmen came to Dr. Camilleri's office. Apparently, he had bought some plots of land and had then been prevented from building on them because a rare species of wild flower grew there. Dr. Camilleri greeted this client with a smile and, observing that they were: "going to make our opponents scream," he outlined his strategy for winning the case. The client fired off his questions, which were fielded by the lawyer. The lawyer then tried to reach out to his client and create a shared narrative understanding of the folly of their opponents' behaviour, by saying "and all this for a couple of flowers." However, the businessman did not respond to this. This case shows that where the social power differential is heavily weighted in favour of the client, it is *lawyers* who try to create a shared narrative framework and *clients* who withhold confirmation. However these cases are a minority.

Different lawyers also adopt varying approaches to clients' narratives. Some of the lawyers I observed dedicated more time to listening to their stories and were more encouraging. Others were more inattentive and cut clients short. These different styles reflect occupational differences between lawyers; with small sole practitioners having more time for the stories of rural/working class clients and top firm lawyers less.

While this analysis illustrates the influence of social power relations on lawyer/client interactions, one should note that these are also conditioned by stories' objective content. Lawyers themselves confirmed this point by telling me it was impossible to generalise because: 'every case is different'. Thus lawyers abandon their indifferent stance to clients' stories and actively engage with them if their content is such as to prevent clients from taking their advice. This can be illustrated by the case of the 'Impotent Husband', where the wife's account of her husband's irrational nature stood in the way of Dr. Camilleri's attempt to negotiate a settlement. Consequently the lawyer altered her story, arguing that her husband was not irrational but was trying to assert his offended virility. When the wife objected that her husband's fixation with buying a luxurious car proved he was abnormally obsessive, the lawyer replied: "that's exactly why he wanted that sort of car. It's a symbol of virility."

Here, therefore, the lawyer was prepared to transform the narrative frame in terms of which his client understood the case, as this ensured that his legal advice would be accepted. This is similar to the attitudes of the American divorce lawyers observed by Sarat & Felstiner (1988),<sup>14</sup> with a crucial difference. While the American lawyers were only prepared to contest the 'vocabularies of motive' which their clients invoked to explain the *present* actions of their spouses, Dr. Camilleri also tries to transform his client's understanding of the motives for the *past* behaviour of her husband in buying a Ferrari Cinque sports-car. His reason for doing so is that the motives ascribed by the wife to account for her husband's present actions were narratively based on her depiction of his past behaviour during their marriage. It is because he was faced with a narrative rather than with temporally isolated 'vocabularies of motive' that Dr. Camilleri also had to transform his client's understanding of her own past. A narrative perspective makes it possible to perceive these linkages between past and present, which a focus on 'vocabularies of motive' leaves out

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<sup>14</sup> See chapter one for a summary of their views.

Having summarised the general discursive features of lawyer/client interviews, this analysis will now concentrate on what they tell us about the social relationships between lawyers and clients. While clients' stories vary widely, a common element is that they portray clients as honourable persons. However it is risky to refer to honour in the context of Mediterranean anthropology. The analytical significance of the term has been questioned (Gilmore 1987). Mediterranean ethnographies traditionally took it: "as axiomatic that honour and shame necessarily have to do with sexual roles" (Sant Cassia 1991: 8).<sup>15</sup> Yet many of these stories cannot be accommodated within this conception of honour. Thus the 'Impartial Widow' seemed more concerned with her parental role as a fair mother than with her sexual role as such. Also, while the 'Honourable Businessman' evoked the sexually charged image of the active man, who directs his own life-walk, this emphasis on autonomy is more than a simple assertion of virility. Consequently, one must refer to more recent ethnographies for alternative accounts of honour.<sup>16</sup>

In an important article, Herzfeld (1987) has explored the social uses of honour by replacing the concept with that of hospitality. He argues that the rhetoric/practise of hospitality to tourists enables Greeks to symbolically deny their dependence on them. Presenting themselves as unilateral givers reverses objective patronage relationships to morally oblige tourists towards Greeks. This in turn legitimates Greek exploitation of foreigners, so that:

"The hospitality I have described reproduces in an active, spatial, and symbolic frame the ideological structure of patron-client relations (see especially Campbell 1964): it is the moral englobing of political asymmetry that allows the client to maintain self-respect while gaining material advantage"(Herzfeld: 1987: 86).

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<sup>15</sup> The traditional approach is exemplified by Campbell's (1964) ethnography, where an analysis of honour is difficult to separate from a discussion of gender roles.

<sup>16</sup> The seeds of an alternative account are already present in Campbell's (1964) classic account of the Sarakatsani. He there speaks of honour as: "a condition of integrity" (*ibid.*: 269). Yet his only explanation for why people assert honour is that this restores the integrity of individuals and families by denying the need for co-operation and stressing the: "mutual exclusiveness and opposition of unrelated families" (*ibid.*: 212).

This analysis suggests that hospitality/honour is a way of creating patronage relationships. Analogously, Sant Cassia (1991) observes that honour operates at the interface between the self and the other. It is central to the processes by which individuals in the Mediterranean produce themselves; creating their own identities, or '*personas*', for social exchange. Honour is embodied through the skill individual actors display in crafting a character and living up to it.<sup>17</sup> Social interaction reflects attempts to accumulate personal honour and also to deny the honour of others by highlighting discrepancies between their actor selves and the characters they adopt. Thus the social uses of honour lie in its dramatic potential. It enables an individual to 'script his self' in the context of a wider social drama he can never fully control. Specifically, honour allows the weak to appropriate the vocabulary of the powerful; using it against them to question their standing.

Both Herzfeld and Sant Cassia see an important social use of honour as lying in its ability to mask the characteristic power differentials of patronage relations. Honour creates and preserves relationships of dependence through emphasising the social autonomy of clients. This is strongly reminiscent of the behaviour of the 'Honourable Businessman', whose assertion of honourable autonomy masked his dependence on the lawyer. While other clients do not emphasise their autonomy to the same extent, their stories also serve as means of 'self scripting'. By constructing their identities as morally upright persons, these clients seek to control the way their lawyers inscribe them within the textual legal domain. This is why lawyers react by trying to negate clients' honour just as Sant Cassia observes; evoking discrepancies between the client as actor and the client as character in his own story.<sup>18</sup>

The picture which emerges is one where most clients use narratives in order to script themselves as honourable persons and thus create, by denying,

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<sup>17</sup> Herzfeld (1985) observes that in Cretan mountain villages, men are not praised for being 'good men', but for 'being good at being men'.

<sup>18</sup> As occurred when his lawyer told the 'Friendly Landlord' that he could not 'screw' his tenants.

patron/client relationships with their lawyers based on the latter's recognition of their morally upright nature. This observation is confirmed by other features of client behaviour, which also aim at creating patronage. Thus, clients try to draw their lawyers into discussions of non-legal personal issues, to create multiplex ties with them. They also give them gifts, ranging from a bottle of whisky to the free use of a beach lido, or a trip abroad in the client's car. Clients even follow lawyers to their home, forming queues in the street outside. Apparently one well-established lawyer wakes up in the morning to find clients offering to drive him to work at his office.

Lawyers do respond to these overtures, often becoming friendly with clients. However they are also wary of becoming too obliged/dependent on them. The reason for this is revealed by a joke one client made to his lawyer, saying: "why don't you let us clients make a collection and buy you a mobile phone?" While seemingly an innocent offer of a gift, the lawyer's acceptance of this present would make it easier for his clients to contact him, making demands at all times. This manifests the latent purpose behind other gifts clients give and explains why many established lawyers do not have mobile phones. As one lawyer told me: "clients want to have us in their pockets."<sup>19</sup>

Consequently, evoking a patronage relationship based on their honour is a way by which clients try to script the whole drama of their relations with lawyers; ensuring the latter will in turn act honourably by forging ahead with their cases and acknowledging obligations towards them. They want lawyers to intercede for them on the basis of the justice of their claims and the honour of their selves. This is why clients tell stories painting themselves as morally upright, although most lawyers told me they are not concerned with the moral qualities of their clients.<sup>20</sup>

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<sup>19</sup> To have someone 'in your pocket' means having ultimate control and dominance over that person.

<sup>20</sup> Lawyers said they could not 'impose their morality' on clients, who 'should not have two judges.'

#### 4. Clients' Perceptions

Relating clients' narrative self-scripting to their attempt to evoke patronage relationships begs the question: 'why do so many clients attempt to create patronage relationships with their lawyers?' To tackle this issue one must probe the underlying assumptions clients bring to their encounters with lawyers. Popular views of lawyers are deeply ambivalent. They are looked up to as people of intelligence, cunning and leadership, who are able to resolve difficult problems. Thus, a particularly crafty thought is described as one which might have occurred to a lawyer. Lawyers' learning is respected and they are elected to posts of authority; being heavily involved in politics, mass-media, clubs, sports and philanthropic associations.

While a respectful attitude towards lawyers is prevalent throughout Maltese society, the reasons for this respect vary according to the social position of the speaker. Businessmen generally praise the strategic ability and crafty deviousness displayed by certain lawyers. They respect their mastery of arcane legal knowledge and the power which this gives them. They admire lawyers who are forceful and aggressive, contrasting them to 'sleepy' lawyers who are not sufficiently alert to defend their clients. By contrast, clients who are placed in a more dependent social position tend to praise the personal ethical attributes of the lawyers who act as their patrons. This is how one separated woman in her early thirties described her lawyer to me:

"My lawyer was like a 'father figure' to me. He was as old as my father. My father had known him at school. They weren't old acquaintances, but sort of, when my father had come with me the first time, like they knew each other, we discussed it, you know. And I always felt like he was guiding me, as if he knew what I was to do more than I knew what to do, which in fact he did."

Lawyers who are particularly generous with their time and attention are classified as '*avukati tar-ruh*', or 'lawyers with a soul'. They are looked up to for their Christ-like capacity to 'bear their clients' crosses'. They inspire the same sort of respectful awe that priests do and clients confide every aspect

of their lives in their hands. This quasi-religious authority is clear in the following interview with a middle-aged, unemployed, man:

"There are other lawyers, whom I call '*avukati tar-ruh*'. These are lawyers who, when you go to them, the first thing they do is to try to reconcile the parties, which should be the ethical duty of all lawyers. The '*avukati tar-ruh*', in my experience, are lawyers who have somehow got a certain Roman Catholic belief. This is very conspicuous in them. It is predominant. So, they also apply it in civil law. These lawyers are so concerned with the soul that sometimes they do what shouldn't really be ethical for a lawyer and get involved personally. And they do. They do a lot of good."

However, while most Maltese claim to 'respect' lawyers, this word has ambivalent connotations, since lawyers as a class have a negative reputation with the bulk of the population. This is not solely the result of their behaviour. Lawyers are symbolically associated with the law and the courts, so attitudes to them reflect generally negative popular perceptions of legal institutions. As one recent newspaper article points out:

"The plain unvarnished fact is that the only sentiment that all Maltese people share is a deep distrust of law enforcement and the administration of justice!" (Laivera 1995: 24)<sup>21</sup>

Legal proceedings are fraught with delays and lawyers are, rightly or wrongly, blamed for them. This connection is also made because lawyers themselves are seen as disorganised and inefficient. Clients complain about being forced to wait for their lawyers and about their inactivity on their behalf.<sup>22</sup> It is quite common to hear people complain that lawyers are never punctual and create delays because they: 'have a different sense of time'. Lawyers have internalised this criticism and jokingly refer to 'lawyer's time'.

Rural and working class clients are especially prone to view lawyers through the optic of class relations. Lawyers are viewed as representing a dominating

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<sup>21</sup> This correspondent also pointed out that: "TV interviewers were recently unable to find one single person expressing confidence in Maltese justice" (Laiviera, V: 1995: 24)

<sup>22</sup> As evening falls, one can observe groups of clients who have to wait in the streets until their lawyers come to open their offices. Often, I waited for more than an hour with clients in this way. Once, I heard a client jokingly quote the Maltese proverb: "*min jistenna, jithenna*" (he who waits will be made happy), to which another ironically replied: "*jew jitherra*" (or will be worn away).

upper class, which uses its superior education and power to deceive clients and induce them to part with their money for dubious benefits. The character of the scheming lawyer is almost an archetypal one in Maltese left-wing newspapers and literature (Mamo 1984). Consequently lawyers are accused of intentionally causing delays to increase their fees. They are also attacked for being deliberately vague, misleading clients into prosecuting claims they can never win. These attitudes are encapsulated in the oft-quoted expression that lawyers '*jghaddu il-klijent biz-zmien*', or make fools of clients by 'playing with time': constantly promising a future vindication which is never delivered. Lawyers are seen as mercenary predators who bleed their clients dry.<sup>23</sup>

Another motive for these negative perceptions is that some aspects of legal work contradict traditional ideals of manliness. Thus Maltese proverbs claim that a real man exercises a prudent economy of discourse, his word being the defining element of his manliness. Its virile strength guarantees the social bonds formed on its basis, so that: 'as the bull is bound by his horns, the man is bound by his word'. By contrast lawyers specialise in producing superfluous talk, which they generally do not act upon. Such talk is sceptically described by the Italianate term for words: '*paroli*', which is reserved for unproductive talk and opposed to the Semitic term '*kliem*', used for veridical discourse.<sup>24</sup> Lawyers are disliked because they 'play with' and 'twist' words. The feminine nature of such deceitfulness is conveyed by a saying that one should leave extra talk to women or lawyers. Lawyers are also compared to prostitutes because they are prepared to represent any paying client, however unsavoury. This adds up to a popular view of lawyers as scheming exploitative rascals, which fuels political debates.<sup>25</sup>

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<sup>23</sup> One village lawyer told me that when clients praise a lawyer, they say: 'he did not squeeze me dry.' This reflects an expectation that lawyers will squeeze as much money as they can from their clients.

<sup>24</sup> This reflects working class attitudes to Italians: often seen as '*brikkuni*', or unreliable deceivers.

<sup>25</sup> MLP supporters criticise the P.N. for being the advocates' party, whose leaders 'twist words' and 'manipulate facts'.

One must also keep in mind that in Malta, as in other Mediterranean societies, there is a deep-rooted rural/working class hostility towards the state and its institutions. Clients are quick to claim that the courts do not side with 'straight', or morally upright, individuals and that it is the 'small fish', or the socially vulnerable, who are caught by the law. Lawyers are representatives of this system and cannot help being associated with it. Thus, one rural client to whom I was introduced was described by Dr. Borg as: "one of the naughtiest persons in Malta;" an oblique reference to his illegal activities. This client felt the need to justify his behaviour before me as an aspiring lawyer, saying: "because, with all due respect, the law sometimes does not give you any satisfaction. You have to take it in your own hands."

If the rural/working classes dislike lawyers' elite status and links with the state, the middle classes are more critical of lawyers' links with criminals who are at the bottom of the social ladder. As one middle-class journalist put it:

"The greater a criminal lawyer's reputation, the more evil are the people who face him across his desk" (Caruana Galizia 1995: 9).

Contacts between prominent lawyer/politicians and criminals are deplored as corruption which undermines state institutions.<sup>26</sup> Clearly such criticism also reflects a middle-class social position, which is more supportive of the state. By contrast, businessmen criticise lawyers' inefficiency.<sup>27</sup> A common complaint they make is that lawyers are impractical and continually quarrel with one another, spoiling any transaction into which they are introduced.

In general, therefore, popular views of lawyers are highly polarised. On the one hand, there are the lawyers 'with a soul'. On the other, one can quote a recent discussion on t.v., where a young lawyer was asked how he reacted to the popular belief that lawyers don't have a soul. This duality is neatly

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<sup>26</sup> A university lecturer recently wrote an article entitled: 'A lawyer who is an m.p. should defend institutions and not those who try to destroy them' (Cassola 1996: 20).

<sup>27</sup> One businessman asked me whether I was learning 'lawyers fucking', by which he meant to refer to the underhand deception they are thought to excel in. "What a disgrace!" he continued: "all those court delays!" Dr. Camilleri replied that: "some clients don't realise delays work in their favour."

captured by the Maltese saying that if God does not take the (dead) lawyer, the devil will. Indeed, the very existence of the category of lawyers who have a soul indicates that other lawyers are thought not to have one. The exaggerated respect and admiration in which *some* lawyers are held is a direct result of the fact that *most* lawyers are considered to be rascals.

One should also note that this is not a clear opposition between good lawyers and bad ones. In Malta, as in Greece (Du Boulay 1974), the ability to perform well in the world is thought to require craftiness, which can imply immoral behaviour. The word '*hazin*', meaning 'badness' is often used as a substitute for '*hazen*', or 'craftiness', conflating the two concepts. In a culture where the assertion that a lawyer is (ethically) good may mean that he is (practically) ineffective, lawyers may not mind having a devious reputation. In this context, rural/working class clients are often particularly uncertain about the moral standing of their lawyers. To phrase it in their own terms, they are unsure whether their lawyer 'has a soul' or not. They tend to keep both possibilities present in their minds during their interviews. For this reason, they approach lawyers with a mixture of suspicion and deference.<sup>28</sup>

This uncertainty is also revealed by the strategies these clients adopt to ensure that they are properly represented in either eventuality. I watched one rural client jokingly tell his lawyer about his response to another lawyer who charged him for a case he had lost. He boasted that he had sent him a cheque which bounced, claiming: "if he (the other lawyer) has three balls, I've got four." Another client complained before his lawyer about the declining ethical standards of the legal profession, while excepting his own lawyer from censure. Through such rhetorical devices, clients exploit the bad reputation of lawyers as a class to pressure their own lawyers to act differently and to alert them that they are no fools.

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<sup>28</sup> One lawyer observed to me that lower class clients either praised him excessively when he did not deserve it or shouted at him when he was trying to help them.

The situation is additionally complicated by the ambivalent social role of lawyers. Poised as they are between the legal system and their clients, it is never totally clear whose interests they ultimately represent. In terms of the professional ideal, the lawyer's duty towards her clients ranks after her duty towards the court. Clients are aware that lawyers might see their primary duty as that of upholding the law in preference to securing their interests. Their jokes reflect this fear that lawyers might adopt a detached professional view, as they constantly stress their human weaknesses and eccentricities. In fact, clients joke about the shabby furniture of a lawyer's office, a time when his car broke down, his personal life and so on. Such jokes construct ties with lawyers on the basis of shared human frailty. To the opposition between lawyers 'who have a soul' and those who do not, one can therefore add that between 'humane' and 'legalistic' lawyers. In both cases we are not so much talking about different species of lawyers as of opposed categories into which clients classify their lawyers' behaviour.<sup>29</sup>

These conflicting attitudes make it easier to understand the motives behind clients' efforts to create patronage relationships with lawyers. Widespread perceptions of lawyers as tricky and dilatory, coupled with equally pervasive notions of the 'respect' they are entitled to, simultaneously motivate clients to create personal relationships and ensure that the only avenue for doing this lies through the discourse of respect/honour.<sup>30</sup> Through their stories, clients hope to gain credibility in the eyes of lawyers, by translating their concerns into language they must respond to. Thus, while Maltese rural/working class clients often oppose law and honour in the way the Sarakatsani shepherds observed by Campbell (1964) did, they are aware that according to the conservative discourse favoured by the '*avukati tar-ruh*', the two form part of the same continuum. They exploit this fact in order to obtain the protection of

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<sup>29</sup> A 'humane' lawyer may sometimes act in a legalistic way and the contrary is also true.

<sup>30</sup> This can be exemplified by the case of the 'Honourable Businessman', where the religious symbolism in Dr. Borg's office identifies him as a lawyer 'with a soul'. Clearly, such a lawyer may not be ready to assist clients to justify immoral acts. It is vital to create a personal relationship with him, since, like all lawyers, he is liable to delay your case unless it is brought to his attention.

lawyers. As such protection is founded on the honour of both parties, the lawyer will naturally be respectful towards his client and is far less likely to try to deceive her or put off taking action in her case.

Not only do patronage relationships allow clients to make moral claims on potentially devious lawyers, but they also make it possible to subvert the professional detachment of legalistic lawyers. Once you have transformed your lawyer into a friend, it becomes easier to exert pressure on him. He finds it more difficult to shelter behind a professional '*persona*', becoming personally responsible to you for his actions. In one case I observed, a lawyer represented some employees of a former client of his in their law-suit against their employer. They reported to the lawyer that their employer had reacted by saying that he: "had never expected such unethical behaviour, given that he had often previously engaged him as his lawyer." While the lawyer shrugged off these comments, they are significant since they show how clients try to evoke and manipulate patronage obligations.

Consequently clients' motivations for involving lawyers in patronage relations seem primarily derived from negative popular perceptions of lawyers and their ambiguous social role. Patronage allows clients to control lawyers and define their role in their own interest. This explains why rural and working class clients, who are the most socially distant from lawyers, are also the ones who try hardest to narrate stories placing their selves in a morally favourable light. Ironically enough, therefore, clients may not want to corrupt lawyers by creating personal relationships with them, but only to ensure the prompt execution of their professional services. Furthermore, lawyers who react to these attempts by stressing their professional distance from clients, motivate them to try even harder to create personal relationships. Thus, patronage and professional detachment appear to mutually reinforce one another.

## Chapter 6: Professionals or Patrons?

### 1. Introduction

A good evaluation of legal representation must flip the coin and explore lawyers' perceptions of their role: how and why they react to clients' overtures in the way they do. To do so, this chapter will initially focus on the professional ideal which is the official self-description produced by lawyers. Particular attention will be paid to the way this ideal is reflected in the spatial organisation of legal offices and conveyed through various practices by which lawyers present themselves as incorporating the law when interacting with clients. The reasons for such an approach to the social role of lawyers are, firstly, that this clarifies the non-verbal context in which most lawyer-client interaction occurs, complementing previous accounts of clients' story-telling. Secondly, such an approach exploits the unique anthropological capacity to analyse symbolism. The organisation of legal offices, in particular, provides a useful vehicle for reflection on the various components of lawyers' identity and how they are combined in practice.

Having outlined the professional ideal, the next section will look at how the compromises, which the practical exigencies of legal practice compel lawyers to adopt, lead them to re-interpret this ideal. This analysis will revolve around extracts from my interviews with lawyers together with my own observations. Two distinct representational styles will be identified, which reflect different reactions to clients' narratives characterising different types of lawyers. The costs and benefits of each style will then be discussed. It will be shown why most lawyers strategically balance between them, in the process walking the tightrope between patronage and professional detachment. Finally I will tackle the influence of these styles on the way lawyers re-present their clients' stories in writing; when drafting the judicial acts on which later court-room litigation will be based.

## 2. The Professional Ideal

Codes of professional ethics and laws regulating advocates' fees help constitute the public face of the legal profession. It is here that the professional ideal finds its purest and most abstract expression. This takes the shape of an emphasis on detaching lawyers from clients' pressures by ensuring that the interests involved remain distinct. Thus lawyers' fees are regulated by an official system of tariffs.<sup>1</sup> In terms of this system, the fee is fixed automatically according to such factors as the value of the object of the suit, the procedural acts filed and the number of decisions contained in the judgement. It makes no difference to the fee whether a favourable decision for the client is obtained or not. While there are certain exceptions to this system,<sup>2</sup> the general principle is maintained and this serves to detach lawyers from their clients since they do not have a direct financial interest in winning the case and often do not determine the amount of their own fees.<sup>3</sup>

Similar principles are enshrined in the recently published 'Code of Ethics and Conduct for Advocates'. Particularly significant for the purposes of this thesis is how this code prescribes the task of legal representation in civil litigation:

"An advocate who appears in court or in chambers in civil proceedings is under a duty to say on behalf of the client what the client should *properly* say for himself or herself if the client were allowed to plead for himself or herself and possessed the requisite skill, knowledge and legal training" (Rule 11, Part IV, Cap 1).

By requiring advocates to restrict their representation to what clients should 'properly' say, this code prevents their complete identification with clients; requiring them to exclude what clients would like to say but properly should

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<sup>1</sup> Contained in Schedule A of the Code of Organisation and Civil Procedure (Laws of Malta: Cap 12).

<sup>2</sup> No tariff regulates the giving of legal advice. Also, since 1996, lawyers and clients may opt out of the tariff system if they agree on a different fee. However, the fee charged remains subject to revision by a special Committee if the client considers it unreasonable and demands review within a month.

<sup>3</sup> It is forbidden to agree to share in the profits of litigation by both the Maltese Civil Code and the Code of Ethics and Conduct for Advocates.

not.<sup>4</sup> This institutionalises the professional separation of lawyers from clients, obliging them to decide how far to go in their representation.

This stress on professional detachment affects the way lawyers view clients and their stories. This was made clear when I interviewed the President of the Maltese Lawyers' Association, the: '*Camera degli Avvocati*'. He made a distinction between the 'case', which the lawyer is duty bound to present to the court as effectively as possible, and 'facts', which are 'in the hands of the client' to prove. He observed that the stories clients tell under oath and in the courtroom context are often very different from the ones they originally told their lawyers. Consequently facts should emerge in the court-room setting of a '*viva voce*' hearing; which he called a 'search for truth' undertaken before the judge. He therefore objected to the use of written affidavits as an alternative;<sup>5</sup> claiming that they tempted lawyers to write their clients' stories for them and risk perjuring themselves. He asked: "why should a lawyer be placed in an intolerable position where he knows that changing a word in a clients' affidavit would lead him to win the case?" He also observed that he had never witnessed a signature in the absence of the person concerned.

Thus the professional ideal sees legal representation as a process where the lawyer's version of the issues involved is separated from that of the client. Lawyers are concerned solely with the 'case'; consisting of the legal arguments and claims to be made.<sup>6</sup> The proof of the 'facts', on the basis of which these legal arguments are raised, is the clients' job. This distinction draws a conceptual boundary between the domain of the client, which is one of potentially changeable oral stories of dubious credibility, and the domain of

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<sup>4</sup> This principle is somewhat diluted in criminal matters, where the Maltese text states that a lawyer should say all that the client would have said in his defence, without including the word 'properly'. However the situation is unclear, since the English text still contains the term.

<sup>5</sup> An affidavit is a written statement of the client's version of the facts. They are supposed to be precise reproductions of their stories and clients must confirm them on oath. As shown in chapter nine, judges increasingly request the presentation of affidavits instead of hearing testimony '*viva voce*'.

<sup>6</sup> Lawyers are prepared to accept more involvement with the facts in criminal cases.

the lawyer, which is one of legally valid writing. By drawing such a boundary, lawyers escape responsibility for proving their clients' stories, confining their role to legal argumentation. Lawyers assert their detachment through expressions like: 'trying to win the case for the client', implying they have no personal interest in the outcome. They describe a good client as one who leaves matters in his lawyer's hands; allowing him to 'guide his walk', or direct the progress of litigation.

This ideal of professional independence is widely shared by lawyers. Thus, other lawyers to whom I spoke claim to be unconcerned with whether clients tell them the truth; as they must represent them on the basis of what they are told, not of what really happened. Detachment from clients' stories implies detachment from clients themselves. Judges, whose role requires them to take this detachment to its logical extreme, claim that:

"The prudent judge must keep himself detached from friendships and close relationships with persons who are not members of his family."<sup>7</sup>

This ideal is ceremonially invoked when lawyers graduate. In this respect the speech given by Professor Xuereb in 1898 resembles those given nowadays.<sup>8</sup> In this speech, the orator emphasises advocates' freedom. He even compares them to: "man in his original dignity" (Ullo-Xuereb, 1898: 9), since they are neither patrons nor dependents. Advocacy is described as '*la professione libera*', or 'the free profession'; a phrase still used by lawyers I interviewed. Thorough legal study is the pre-condition for this freedom:

"A numerous clientele will come without any difficulty, but only to those who are well prepared, not to those who are most solicitous, to those who show that they are deserving" (*ibid.*: 11).

Lawyers should not easily trust their clients, nor allow themselves to be guided by them (*ibid.*: 18). Particularly despicable are lawyers who:

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<sup>7</sup> This quotation is taken from an interview with Mr. Justice Victor Caruana Colombo carried on the Maltese newspaper, *Il-Mument* in 1997.

<sup>8</sup> See the start of chapter four.

"induced by need, or by sole love of gain, run after affairs and bewail the loss of their daily bread when the success of a law-suit does not correspond to their desires. This has always been a cause of corruption" (*ibid.*: 13).

These quotations are enlightening because they give a clue as to the ways in which lawyers seek to live up to their ideals when interacting with clients. This can be seen by focusing on legal offices and court corridors, which are the two domains where lawyer/client interaction mostly occurs.

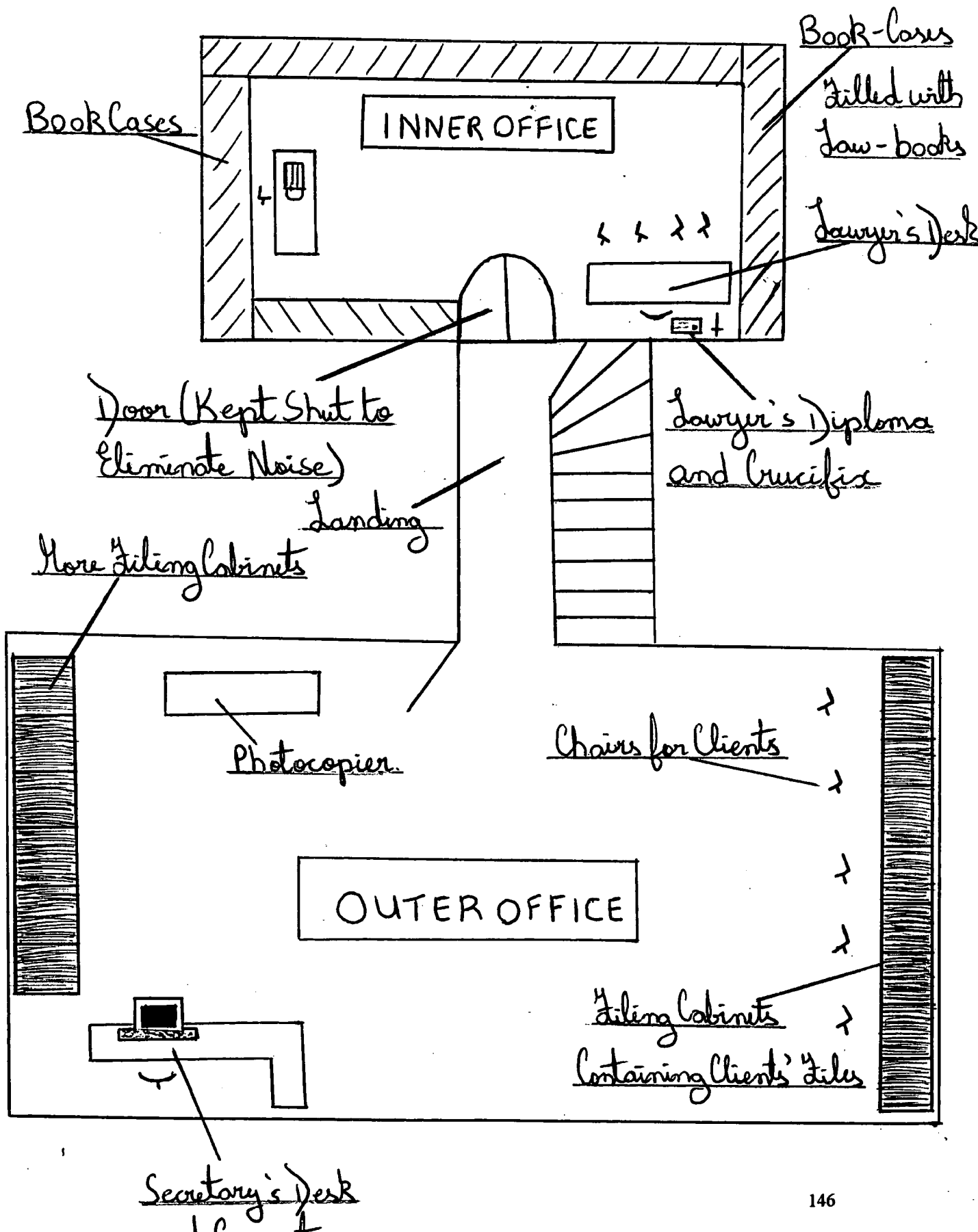
The organisation of space within legal offices can only be understood if one keeps in mind the desire of lawyers to instil a recognition of their professional autonomy in clients. This point can be illustrated by the plan of Dr. Camilleri's office. The diagram on the next page shows how his professional detachment is spatially encoded through the physical separation between the outer office, where clients and their files reside until allowed to present themselves for his inspection, and the inner office; where he sits surrounded by law-books. This institutionalises the distinction between the 'law' and the 'facts', by means of a spatial separation, which must be traversed by clients in order to bring the 'facts' they bear to the lawyer. Lawyers wait in their inner offices and clients must knock and request entry. Also, when Dr. Camilleri needs to look at a client's file, he asks his secretary to bring it to him through the intercom. Rarely does he go to the outer office to bring it in himself before clients. The arbitrary nature of this division is also revealed when one realises that an established lawyer like Dr. Camilleri needs to refer to clients' files at least as often, if not more, than he does law books. Yet he fills his inner office with law-books and consigns the files to the outer office.<sup>9</sup>

If the outer office is the domain of clients and their files, everything in the inner office testifies to its role as the domain of the law. There are, first of all,

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<sup>9</sup> An emphasis on clients having to *come* to lawyers, conceived as repositories of legal knowledge, also marks the first steps made by a young lawyer opening an office. It is the practice for him to sit and wait in the empty office until the first clients appear (Pullicino 1989). While this can take months, the professional ideals do not allow him to do much else to solicit clients.

Plan of Dr. Camilleri's Office



various symbolic barriers which must be traversed on entry. These range from the shut door, which also prevents eaves-dropping, to the paper-loaded desk, which continues to separate clients from lawyers. The symbolic importance of the desk was revealed to me by the insistence of certain lawyers that I should sit on their side of the desk while they introduced me to clients as a young lawyer.<sup>10</sup> Clients have to hand their papers to lawyers across this desk which is often quite wide and forces them to reach across it.

Moreover, the inner office is replete with objects which make powerful statements of legality, testifying to the extent of the lawyer's legal knowledge and authority. Indeed, the various components of the inner office can be shown to reflect different aspects of the professional identity they convey to clients. Pre-eminent among these are the statute books of the Laws of Malta. These are generally displayed in a cupboard resting against the wall behind the lawyer and above his head. Next to them, are usually framed copies of the diplomas obtained and the professional warrant. Also behind the lawyer, or sometimes on his desk itself, one generally finds a crucifix. As can be seen from the plan of Dr. Camilleri's, inner offices often contain a number of other book shelves, replete with case-books and old and dusty text-books.

The symbolic purpose of these objects is clear from their nature, positioning and use. The framed certificates are, of course, the professional symbols '*par excellence*', which literally inscribe the lawyer's self within the textual domain of the law and officially endow him with the authority to mediate between this written domain and the oral one of clients. The plethora of dusty books reflect the vastness, antiquity and authority of the laws consulted by the lawyer. Their strategic value was manifested in the case of the 'Honourable Businessman', when Dr. Borg pointed to them so as to display his learning to

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<sup>10</sup> Indeed, when subjecting law students to an oral examination, lawyers always make sure that a desk stands in between and often try to fill it with papers in order to further distance themselves from the student. This confirms the point made in chapter four that law-students are treated like clients.

his client.<sup>11</sup> Significantly too, while Dr. Camilleri gets his secretary to bring clients' files over, he often walks over to his book shelves to consult the law-books. Often, he does this to solely to symbolically buttress advice already given to clients by showing that it is based on the law.

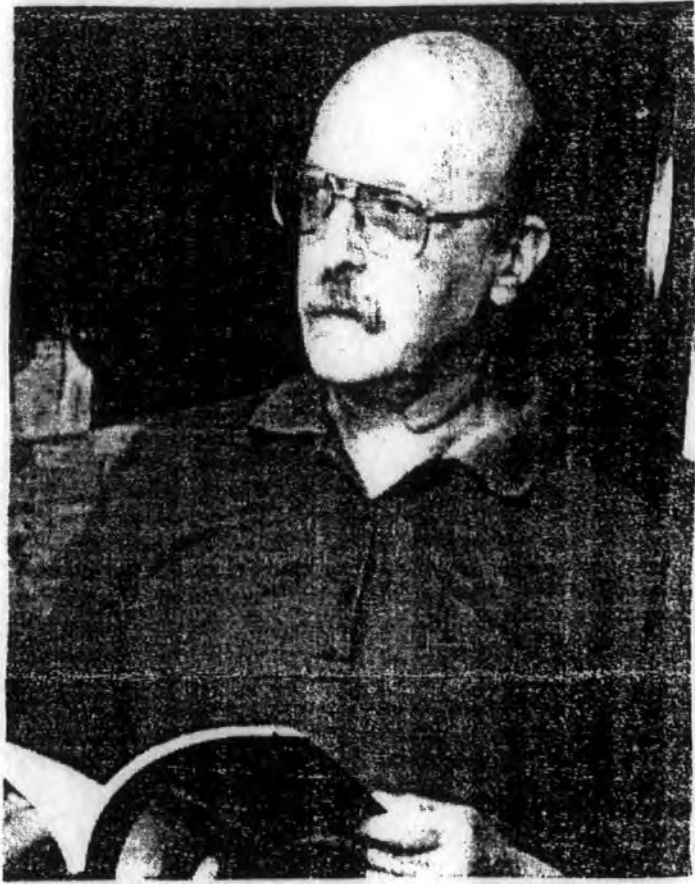
This symbolic use of law-books indicates that when lawyers present themselves to clients, they invert the theory/practice dichotomy which practising lawyers inculcate into law-students. The fourth chapter observed how, in the theoretical field of the University, lawyer lecturers elevate the importance of practical knowledge over the theoretical knowledge their students possess. When facing clients, however, they emphasise the superiority of the theoretical knowledge contained in the law books above the practical knowledge of the clients. Similarly the crucifix functions to symbolically align the legal realm to the religious one. This endows the lawyer with the quasi-priestly authority of the '*avukat tar-ruh*', making it easier for clients to confide secrets to him and more difficult for them to lie. The presence of the crucifix next to the law-books evokes the same continuum between legal and moral rules which clients evoke in their stories and which lawyers selectively confirm, ignore and deny.

The positioning of these objects is also revealing. By placing the statute books immediately behind and above them, lawyers portray legal knowledge as flowing down from a hierarchically superior position towards the lawyer, who then transmits this knowledge across the desk to his client. This point is confirmed by the poses lawyers favour when they take photographs for public consumption. They almost always make sure that they are either seated at their desk, with the statute books behind them or else have a book in hand, which they are gravely consulting.<sup>12</sup> Thus, the public '*persona*' of the advocate is derived from his professional role as an interpreter of the law.

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<sup>11</sup> As shown by a professional 'in-joke' about a law professor who came to assist another lawyer staggering under the weight of several legal tomes. When told that the case did not require detailed study, the professor said he had not brought the books for consultation, but to impress clients!

<sup>12</sup> The photos on the following page show lawyers in each of these poses.



(Source: "The Malta Independent" of the 3<sup>rd</sup> September 1995)



(Source: "*Il-Gens*" of the 8<sup>th</sup> December 1995)

A Learned Profession.

This privileged position as the mediators transmitting hierarchically superior legal knowledge in turn endows lawyers with the ability to produce authoritative descriptions of social reality. Given the explicit recognition of the sovereign status of legal knowledge supplied by the doctrine of the rule of law, lawyers have little doubt about their ability to create superior descriptions of the inferior realm of social facts.<sup>13</sup> Maltese lawyers often double as all-purpose writers cum social scientists.<sup>14</sup> Moreover, the relationship between lawyerly identity and legal texts is so close that the two are often presented as emerging from one another. Indeed, lawyers often present themselves, as part of their presentation of the law.<sup>15</sup>

If lawyers' identity is often conflated with legal texts, this implies they might construct their own physical presence in a manner continuous with the way they organise their offices. Here the analysis follows recent anthropological theory, which explores how the body is trained to unconsciously enact a 'political mythology' (Bourdieu 1997: 69). As Bourdieu observes:

"One could endlessly enumerate the values given body, *made* body, by the hidden persuasion of an implicit pedagogy which can instil a whole cosmology, through injunctions as insignificant as 'sit up straight' or 'don't hold your knife in your left hand,' and inscribe the most fundamental principles of the arbitrary content of a culture in seemingly innocuous details of bearing or physical and verbal manners, so putting them beyond the reach of consciousness and explicit statement" (*ibid.*)

It is possible to identify a series of ways by which lawyers seek to incorporate and live up to a professional '*persona*' modelled on the law itself. Particularly noticeable are the clothes lawyers wear in offices and other public settings.

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<sup>13</sup> Bonello (1996) observes: "advocates make a point of knowing everything and learning nothing."

<sup>14</sup> The link between the literary activities of advocates and their professional role is made clear by the existence of a "bridging genre" between strictly legal writing and literary compositions, such as autobiographies mixing personal professional life and Maltese social history (Pullicino: 1989).

<sup>15</sup> One lawyer perceived no incongruity in placing a full length colour photograph of himself and his family, accompanied by a c.v., at the end of eight volumes of case decisions he had compiled and glossed! Also, a law-firm published a booklet informing clients about the state of the law in regard to certain issues and inserted a loose-leaf sheet with information about the firm in this booklet.

They almost always wear suits. The traditional colour scheme, which is still favoured by many lawyers, is a black or dark grey suit, white shirt and grey tie. This colour scheme, which is also maintained in Summer despite its impracticality in a hot climate, serves to visibly distinguish lawyers from laymen. One layman observed that: "you can spot a lawyer from seven miles away."<sup>16</sup> During my fieldwork, I grew so used to looking out for the dark suits of lawyers that often I unconsciously ignored lay acquaintances who were dressed differently and who therefore fell outside the legal field of vision! Thus the lawyer's dark suit evokes the serious and traditionally authoritative nature of law. Similar motives also explain the serious facial expressions lawyers usually favour. All these devices are meant to endow the lawyer with the authority and dignity of the law, ensuring that he conforms to a particular image of the legal system as conservative, learned and serious.

Lawyers usually ignore the strategic potential of their dress and office. Sometimes they even joke about them, as when they laughingly refer to their 'dusty' or 'paper-filled' office. However the relaxed ease with which they treat what are for many clients solemn symbols of authority, itself tends to defamiliarise them. Moreover, the strategic potential of the legal office and professional '*persona*' form part of the advocate's stylistic repertoire, to be utilised when necessary. Indeed, one lawyer told me that he was buying particularly dark-rimmed glasses so as to be able to give those 'sudden sharp glances' which serve to discipline clients. Thus these devices enable lawyers to rapidly shift from 'humane' to 'legalistic' client-handling styles.

Professional detachment is also clearly incorporated by lawyers through their posture and gait. Lawyers spend a lot of time walking; either in the context of the court-corridors, or between the court-room, other public institutions and their offices.<sup>17</sup> During these walks, their professional '*persona*' is subject to

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<sup>16</sup> Similarly, a law-student joked that he was tired with having: 'all this blackness shoved in my face'.

<sup>17</sup> All of which are usually located in the city of Valletta.

the scrutiny of a larger and more critical audience than occurs in their offices. In these contexts lawyers adopt a special style of movement which serves to dramatise their autonomy. On weekday mornings, lawyers and notaries can be seen making their way down the streets of Valletta towards the courts or their offices. They generally occupy the centre of the street and look straight ahead, walking rapidly forward and avoiding the possibility of catching anyone's eyes. This style of movement often means that the greetings of friends or clients are ignored. Laymen are accustomed to such behaviour from lawyers, and explain it as a result of their 'busy work' or their 'bad manners', depending on the informant. Thus the professional detachment of lawyers is incorporated through adopting a style of movement which makes it difficult to engage them with the ordinary greetings employed in social life.<sup>18</sup>

This style of movement is so characteristic that it is used to distinguish lawyers from laymen when entering the court. People entering the courts are usually frisked by a court usher, while lawyers are not subjected to this examination. As I personally discovered during my fieldwork, this examination is avoided by marching straight through the entrance, ignoring both the court ushers as well as any queues of 'ordinary people' which might exist. The resentment this can cause is revealed by one letter recently published in a local newspaper, which complains about the way lawyers: "simply walked in through a side-door, their heads high in the air *as if they belonged to a different species.*"<sup>19</sup>

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<sup>18</sup> However, its contrived nature is revealed by the reaction of a client to one young lawyer I know who waved at this client on seeing him in the street. Apparently, a look of incredulous amazement passed across this man's face and he backed away in a flustered manner.

<sup>19</sup> A reference is lacking, since I tore out this letter and did not record the date. However, the newspaper is the 'Times of Malta' and the writer: 'Alex Caruana' from St. Julian's. The text runs:

"Recently I had to visit the court. On entering I had to walk through a detector and undergo physical frisking by court employees. Had this procedure been applied to everyone, I would not object but all lawyers, except one, simply walked in through a side-door, some carrying heavy bundles of papers or bulging brief-cases, their heads high in the air as if they belonged to a different species. Dozens of police officers followed suit and nobody dared stop them. My advice to any would-be terrorist: Find a hard-up lawyer to carry whatever you want to carry inside for you -- your only problem would be to find a hard-up one!"

To understand why lawyers incorporate professional autonomy through their 'straight walk', one has to keep in mind the conceptual opposition between corrupting social entanglement and honourable moral autonomy explored in chapter five in the case of the 'Honourable Businessman'. Lawyers face this threat of entanglement in the shape of clients' efforts to involve them in patronage relationships. This is not just a matter of words, as some clients actually clutch at their lawyers; physically impeding their movement so as to ensure that they are listened to.<sup>20</sup> Moreover, the lawyer's walk is comparable to that of other Mediterranean 'men of honour' observed by anthropologists.<sup>21</sup> In such ways, lawyers project their honourable refusal of social entanglement. Their honour is based on a dramatic display of single-minded allegiance to the law, even if it leads them to ignore their own clients. Thus, when a lawyer encounters a client, he generally strides ahead, while the latter strives to catch up with him. This also emphasises the client's role as a follower who has to tread in his lawyer's footsteps, conforming perfectly to the way in which legal representation is usually imagined. Indeed, clients complain that they have to 'run after' lawyers to get their attention, while lawyers claim that the lawyer should '*imexxi l-kljent*', or 'guide his client's walk'.<sup>22</sup>

While lawyers try to convey a sense of their professional autonomy, they are also aware of the need to avoid alienating clients. Their attempts to simultaneously achieve both aims are revealed by the way lawyers move in

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<sup>20</sup> The photo on the next page shows the current Leader of the Nationalist Party, a lawyer/politician, being 'clutched at' by an elderly woman who is one of his supporters. The posture of both parties is typical of that of many lawyer/client encounters I observed. Note that the woman's affectionate gesture still interrupts her lawyer's forward walk.

<sup>21</sup> Compare the gait of Kabyle men of honour:

"The man of honour walks at a steady, determined pace. His walk, that of a man who knows where he is going and knows he will get there on time, whatever the obstacles, expresses strength and resolution, as opposed to the hesitant gait (*thikli thamahmath*) announcing indecision, half-hearted promises (*awal amahmah*), the fear of commitments and inability to fulfil them" (Bourdieu 1997: 70).

<sup>22</sup> The only case I know in which the client appeared to direct his lawyer's walk occurred during the recent trial of an alleged major drug dealer. Television footage of his entry into court showed this man walking behind his lawyer with his hand placed imperiously on her shoulder. However it is clear, in the context of this analysis, why this gesture was used to indicate the clients' superior power.



(Source: The Malta Independent, 17/11/1996)

**Clutching the Lawyer/politician**

the corridors of the court building.<sup>23</sup> Lawyers emerge from court-rooms, head straight towards particular clients or other lawyers with whom they have some business. After a very short time talking, they abruptly depart, heading straight towards another encounter. Alternatively, they might go towards a particular court-room, to see which stage proceedings have reached, or look at the notice-board of one of the courts or leave the court building altogether. What seems significant about this style of movement is that interactions are so drastically reduced that it is very easy even for close friends to take offence at what they feel is highhanded treatment. This contrasts with the relaxed behaviour of lawyers on entering the 'Advocates Chambers', which are the lawyers' quarters to which the public has no access. Once they enter these rooms, lawyers sink contentedly into sofas and start gossiping about the latest football results or Italian politics. Yet, if the same lawyers meet in the court corridors a moment before, they exchange a few short words and then depart.

This interactional style seems to be an intentional compromise between lawyers' need to service relationships with clients and the desire to display their professional independence before them. Lawyers make a point of talking to clients, but they are also quick to cut off the conversation in order to 'walk straight' towards their work; emphasising their professional detachment. This shows how lawyers are obliged to compromise between the opposed demands of patronage and professional detachment; a point which will be further explored in the next part of this chapter.

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<sup>23</sup> This is because of the liminal position occupied by the court corridors within the overall organisational structure of the courts. Court corridors are public spaces which are clearly distinct from the controlled environment of the court-room, while they do not have the anonymous informality of a public street, or the secrecy of legal offices. See chapter seven for a more detailed explanation of why lawyers feel 'on display' when walking along the court-corridors.

### 3. Two Styles of Representation

While the lawyers interviewed all proclaimed the ideal of professional autonomy, they also had to cope with their client's efforts to create patronage relationships with them through story-telling. To comprehend their reactions, the way lawyers talked about their work will now be discussed in the context of my own observations of lawyer-client interaction.

Lawyers related variations in story-telling to the nature of the case and clients' social backgrounds. They said family law cases generate the longest and frankest stories. One experienced lawyer told me that in such cases she was expected to be a confessor since clients wanted advice about intimate personal matters. She derived this from the loneliness of these clients who had no one else to confide in, especially because certain matters could not be shared with family or friends. She also distinguished 'business' or 'more educated'<sup>24</sup> clients from others; arguing that the latter are readier to confide:

"You've got to remember that here in Malta being a lawyer still carries quite a lot of weight. There is a difference between what I call the general public and, for example, businessmen. Socially, if they are the general public, they feel that if you're not superior, at least you're more knowledgeable. A business person wouldn't feel that way; especially a person who has more than a grocer, if you know what I mean, who has a certain level of business. So when a client comes for an opinion, you're his lawyer. I've noticed that even the fact that I'm a woman comes secondary with the general public. With business people, it's different. With them, it's more like it's the other way round and with professional classes."

Thus this lawyer confirmed my observations, reported in chapter five, that rural/working class clients are keenest to tell stories placing themselves in a morally positive light. However because they interpret these stories as attempts to confide reflecting a vulnerable social position, lawyers do not perceive that they might form part of the strategies by which their clients try to control them.

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<sup>24</sup> I place business and educated people in separate categories. Yet lawyers conflated the two.

Lawyers explicitly spoke about the threats stories posed to their detachment.

The lawyer quoted earlier observed that this is necessary:

"Because if you're not detached, first of all you become too emotional and you are not crystal clear when you are pleading in court. Secondly, clients sometimes lie to you and you've got to be careful not to fall into the trap of feeling offended, or stuff like that. It's all a question that if you're detached, you work better. You see lies. You see your way ahead of you clear. You can deal with the other person. For instance, in family law, let's say she says that her husband beat her. This is something which me, personally, I suppose most people... It's not something which you enjoy hearing. Now, often, in law, if you want things to turn out well for your client, you have to know how to compromise. For example, if you're owed a hundred pounds and you manage to get eighty out of court, take the eighty and be happy with it. So, with my clients, I try to remain detached. Because let's say it's my client and I know he beat her up. That would make me really angry... Whilst if you're detached, you look at things from a different angle and say: 'no, it's better if you get eighty instead of a hundred and miss out on all that aggro."

One should here note that this lawyer legitimates her detachment on the grounds of the unreliable character of clients' stories and their best interests. Other lawyers to whom I spoke also stressed the difficulty and importance of detaching oneself from the client's view of the case. A lawyer with a rural practice told me that clients often don't understand the purpose of their own law-suits; going to court against the advice of their lawyers and then blaming the latter when they lose them. This illustrates the difference between clients' perceptions and those of their lawyers, since most clients do not imagine that lawyers would defend their cases unless they believe a successful outcome to be probable. By contrast lawyers insisted that the law-suit belongs to the client, arguing that one should let particularly unreasonable clients do as they please, without paying attention to them.<sup>25</sup>

While lawyers accepted the necessity of making some concessions towards confirming clients' narratives, they usually presented this as a matter of

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<sup>25</sup> The way lawyers refer to cases illustrate their distance from client's stories. In fact, lawyers never evoke these stories, referring instead to: (i) the legal issues involved (i.e. a 'separation' case); or (ii) the financial rewards they would get from them (i.e. a "LM1000 case); or (iii) their political implications (i.e. a politically 'hot' case); or (iv) the name of the client.

paying lip-service to the client. Thus one lawyer observed that: "you have to know how to put things to clients so as to avoid offending them." When asked how clients reacted to her attempts to detach herself, another one claimed she lived up to their expectations by staging an aggressive court performance; which is how she learned to 'play the game':

"You notice that your clients enjoy having you act a pantomime. So you act a pantomime, although you know that you're not making sense legally."

The most significant disagreement among lawyers concerned the extent to which they should listen to clients' stories. While some claimed that it was necessary to cut clients short, others argued that one should dedicate extra time to listen to them. One interviewee who favoured the former approach, observed that a client he had charged for this extra time had filed a complaint against him for over-charging. By contrast, the earlier quoted lawyer said:

"I have problems with that, personally. I tend to spend too much time on these individual clients. But I find that although it looks like a waste of time, long-term it usually pays. Because they look on you with a certain amount of ... respect. Because you give them respect. I think basically there are two different styles. Because, for example, Dr X (here she mentioned another lawyer who worked in the same law-firm), that's the way he does it. He doesn't take time. He does this, then that and the other. I tend to do a lot of family stuff. Those, you can't. You have to give them their time. In fact, we give appointments of a quarter of an hour or half an hour. Those, immediately we give them half an hour. Because otherwise forget it. They have a real lot to tell you anyway. And you can't chuck them out, you know. By contrast, traffic cases...and even with those you have to be careful."

This confirms my own observations. I have noted two main styles by which lawyers seek to handle their clients' stories. Adherents of the first style stress their position as independent professionals. They do not waste time in listening to all the niceties of their clients' stories, but tend to cut them short with a few abrupt questions. Such lawyers avoid small-talk and casual conversation with their clients and to emphasise speed and efficiency in handling cases. They are more likely to assert their own authority as persons who know the law and expect clients to acknowledge this by respecting their

silences and allowing them to do the questioning. Lawyers who adopt the second style are more gregarious; dedicating time to listening to clients' stories and being prepared to confirm them when necessary. They do not emphasise the difference between themselves and their clients and are more sympathetic to them.<sup>26</sup> These two styles broadly correspond to the distinction between 'humane' and 'legalistic' advocacy. They express different ways of understanding the task of representation. While 'legalistic' advocacy emphasises the professional autonomy of the lawyer, 'humane' advocates act more like their clients' patrons. Thus the tension between patronage and professionalism seems to explain lawyers' characteristic attitudes.

Here I must observe that despite my efforts to do so, it often proved difficult to definitively classify lawyers in terms of the client-handling style they adopt. It seems most lawyers select characteristics of both styles and mix them together in varying proportions; so that the differences between them are more a matter of degree than of kind. Both 'professional' and 'patron' lawyers deny that it makes any legal difference whether the lawyer devotes much time to listening to the client or not. The claimed advantage of listening to clients' stories is that this satisfies them. Moreover, adherents of both styles assume that their occupational role endows them '*a priori*' with the honour of the legal system itself. They both react negatively when clients try to display their own knowledge of the law before them.<sup>27</sup>

Even 'professional' lawyers often waive payment for their legal services, ensuring that clients feel personally obliged towards them. Moreover they also use narratives to create a shared moral consensus with their clients, when this is necessary to ensure they follow their advice. Conversely, 'patron' lawyers at times display incredulity to their clients' stories. I have observed

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<sup>26</sup> Dr. Borg adopted this style in the case of the 'Honourable Businessman' reported in chapter five.

<sup>27</sup> As a rule, clients' efforts to 'wave the law' at lawyers are quickly countered. At best, lawyers will qualify their agreement with the clients' views by stating that they are 'obvious' or 'natural', implying that they are not saying anything particularly brilliant. Often they ignore clients' attempts to assert

the most 'humane' lawyers suddenly assume a sharp, questioning, tone of voice in order to discipline their clients. As one young lawyer put it:

"The older lawyers don't want to get to know clients and listen to their stories. They want to get rid of them and try to put them off. I'm different. I enjoy talking and I've discovered that clients feel relieved when they realise that their lawyer takes an interest in their lives and their hobbies. The problem I have is that my clients put more pressure on me than they do on the others. But I'm learning how to shout at clients who are too intrusive."

Thus 'patron' lawyers maintain an ability to assume a professional '*persona*' implying distance from and superiority over their clients. In order to do so, they employ all the techniques of self-presentation previously analysed. This confirms that most lawyers strategically balance between the opposed demands of patronage and professionalism.<sup>28</sup>

This raises the question of the costs and benefits which guide the selection of either of these styles of handling clients. Clearly the benefits of the 'professional' style are efficiency and speed. 'Professional' lawyers run less risk of getting entangled in their clients' stories and are freer from pressures which take up their time and threaten their freedom to organise their work as they deem fit. Such lawyers do not have to justify themselves before their clients and can easily give them unwelcome advice. Given the advantages of this style, it may seem strange that lawyers do not always adopt it.

However important considerations militate against the adoption of this style in its full purity. Firstly, as explained in the previous chapter, clients want nothing more than to enjoy a personal relationship with their lawyers. Thus

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legal knowledge, or point to defects in their reasoning which invalidate their arguments. A common strategy is replying with jokes or proverbs to clients' efforts to speak in a legally correct manner.

<sup>28</sup> I heard both lawyers and clients pass ironic comments about the discourse of honour/patronage. One old man told his daughter, who was Dr. Camilleri's client: "listen to the lawyer, because he will take proper care of your case *in order for him to make more money*." When I asked another lawyer what it means to be an '*avukat tar-ruh*', he said: "it means that you ask your clients for your fees straight away." In both cases the irony plays on the discrepancy between the outward affectation of concern for clients required by the 'patron' style and the actual distance from clients engendered by professional detachment, reflecting lawyers' efforts to cope with both.

lawyers who are too professional risk alienating their clientele. The drawbacks of such an approach are illustrated by one case I observed, in which a notary's efforts to avoid endorsing his client's story led him to couch his advice so abstractly that his client did not understand it. The difference between clients' desires and the professional ideal is revealed by attitudes to affidavits. As has been seen, lawyers complain about being over-involved in the drafting of affidavits. By contrast, clients grumble that lawyers do not pay enough attention to the affidavits they write. One client observed that this should be drafted between lawyer and client. Another said that after she had spent a whole night writing her affidavit, her lawyer had barely glanced at it. Thus lawyers must provide some confirmation of their narratives if they wish to satisfy their clients and to persuade them to follow their advice.

Another motive which forces lawyers to compromise their stylistic purity is that in Malta, as in Greece (Du Boulay 1974), there is a very tightly controlled economy of secrecy. Knowledge about personal matters is only told to a few individuals with whom one enjoys a close relationship. For this reason, lawyers who emphasise their professional distance from their clients risk being obliged to operate in ignorance of the real facts of the situation. Although lawyers claim not to be concerned with the truth of their stories, in practice the biggest confirmation of their honour and power is their clients' readiness to confide their secrets in his care. A lawyer who is misled by his clients risks being made to look ridiculous in court. It becomes impossible for him to fulfil his professional role of controlling the evolution of legal proceedings. This is why lawyers who want to be 'respected' by their clients have to give them 'respect' by listening to their stories.<sup>29</sup>

There are also pull factors which encourage lawyers to create patronage relationships. Certain rewards of patronage are inherent in the relationship itself. For instance, in his autobiography, one Maltese lawyer remarked that:

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<sup>29</sup> See the interview with the female lawyer quoted earlier on in this section.

"The clients who come the way of a newly fledged lawyer are not the sort that bring him lucrative work, but they start to give him some practical experience and also, gradually, some very much needed self-confidence and encouragement" (Pullicino 1989: 43).

Thus patronage can supply the self-confidence on which a successful court performance is based. Lawyers may also desire to create patronage relationships in order to convert them into social power in other, non-legal, spheres of life. The standard case is that of party politics, where successful professionals use their network of clients to win the necessary votes for election to Parliament.<sup>30</sup> One should also observe that the lawyer/patron's reputation may be greater the lower the position occupied by his clients in the social spectrum.<sup>31</sup> Consequently, it is not surprising that even the most dedicatedly professional lawyers adopt features of the 'patron' style.

However patronage also carries its own cost for the lawyer. Apart from the increased time that has to be spent to listen to their stories, lawyers who act as their clients' patrons run the risk of becoming overly subject to their pressures to act unprofessionally. Rather than being '*avukati imqabbdin*', or 'lawyers who have caught on to a large clientele,' they find that they themselves '*jinqabdu*', or 'get caught' by their clients. Increasingly such lawyers become associated with their clients in the popular view. After all, patronage forces the patron to pay lip-service to the discourse of mutual honour on which his relationship with his client is based. This exposes him to the accusation that he is as corrupt/evil as his client. Indeed, lawyers often find it impossible to express an opinion about some alleged wrongdoing, because a friend of theirs is involved.

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<sup>30</sup> Sant Cassia somewhere described this as the double process of the politics of 'professionalisation' and the professionalisation of 'politics'.

<sup>31</sup> Douglas has argued that areas where the social structure is poorly articulated are also those from which informal powers which create disorder are thought to derive (Douglas 1988: 101). She contrasts these powers to the explicit and articulate powers wielded by those occupying clearly defined positions of dominance in the formal social structure. Thus a lawyer/patron who attracts criminal clients located outside formal social hierarchies is also tapping the invisible and inarticulate power which they possess and uniting them to the explicit and formal powers he already has.

These considerations explain why most lawyers cannot afford to adopt a client-handling style based wholly on patronage or professionalism, but must attempt to balance between the two. Thus both lawyers and clients have to try to square a circle in order to achieve their respective purposes. Clients who want to act autonomously feel that they have to create a personal relationship of dependence on lawyers to do so, while lawyers who want to act as independent professionals have to adopt many of the traits of patrons.

There also appears to be a relationship between the client-handling strategy adopted by lawyers and their occupational status. While the lawyers whom I observed adopting the 'patron' style were all sole practitioners, those who belonged to large law-firms tended to adopt a more 'professional' approach to clients' narratives. Here it is useful to refer to the analysis of the occupational distribution of Maltese legal professionals.<sup>32</sup> This showed a growing division between those lawyers who are employed in firms, specialising in various branches of the law and sole practitioners who mostly specialise in social networking. The latter focus on attracting a heterogeneous clientele by penetrating various peripheral regions. The greater attentiveness sole practitioners display towards clients' stories seems to be a consequence of the importance they give to satisfying the diverse expectations of different clients, whom they seek to attract on the basis of their personal qualities. By contrast, firm lawyers cater for a more standardised clientele, which reflects their more specialised legal practice. They are therefore less inclined to act as their clients' patrons.

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<sup>32</sup> See chapter four of this thesis.

#### 4. Writing the Case

While the effect of these two client handling styles may seem restricted to the behavioural level of lawyer/client interaction, it is possible to show that they have a direct bearing on the sort of legal representation lawyers provide. This can be seen by exploring the way lawyers draft judicial acts. The principal task lawyers carry out when opening a law-suit is that of writing a '*citazzjoni*', or 'writ of summons.' As explained in the fourth chapter, this contains a statement of the legal motives for the suit and is accompanied by a 'declaration of the facts' on which this claim is based. According to professional practice, the '*citazzjoni*' is written by lawyers in a standardised form which centres around the legal issues involved and employs legal descriptive categories; containing only the barest bones of the client's story.

Thus drafting the '*citazzjoni*' usually means re-structuring the clients' narrative around the legal rules he is invoking, so that its particular 'subjunctive' features are muted and the rules invoked made clear. Various drafting techniques are utilised to present the client's case as typical and therefore as falling within the central meaning of the descriptive terminology of the legal rules which it is intended to animate. It is reduced to a few details, such as the crucial names and dates. Any reference to the thoughts and feelings of the parties is omitted and only those actions of theirs having a direct relevance to the legal argument mentioned. By contrast, the legal rules involved are extensively referred to and explained in detail. The outcome is the sort of 'paradigmatic story' which Ricoeur described and which was examined in the fourth chapter of this thesis,<sup>33</sup> where the legal rules operate as the paradigms which are evoked.

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<sup>33</sup> See the second chapter for Ricoeur's analysis of 'paradigmatic stories'. The section on 'Teaching the Law' in the fourth chapter contains an example of the sort of paradigmatic story law-students are taught to produce.

The 'declaration of the facts' which accompanies the '*citazzjoni*' is supposed to be a sworn statement by the client of the factual grounds on which the legal claims made in the '*citazzjoni*' are based. It is therefore couched in the form of a declaration by the client affirming the truth of a series of numbered paragraphs containing 'the facts'. The original aim behind the introduction of this declaration was that of compelling litigants at the start of litigation to state in writing and in full the stories they intend to prove later on, during the oral court-room phase. The legal requirement of making this declaration of facts followed a report on the Maltese courts prepared by a British Royal Commission in 1913.<sup>34</sup> This sought to eliminate delays by ensuring that judges know what cases are all about at the start of litigation, reducing reliance on oral testimony for this purpose. Yet professional practice has largely subverted this by making the 'declaration' a carbon copy of the paradigmatic story contained in the '*citazzjoni*'. It is therefore copied from the '*citazzjoni*' written by the lawyer, with minor changes to make the story seem to emerge from the client's lips. So as to explore this issue, I examined the first fifty writs, or '*citazzjonijiet*', filed in February 1997. There were only three cases in which the declaration of facts was substantially different from the '*citazzjoni*' and contained new facts unmentioned in it.

There are various reasons why lawyers try to avoid committing their clients to a detailed written statement of the factual issues involved at the beginning of a law-suit. On one hand, this is because, like affidavits, the 'declaration of facts' is seen as threatening their professional detachment. As a written document enunciating the client's story, this declaration blurs the neat separation professional ideals establish between written documents filed by lawyers and oral stories told by clients.<sup>35</sup> It commits lawyers to clients' stories in a way most would like to avoid. Consequently objections to the 'declaration of facts' mirror those to affidavits considered at the start of this chapter.

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<sup>34</sup> As was made clear by our professor of civil law, Professor Ganado, when I was a law student.

<sup>35</sup> See my interview with the President of the '*Camera degli Avvocati*' analysed at the start of in the previous section of this chapter on 'The Professional Ideal'.

Lawyers told me they prefer to let the facts emerge through oral court testimony since stories often change during this phase; either because the client changes his version, or because new details become known which throw new light on the case. They therefore wish to avoid committing their clients to sworn written statements which can later be given the lie; exposing them to charges of perjury. Above all, most lawyers insist that facts should be left 'in clients' hands' so that lawyers are not perceived to be conniving with attempts to mislead the judge. Moreover, there are also strategic motives for lawyers' dislike of the 'declaration of facts', which relate to the way this restricts their space for court-room manoeuvring and will be considered in the ninth chapter of this thesis.

As explained in chapter four, the defendant's lawyer replies to the '*citazzjoni*' by means of a '*nota tal-eccezzjonijiet*', or 'statement of defence'. This is drafted in precisely the same way as the '*citazzjoni*', with the difference that it is intended to rebut the plaintiff's claims. The '*nota tal-eccezzjonijiet*' therefore refers to each of the claims made by the plaintiff in his '*citazzjoni*' and states why they should not be accepted by the court. Clients' stories are incorporated in the '*nota tal-eccezzjonijiet*' in the same paradigmatic form as they are in the '*citazzjoni*'. The defendant's lawyer must also attach a 'declaration of the facts' to the '*nota tal-eccezzjonijiet*' and this too is usually a carbon copy of the paradigmatic story contained in the '*nota tal-eccezzjonijiet*'. Moreover, the defendant may also present a counter-claim against the plaintiff, by attaching another '*citazzjoni*' and 'declaration of facts' to his 'statement of defence.'

When I carried out my fieldwork there were a couple of occasions when I was asked to draft a '*citazzjoni*'. One lawyer advised me to be as concise as possible, remarking that some tended to draft documents which are too long and verbose. In this context a particular lawyer is often mentioned. He is considered as a bit of a maverick by many of his colleagues, due to his radical social beliefs and what is considered as the excessive length of the judicial acts he drafts. Lawyers would humorously refer to his '40 page long'

affidavits. Apparently certain judges are annoyed by this practice, which increases their workload tremendously. One lawyer pointed out to me that: "he makes them (judges) read," observing:

"Do you know how he works? First he goes on the radio till late in the evening. Then he tours his offices one by one coping with all his clients. He's got a bed in every office, so when there aren't any more, he just sleeps in the office. His clients adore him. They consider him as their saviour. I've heard of one man who waits outside in the cold for hours (until he comes to open the office) holding a thermos so that he can have warm coffee."

This lawyer is a sole practitioner. His media activities, the number of offices he has and his clients' attitudes clearly indicate that he handles clients in terms of what I have defined as the 'patron' style. As the above quoted remarks show, this is a lawyer who specialises in attracting clients by totally immersing himself in their worlds. Moreover my lawyer informants explicitly related the way he drafts judicial acts to the way he handles clients. This relationship can be investigated by looking at the judicial acts drafted in one case by this lawyer.<sup>36</sup> In this case, he was defending a man whose wife had instituted a law-suit for personal separation from him.

The '*citazzjoni*' in this case was drafted by the wife's lawyer in terms of the usual formulaic style. In fact, the only details of the wife's story incorporated in it are the date of her marriage and the names and ages of her children. The rest consists of the legal grounds on which her demand for personal separation was based, which are standard since they are listed by the law; reference to two court decrees the wife had obtained and a list of her claims relating to custody of children, maintenance and other property matters. The declaration of facts simply replicates the factual part of this '*citazzjoni*' and adds no new details. The '*citazzjoni*' and declaration together are only three pages long.

In comparison, the '*nota tal-eccezzjonijiet*' drafted by the husband's lawyer is seven pages long and replete with details about his story. Here 'subjunctive'

features predominate and strictly legal argument is secondary. The flavour of this document can be conveyed by looking at its second paragraph. This is a rebuttal of the wife's assertion in her '*citazzjoni*' that the marriage ended due to:

"physical and moral violence and other facts imputable to the defendant, her husband, which constitute cruelty threats and grievous injury according to the law and also because the marriage has irretrievably broken down."

As already noted, this terminology has been copied verbatim from one of the grounds of separation listed by the law. In reply, the second paragraph of the husband's '*nota tal-eccezzjonijiet*' states:

"That regarding the second assertion, the defendant strongly rejects the notion that he was responsible for the shattering and irredeemable breaking of his marriage, since it was the wife who, apart from her adultery, through her savage behaviour against the defendant her husband was a continual menace against him to the extent that it resulted that he could not tolerate this sort of conjugal life any more, and apart from all this he still made an effort to save the marriage, but unfortunately this was all in vain because the plaintiff through her actions showed her determination to shatter this marriage at all costs and also to destroy her own family and this both literally and metaphorically since the plaintiff carried out a series of violent acts both against her husband the defendant and even against her own children, as will amply result through the pleadings in this law-suit."

What is particularly striking about the convoluted prose of this extract is the way it reinterprets the legal ground of 'irretrievable breakdown of marriage'. Actually this ground was introduced into Maltese law so as to move separation proceedings away from notions of fault. It made separation possible if a marriage had irretrievably broken down and four years had passed; eliminating the need to identify a 'guilty' party, responsible for the marriage breakdown. Yet the husband's lawyer has gone in a totally opposite direction. He exploited the semantic resonance of the term 'breakdown', which in Maltese suggests a shattering into tiny pieces so as to paint a picture of a marriage which is irredeemably destroyed due to the wife's irresponsible actions. Other parts of the '*nota tal-eccezzjonijiet*' also show the

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<sup>36</sup> I came across the record of this case while doing my fieldwork.

lawyer using every opportunity to introduce grotesquely loaded moralistic narratives which clearly reflect the husband's own understanding of events far more than the legal categories. For instance, the neutral tone of a statement in the wife's '*citazzjoni*' that the court had authorised her to live in the matrimonial home is challenged by incorporating it into a story about her continual cruelty forcing her long-enduring husband to leave the home.

While one could list many other 'subjunctive' aspects of this '*nota tal-eccezzjonijiet*', one should also note that the appended 'declaration of facts' this lawyer drafted *does* contain totally new facts unmentioned in the 'statement of defence.' An additional five pages recount incidents from the marriage, entering into graphic detail about the alleged adulterous behaviour of the wife. The husband's feelings on discovering this are detailed, as also how the adulterer escaped being caught by him, the feelings of the children and so on. While the wife's lawyer listed twenty potential witnesses, the husband's lists over sixty! Moreover this lawyer then added a counter-claim to the statement of defence, in which his client made *his* action for personal separation against the wife. The '*citazzjoni*' in this counter-claim took five pages and the 'declaration of facts' was another nine pages long, containing such new details as the story of his courtship with his wife or the time he burst into tears when he heard the adulterer's testimony in court. This adds up to a grand total of twenty six pages of emotionally drenched narrative in response to the three pages produced by the wife's lawyer!

What is one to make of this case? It should firstly be clear that it is exceptional in many ways. This is because:

- a) Separation cases are perceived as more likely to generate long stories.<sup>37</sup>
- b) The case itself was a particularly dramatic one between two working-class spouses. Powerful emotions were aroused which, as the record shows, even led to a physical fight between the spouses in the court corridors.

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<sup>37</sup> See the previous section of this chapter for confirmation of the way lawyers regard these cases.

c) This lawyer's representational style is considered unusual precisely because he tends to draft excessively long judicial acts. One lawyer informant gave me a cynical reason for this, pointing out that the tariff for drafting a '*citazzjoni*' reflects the total number of pages it contains, hinting that this is the real motive for these long documents. Yet this does not seem to me the principal reason. After all, the lawyer might be able to devote more time to attracting clients if he did not draft these long documents. More convincingly his drafting style appears necessarily entailed by the way he manages interactions with clients.

Thus while the anomalous character of this case may seem to make it irrelevant, it actually reveals the intimate connection between the client-handling style adopted by lawyers and the manner in which they legally represent their claims. This lawyer has adopted the 'patron' style in an extreme manner. This means that he gauges his success according to the extent to which he fulfils clients' expectations by creating a personal relationship that bridges the professional distance between them. Clients want nothing more than to receive confirmation of their narratives from their lawyers and to see them operating within their view of their cases. This lawyer fulfils this desire in a particularly complete and gratifying manner, by making his clients' narratives, not legal categories, the central cognitive framework in terms of which he legally scripts their case. It is hardly surprising that he is rewarded with devotion on the part of clients whereas many judges and lawyers see him as a maverick. Because he tilts towards one side of the tight-rope between patronage and professionalism on which lawyers balance, he makes the whole balancing act apparent.

It follows that it is not only in their interactions with clients, but also when legally representing them, that lawyers have to balance between patronage and professionalism. In this context, professionalism is expressed through resisting the unmediated incorporation of clients' stories into written legal texts. Conversely patronage means letting these stories encroach into the written legal domain, culminating in situations where the stories structure the

invocation/interpretation of the legal rules rather than the other way round. Thus there is no homogenous professional consensus on the manner in which legal representation is to be carried out. Still less is it dictated by the law. On the contrary, all lawyers have to decide how much of their clients' narratives to include when legally scripting cases and arguing them before the court. While most lawyers will not give them the prominence they were given in this case, they will all have to make choices as to whether this particular incident is 'legally relevant' or whether this phrase is 'legally acceptable'.<sup>38</sup> In the process, they creatively extend the limits of legitimacy. Consequently, too, the driest and most paradigmatic texts lawyers produce are generated against the background of the pressure placed on them by clients' stories. Even if lawyers act 'professionally', refusing to give much space to these subjunctive stories in the judicial acts they draft, they still have to cope with this pressure. They may try to find another outlet for it which vindicates their clients' desires for narrative self expression. To further explore these points, it is now necessary to move towards the court-room and examine the manner in which testimony is produced.

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<sup>38</sup> The choices made reflect the client-handling strategies adopted by lawyers, which arise at the intersection between their own socially structured attitudes and those of their clients. Thus it seems that culture and social relationships powerfully influence the way legal representation is carried out.

## Chapter 7: Telling it to the Judge

### 1. Introduction

This chapter continues to explore legal representation by looking at the way litigants' stories are re-told in the context of the court-room itself. A brief description of the court environment will set the stage for a more in-depth focus on the way testimony is produced and contested in oral litigation. The discussion will revolve around a case-study, which serves to clarify the parameters within which court-room narratives are elaborated. These correspond to what were previously termed the paradigmatic and subjunctive poles of narration and reflect the way court-room testimony mediates between the subjective experience of witnesses and the language of paradigmatic legal rules. The strategies by which opposing lawyers seek to shift testimony towards either of these poles will be described and explained by reference to their respective interests in the case. The effects on witnesses and their resistance will also be charted.

This analysis will show how complicated and time consuming court-room story-telling is. The shifting and malleable quality of orally told narratives requires lawyers to act as skilful story-tellers, acquiring an ability to develop and reinterpret stories to take account of new evidence. On this basis an evaluation will be conducted of Jackson's (1991) hypothesis that litigation provokes the telling of a plurality of narratives. My fieldwork suggests that this theory sees only one side of the picture, ignoring the aims which motivate court-room narration and the way the judicial process operates to reduce these different stories to a single official narrative. This has important implications for the exercise of judicial discretion, which will be fully explored in the next chapter.

## 2. The Court Environment

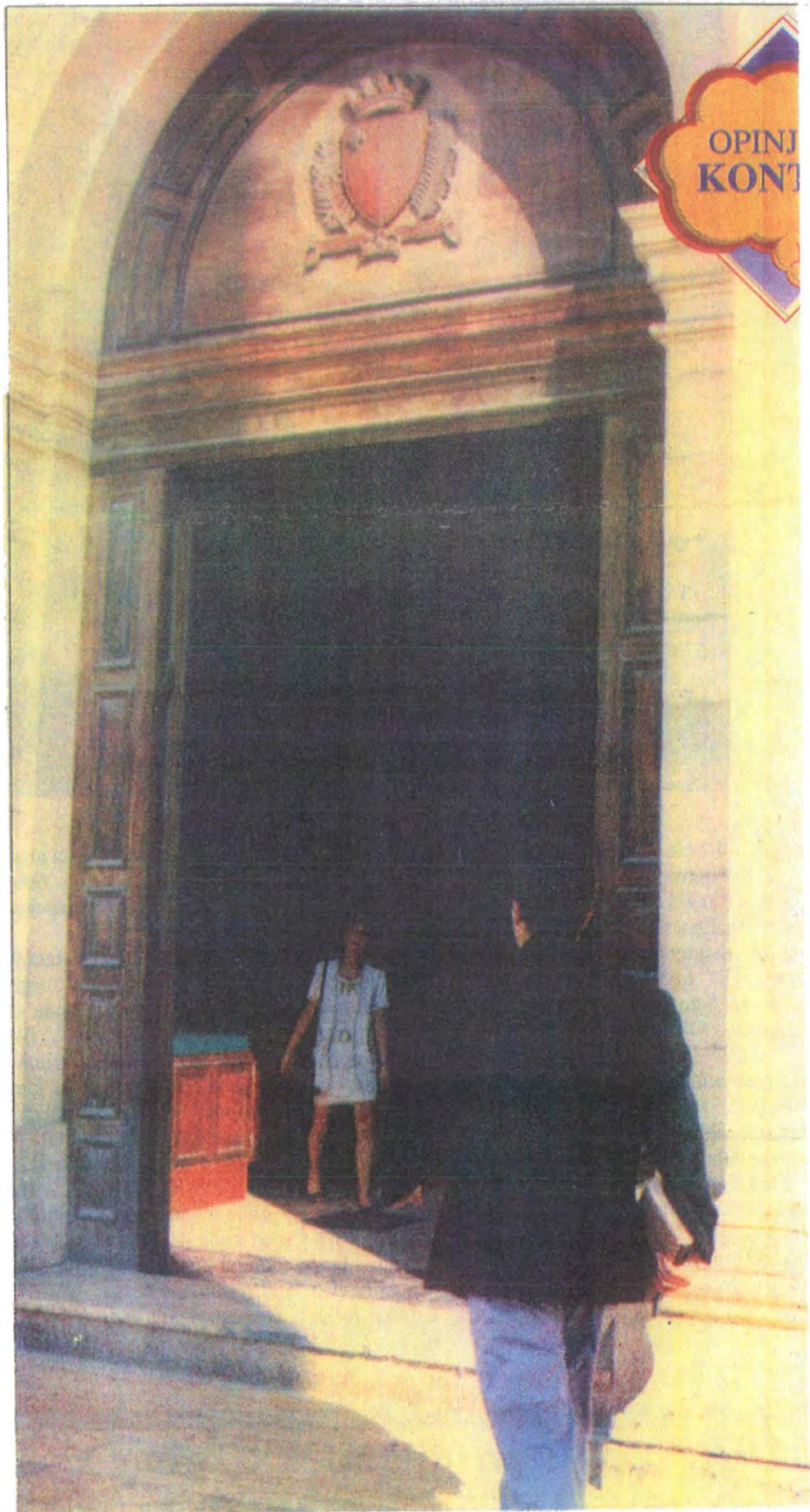
The Maltese Law-Courts are housed in a large building in Valletta, the capital city. The imposing neo-classical facade abuts on to the busy and crowded Republic Street. This street runs straight through the centre of the city, linking the Court building to the Presidents' Palace, which houses the Maltese Parliament. Completed by the Nationalist Administration in 1970, the building's architecture dramatically contrasts with the surrounding baroque streetscape.<sup>1</sup> In the morning, when court sessions are usually held, there is a constant flow of people moving in and out of the building. A sense that momentous business is being carried on inside is communicated to outsiders. In fact, the square outside the court is the favourite 'hang-out' of some older men, who lean against the walls and gossip about current goings on. At times when there is a major criminal trial, crowds of people often invade the building, eager to observe the case. Mostly, however, the influx of people is restricted to litigants, witnesses, lawyers and policemen.

The court space is deeply imbued with symbolic meaning. Thus the threshold of the court is not only a physical space, but also the liminal point of entry into a special legal domain, often experienced by ordinary laymen as aggravating, de-familiarising and humiliating. Idiomatic expressions refer to this '*ghatba tal-qorti*' as very ugly.<sup>2</sup> It is also said to be 'as sticky as pitch', given the length of time it takes to settle court-cases and the consequent difficulty of extricating oneself. Once inside the court, many clients look gloomy and start grumbling about the delays, arrogance and corruption of lawyers and judges. Lawyers also complain of the waste of time, chaos and boredom induced by court-proceedings.

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<sup>1</sup> The daily news bulletin broadcast on Malta's state television channel generally contains a section on Court News. This is always read out against the background of a photograph of the court's facade (see photograph further on). Often tourists wander into the court building, convinced that it must be some ancient and significant monument.

<sup>2</sup> See the photograph on the following page.



**The Threshold of the Courts**  
(Source: "*In-Nazzjon*" of the 6<sup>th</sup> March 1996)

As already observed,<sup>3</sup> a sense of hierarchy is imposed at the outset, through the frisking inflicted on laymen, from which lawyers and police are exempt. With this hurdle surpassed, laymen find themselves in a gloomy echoing hall, filled with people. Lawyers stride about purposefully with their dark-suits and brief-cases, often accompanied by their clients. Everyone seems to be talking loudly and this soundscape is punctuated by the shouts of the court messengers who, at rhythmic intervals proclaim three times the names of lawyers, litigants or witnesses summoned to appear in court-rooms. In this setting it comes as no surprise that, '*ghamel qorti*', or 'making a court' refers, in Maltese, to the creation of clamour. Unaccompanied laymen often experience a sense of confusion and disorientation. Directions are largely lacking. Although an information desk was installed while I was doing my fieldwork, certain details, such as the current location of particular lawyers, cannot be given. As a result, one often sees clients wandering around like lost souls, eager to question anyone where Doctor so and so is to be found.

The entrance hall leads into a long corridor replete with door-ways, which open into the Magistrates' court-rooms, known as the Inferior Courts. There are also two stairways leading upwards to the Civil and Appellate Courts, which by an understandable social logic are termed the Superior Courts. These court-rooms are mostly located in a corridor on the second floor of the building. There is a clear class difference between the clientele of different courts. The Magistrates' courts attract a larger proportion of rural/working class litigants, who are often unsure how to behave in the confines of the court. During my fieldwork, I grew used to seeing rural men struggle to put on unfamiliar jackets and ties in conformity with the dress codes imposed by the Magistrates, or taking these off with a sigh of relief as they emerged from the court-rooms. By contrast, the Superior Courts attract a clientele largely composed of businessmen and the higher social classes, who are also more acquainted with the court setting. Thus the division of Superior and Inferior Courts encodes and reinforces hierarchical class differences.

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<sup>3</sup> See the section on the 'Professional Ideal' in chapter six of this thesis.

A separate part of the Court is located in another building located just behind the main building and linked to it by a closed bridge. This building is known as 'the Annex' and houses most of the administrative offices of the Court Registry. Here there is also a special court-room where most of the civil cases relating to family matters were heard during the period of my fieldwork. The clientele of this so-called 'family court' mostly consists of couples from all social classes who are breaking up. They generally wait outside the court-room in a mutually hostile and suspicious silence.

In the main court building, activity centres around the two corridors on which the Inferior and Superior Courts are respectively located, the stairs which link them and the various offices which pervade the court. The atmosphere of the two corridors varies in line with the differing class backgrounds of the litigants. There is more shouting and swearing in the crowded Inferior Court corridors and physical fights sometimes erupt there. There is also a concentration of police officers around the Inferior Courts, reflecting the fact that criminal cases are largely handled by the Magistrates. The Superior Court corridors are generally less crowded than those of the Inferior Courts and the noise level more bearable. Here *nouveau riche* building contractors rub shoulders with established land-owners and the commercial elite. The Chamber of Advocates' rooms are also located in this corridor and these constitute a point of reference for advocates and clients alike. All advocates must make their way to the Chamber of Advocates at least twice a day, in order to put on or remove their 'toga'.<sup>4</sup>

Both corridors share a liminal position in between the highly controlled space of the court-room and the less regulated spaces of everyday social life.<sup>5</sup> The

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<sup>4</sup> Clients who are seeking their lawyers often question the chamber's clerk about his whereabouts, through a little window which opens into the Chamber.

<sup>5</sup> In the court-room, the judge and the lawyers are in charge of the proceedings and clients are largely invisible. Indeed, lawyers tend only to take notice of their clients once they emerge into the corridors. Here they can consult one another freely in the light of what has just been said or what they believe is going to occur in court.

corridors are the place from which litigants and lawyers are summoned into the court-rooms and into which they emerge on leaving them. There are benches in these corridors where clients wait to be summoned. The wooden doors of the court-rooms also have little glass windows through which one can observe the goings on in different courts. These windows are used by lawyers and clients who are trying to trace one another or to gauge the stage reached by court-work.<sup>6</sup> These corridors are important zones where lawyers display their busy lifestyle and professional detachment under the close observation of prospective clients. They are normally chock-full of people, including prominent businessmen and lawyers, busily engaged in assessing each others' worth and work-load. Thus they constitute a central zone of lawyer/client interaction.

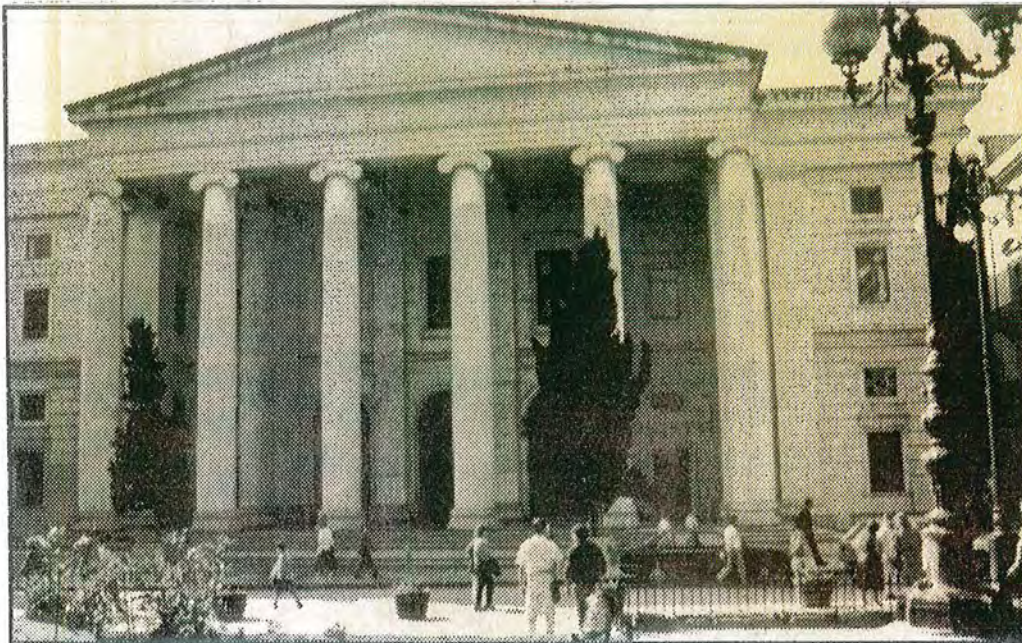
The central focus of this activity is the court-room itself. With some minor exceptions, Maltese court-rooms have the same general lay-out.<sup>7</sup> On entry, one finds a large wood-panelled hall, broadly divided into three stages. The first stage, at the back, is where lay-people are allowed to sit on two or three benches facing the judge. There are also benches at the side which serve the same purpose. In the centre of the room, between the benches and the judge, is a raised platform surrounded by a wooden screen and containing a table and some chairs. This is the lawyer's area of the court, which is usually out of bounds for anyone not wearing the 'toga'. Here lawyers jostle behind one another, impatiently waiting to argue their cases, or sit to examine the record of a case before debating it. At either end of this platform, facing the judge, there are two microphones which serve the purposes of the opposed lawyers pleading in each particular case. Outside the platform area, on the left and also facing the judge is the witness-box. This contains a crucifix, which witnesses must kiss before testifying.<sup>8</sup> In front of the lawyer's zone is the

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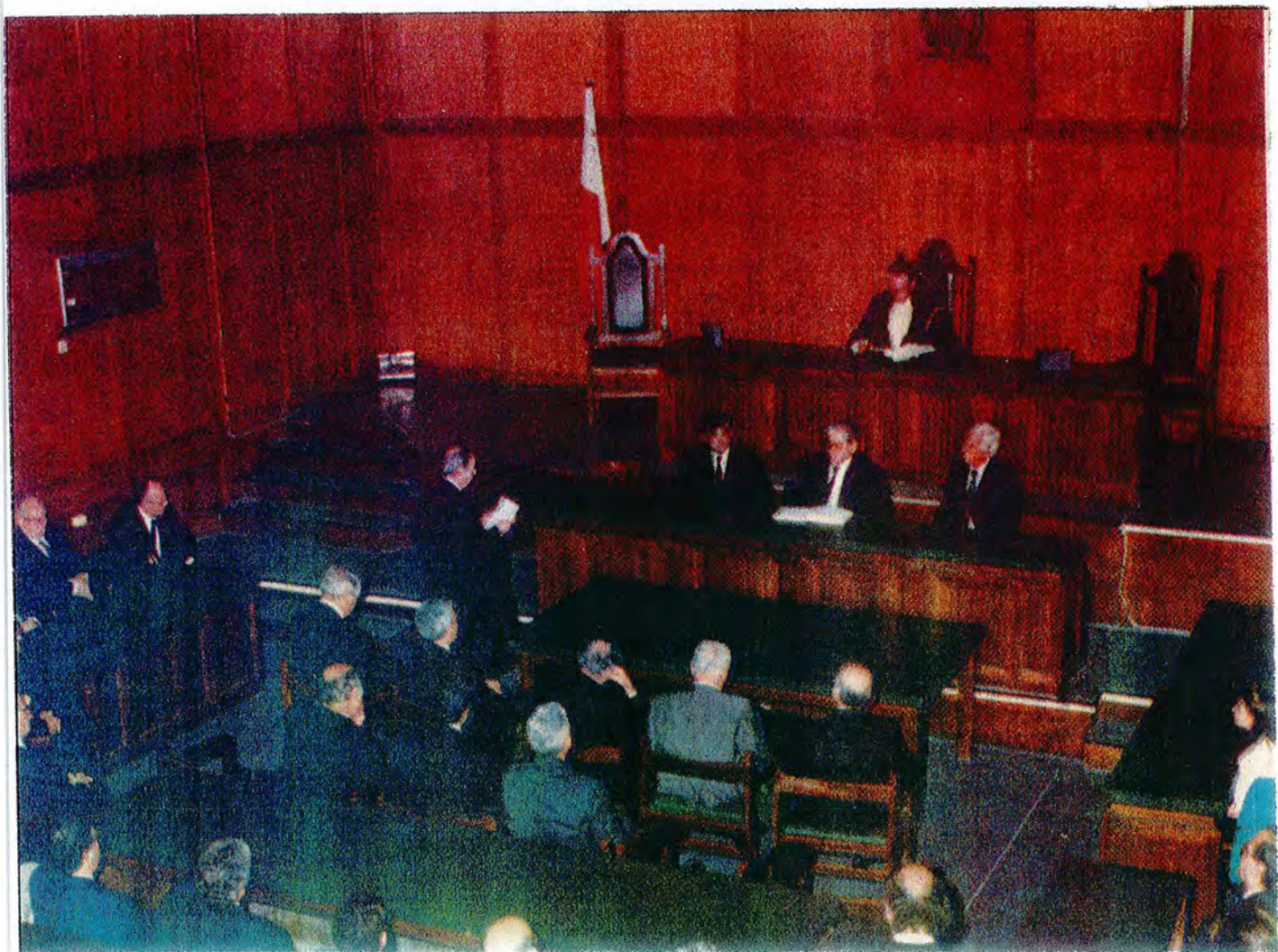
<sup>6</sup> The doors are closed and their windows covered to ensure secrecy when sensitive cases are heard.

<sup>7</sup> See the photograph on the following page.

<sup>8</sup> Instead, non-Christians may make a solemn affirmation to tell the truth.



Above is a photograph of the façade of the Maltese law-courts in Valletta (Source: "*Il-Gens*" of the 16<sup>th</sup> August 1996). Below is a photograph of the interior of a Maltese court-room (Source: "*In-Nazzjon*" of the 6<sup>th</sup> March 1996).



raised desk of the court clerk. Next to him are the files containing the records of the cases to be heard during the day. At the very back of the court and raised so as to visually dominate the entire space, is the judge's bench. On the wall behind him are the emblem of the Republic of Malta and a crucifix.

The court's day starts at 9 a.m. and is usually over by 1.00 p.m. Court-work is of its nature varied. Yet it can be summarised as follows:

- a) Judges read out their judgements. They normally do this hurriedly and in a low voice, received by the attentive silence of lawyers and litigants.
- b) Judges take decisions and issue decrees in regard to matters on which a provisional ruling must be given during the course of the law-suit.
- c) Lawyers plead cases orally, stating the reasons on which their legal claims are based and rebutting points made by their opponents. Lawyers may also be asked to draft written notes summarising their arguments, to present affidavits on behalf of their clients and to state their claims in a formal manner for inclusion in the record of the case.
- d) Lawyers bring parties and witnesses forward to testify and produce other relevant evidence. These witnesses are directed to the witness box, from which they have to answer the questions put by the judge and the lawyers.

While every judge has a numbered list of the cases which he should hear that day, this does not really determine the order or timing in which cases will be heard.<sup>9</sup> This is because of the many imponderables which can crop up in a court hearing. Nobody can say beforehand exactly how long the hearing of any particular case will take. Cases tend to be heard on a 'first come, first served' basis, with queues of lawyers forming before the judge and competing to get his attention. Once this is secured, they try to obtain a hearing for each of the cases in which they are involved, regardless of their position in the list. There is a constant sense of bustle and clamour in Maltese court-rooms and often all the lawyers are talking at once and trying to interrupt one another, while judges periodically warn them to keep quiet.

Moreover cases are rarely, if ever, heard and decided in one sitting. Instead, they are usually dragged on over a number of sittings. Adjournments are generally given for two or three months, for such purposes as calling a new witness or giving a lawyer time to draft additional written pleadings. As a result, lawyers claim that law-suit hearings proceed '*bis-sulluzzu*', or 'by hiccups'. They complain of the chaotic nature of court-work, which can involve a 'lot of waste of time' and 'can't be predicted in advance.' Symptomatic are the comments of one lawyer who explained to me that even when granting the final adjournment before pronouncing judgement, judges state that this is being given '*in difett ostakolu*', or 'as long as there are no obstacles'. This lawyer observed that such wording practically invites lawyers to create obstacles which will delay the case even more.

Court-work is therefore piece-meal and sporadic in character. Typically a lawyer and his client would enter the court and separate, as the lawyer heads for the table in the centre, while the client sits deferentially at the back. They are soon followed by their opponents in litigation, who would do the same. After a period waiting their turn and chatting with fellow lawyers, it is the turn for these opposed lawyers to speak. Standing on either side of the table and clutching the microphones in their hands, they would compete to inform the judge of their respective views on the issues involved and the work which needs to be done. They would then present their arguments and/or examine their witnesses. Having completed their work in connection with the case and obtained a ruling or an adjournment from the judge, the lawyers thank him for his help and leave the court-room, followed by their clients. Their place would then be taken by a second set of lawyers.

Court proceedings are characterised by the formal and highly regulated nature of the interaction between the participants. There are a number of mechanisms through which a sense of the hierarchical position of each of the participants in the court-room drama is reinforced. Thus the very lay-out of

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<sup>9</sup> Some judges have recently begun to set fixed hours in which particular cases must be heard. This

the court-room serves to spatially demarcate judges, lawyers and laymen, creating an ascending series of spaces, with judges at the most elevated position and laymen at the bottom. This institutes an economy of sound and vision, in which the judge is the only person who can both see everything that goes on in the court-room in a single glance and clearly hear the arguments and testimony.<sup>10</sup> This arrangement reflects a view of the judge as the person who controls the whole performance for the edification of a public which is mainly concerned with the case as a spectacle.

Moreover hierarchical legalism is more than just a background feature of court-work manifested in judicial injunctions to laymen to maintain silence in court, sit properly, or put a tie on. In a very real sense, the constant evocation of what is legally proper is the fundamental basis for all court-work, informing lawyers' questions and arguments and controlling what they are allowed to say and how.<sup>11</sup> Before the judge, lawyers' efforts to display an aggressive professional persona reach a climax. They are extremely assertive, often breaking out in dramatic displays of anger against the other party and constantly invoking the legal rules. Indeed, judges and lawyers seek relief from the strain of maintaining this artificial legal correctness of speech by cracking jokes, thus introducing moments of what Turner (1996) called '*communitas*' into rigid court-rituals. Surrounding and underlying the presentation of legal argument is a constant flow of banter, which often comments ironically on the case being discussed and the behaviour of the lawyers. Thus, one judge reacted to a lawyer's argument by observing that it

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system appears to be eliminating some of the uncertainty as regards timing.

<sup>10</sup> By contrast, lawyers are in a position where they can hear what is being said, but are expected to keep their gaze fixed on the judge, literally turning their backs on the lay onlookers. The latter can see everything, but often have difficulty in following what is being said in front, before the judge.

<sup>11</sup> This is also revealed by lawyers' gestures in litigation. Often these portray the imposition of a straight line onto an invisible reality, mimicking the hierarchical imposition of the law on the facts. Thus lawyers hold their right hand in a straight vertical position and move it horizontally forward, conveying a sense of straight, uninterrupted movement. They also oppose the right thumb to the index finger to form a circle, which is then moved vertically downwards. This gives the impression that a straight line is being described by the point of intersection of thumb and index finger.

is very rare to find businessmen who are prepared to give up their rights *gratis*. He pointed out that people like Mother Teresa of Calcutta did exist, but not, as a rule, in business. Similarly, one lawyer jokingly interjected while his opponent was in the middle of a convoluted legal argument that the latter would do better to go and cut his hair, since it was far too long.

These comments, which might seem so peripheral to the real tasks of litigation, are actually a good pointer to the underlying tensions which are built into the relationships between the participants. Thus much banter is exchanged between lawyers who are opposing each other in a particular case, serving to mockingly undermine each others' claims. Metaphoric language is mined for the purpose of these witty exchanges, or '*battibekki*' as they are known. In one case, for instance, a judge observed to a lawyer that his arguments were being ignored by his opponent, telling him: "you are throwing your seed in the emptiness." This lawyer seized the opportunity to twist his words to insinuate that his opponent was not very bright, replying: "yes, because the soil on the other side is not very fruitful, your Honour." To this, his opponent replied: "that's because you're sowing it with thorns like those of Jesus Christ!" In another case, a lawyer commented that the court had to be careful because the nick-name of his opponent's client was: '*-ahrax*', or 'the savage one.'

Thus lawyers' banter utilises metaphorical language as a vehicle through which to communicate matters which are unmentionable in strictly legal argument and express their hostile relationships with their opponents. At the same time, this conforms to a pervasive Maltese conviction that whatever is said openly is only the tip of the iceberg of sophisticated underground machinations. Indeed, lawyers, judges and litigants often claimed that 'there's something else underneath', or that 'you have to know what's going on beneath the surface'. For this reason too lawyers pass off pointed criticism as a joke, or come up with ambiguous comments which have more than one

meaning.<sup>12</sup> These tactics endow lawyers with the discursive freedom to attack their opponents, not only with the weaponry of legal argument, but also with that of gossip and innuendo. Indeed one lawyer who made fun of me justified this by saying: "I'm preparing you for the court, because there you must not pay any attention to the things they say." Consequently lawyers experience the court-room agonistically, as what Appadurai (1986) has called a 'tournament of value'. It is a place where their own honour and that of their clients are constantly being challenged and where success depends on the ability to assert oneself (and one's definition of the issues involved in the case) and being quick and ready to reply to provocation. The good reply is not solely a legally learned one, but also one which shows a wide cultural competence: an ability to mine proverbs, religious parables and operatic motifs so as to present oneself as being in full command of the situation, able to deploy key cultural values in one's support .

Judges' behaviour, on the other hand, seems to be guided by two objectives. Firstly they are concerned to ensure a sense of justice, order and discipline in the court-room. They are therefore quick to censure laymen or lawyers who speak out of turn or behave inappropriately. The court-room is, in fact, described by lawyers as belonging to the judge who presides over it. Maltese judges exercise a very close, hands-on surveillance over all that occurs in 'their' courts. A second objective, which is not always shared by lawyers,<sup>13</sup> is their desire to reduce the backlog of cases, to ensure they are settled as soon as possible. As shown in chapter four, there is great public concern about court delays. At the end of every forensic year, the Court Registry compiles lists of the cases which have been decided by each judge. Moreover, the doctrine of judicial independence, which Maltese judges are

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<sup>12</sup> Thus, one lawyer came up to me in court and claimed that Dr. Camilleri was not a good informant for me, as he would conceal 'juicy' information. This was said smilingly in the presence of Dr. Camilleri, who smiled back.

<sup>13</sup> One lawyer told me that judges also tend to delay cases when they have reached the stage where they have to write their judgements.

quick to defend, might imply that *they*, not the government, are responsible for the overall efficiency of the courts.

In this situation no judge wants to be seen as contributing to court delays. On the other hand lawyers often try to stretch out cases, for various reasons which can only be roughly indicated here. There is a clear tendency to try to put off the final judgement when this seems likely to have an adverse effect on clients' interests. In addition they also try to represent clients as fully as possible, by calling a large number of witnesses to prove their versions of events and opposing the other party every inch of the way. Another possible reason, which clients mentioned but I could not verify, was that some lawyers may have a financial interest in prolonging litigation. This increases the work they perform, multiplying their fees. While it was difficult to ascertain the respective contribution of each of these factors to court delays, it was a recurrent part of my fieldwork experience to hear judges shout at lawyers, accusing them of delaying cases unreasonably. Generally these arguments raged around lawyers' attempts to obtain adjournments to call new witnesses, to present documents, or to reach agreements with the other party. Lawyers also justified their actions by claiming they were trying to shorten proceedings, so as 'to avoid summoning witnesses uselessly'.

Clients and other laymen are largely invisible in the court-room. They are often initially intimidated by the whole set-up. When they try to assert themselves, they are disciplined by lawyers and judges and forced to accept the passive role of a silent audience. Here is how one middle aged man I interviewed described the experience:

"There's a lot of stress in the court experience. You hear a lot of lies and you're not allowed to refute them. Or if you do refute them and bring proof against them, it makes no difference as the judge pays no attention."

Similarly, a woman in her mid-thirties observed that:

"Like, when you're in there (the court) for the first time, it's terrifying. You know what's bad, as well: the fact that you have to wait outside. So many people around, all kinds of people and

you're waiting and waiting and waiting and waiting. And you have to go there, say, at nine. I think everybody must go there at nine or half nine. And people have to go there alone sometimes. You have to make your way there. Lawyers running all around the place and you don't know whether your lawyer will be inside the court-room when they call you. When they do call, sometimes he's not around. So you're in the court-room actually waiting for him to arrive. Very worrying. Plus the fear that you feel inside you when you're going before the judge for the first time."

Lay-people are only allowed to speak at any length in the court-room when they are summoned to testify as witnesses. When I first started my fieldwork, I was impressed by the amount of time devoted to the examination and cross-examination of witnesses during the court's work. I had expected to hear lawyers deliver ornate speeches and to hear judges declaiming their judgements. Instead the bulk of the courts' time was taken by the questioning of witnesses, which also tended to emotionally dominate the proceedings. Documents and other material evidence produced in the course of law-suits were often handed over by witnesses while they were being questioned. The generation of evidence thus took place in the context of the narrative framework established by the oral questioning of witnesses. Consequently my focus on testimony does not only reflect my theoretical concern with the way clients' stories are re-told to the court, but also mirrors the nature of court-work itself. For these reasons, the rest of this chapter will be dedicated to investigating the way testimony is produced before the court.

### 3. The Relations of Production of Testimony

Witnessing is a highly regulated activity. Apart from general evidentiary provisions and rules contained in other statutes, the Maltese Code of Civil Procedure (Laws of Malta: Cap.12) has 63 sections specifying how oral testimony is to be produced and recorded. For the purposes of this ethnographic study, however, the details of these provisions are less important than their general influence on the routine processing of evidence. For similar reasons, the distinct evidentiary rules applicable to criminal cases will here be ignored. The processes focused on are shared by most law-suits. Moreover, while criminal litigation is often the object of media attention, this rarely happens with the civil law-suits researched, enhancing their ethnographic interest. Consequently this chapter will concentrate on the general features governing the production of testimony in civil litigation, leaving the distinguishing features of criminal litigation to future research.

The regulatory framework of testimony sets the scene for this activity in a number of ways. Among the most important rules is the initial one directing that evidence given should be: "relevant to the matter in issue between the parties" (Cap.12, sec. 558). This combines with other rules enabling the court to disallow evidence it considers irrelevant and to require the party producing evidence to state its object, so as to privilege the judge's view of what is 'relevant' and what is the 'matter in issue'. Thus lay perceptions of the meaning of the case are formally subordinated to those of the judge, in turn largely based on what he has been told by the opposing lawyers.

Other rules structure the giving of evidence, making a distinction between the 'examination in chief' and the 'cross-examination'. The 'examination in chief' is the initial questioning of a witness by his lawyer or by the lawyer of the party who has produced<sup>14</sup> this witness in court. It is followed by the cross-

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<sup>14</sup> Witnesses are 'produced' by listing their names in a note which must be filed together with the '*citazzjoni*' or '*nota tal-eccezzjonijiet*'. Normally lawyers ask their clients to ensure that a particular

examination of the witness by the lawyer of the other party. To a certain extent the rules also influence the relations between lawyers and witnesses, creating a collaborative relationship between lawyers and the witnesses produced by their clients and inserting hostility into relations with witnesses produced by opponents in litigation. Thus, during the examination-in-chief, no leading questions may be put to the witness and it is not allowed to: "impeach his credit...by evidence of a bad character" (Cap.12, sec. 584).<sup>15</sup> By contrast, these questions are permitted during cross-examination. The roles of witness and judge are similarly regulated. Witnesses are obliged to answer all questions put to them,<sup>16</sup> while judges are allowed to ask any questions they: "deem necessary or expedient" (Cap.12, sec. 582). Moreover, not all testimony is allowable. As a general rule, for instance, hearsay evidence is not acceptable. Finally other rules dictate that the *substance*, not the actual words of a witness's testimony shall be taken down.<sup>17</sup>

These rules are usually implemented as follows. The plaintiff's advocate is given the first opportunity to state his client's version of events and produce testimony for that purpose. He will therefore tell the judge of the names of the first witness he wishes to summon. The latter informs the court marshal and the marshal emerges into the corridors of the court and shouts the witness's name three times. Normally the first witness to be brought is the plaintiff herself, who enters the court-room and is directed to the witness box, where she stands, facing the judge. Once there, the judge will ask her whether she: 'swears to say the truth, the whole truth, and nothing but the truth'. On

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witness attends their sittings. However, if the witness does not turn up in court, the lawyer can compel him to do so by issuing a special warrant and even, if the judge approves, have him arrested and brought to court by the police.

<sup>15</sup> Although it is permissible to: "contradict him (the witness) by other evidence" and to: "show that he has made at other times statements inconsistent with his present testimony" (Cap.12, sec. 584).

<sup>16</sup> Save when the judge rules otherwise, or when the witness's answers may incriminate him.

<sup>17</sup> This rule is immediately qualified with the words: "every answer which may have a material bearing on the merits of the case shall be taken down word for word" (Cap.12, sec 594 (1)). However this still leaves it up to the judge to decide whether an answer materially bears on the merits.

receiving a positive reply, the judge tells her to kiss the crucifix and then requests her name, date of birth and occupation. Having obtained these details, he then allows the plaintiff's lawyer to begin the examination-in-chief.

When the examination in chief is completed, she is cross-examined by the defendant's lawyer. Finally, the witness may be questioned once more by the plaintiff's lawyer in what is known as a '*ri-ezami*' or 're-examination'. Usually three or four witnesses testify in any particular sitting. The general procedure followed is one where the lawyer for the plaintiff is the first to summon his witnesses in the order he chooses. When all the plaintiff's witnesses have been questioned and cross-examined, it is then the turn of the defendant's. These are also examined initially by their lawyer and then cross-examined by the plaintiff's lawyer. The questions put and the answers supplied are recorded on tape and subsequently typed by the clerk of the court.

From this description, the production of evidence might seem to be a smooth and trouble-free process: a sort of unequal dialogue where all the cards are held by judges and lawyers, so that the views of lay witnesses on the meaning of their own testimony have no real influence. Yet when one looks at the actual practice of the Maltese courts, what could be called the 'relations of production' of testimony appear more tense and troubled. To start with, testimony is not usually taken down the moment it is uttered. Most judges I observed would keep the recorder<sup>18</sup> turned off while a witness is replying to questions. They only turn it on again after the witness has finished, when these judges repeat the testimony given into the tape-recorder, generally using a more formal, Italianised and legalistic Maltese than that of the witness. Moreover, there are endless objections by lawyers and judges regarding the summoning of particular witnesses, the framing of questions by the other lawyer and the best words to insert into the record of the case to

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<sup>18</sup> The judge controls the recording of evidence by means of a sort of hand-held joystick.

express what the witness intends to convey.<sup>19</sup> These arguments aggravate the conflicts between lawyers and witnesses produced by questioning itself, to make the production of testimony an intensely contested process.

To explain these tensions, one must understand the divergent interests and experiences of each of the protagonists, starting with lawyers. The lawyers for the plaintiff and the defendant are clearly in an antagonistic relationship. They express this opposition by formally objecting to the summoning of particular witnesses or the placing of particular questions, often on the grounds that they are irrelevant or not the best proof that could be brought. There is often substance to these allegations, because one of the tools by which lawyers can delay a case is by contesting every detail, multiplying the number of witnesses which have to be brought. This increases the time which must be devoted to the hearing of witnesses and also makes the lawyer appear more assertive and aggressive in the eyes of his client, since he openly disagrees with all that is asserted by the other party.

Increasing the number of witnesses also creates space for endless manoeuvres to the effect that a case should be adjourned so that a particular witness could be called, or that a witness was not properly notified and so on. Indeed, one of the things which surprised me when I acted as a legal referee<sup>20</sup> was just how problematic the hearing of evidence could be. I heard lawyers openly remark that a particular witness was too important to be brought to court to testify over a minor case. Despite my best efforts, around ten months and six court sittings were wasted in one case because a particular witness did not turn up in court, although the lawyer who wished to bring him claimed that he had notified him properly. These delays often give rise to the suspicion on the part of opponents in litigation that the opposing lawyer is causing the delays to prolong the case because he believes he will

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<sup>19</sup> Frequently, judges stop the recording, rewind the tape and delete some piece of testimony which has been objected to by the lawyer for the other party or which seems to be unclear. Often, too, judges ask questions themselves or re-phrase questions originally put by the lawyers.

<sup>20</sup> See chapter three for a description of this experience.

ultimately lose it. Indeed, lawyers often ask their opponents: 'why should we bring witnesses to prove something we agree on?'

Apart from these objections about the relevance of particular witnesses or questions, lawyers interrupt opponents and pass sly comments attacking them while the latter are questioning witnesses.<sup>21</sup> They pay great attention to the actual content of the testimony delivered by the other side and rush to re-phrase expressions which might damage their case. Often heated discussions develop between the lawyers and the judge as to whether to use one word instead of another. Consequently judges delete or re-phrase testimony and question witnesses themselves to clarify the matter. Indeed, for historical reasons, Maltese judges tend to take a more active part in the questioning of witnesses than in common-law systems.<sup>22</sup>

As already observed, judges are guided by the twin aims of ensuring that the case proceeds fairly and without too many delays. For this reason they try to discipline all the parties to the case, ensuring that lawyers and witnesses do not speak out of turn. They do not look kindly on those lawyers who seem to them to be wasting the court's time by disagreeing with their opponents on every facet of the case,<sup>23</sup> calling large numbers of witnesses and spending too much time asking irrelevant questions. Consequently they often threaten to cut short a particular line of questioning, by asking the lawyer what relevance the answers to these questions could have and 'where he intends to arrive' with them. Lawyers often wrangle with judges in order to be allowed to call a particular witness or to ask a particular question and this clearly

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<sup>21</sup> Thus one lawyer said: "Dottore, you are inserting the answers you want into the questions you put."

<sup>22</sup> This seems to be a legacy of the inquisitorial judicial system Malta had before the British reforms (Harding 1980). I have noted another cultural legacy of this system, which is the tendency of judges to ask lawyers what the case is about before the court sitting starts and while they are waiting for the lawyers of the other party to appear in the court-room.

<sup>23</sup> One judge complained in my presence about the unreasonable behaviour of one lawyer who told him: "I contest everything which my opponent says in this case." When the judge asked him whether this included his statement that the house which formed the object of the suit had a door painted green and had four walls, this lawyer replied: "yes, I disagree with everything."

conditions the sort of testimony which can be brought. The following outburst noted in my field-diary conveys the flavour of their interaction. Here a judge is shouting at a lawyer who tried to obtain an adjournment to call a new witness:

"How can you do this in a case which has been going on for six years? It cannot be that you make fools of us in this way! What can you have left to say? Can you tell me what you have left? I'm going to keep going without any brakes. If necessary we'll eat here (in court) and we'll keep going without interruptions until all the proof is brought!"

The questioning of witnesses is itself conducted in a way which reflects the different interests of the protagonists. To start with the relationship between a lawyer and his client's witness, one must note that it is usually much more collaborative in nature than that between a cross-examining lawyer and the other party's witnesses. When a lawyer conducts an examination-in-chief, he tries to ask his witness a series of questions which help him build up a coherent narrative through his testimony. The next section will show how this questioning is usually intended to elicit a paradigmatic story of the sort which has been discussed. Characteristically, therefore, the lawyer's questions attempt to create a culturally believable and chronologically sequential story, through asking the witness what happened 'subsequently', or saying: 'if this is what happened, then what was your reaction to it?'

Generally lawyers are courteous to their witnesses and try to interpret their words in good faith to iron over any discrepancies. However they are also quick to discipline witnesses who do not reply to their questions or ramble on at length. This is because they are afraid that they will muddy the waters, confusing the issues involved in the case or making damaging admissions. Lawyers and judges selectively repeat the answers given by witnesses, cloaking them in a formal vocabulary which meshes better with the language of the legal rules. Thus, even the collaborative relationship between a lawyer and his own witness is based on the barely concealed linguistic dominance

exerted by the lawyer, who claims to be able to identify the real meaning of what the witness wants to say behind the actual words he uses.<sup>24</sup>

If the relationship between a lawyer and his client's witness has its latent tensions, then that with the other party's witness is often overtly hostile. This is not only because lawyers are free to attack the credibility of witnesses during cross-examination, but also because of the way this is done. In fact lawyers resort to a range of rhetorical tactics to debunk witnesses' credibility. Often they adopt a mocking superior tone, trying to discover discrepancies in the testimony. They also intimidate witnesses by interrupting them, shouting at them and piling questions on top of one another. A common tactic is to ask the witness ever more precise details about the remembered event, to uncover lacunas in his memory which can then be used to suggest that he is lying.<sup>25</sup> The assumption made is that a truthful witness will remember the past accurately. However it is also assumed that a lying witness can be identified by the suspicious accuracy of his memory of minor details crucially important to his case.<sup>26</sup> Clearly these assumptions can easily contradict one another and they illustrate the flexible nature of the theories of memory which lawyers appeal to in cross-examination. Typical of cross-examination are questions of the form: 'what would you tell me if I were to tell you so and so?' Such questioning creates a sceptical atmosphere, allowing the lawyer to confront a witness with statements which contradict testimony he had earlier given.

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<sup>24</sup> One lawyer I interviewed put it this way: "there's a lot of psychology, for want of a better word, in court. You start to realise that this is the situation where you have to appear aggressive; this is the situation where you have to be passive: this is the situation where you have to scream at your client in order to tell him to shut up because he's mucking up his case."

<sup>25</sup> In one criminal trial I observed, a female police-woman testified that she had received an anonymous phone-call in which a stuttering male voice informed her of the commission of a crime. Under cross-examination, the defence attorney started to grill her as to the exact sound of the voice and the quality of the stutter. In response, the witness eventually attempted to personally reproduce the voice she had heard in the court-room. Clearly she felt that any attempt on her part to describe the voice would make it possible for the lawyer to misinterpret or 'twist' her words. She tried to prevent this happening by reproducing the voice herself and leaving it up to the lawyer to describe it.

<sup>26</sup> Especially when major events which occurred at the same time are forgotten.

As has been explained, judges often question witnesses themselves and in the process may ask questions which resemble both those which are posed by lawyers during the examination-in-chief and during the cross-examination. Thus one judge who used to deal with cases of personal separation told me that there were a number of trouble questions which he would always ask to test the credibility of witnesses. For instance, he would ask separating women whether they allowed their husbands access to their children and follow this up by asking when they last saw them. What is particularly noticeable about judges' questioning is the care they take to prevent witnesses from digressing and recounting long narratives which explain their subjective perspective on events. This is partly because of their desire to reduce court delays and also because, as one magistrate told me, listening to these stories, can expose judges to charges of prejudice in favour of one of the parties. Certainly judges often commented that they: 'do not enter into these stories', because: 'they never end'.<sup>27</sup>

The effect of questioning on witnesses is usually to make them feel exposed and vulnerable. Clients I spoke to described the fear they felt when testifying before the judge. Many characteristic features of testifying conspire to produce this feeling. Witnesses often do not know where they are supposed to stand and have to be directed to the witness box by lawyers. They have to wear a jacket and tie to enter the court-room and, if these are carelessly put on, or if they slouch, they are shouted at by judges and directed to 'arrange your tie' or to 'stand properly'. When in the witness box, they are placed on a higher position than other laymen and the gazes of everybody in the court-room are fixed on them.<sup>28</sup> They have to take an oath and kiss the crucifix. When replying to the lawyer's questions, they are instructed to look straight ahead towards the judge, rather than side-ways towards the lawyer with whom they are actually conversing.

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<sup>27</sup> I also heard a legal referee complain to a judge that it was impossible for her to listen to everything a particular litigant had to say, because: "we'll continue into the next millennium!"

<sup>28</sup> This sense of being raised up to public scrutiny is conveyed by the Maltese expression used, which is: '*tellghuh jixhed*', or 'they raised him up to testify'.

However it is the actual questions which create the greatest tension. Witnesses are often placed in a frustrating situation where intimate details about their personal life are aired in public, while they are unable to direct the course of what is said or to give their own perspective on events. In fact, it has been observed how not only the opponent's lawyer, but also the judge and the lawyer who is conducting the examination-in-chief re-phrase what the witness says and prevent him from expounding his subjective opinion. Witnesses are constantly being cut short and interrupted.<sup>29</sup> Moreover, while cross-examining lawyers may only seem to be contradicting the *words* of the witness, their aim in doing so is often that of attacking the witness's *self*, by undermining his credibility. This is made clear both by the types of questions which are asked and by the ways in which they are asked.<sup>30</sup>

Questioning provokes a reaction on the part of witnesses, which reflects its influence on them. Witnesses become angry and emotional, insisting that they must have their say. Lawyers complained to me that their witnesses would not allow them to do the questioning and would insist on pouring forth entire stories to the judge. This damaged their cases because clients did not understand what was relevant and lost the judges' sympathy. In another case, a legal referee complained that a client had even brought a tape-recorder with her to make sure her testimony was properly taken down. It is however important to note that witnesses sometimes manage to communicate and impose their own understanding of events and this will be revealed by a detailed examination of the way in which testimony was produced and contested in a particular case.

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<sup>29</sup> As I heard one judge tell a witness: "if you please, do not argue. You are here, solely to answer the questions which are put to you."

<sup>30</sup> When Maltese describe the giving of testimony there is a great emphasis on what 'emerges' from witnessing. In the process, people slip from talking about the emergence of the truth to talking about the emergence of selves. Thus, it is common to hear people say '*hareg ta' ragel*', or 'he emerged as (an honourable) man'.

#### 4. The Case of the 'Rented Garage'

The relations of production of testimony will now be exemplified by looking at the evidence given in a particular case, so as to further develop the analysis. My access to this case was mediated through the official transcript prepared by the court clerk. It is important to keep the conditions of production of such transcripts in mind. It is clear from what has just been said that they cannot be considered as perfectly reflecting all that was said in court during the sittings to which they refer. Apart from the fact that all non-discursive features are automatically eliminated, these transcripts already bear the mark of the efforts of lawyers and judges to shape the testimony produced in line with their own objectives. However since they contain a detailed record of the questions asked and the answers given in particular cases, these transcripts can be mined for their ethnographic interest.

The case which will be described is still an ongoing one at the time of writing this thesis. It is significant mainly because it is ordinary and therefore typifies the way testimony is negotiated in most Maltese civil law-suits. One of my lawyer informants acted for the defence in this case along with another advocate. He brought it to my attention because he wanted my opinion on the legal issues involved. For this reason, he also told me the story of the case, as he saw it. With his permission, I tape-recorded his description of the case, which was given in English and can serve to introduce this discussion by showing what the story of the case was in the eyes of one defence attorney. The transcription of this recording is given below and on the following page:

Me: "Do you mind (my recording)? If you mind I'll switch it off."

Lawyer: "No, no, no. In this case...the defendant John Zammit. Zammit was the owner of the garage. At least, he *thought* he was the owner of the garage. Now the facts were these: He had a '*konvenju*' (a promise of sale agreement<sup>31</sup>) with a certain Gejtu Aquilina. Gejtu, on the '*konvenju*', we know for sure, was paid the

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<sup>31</sup> This is an agreement where the owner of immovable property promises to sell it to another who promises to buy it.

whole amount, being the same price, value of the garage. For some reason, either they did not finalise the contract of sale or they did not register it. In the mind of John Zammit, he was the owner. John Zammit then gave the garage on lease to my client, who is Salvu Camilleri (the other defendant). Eventually, Salvu Camilleri was approached by a certain Joseph Tabone, who is the plaintiff and Joseph Tabone told him: "listen, get out of here...this is my place." Apparently John Zammit was never registered as owner. Gejtu then hypothecated (a form of mortgage) the place in favour of the B.O.V.<sup>32</sup> B.O.V. called down the debts. There was a 'subbasta' (a judicial sale by auction<sup>33</sup>). It was sold to Joseph Tabone. Joseph Tabone bought the place through the 'subbasta'. So Joseph Tabone was the real owner. But for a long period of time, John Zammit was the possessor '*animo domini*'.<sup>34</sup> Because this guy can barely read or write. I believe John Zammit. He is a very simple man. This guy Gejtu was jailed. Fraud. The story was quite obvious. The notary<sup>35</sup> was also of shaky qualities. So is my client Salvu Camilleri protected against the real owner?"

Although my lawyer/informant described this story as 'quite obvious', it may not appear to be so clear-cut to a non-lawyer. The whole structure of this narrative suggests this lawyer is describing events from the standpoint of how they relate to a framework of legal rules and concepts which are shared with other Maltese lawyers but not with a wider audience. To an audience unfamiliar with Maltese legal terminology, the story could be re-phrased so:

Gejtu Aquilina owned a garage, which he promised to sell to John Zammit, by means of a written agreement. John paid the full price of the garage to Gejtu. Yet the two parties did not conclude a final contract of sale with all the legal formalities, so that the ownership of the garage did not legally pass to John, who was unaware of this and thought that he had become the full owner. Acting on this belief, John leased the garage to Salvu Camilleri. Meanwhile, Gejtu, who was a dubious character, mortgaged the garage as

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<sup>32</sup> The Bank of Valletta: one of the two leading Maltese banks.

<sup>33</sup> A '*subbasta*' is an auction of mortgaged property which is authorised by the Maltese courts and often held within their precincts. Judges will order that a '*subbasta*' be held when a debtor is unable to re-pay his loans and has mortgaged some of his property in order to secure these loans. The proceeds from the auction will go to the creditor.

<sup>34</sup> Under Maltese law, possessors who are in good faith, believing that they are the owners of property which is not their own enjoy special protection even against the real owner.

<sup>35</sup> The notary had drafted the '*konvenju*', but apparently failed to follow it up with a contract of sale.

security for the repayment of a bank loan he had taken. When he did not repay this loan in time, the bank decided to initiate court proceedings and obtained a judgement ordering an auction of the mortgaged garage so that the bank would be repaid out of the proceeds. The garage was auctioned and sold to Joseph Tabone. Joseph Tabone approached Salvu Camilleri (who had leased the garage from John Zammit) and told him that he had to leave the garage on the grounds that his lease agreement was invalid, since the lessor had no valid legal title over the garage.

The need I feel to translate this story makes clear my own involvement in narrating (and therefore re-interpreting) the case. What I am here telling is *my* story concerning the story my informant told me about what *he* saw as the real issues involved in the case. Each of these levels of story-telling implies a different perspective on the issues involved and subtly influences the ensuing narrative, adding new layers of significance to it. My academic training in law and anthropology and the context of narration of an anthropology thesis has clear repercussions on what I write, not least of which being the way I must re-tell the story for the consumption of a non-legal, non-Maltese, audience. In comparison, the story provided by my lawyer/informant was produced after most of the witnesses had testified in court and he was telling it to me as a lawyer colleague in order to obtain my opinion on the legal issues involved. His narrative is therefore the sort of finished product this defence lawyer tried to elicit through his own questions in court. It is a series of events which has been remembered for the purpose of clarifying a legal issue.

In order to understand the specific characteristics of the story told by my lawyer informant, it is useful to recall the spectrum of narrative possibilities outlined in the second chapter of this thesis. This spectrum lay between the opposed poles of paradigmatic rules and subjective experience. In this context it was argued that the significance of narrative lies in the way it mediates between these two poles. This means that telling stories can serve both as a medium through which rules structure individual experience and as the means through which particular experiences can challenge existing paradigmatic rules and ultimately generate new ones. Different forms of story-telling epitomise these converse processes, so that such 'paradigmatic

narratives' as moralistic tales affirm established rules, while 'subjunctive narratives' like modern novels challenge them.

In the light of this distinction, it is clear that the story my lawyer-informant told me is a paradigmatic one. The internal fabric of this narrative itself reveals this. For one thing, it is a unitary, coherent, story authoritatively told from a single viewpoint. There is no sign of ambiguity or contradiction and no awareness of the co-existence of different narratives providing alternative interpretations of events. Nor is there any of the hesitation, calculation, disruptions and opacity of practical life. Moreover this narrative is structured in terms of a series of legally defined concepts and relationships. Persons are characterised mainly in terms of their legally significant actions and their thoughts and feelings are only mentioned in those points in the narrative where this is essential so as to understand the legal issues involved. It is the paradigmatic rules of the legal system which are stressed in such a story, as against the particular experiences of the protagonists.

In practice, however, most people do not understand their actions in terms of such legally oriented narratives. Nor are such stories automatically produced by clients when they come to testify in court. Rather, there is a long process of delivery of testimony, in which parties and their witnesses are repeatedly questioned, various narratives are evoked and different lawyers seek to shape this material in the interests of their clients. This can be seen from the following extract from the official transcript of John Zammit's court testimony, which I have translated. It shows my lawyer informant trying to discover the basis of John Zammit's claim to own the garage and in the process actively creating a paradigmatic story out of his utterances :<sup>36</sup>

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<sup>36</sup> In the extract reproduced on the next page. 'L' refers to my lawyer/informant, who was defending Salvu Camilleri. 'JZ' is John Zammit, who was called as a witness by Salvu Camilleri and 'Crt' is the judge hearing this case, who also put questions to this witness. One should note that all the names I have used are pseudonyms.

Creating a Paradigmatic Story:

Joseph Tabone vs. John Zammit & Salvu Camilleri

Defendant John Zammit, produced by defendant Salvu Camilleri, on oath declares:

L: Did you lease a garage to defendant Salvu Camilleri?

JZ: Yes

L: Where is this garage?

JZ: Hal-Farrug, Independence Street

L: This garage, how did it come to you?

JZ: I bought it from Gejtu Aquilina; I bought it from him, I paid him and asked the notary for the contract and each time he would tell me: 'wait, wait'. Some days passed and he did not give me the contract.

Crt: When you say that the notary did not give you the contract, do you mean he did not give you a copy or that a contract was not made?

JZ: No. The contract was made. As far as I'm concerned, it was made. But what he did I don't know.

Crt: You went to the Notary and made the contract. You went before him and signed. Then you asked him for a copy of the contract and he did not give you one?

JZ: Yes.

L: How much did you pay for the garage?

JZ: Eight Thousand (Malta Liri)

L: Did you give him the full amount? In cash?

JZ: In cash. In cash.

L: Who was the notary?

JZ: Peter Borg

Crt: Where is his office?

JZ: Hal-Farrug

L:: Did Aquilina give you the keys to this garage, initially, before you leased it?

JZ: Before I leased it, it was leased to me.

Crt: So you bought the garage and it was already rented to you?

JZ: The garage was rented to me and after a little time, I rented another and this one was not being used and this man cropped up for it.

Crt: The question is: so, when you bought the garage from Aquilina, you were already using it. You transferred it to Camilleri and Camilleri began to rent it from you

JZ: Yes it was in my hands and that.

Crt: When you bought the garage, the keys were in your possession.

JZ: They were.

L: When you leased the garage to the defendant Salvu Camilleri, was there anybody there before him, before Camilleri took the garage?

JZ: No, no.

L: So the first person who entered the garage.....

JZ: It was him, he entered.....

L: When you leased the garage to Salvu Camilleri, you made a writing, right?

JZ: Yes.

Crt: Where did you make this writing? Did you make it at some notary, at some lawyer?

JZ: No, no. On a book, we made it –the rent-book.

Crt: He will show you a document and you must see if it is that one or one like it.

JZ: I don't know how to read.

[I have omitted part of Zammit's testimony here for reasons of space. At the end of this examination in chief, the lawyer asked Zammit:]

L: How did trouble arise? What happened?

JZ: I leased the garage to him; well it was leased with Gejtu. Suddenly, one day, I was called to the Bank, I don't know which one, and I was told to give the keys to Joseph Tabone. I was left staring.

Crt: Because you thought the garage was yours; right?

JZ: Of course.

The extract above is taken from the examination-in-chief of John Zammit by Salvu Camilleri's lawyer. This lawyer has 'produced' Zammit, as he is the landlord of Salvu Camilleri, who is faced with a demand for his eviction from the garage on the grounds that Zammit's title was not valid. It is therefore in the interest of Camilleri's lawyer to show that Zammit's title was at least apparently valid. He consequently asks the witness to provide more details about the basis of his title, how much he paid for the garage, the name and address of the notary involved in the alleged sale and so on. His questioning is co-operative not hostile and meant to show that the witness had good reasons for believing that he owned the garage. This lawyer does not try to highlight contradictions, but to produce a coherent story out of the answers of the witness, which meshes with the legal rules it invokes.

If one considers Zammit's testimony, however, it seems possible to identify an alternative narrative understanding of events which eludes the shaping efforts of both lawyer and judge.<sup>37</sup> This alternative version can first be glimpsed in his answer to the judge's first question. This was itself aimed at clarifying his legally unclear claim that he bought the house but the notary did not give him the contract. Consequently the judge asked him if this meant that the notary did not give him a copy of the contract or that the contract as such was not made. He replied that: "as far as I am concerned it (a contract) was made but what he (the notary) did I don't know."

From a legal perspective a contract either exists or it does not. There is no place for a contract which exists only in the eyes of one of the parties. Such a contract would have to be considered as legally inexistent. By evoking this possibility, Zammit is undermining his previous claim to have bought the garage, since one cannot legally buy a garage except through a valid contract of sale. Thus his statements are, legally speaking, contradictory. Yet from a lay perspective he seems to be narrating how his own good faith was abused of by the notary, who presided over what was in effect the sale of the property without ensuring that the contract complied with legal formalities. After all, Zammit is illiterate and he clearly belongs to a lower social class than the highly educated lawyers who are questioning him. How could he have known that what he signed was a contract if he could put his mark on it but not read it? He had to rely on the notary's word.<sup>38</sup> This would explain why he previously referred to the notary's attempts to fob him off whenever he asked for the contract. This witness was therefore being as honest as possible in court in order to convey his belief that effectively and ethically speaking a contract existed even if there were some legal procedures which had not been observed.

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<sup>37</sup> This is my own interpretation of this testimony, which doubtless reflects my legal background.

<sup>38</sup> I am indebted to Mary Thompson for making me aware of this point.

Unfortunately, this sort of story does not easily mesh with legal logic which does not recognise the existence of divergent popular notions of the significance of contract.<sup>39</sup> Consequently, the judge's next question seeks to reformulate Zammit's testimony to fit into the legal categories, in the process giving it a different slant:

Crt: "You went to the Notary and made the contract. You went before him and signed. Then you asked him for a copy of the contract and he did not give you one?"

The difference between this question and the previous answer is that it completely eliminates the ambiguous legal status of the 'contract' evoked by Zammit. Instead of a contract which exists in real terms but lacks some legal formality, the judge's question implies that a contract only exists if it is legally valid and re-interprets the notary's behaviour as the forgetful or deliberate withholding of a copy of the contract from the witness. Faced with this authoritative reformulation of the issue, Zammit is effectively pinned down and forced to choose between the claim that a contract of sale legally existed and the claim that it did not. Not surprisingly, he chooses the former option, since this seems to strengthen his claim to own the garage. Yet this was not the way he originally described the situation.

Salvu Camilleri's lawyer continues to question Zammit. At one point, he asks the witness whether Gejtu, who supposedly sold him the garage, gave him the keys of the garage before he leased it to Camilleri. Zammit's reply serves to muddy the waters once more, since he states that before he leased the garage to Camilleri, the garage was leased to himself. Legally speaking this is another contradictory statement which throws doubt on his previous claims, as the status of owner and that of lessee are mutually exclusive. The witness, who earlier claimed to have been the owner of the garage is now stating that

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<sup>39</sup> Although John Zammit's lawyer could conceivably have sued Gejtu Aquilina and the notary on the grounds that they had fraudulently extorted money from him, this would have to be a separate law-suit from the current one which is solely concerned with establishing the legal basis for the title of the defendants and whether Salvu Camilleri is protected in his possession of the garage.

in the period before he gave it out on lease, he was only the lessee of the garage. Again this claim, which is incoherent from a legal perspective, is intelligible in terms of the previously identified layman's narrative. In fact, Zammit seems to be invoking his earlier uncertainty as to whether a legally valid contract of sale had been entered into and suggesting that the situation was more similar to a lease. Once more, however, the judge re-formulates the question so that it will provoke a reply which does not contradict Zammit's earlier testimony or the legal categories. In the process the testimony is again given a different slant. The judge asks the witness whether he used to lease the garage *before* he bought it, thus effectively reminding him of his earlier claim to have bought the garage and suggesting a new temporal structuring of the testimony which reconciles its various parts and makes legal sense. However Zammit makes it even more clear that his understanding of events resists categorisation by legal logic:

W: "The garage was rented to me and after a little time, I rented another and this one was not being used and this man cropped up for it."

This answer seems to completely exclude his previous claim to have bought the garage. Not surprisingly, the judge repeats his question in another attempt to clarify the situation:

Crt: "The question is: so, when you bought the garage from Aquilina, you were already using it. You transferred it to Camilleri and Camilleri began to rent it from you

JZ: Yes it was in my hands and that."

This time Zammit's answer is more satisfactory, since he seems to accept the court's formulation of the issue. However, it is important to observe that he still qualifies his acceptance, using the ambivalent expression: "it was in my hands." This expression seems to be intentionally chosen so as to evoke his previous ambiguous stand as to whether a legally valid contract existed without openly challenging the judge's formulation of the issue.

The final question put by the judge shows the same attempt to pin the witness down to a legally correct version of events which conforms with his earlier statement that he had bought the house. Zammit had just described his shock on learning that he was expected to evict the garage since Joseph Tabone was the real owner. The judge asked whether this sense of shock arose because Zammit thought he owned the garage, to which he replied: "yes." Thus the judge attempts to resolve the lingering uncertainty about the actual existence of a contract of sale which was produced by Zammit himself.

This extract consequently shows the judge and the lawyer for the defence collaborating to transform the narratives produced by this witness into stories which more fully engage with the logic of the law. It seems clear that this process involves shifting stories towards the paradigmatic pole stressed by Ricoeur (1984), away from the 'subjunctivising' discourse Bruner (1986) described. It can therefore be considered as the creation of a paradigmatic story. In this case, creating such a story is useful for the defence lawyer, since the legitimacy of his client's title is under attack and he wishes to stress its conformity with the legal rules by showing that the person from whom his client derived his title also acted in a legally correct manner. It is also useful for the judge, whose position requires that he assume that legal categories are applicable to everyday life and therefore intelligible to witnesses. However the extract shows that this process is not carried out without the resistance of the witness, who seeks to impose his own narrative understanding of events and to some extent succeeds in doing so. There is therefore a sort of narrative struggle which accompanies the giving of such testimony, in which witnesses assert the validity of their subjective experiential understanding of events as against the sort of paradigmatic narratives the legal system favours. In the case under discussion, while the witness was more or less forced to accept the paradigmatic story as representing the events he described, he also managed to create a margin of doubt as to its adequacy.

The subsequent cross-examination of this witness by the lawyer for the plaintiff, Joseph Tabone shows how it can also be the aim of lawyers to try to demolish the coherence of the a witness's narrative and to detach it from the legal rules which provide its paradigmatic underpinnings:<sup>40</sup>

Contesting a "Paradigmatic Story":

L: How often did you go to notary Borg?

JZ: At the start, I went several times.

L: How often did you sign the contract?

JZ: I signed the promise of sale agreement once and I also signed the other time when I don't know whether there was a contract: that which I thought was a contract.

L: For how long had the garage been leased to you when you bought it?

JZ: I can't tell you precisely offhand, but I'd had it for a long time. Maybe four years?

L: What did you do with it (the garage)?

JZ: Pasta

L: Did you have some company producing pasta?

JZ: No, I work with pasta.

Crt: Did you produce pasta or did you store pasta there?

JZ: I used to store pasta.

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<sup>40</sup> In this extract, 'L' refers to the lawyer who represented Joseph Tabone. 'JZ' is John Zammit, who was called as a witness by Salvu Camilleri and 'Crt' is the judge hearing this case, who also put questions to this witness.

- L: For how long was the garage in your possession before you bought it?
- JZ: Some four years maybe? Three years perhaps? I can't tell you precisely how long.
- Crt: But even before you made the promise of sale agreement, it was already in your hands?
- JZ: The garage was in my hands.
- L: For how long (a time) before you bought the garage had you stopped storing pasta in it?
- JZ: How long? Six months maybe?
- L: Some six months before you bought the garage you stopped using it for your business.
- JZ: No, before I passed it on to this man (the lessee).
- L: So when did you buy the garage?
- JZ: I bought it previously.
- L: Were you still using it for storage?
- JZ: Certainly. Of course!
- Crt: So you did not give the garage to this man (on lease) as soon as you bought it. Did you pass it on to him when you bought it?
- JZ: No, because it was leased to me. Then I told him: 'sell it to me' and he sold it to me.
- Crt: The question is whether you passed it on to Camilleri immediately on buying it (the garage). You did not pass it on immediately.
- JZ: No, no.

Crt: You were still using it.....

JZ: Using it.

L: For how long did you continue to use it? A few months?

JZ: His reply was not registered on the tape.

This extract shows a lawyer resorting to hostile cross-examination of a witness in an attempt to destroy his credibility. Although the court transcript does not capture this, lawyers generally adopt an aggressive tone of voice and try to intimidate witnesses when they conduct these cross-examinations. They pile questions on top of one another, often appearing to disdain the answers and conveying the impression that it is only a matter of time before the lies of the witness become obvious to all, as they have been to the lawyer from the start. In this case Tabone's lawyer has good reasons for wanting to undermine Zammit's credibility, since otherwise his own client's entitlement to the garage would appear questionable. Consequently his questions differ from those put by the defendant's lawyer, since rather than creating a paradigmatic story, they aim both to destroy the internal unity of Zammit's narrative and to detach it from the paradigmatic legal framework. Instead, the plaintiff's lawyer implies that Zammit's story only reflects an idiosyncratic understanding of the situation which can have no legal consequences.

Such an attitude is apparent from the first two questions put by the plaintiff's lawyer. The first seems to confirm this witness's story, by asking him how many times he went to see the notary. This fits well with Zammit's initial claim that despite his efforts the notary had always eluded him and had not given him the contract of sale. Having lulled the witness into a false sense of security and predisposed him to answer positively, the lawyer then asks his second question: "how often did you sign the contract?," which is apparently a simple continuation of his previous one. In reality, however, it is a clever attempt to catch the witness in a legal and personal contradiction. In fact, a contract can legally be signed only once. However Zammit's preceding testimony suggested that he might not understand legal logic very well and

that he more vividly and bitterly recalled his repeated visits to the notary, than whether a contract had, legally speaking, been signed. There was a good possibility that he would also misunderstand this question and give the legally absurd reply that he had signed the contract 'many times'. Obviously this statement would continue to cast doubt on his claim to have bought the garage. It would do so precisely by turning the story into a personal tale of misfortune which does not have any valid legal grounding. The lawyer is therefore attempting to shift the witness's narrative away from the paradigmatic and towards the subjunctive pole of the spectrum of narrative possibilities. To do so he is exploiting the earlier identified gap between the paradigmatic story produced by the lawyer and his subjective experience. But this time the witness comes up with a reply which cannot be faulted legally, claiming to have signed the promise of sale agreement and the document which he believed to have been the contract of sale.

The lawyer then changes tack and starts to ask a number of questions which are meant to extract more details from Zammit about his possession of the garage. While these questions are superficially similar to those of Camilleri's lawyer, there is a fundamental difference in orientation. In fact Camilleri's lawyer tries to extract details fitting into a paradigmatic story which makes Zammit's title to the garage seem more solidly founded. Tabone's lawyer, by contrast, tries to extract more and more details from the witness in the hope that the latter will contradict himself at some point and destroy the coherence of his story and his own credibility. This hostile orientation is manifested in various ways. For instance, Tabone's lawyer asks many questions about the temporal sequence of events at different stages of this testimony. He asks how long the garage had been leased to Zammit before he bought it, how long before he bought the garage did he stop storing pasta in it, when he bought the garage and for how long he continued to use it to store pasta after buying the garage. Clearly the intention behind the lawyer's request for all these details is his hope that some of these time periods will contradict one another and undermine Zammit's credibility. For the same reason, the lawyer repeats his question regarding the length of time for which Zammit had

leased the garage before buying it. The witness had given a very uncertain reply to this question the first time it was asked, saying that it could have been three or four years. By repeating the question the lawyer highlights and emphasises Zammit's uncertainty. When the witness again replies that it could have been three or four years, he seems incompetent at best and evasive at worst. Finally, the hostile orientation of the lawyer is clearly revealed by the way he frames the following question:

L: "For how long (a time) before you bought the garage had you stopped storing pasta in it?"

At first sight, this question seems bizarre since there is no reason why the lawyer should assume that Zammit stopped using the garage before buying it. Yet this question is intended as a trap, which the witness uncovers by promptly falling into. In fact, when the witness replies: "six months maybe," Tabone's lawyer seizes the opportunity to re-state this reply in a way which makes the witness's behaviour appear absurd:

L: "Some six months before you bought the garage you stopped using it for your business?"

This re-statement of the reply which the lawyer provoked by his question makes the reader wonder what incentive the witness had to buy the garage in the first place if he was no longer using it for his work in the period before the sale. In this way, even more suspicion is thrown on Zammit's claim to have bought the garage and the credibility of his story as a whole becomes strained. This seems to have been precisely the motivation behind this question. This purpose was achieved by framing the question in such a way that Zammit understood it to refer to the time period before he leased the garage to Camilleri, rather than the period before he bought the garage.

This sample of testimony is a good illustration of the way in which the cross-examination of witnesses is often carried out. Particularly noticeable is the ability shown by this cross-examining lawyer to frame his questions in ways which evoke alternative narrative understandings of events, breaking up the

coherent unity of the paradigmatic narrative created by Camilleri's lawyer. Various strategies are used to achieve this, which range from exploiting actual areas of divergence between subjective experience and paradigmatic stories to the active creation of such discrepancies by asking questions which provoke them. In this way the story is detached from its anchorage in the paradigmatic legal framework by stressing its subjective and legally contradictory features.<sup>41</sup>

These processes can also be seen at work in the examination of the other witnesses questioned in the same court sitting in this case. These were all brought by Salvu Camilleri's lawyer.<sup>42</sup> Their summoning and examination-in-chief reflected his objective to create a solid framework of interlocking paradigmatic narratives bolstering his client's title to the garage. Thus the next witness produced was a certain Frank Azzopardi, who said he had lent a sum of money to Zammit to allow him to buy the garage. He was followed by Gejtu Aquilina, the putative seller of the garage, who testified that he had in fact sold the garage to Zammit. Finally the lawyer brought Camilleri himself to testify. The latter supplied important details about the duration of his lease of the garage from Zammit, the amount of his rent and so on. In examining all these witnesses, Camilleri's lawyer kept trying to create interlocking paradigmatic stories, notably by showing them documents and asking them to confirm their validity. Consequently, the stories told were shown to be grounded in legally valid documents. Moral feelings were also evoked in support of these stories. Thus his lawyer asked Salvu Camilleri the duration for which he had rented the garage before becoming aware that he was liable to be evicted by the real owner. When the latter replied: "four years," the lawyer exclaimed in a shocked tone: "you had it for four whole years before this business cropped up!"

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<sup>41</sup> One should however note that this strategy did not wholly succeed to debunk Zammit's testimony.

<sup>42</sup> Since the case is still going on at the time of writing, it is not possible to state the outcome of the case or even to list all the witnesses who testified.

Conversely, Tabone's lawyer continued to use both fair means and foul to fragment the unity of these inter-locking narratives. For this reason he confronted Gejtu Aquilina with the fact that he had mortgaged the garage which he previously claimed to have 'sold' to Zammit. Gejtu said he knew nothing about this and suggested that his notary had mortgaged the garage without telling him. When cross-examining Frank Azzopardi, who claimed he gave Zammit a loan to buy the garage, Tabone's lawyer alternately suggested that Zammit had said the amount lent was different, that Zammit could not have signed the loan agreement because he was illiterate and that Zammit and Azzopardi were colluding to mislead the court. Many of these allegations were based on previous testimony which had been slightly altered, or 'twisted', by the cross-examining lawyer. For instance he recalled Zammit's statement that he did not know how to read in order to confront Azzopardi with it. But he neglected to mention Zammit's previous admission that he knew how to sign.<sup>43</sup> Such tactics were repeatedly used by this lawyer.

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<sup>43</sup> These questions illustrate another feature of witnessing, which is the crystallising of certain narrative themes, the validity of which is tested by questioning various witnesses about them. These themes serve to test the credibility of the narratives to which they refer. In this case, the nature of John Zammit's illiteracy was definitely one of these themes, on which questions were put to two of the later witnesses. Clearly, if Zammit could be shown to have been lying about this issue, then his whole story would become highly suspect.

## 5. Courtroom Story-telling

The case of the 'Rented Garage' provides food for further reflection on the nature of testimony and the role stories play in the process. The previous analysis illustrates the differences between the oral delivery of stories in court and their presentation *via* such written accounts as are contained in 'affidavits' or 'declarations of the facts'. The stories told in court are much more opaque and unclear than written narratives. After all, had John Zammit really bought the garage or not? Both the judge and the opposing lawyers kept trying to define what his story really was. Moreover oral stories change or reveal unexpected dimensions under the impact of court questioning. Thus, while being questioned, Zammit shifted from his initial claim to have bought the garage to saying that he had leased it. This places into relief the time-consuming and laborious character of court story-telling. In the process opposing lawyers must employ their narrative skills; orchestrating the production of evidence to conform to the accounts they respectively present in court and also changing the stories they tell on their clients' behalf in response to changes in the testimony given.<sup>44</sup>

Lawyers' narrative skills can be investigated by taking a deeper look at the different questioning strategies adopted by opposing lawyers in this case. The strategy of the defendant's lawyer has been shown to rest on the creation of a monolithic paradigmatic story which links together all the stories produced by the different witnesses and affirms their continuity with the legal framework. Such a story denies the existence of any contradictions between these narratives, or between the subjective experience of witnesses and the legal framework. For this reason, the lawyer resorts to a type of questioning which reflects the sort of 'learned ignorance' which Bourdieu (1997) saw as inherent in any theorist's attempt to reach an objective understanding of

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<sup>44</sup> Thus Zammit's lawyer shifted from claiming that his client owned the garage to saying that it was 'in his hands'.

social life which does not reflexively analyse the theorist's own relationship to his object.<sup>45</sup> He writes in regard to how anthropologists question informants:

"There is every reason to think that as soon as he reflects on his practice, adopting a quasi-theoretical posture, the agent loses any chance of expressing the truth of his practice, and especially the truth of the practical relation to the practice. Academic interrogation inclines him to take up a point of view on his own practice that is no longer that of action, without being that of science, *encouraging him to shape his explanation in terms of a theory of practice that meshes with the juridical, ethical or grammatical legalism to which the observer is inclined by his own situation*" (Bourdieu 1997: 91).<sup>46</sup>

Thus it seems that the questions asked by Camilleri's lawyer and the judge reflect *their* relationship to the case, which is that of educated people who have had a legal training and are more concerned with the legal rules involved than with the subjective experience of witnesses. One could say, following Oleson (1994), that lawyers 'introspect' the legal rules into recalled testimony in the same way that literacy induces speakers of a language to model their own speaking on the grammatical rules which structure the written language. Clearly such questioning also reflects class differences when these result in different conceptions of what constitutes a good story. (Bennett & Feldman 1981). In the process witnesses are encouraged to remember their experience in terms of paradigmatic stories meshing with the legal rules and to forget those aspects of their practical experience which cannot be easily accommodated within this framework. Examining lawyers actively produce complete paradigmatic stories by assuming that they already exist and therefore by denying their creative role in this productive process.<sup>47</sup>

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<sup>45</sup> He argues that the kinship charts and statistical tables produced by anthropologists reflect *their* detached position as leisurely observers more than the practical experience of their informants.

<sup>46</sup> There is a striking parallel here between lawyers and anthropologists and between the questioning of informants and that of witnesses. Bourdieu (1997) argues that anthropologists actually produce rules out of experience whenever they ask informants what they do in particular circumstances and then generalise this experience by writing: 'members of X culture do so and so in this situation'.

<sup>47</sup> Lawyers' attitude to witnesses reflects their training. Reference is made to the discussion in chapter four of the way law-students write essays and are questioned during oral examinations.

Such questioning provokes the resistance of the questioned, who try to assert their subjective view of events, seeking the words with which to fulfil their promise to tell the whole truth. Simultaneously, however, the creation of interlocking paradigmatic stories also affirms the coherence of the experience of witnesses and socially validates it by creating continuity with the narratives of other witnesses and with the legal framework.

This continuity is precisely what the cross-examining lawyer seeks to attack. He does so by resorting to 'subjunctivising' language to fragment the unity of these paradigmatic narratives; suggesting they are internally contradictory and that different stories could be told. This exerts a symbolic violence on witnesses which runs in the opposite direction to that exercised by the examining lawyer. This is because of the close relationship between the stories through which people remember their past and their sense of self-identity (Freeman 1995). This relationship illuminates the internal dynamics of cross-examination, where the lawyer's aim in debunking a particular piece of testimony is to undermine the entire narrative framework with which it is inextricably tied up (Bennett & Feldman 1981) in order to attack the self of the witness. Witnesses are made to feel their whole social personality is at stake and react to this type of questioning by seeking to tell a coherent story which reflects the coherence of their memories and ultimately that of their lives.

Court questioning therefore reflects the assumption that the best way to invoke legal norms in one's favour is through the production of a coherent paradigmatic story, which withstands the attempts of opposing lawyers to destroy and fragment it<sup>48</sup> by evoking alternative subjunctive narratives. On this basis, it is possible to cast a fresh look at Jackson's (1991, 1994) analysis of witnessing, summarised in the second chapter. This takes off from a

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<sup>48</sup> For an anthropological critique of similar tactics in a US court, see Feldman's (1994) discussion of the Rodney King trial in Los Angeles. In this trial the prosecution relied on video footage of the police beating King to argue that they had used undue violence on him. The defence inserted a 'voice-over' explaining that King had been disobedient and was trying to retaliate and freeze-framing the video at various points so as to illustrate this. Thus the coherent narrative provided by the prosecution's video was literally fragmented, through freeze-framing it.

critique of the views of Bennett and Feldman (1981), who claimed the significance of such 'court-room drama' as the performative ability of lawyers is given by its role in the over-arching story of the case, constructed during the delivery of testimony. Instead Jackson argues:

"We have in the trial not simply a single story, but a set of stories. The act of testifying of each individual witness is a story in itself, but other polemics are also going on concurrently, albeit manifested in different (and less immediately perceptible) ways. There is the story of the jurors, to perform the task of adjudication in a manner conformable to narrative images of their 'official role'. There is the combat of the parties to the dispute, manifest very often by their location in spatially opposed places in the courtroom. There is also a variety of forms of professional combat, often using procedural tactics, between the advocates and between the judge and the advocates....We have then a plurality of narrative discourses at work in the trial" (Jackson 1991: 85).

The case of the 'Rented Garage' shows that there were indeed multiple stories at work in the case. Apart from the stories identified by Jackson, one could also add the story produced by the examining lawyer on behalf of his witness, the story the witness himself tried to tell and the stories evoked by the cross-examining lawyer. Yet these stories did not function as separate discourses which exist side by side in detached self-contained compartments. On the contrary court-room story-telling was an inherently dialogical activity (Bakhtin 1994), where the aim of each participant telling a story was to have an impact on the stories told by the others. Thus the aim of the plaintiff's lawyer in evoking alternative narrative scenarios was to destroy the unity of the inter-locking paradigmatic stories produced by the defendant's lawyer. Similarly the judge was clearly uncomfortable when John Zammit's answers suggested that he had a different story to tell from the paradigmatic one which had been produced on his behalf. He kept trying to iron out these discrepancies. The same point could be made in relation to the way lawyers and witnesses 'performed' in court. Their gestures, oratory and inter-personal relationships both contributed to and were generated by the stories they were telling.<sup>49</sup>

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<sup>49</sup> My efforts, as a participant observer, to understand the dynamics of litigation generally foundered if I did not know these stories. On many occasions I observed opposed lawyers litigating several

Jackson's insistence on the plurality of the stories at work in litigation is oddly similar to the stance of a cross-examining lawyer, who evokes alternative narrative scenarios in order to prevent the paradigmatic narratives produced by the other side from coalescing into a unitary whole. It misses an important point about court story-telling; which is how different stories are pitted against one another so that a paradigmatic story which is successfully contradicted by a cross-examining lawyer cannot serve as a basis from which to invoke legal protection. The judicial process operates to produce a *single* official narrative of what 'the facts' are and it is on this basis that the judgement of the case is made. Alternative narrative accounts cannot be officially recognised and are not allowed to figure in the final statement of the facts made by the judge. The reasons for this will be explained in the next chapter, by exploring the outcome of one case where a coherent story survived this process and was not contradicted by the cross-examining lawyer.

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successive cases before the same judge. As one case ended and the other began there was often a dramatic change in the atmosphere of the court and the relationships between the lawyers. The effect was similar to watching a series of different films after each other. These shifts derived from the differences between the stories told in each case, which determined whether lawyers would shout angrily at one another or smile tolerantly.

## Chapter 8: The Judicial Consumption of Stories

### 1. Introduction

Having examined the ways in which stories are produced and contested during litigation, this chapter will now explore their 'consumption' by judges when they determine the legal relevance and credibility of the 'facts' on which their judgements are based. My field research will be drawn upon to address various issues which are often uncritically lumped together under the general label of adjudication. Particular attention will be paid to how judges describe the facts in issue so as to legitimate their judgements, as also to the manner in which they interpret the legal rules involved.

Focusing on two cases will demonstrate how Maltese judges complete the process of producing a single official narrative of the facts in issue which begins when testimony is orally contested. This is achieved partly through the invocation and attempted recovery of pre-existing narrative linkages between the experiences of the opposed parties, which the latter deny and play down when producing their divergent stories. It is also done by debunking stories which contradict the accounts of the facts contained in final judgements. In this way, judges attempt to create a sense that justice is being done while affirming the validity of the pre-existing legal framework. Yet when coherent stories survive these processes, they can normatively condense critical cultural beliefs so as to challenge existing interpretations of legal rules, spurring judges to re-interpret them. This explains why judges try to reduce the conflicting stories told in the case to one official version. Thus this analysis will expose the differing practical involvement of lawyers and judges with litigants' stories; providing the tools for the analysis of ongoing tensions within the Maltese legal system which will be conducted in the next chapter.

## 2. The Case of the 'Pain in the Neck'

I had a close practical involvement with this case, since it was one for which I had been appointed as a legal referee.<sup>1</sup> My job was that of gathering all the relevant evidence and on this basis compiling a report giving my opinion on the factual and legal issues involved and how they should be decided. Such a report is then presented to the judge who commissioned it and, if he agrees with its conclusions, it will form the basis for his judgement. Court sittings in these cases are held before the referee, who himself collects the evidence and transcribes the testimony given. Since this particular case related to a personal injury, the court had also appointed a medical doctor to act as a court expert and draft a report of the plaintiff's medical condition. In this context it is clear that my relationship to the evidence was a quasi-judicial one. A reflexive analysis of the way I assessed this evidence may therefore throw light on more general trends in the judicial consumption of stories.

The key legal issues in this case were quite clear-cut. The two parties had been involved in a traffic collision and the plaintiff was alleging that the defendant was responsible for the accident since she had driven negligently and without observing traffic regulations. If this claim was correct, then according to Maltese law, the defendant would be liable to recompense the plaintiff for any permanent disability he suffered as a result of the collision. The plaintiff was claiming that the crash had provoked a permanent whiplash injury to his neck and he should therefore be adequately compensated for the permanent loss of 15% of normal bodily functioning that he had suffered. The defendant, for her part, rejected all the plaintiff's claims, saying that she had not driven negligently and that the plaintiff had not suffered any permanent disability.

If the legal issues were clear-cut, the same can certainly not be said for the factual aspect of this case, which was characterised by the almost complete

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<sup>1</sup> See chapter three for a description of how I was appointed a legal referee.

divergence between the stories told by the opposing parties. This is revealed by the written affidavits they filed. Thus the plaintiff's affidavit starts by outlining the spatial positions of the vehicles involved. He stated that:

"At the time of the accident, my car was in a stationary position behind another car, which had stopped so as to let some people cross a zebra-crossing. There was no other car behind me when I stopped. After I had been stationary for about a minute, I glanced at the mirror and saw the defendant's car round a curve of the road behind me. She was heading in my direction and I could see from the mirror that she was pointing at some boats in a nearby bay as she was driving and looking towards this bay rather than at the road in front of her. Then I saw the defendant turn towards her left while the car was still moving forward and look backwards towards her daughter, who was in the back-seat of the car. Suddenly I felt that my car had been jolted. As a result, my body moved forward towards the steering wheel, while my head moved backwards. My head did not find the headrest and I felt my neck being tugged. Due to the impetus from the bump, my car crashed into the stationary one in front of me. With this second crash, my neck was jolted towards the front of the car, I felt it being stretched and I lost consciousness for a while."

The affidavit continues by describing the aftermath of the incident. The plaintiff said that when he regained consciousness, he got out of the car and approached the defendant. The latter was depicted as slightly worried that some damage might have been done to her car and quite unconcerned about any possible damage to the plaintiff's. He recounts how he had to persuade her to remain at the site of the incident until the police came<sup>2</sup> and how his parents then turned up and took him to hospital. Finally his affidavit terminates in a long list of his repeated visits to the hospital and various clinics, the medication he was subject to at different stages, the opinions of various doctors he consulted on the degree of his permanent disability, the negative consequences on his ability to work and graphic descriptions of the neck pain he suffered and continues to suffer as a result of the accident.

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<sup>2</sup> According to Maltese law, the police used to be called in to prepare a road accident report whenever there was a car collision. This has recently been abolished.

The contrast with the defendant's affidavit is apparent from the start. Like the plaintiff's, it starts with a description of the spatial co-ordinates concerned:

"We were in a traffic jam, one car after another. I completely deny what the plaintiff said: that I was pointing with my finger in the direction of the boats in the bay and that I was looking at the boats. My attention was on the road and the stop start conditions. My velocity was practically nil and I was driving on the first gear. The incident occurred when the plaintiff stopped abruptly because there were some people crossing on the zebra-crossing. My car bumped lightly into his and the impact was minimal. In fact, it was so minimal that we did not even notice it. I deny that the plaintiff lost consciousness, because immediately after the incident, he came out of his car and I, since we had not realised that we had touched him, asked him: 'what happened?' He replied: 'don't you know that you bumped into me?' Then I came out of my car and realised that the two cars were touching one another. I saw no damage."

The defendant's affidavit terminates by pointing out that she saw nothing unusual or abnormal in the plaintiff's behaviour after the incident and that he did not seem to be in any pain.

The stories of the two parties were therefore opposed term by term, to the extent that a traffic jam in the defendant's version became an empty road in the plaintiff's! When producing their evidence before me, both sides sought to strengthen their respective versions, in the way described in the previous chapter. The plaintiff brought two witnesses. These were the woman who in his version of events had been driving the stationary car in front of him and the police officer who had drafted the relevant road accident report.<sup>3</sup> The driver of the foremost car testified that as a result of the defendant's collision with the plaintiff, the plaintiff's car had crashed into hers and moved it forward from its immobile position. The plaintiff also produced various medical certificates issued by different doctors who had examined him, all claiming that he had suffered a permanent disability in the region of 15% of normal. By contrast, the defendant produced one witness, who was a representative of

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<sup>3</sup> An official description of the nature and causes of a traffic accident, generally accompanied by a plan reconstructing the events in question.

her insurance company.<sup>4</sup> The latter testified that on being informed of the claim his company had contacted the plaintiff and requested that he visit the company doctor to establish the extent of his injuries. The company doctor had indicated that the plaintiff might be maximising his problem, since he saw him emerge from his car without any difficulty before he entered his office. However, he had also opined that there was probably a permanent disability of not more than 5% of normal. On the basis of this opinion, the insurance company had offered the equivalent of 4000 pounds sterling compensation to the plaintiff in settlement. The latter had refused this offer, resorting to legal action instead.

Despite these discrepancies, which even extended to the supposedly objective medical issue of the extent of the plaintiff's injury, the cross-examinations carried out by the opposing lawyers served to bridge some of the gaps between the parties' respective stories. When the plaintiff's lawyer cross-examined the defendant, she replied that she did not know where the traffic jam she mentioned had started, nor whether the impact of the collision moved the plaintiff's car forward. She claimed not to remember anything which she had not mentioned in her affidavit as the incident was such a minor one that she had not given it any importance. The cross examination showed that the plaintiff's story that the jolt had been powerful enough to push his car into the one in front of him was not really contradicted by the defendant and also created doubt whether, as she said, they had really been in a traffic jam.

When the driver of the foremost car was cross-examined by the defendant's lawyer, she admitted that the bump she felt when the plaintiff's car crashed into hers had not been a big one and that she did not know whether her car had really been pushed forward as a consequence. This strengthened the defendant's story that the collision had been a minor one. Finally when the plaintiff was cross-examined by the defendant's lawyer, he reduced what he had previously described as a time period of a minute in which his car was

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<sup>4</sup> All Maltese car drivers are legally required to take out a third party insurance policy covering any

standing in a stationary position until the defendant's car bumped into his. He now said that he had only been waiting for around forty seconds. This brought his story closer to the defendant's, since it implied that there had not been such a great distance between their cars. He also admitted that he occasionally danced when he went out with his friends, which implied that his injury was not quite as grave as he had previously made out.

Although these cross-examinations had brought about a degree of narrative convergence between the two stories told by the parties, my initial reaction on approaching the task of writing my report was a mild feeling of panic. It seemed that either of these stories could be true and also that they were mutually exclusive. My training as an anthropologist strongly predisposed me to take a relativistic stance on the matter and accept that both parties to the case lived in their own subjective universes of meaning. The situation seemed even more muddled after the court appointed medical expert issued his report, as he said that the plaintiff had suffered no permanent disability at all as a result of the incident. This opinion went even further than that of the doctor appointed by the defendant's insurance company, since the latter had assessed the permanent disability at 5%. If even the medical doctors could not agree on a medical fact, then how could I legitimately take a decision vindicating the story of one of these parties and denouncing that of the other?

In an attempt to escape from this quandary, I obtained and read copies of other reports and judgements. I also delved into the legal rules, trying to discover principles to orient the assessment of the facts. The reports and judgements served to introduce me to the characteristic attitudes of adjudicators when faced with conflicting stories. As a rule they try to create a single coherent narrative by ironing out discrepancies between the stories or by debunking either or both of the narratives produced by the parties. Once such a narrative has been created, it then becomes much easier to apply the rules to it so as to opine on the legal position. If contradictory stories are

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damage they might cause to third party's by their driving.

allowed to co-exist then clearly the legitimacy of the judgement would be called into question.

This point can be illustrated by reference to one of the reports I consulted. This concerned a law-suit for personal separation, in which the husband was claiming that his wife had committed adultery, while his wife had filed a counter-claim denying this and alleging that her husband used to beat her up. One should note that such emotive issues are often raised in Maltese marriage breakdown cases. This is partly a result of the influence of Catholic canon law on local legislation, which stresses the ongoing relationship between separated spouses and tries to financially penalise immoral behaviour.<sup>5</sup> These legal principles are the antithesis of the 'no-fault divorce' found in many Euro-American states. They create financial incentives for a spouse to prove the immoral behaviour of his or her partner, while also requiring high levels of proof. The consequent increase in the volume of court story-telling is aggravated by local cultural traits deriving from the highly personalised texture of Maltese social life, in which individuals are linked together in multiple ways through long-term obligations. In this context, conflict often takes the shape of an ongoing competitive feud known as a state of '*pika*', in which one must show an awareness of and ability to react to the smallest actions of opponents (Boissevain 1965).

In the case to which this report referred, these factors had operated so as to multiply the number of witnesses, the length of the stories that were told and the applications the respective spouses made to the judge requesting changes in the provisional orders he had made. In fact this case took eight and a half years to be decided and the record of the case was around two hundred pages long! The husband had powerful incentives to prove that his wife had committed adultery, because he could not then be obliged to pay for her maintenance. He therefore recounted a long and complicated story about

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<sup>5</sup> There is, for instance, a statutory linkage between a spouse's 'guilt' or responsibility for the breakdown and a diminution in the share of the matrimonial property which that spouse would otherwise be awarded when the court divides joint assets.

his wife's seduction and subsequent un-wifely behaviour, which he claimed included attempts to poison him! He produced five witnesses to support his version. These included his father and sister who had both on separate occasions seen the wife in the company of her 'paramour' and attempted unsuccessfully to ask bystanders to testify about this in court.<sup>6</sup> For her part, the wife narrated a moving story of the brutality of her husband, whose beatings had even induced her to go to hospital for stitches. She brought her son to testify about the brutality he had witnessed and also produced a friend who had seen her husband in the presence of *his* new lover.

In his report, the legal referee noted that a special characteristic of this case was that there had been no cross-examination of the testimony given, which he described as:

"A series of monologues. It seems that every party had his or her say; one party stating its point of view without replying to the other."

He next noted that with the exception of one neighbour,<sup>7</sup> none of the witnesses summoned was detached from the case, since they were all relatives or close friends of the parties. For this reason one had to be careful in evaluating their testimony.

These two consecutive observations illustrate the difficulties faced by the legal referee as a result of the opposed stories of the parties and his attempts to resolve them by adopting a certain analytical distance from the stories which the parties were trying to get him to consume. This enabled him to create his own narrative version of the facts, which effectively incorporated elements of the stories told by both the spouses, while refusing to endorse those elements which conflicted with his version. Thus the report endorsed the wife's claim that her husband used to beat her up, yet it did not fully

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<sup>6</sup> The father recounted how he had followed the defendant together with his son as she went for a secret meeting with her lover. They had then asked a by-stander to testify that he had seen the couple. however the latter refused to get involved in the case.

<sup>7</sup> She claimed to have seen the wife's lover enter her house in the absence of her husband.

endorse the husband's story about her infidelity. The legal referee suggested that the husband had tacitly encouraged his wife to be unfaithful, since he had not testified that he had ever confronted her alleged lover and told him to stay away from his wife. He also argued that the wife had committed adultery only after she had been forced to leave her home due to his beatings. Thus, the legal referee wove his own version of events by maintaining his distance from and creatively re-interpreting the testimony given by the two parties. In drafting his report, he operated on the assumption that there was only one story to be told about this case.

After reading these reports and judgements, I decided to adopt a similar attitude when writing my report about the case of the 'pain in the neck'. At the time the creation of a unitary narrative appeared as a necessary legitimisation 'after the fact' of a decision which would have to be made on other grounds. So as to reach this decision, I carried out some research on the applicable legal rules. These strongly implied that the defendant would have to be considered responsible for the incident even if her car was locked in a traffic jam just behind the plaintiff's and he had stopped abruptly.<sup>8</sup> These rules also made it apparent that if the plaintiff's disability was a direct consequence of the defendant's negligence, then she or her insurance company would have to compensate him in full for any resulting permanent disability. This was, after all, what her insurance company had already tried to do, when it offered the plaintiff a sum of money in compensation. In this context the defendant's responsibility to compensate the damage seemed clear. This left only one legal issue to be decided, which was that of whose medical opinion was to determine the existence of any permanent disability. However other lawyers informed me that the opinion of the court appointed medical expert is usually followed in such cases.

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<sup>8</sup> A local newspaper had just carried a case report in which the court had invoked a section of the Maltese Highway Code prohibiting a vehicle from driving too close to the one in front of it, without leaving enough space to pull up in case of an emergency. This meant that the defendant was still responsible for the collision even if the two cars were in a traffic jam, as she should not have driven so closely behind the plaintiff's car.

On coming to write my report, I consequently knew that this had to lead to the two principal conclusions that the defendant was responsible for the accident, but that since no permanent disability had been caused she did not have to compensate the plaintiff for this. It also seemed that the creation of a unitary narrative out of the conflicting stories of the two parties must serve to legitimate my recommendations. In order to achieve these aims, I set about writing my report in the following ways:

1) The opening paragraph of such reports must contain a brief description of the traffic accident which gave rise to the case. At this stage, I avoided any reference to the stories of the two parties and simply recounted the date and time of the accident and that this had taken the form of a collision when the defendant's car had bumped into the back of the plaintiff's stationary car. My aim was to extract an uncontested kernel of 'facts' with which to legitimately open my narrative.

2) It is standard practice for such reports to include a section reproducing the relevant testimony given, followed by one which contains the legal referee's conclusions on the responsibility of the defendant and a final section with his assessment and liquidation of damages. When reproducing the testimony, I was careful to quote all the answers to cross-examinations, which had served to create a certain narrative convergence.

3) I embedded my opinion on the defendant's legal responsibility within a wider narrative framework stressing her moral responsibility. This meant pointing out that the collision had not been as insignificant as she had tried to say. It had been powerful enough to move the plaintiff's car from a stationary position until it bumped into the one in front of it and the defendant had not denied this. I then argued that the lacunas in the defendant's memory which had emerged under cross examination<sup>9</sup> actually confirmed the plaintiff's claim that she had not been paying enough attention to her driving at the time.

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<sup>9</sup> Such as her claim not to recall whether the collision had pushed the plaintiff's car forward.

These rhetorical techniques were intended to ensure a favourable reception for my conclusion that even if the defendant's story was correct, this did not legally eliminate her responsibility for any permanent disability caused by the accident. They brought the defendant's story closer to that of the plaintiff, by making the collision more significant and her driving less attentive.

4) An assessment of the plaintiff's story followed. This argued that if the defendant had tried to minimise the accident, the plaintiff had exaggerated by trying to magnify it. In order to create this argument, I drew upon my experiential knowledge as a Maltese of the area in which the accident occurred. This was quite detailed since as a kid my parents used to take me to Sunday Mass in a church facing the stretch of road in question.<sup>10</sup> Consequently I knew that if the plaintiff had parked in the position he described, then there were less than hundred metres of road space which he could have viewed through his rear-view mirror. After this the road curves sharply to the right and is no longer visible. Yet the plaintiff had given a detailed description of the actions of the defendant before she crashed into him. He claimed to have seen her point out of her car window and subsequently turn to the back of the car to look at her daughter. I therefore argued that the plaintiff's claim to have observed the defendant perform these consecutive actions in the short stretch of road in question was only credible if one adopted one of these two hypothesis:

- a) Either the defendant was driving relatively slowly and therefore the collision (and the jolt suffered by the defendant) was not a large one.
- b) Or the plaintiff was lying when he claimed that for around forty seconds after he stopped he saw no car behind him and the defendant was correct when she claimed that the two cars had been locked in a traffic jam.

This created a reasonable doubt as to whether the defendant was moving at a fast speed and consequently whether the plaintiff had suffered such a

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<sup>10</sup> Such 'local knowledge' is a common feature of Maltese litigation given the small size of the archipelago.

severe jolt as appeared from his affidavit. Although this part of the report concluded that the defendant was in any case responsible for the accident, my treatment of his evidence had clearly brought the plaintiff's story closer to that of the defendant. In this way I hoped to show how my decision about the defendant's responsibility was based on a thorough study of the evidence and also to create some doubt regarding the extent of the plaintiff's disability. This would prepare the reader for the final section of my report in which reference would be made to the opinion of the court appointed medical expert that he had suffered *no* permanent disability as a result of the accident.

5) In the final section my narrative skills were used to try to reconcile the differing medical opinions about the extent of the plaintiff's disability, so as to justify a reliance on that given by the court appointed medical expert. The report pointed out that these varying opinions had been given over a long period of time and that the disability the plaintiff suffered might not have been permanent but temporary in nature. It drew attention to the fact that he had followed a long course of therapy between the giving of one opinion, assessing his disability at 15%, and the giving of another which assessed it at 5%. Conceivably his condition might have improved as a result of treatment. I therefore argued that the opinion of the court appointed medical expert should prevail, not only because he was an independent person who enjoyed the court's confidence but also since he was the last doctor who had examined the plaintiff. Thus he was in the best position to establish whether any permanent disability had been caused.

Although I had felt uncomfortable about creating this unitary official narrative, my own writing seemed increasingly convincing as I drafted and re-read my report. This may be a case of self-mystification. However my feeling was more similar to the sensation of successfully completing a jigsaw puzzle. After all, my story incorporated details from the stories of both parties and was therefore bound to seem more complete than either. On a deeper level, focusing on those aspects of testimony provoked by cross-examination felt like recovering a pre-existing untold narrative which had been obscured by

the testimony of the parties. This point can be exemplified by looking at one statement made by the defendant under cross-examination. She said that she did not remember whether the impact of the collision had been powerful enough to move the plaintiff's car forward from a stationary position until it collided with the car in front of it. This fact had been completely excluded from the defendant's affidavit. Yet under cross-examination she admitted that this could well have happened.

An apt description of my activity is supplied by Ricoeur. So as to explain the notion of an 'untold story', he explicitly gives the example of a judge who:

"undertakes to understand a course of actions, a character, by unravelling the tangle of plots the subject is caught up in. The accent here is on 'being entangled', a verb whose passive voice emphasises that the story happens to someone before anyone tells it. The entanglement seems more like the 'prehistory' of the told story, whose beginning has to be chosen by the narrator. This 'prehistory' of the story is what binds it to a larger whole and gives it a 'background'. This background is made up of the 'living imbrication' of every told story with every other such story. Told stories therefore have to 'emerge' from this background. With this emergence also emerges the implied subject" (1984: 75).

This view of individuals as entangled in untold shared stories reveals a new dimension of the defendant's court-room narration in this case. While making her affidavit, it seems clear that she was mainly concerned to *deny* the narrative threads through which her story was entangled with that of the plaintiff. This was why she excluded any reference to the way the collision had propelled his car forward. The story she told her lawyer had emerged from this shared narrative backdrop as part of the process by which she 'scripted her self' as an autonomous moral entity before him. Like the other cases of self-scripting discussed in chapter five,<sup>11</sup> this involved focusing on those aspects of events which put her in a more sympathetic light and neglecting those which did not

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<sup>11</sup> Reference is particularly made to the case of the 'Impotent Husband'.

This suggests that by attempting to create a unitary shared narrative out of the conflicting stories of the parties, I was trying to restore a common pre-existing narrative framework which had been selectively denied by both when they told their respective stories to their lawyers. My attempt was unlikely to result in a perfect reproduction of the pre-existing story. However, by incorporating statements elicited through cross-examination, my story may have been closer to the untold story the parties had experienced than either of their initial narratives was. If correct, this might tell us something important about adjudication by explaining how a sense of the legitimacy of a judgement is created. Once one abandons the notion that the stories the parties tell through their testimony truly represent the whole of their experience, then it is quite probable that cross-examination and adjudication serve to recover narrative elements which had previously been obscured or denied.

The case of the 'Pain in the Neck' also indicates the power of the stories told by the parties. Again if one looks at the defendant's story, it is clear that I felt the need to author a narrative questioning her version that the collision was an insignificant one and that she had been paying careful attention to her driving. This is because although these claims would not have affected her legal responsibility, they certainly created moral sympathy for her within a Maltese cultural context. Malta is a small island which imports over 10,000 new cars a year. Traffic jams are a common, and for many people daily, experience. In this situation, minor collisions are also frequent. Whatever the law may say, people often attribute the blame to the driver of the front vehicle who stopped too suddenly. Thus I felt relieved to have managed to cast some doubt on the defendant's story as it would otherwise have seemed unjust to recommend that she be declared responsible for the accident. The next case to be analysed will provide more food for thought on the cultural basis of this morally persuasive power of narratives.

### 3. The Case of the 'Faithful Prostitute'

The next case to be described is in many respects an unusual one. One reason for its exceptional character is the shocking and emotionally compelling character of the stories told in its regard, while testimony was being heard in court. In fact, my attention was drawn to this case by one of my lawyer informants who thought it sounded 'anthropological'. Given prevalent perceptions of anthropology among the lawyers to whom I spoke, this meant that it was 'colourful' or 'interesting' and therefore symbolically distanced from ordinary 'boring' litigation. However, the following analysis aims to demonstrate that this case can tell us something important which applies to more run of the mill litigation.

So as to understand this case it is necessary to provide more of the social and legal context. As observed in chapter three, Maltese law does not allow divorce.<sup>12</sup> This situation, which may be about to change,<sup>13</sup> reflects the important role traditionally played by the Catholic Church within Maltese society.<sup>14</sup> Consequently there are two principal avenues by which Maltese spouses whose marriage has broken down can obtain legal recognition of this and some remedy for their situation. The first option is the legal institution of personal separation. This allows spouses to separate from one another by means of a contractual agreement ratified by the court, or through opening a law-suit. Separated spouses may be obliged to pay maintenance to one another and the court will divide the matrimonial property and determine issues of access and custody of children. While separation is very similar to divorce, the glaring difference is that separated spouses are still considered

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<sup>12</sup> Although it does recognise divorces granted by foreign courts, where one of the parties to the marriage is either a citizen of or domiciled in a foreign country.

<sup>13</sup> The Prime Minister has recently appointed a commission to advise on the best way to introduce divorce into the Maltese legal system.

<sup>14</sup> On this see chapter four of this thesis.

as being married, in line with the Catholic doctrine of the indissolubility of marriage. Consequently they cannot re-marry.

By contrast, if the other avenue is chosen and the marriage is judicially annulled, the spouses are allowed to re-marry. This is because annulment is based on the canonical notion that due to some defect a real marriage never existed between the spouses and the judge's role is simply that of acknowledging this fact. For this reason, annulment must always be judicially ascertained through litigation and cannot be established through a contractual agreement. Following ecclesiastical canon law, Maltese law allows a limited number of grounds for annulment and this will be granted only if the existence of one of these grounds is proved in court. Many of these grounds refer to defects in the consent originally given by either of the spouses to the marriage. For instance, if it is proven that one of the spouses consented to the marriage without properly understanding the nature of married life or its essential rights and duties (as defined by Catholic canon law), the consent of that spouse would be vitiated and her marriage annulled.

Couples whose marriage has broken down tend to prefer to file for an annulment instead of personal separation, as the effects of an annulment are practically identical to those of a divorce. However it is much more difficult to prove than a separation, which is always granted after the lapse of a certain period of time. Judges are also less likely to require either of the spouses whose marriage has been annulled to pay maintenance to the other. They may, however, order that maintenance be paid for a period of five years in cases where the spouse claiming maintenance is in good faith and the other spouse is 'responsible for the nullity of the marriage'.

In the case of the 'faithful prostitute', the husband filed an action for annulment of his marriage before the civil court. In his '*citazzjoni*', he argued that neither he nor his wife had properly consented to marry one another, claiming that there had been simulation of consent and 'lack of due discretion of judgement on the nature of the matrimonial life or its essential rights and

duties'. In her written reply, his wife denied that there had been any defect in the consent *she* gave to the marriage and said that if the marriage was null then her husband was responsible for the nullity and should be ordered by the court to pay maintenance to her since she was in good faith.

The legal claims of the two parties motivated the narrative strategies to which their lawyers resorted when orchestrating the production of their testimony in court. The husband was the first to testify. His story was brutally clear. He claimed that he had married his wife purely in order to encourage her to work as a prostitute, so that she could bring him money. He explained that he was a well known pimp and showed his police record to prove it; observing that while he used to have other women working for him, the one whom he married brought him the most income. Therefore his decision to marry was made solely to ensure that he did not lose the income she brought him and for no other reason. During eleven years of marriage his wife had brought him a lot of money. However she had now taken to drinking and was becoming violent and refusing to work for him any more. He had now found the sort of woman he had always wanted and therefore wanted to annul his marriage in order to settle down with her. The husband's lawyer lost no effort in portraying him and his marriage in a degrading light. He even brought his client's mother to testify that he had quarrelled with his parents and left home at an early age and also asked him to explain how he and his wife used to participate in orgies with other couples.

The strategy of the husband's lawyer consequently involved a graphic description of the husband's criminal character, his brutally manipulative relationship to the woman he married and the sordid details of the 'marriage'. His aim was clearly to show that neither he nor his wife had really consented to marry and that they did not at the time have a mature understanding of the essential rights and duties of married life. This was therefore a paradigmatic story with a difference and shows how the legal rules can structure narratives of evil-doing as well as those which evoke a positive moral response.

When his turn came, the wife's lawyer brought the wife to tell the story of her life, emphasising her courtship and marriage. While she did not contradict any of the 'facts' stated by her husband, the wife threw a completely new light on them. Her story took three court sittings to recount and it is impossible to include all the details here. However its bare outline is that she was born into a large family of seven children, which had fallen on hard times following the early death of her father and mother. Her eldest sister used to look after her, but was very strict and would prevent her from staying out late at night. She met her future husband in a disco when she was eighteen years old and soon fell in love with him. He seduced her and encouraged her to come and live with him in a flat he had rented, away from the vigilance of her family. She followed him willingly, because she loved him and was happy to live with him. Once away from her family, her lover introduced her to another couple who were friends of his and were called Horace and Anna. Anna was actually a prostitute and Horace was her pimp. Her future husband started to drop hints that he needed money so as to encourage her to go and work as a prostitute with Anna. She initially resisted this, but then gave in when her lover explained that she would only go when necessary. Soon Anna had introduced her to the trade and though she did not like it, she was happy so long as her lover was content.

After she became pregnant with his child, her lover decided to marry her.<sup>15</sup> Although she loved him and was eager to marry, she did not pressure him to do so for fear of annoying him. After her marriage was celebrated and her baby born, she continued to work as a prostitute as her husband urged her. She saw nothing wrong in this as long as her husband was happy, seeing it as her way to contribute to the family finances. It seems that they lived in this manner for eleven years and that the money she brought in even gave their marriage a veneer of respectability. In fact, she had another daughter and they bought a villa to live in. She sent her children to expensive private schools and her husband bought a bar and started to work as a barman.

During this period she still worked as a prostitute whenever her husband told her that this was necessary to help the family finances. She started to quarrel with her husband after the latter began to stay away from home late at night and she learned he was dating another woman.

The wife's story was clearly a heart-breaking one which resonated with many key cultural themes in Malta. To begin with, there is the initial narrative of a naive young woman from a strict family corrupted by an older and more experienced man, who contrives to place her at his mercy. This is followed by the dominant narrative, which concerns the unconditional love of a woman ready to be exploited by the man she loves as long as he needs her. This story makes a direct appeal to the Christian ideals of love as self-sacrifice underlying the canonical rules of marriage which her husband tried to invoke against her. It transforms the wife into a sort of Mary Magdalen; one to whom 'much will be forgiven because she loved much' (Luke 7, 36-50). Piquancy is added to this tale by the woman's attempt to fulfil traditional Maltese conceptions of the gender roles of wife and mother: working hard to buy and furnish a large house and giving her children the best education that money can buy. Finally, there is the dramatic denouement when her husband withdraws the only thing she asked from him: his company; which leads to the unravelling of the whole relationship. These themes have a deep resonance in Maltese culture, where it is an accepted justification for apparently unethical behaviour to claim that one is doing it 'for the family' and where the rate of marriage breakdown is below that of most European countries (Tabone 1995).

Another reason why this testimony is so compelling is the way in which it was given. Consider the following extract, where the wife is replying to the important question as to whether she still intended to work as a prostitute when she married her husband:

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<sup>15</sup> Apparently, she had unprotected sexual intercourse only with her future husband. The child was therefore his.

"As far as I was concerned, I had no idea that things would change after marriage. So long as my husband was happy, I had in mind that we would continue with that sort of life –that is he would keep his bar and I would go there occasionally and when I could I would pick up a man to earn some money for the good of the family."

In this extract the wife does not try to disguise the way she consented to marry while planning to act as a prostitute. Yet this admission, which should be so damaging to her claim to have given a valid consent to marry, becomes a touching sign of her ingenuous devotion to her husband when placed within the narrative context of her willingness to do anything that would make her husband happy and promote the well-being of her family.

This story is also convincing because it is so coherent. There is no sign of any contradiction and it seems to fit into and supply the missing parts of the story produced by her husband. Naturally, I have re-told her story in a unified and coherent way. However this reflects the way the story is represented in the official record of the testimony produced by the court. Apart from a few questions designed to illustrate the degraded nature of her life-style, the husband's lawyer did not try to break up her story through cross-examination as happened in the case of the 'rented garage'. Yet he clearly had an incentive to prove that the wife did not give a valid consent to the marriage, as otherwise his client would be considered as the only spouse responsible for the nullity and condemned to pay maintenance to his ex-wife for a period of five years.

There were various reasons why the plaintiff's lawyer could not really destroy the coherence of the wife's story. This story was largely pre-supposed in the husband's own story of his exploitation of his wife. Actually the wife's story supported her husband's, showing why it was so easy for him to exploit her. The main way in which the wife's story differed from her husband's was in her description of her feelings towards him and this is something which would appear difficult for the cross-examining lawyer to question. Moreover, the case might seem to be quite a straightforward one. Fidelity to the other

spouse is one of the essential rights and duties of marriage which the spouses must consent to. How could a woman who intended to act as a prostitute when she married give a valid consent to marry? Yet, on the other hand, there was the wife's tragic story of unconditional love and abandonment. Still, it must have seemed that the only remedy the legal system could provide was that of terminating her marriage.

It is therefore instructive to look at how this case was decided. There were two consecutive assessments of the evidence. The first was produced by the legal referee.<sup>16</sup> In his report, the legal referee summarised the wife's story in his own words, underlining the husband's exploitative behaviour and contrasting it to her selfless devotion. He observed:

"There is no doubt that the defendant on her part had a sincere intention and was in good faith when she gave her consent to the marriage. It is very evident that she was blindly in love with the plaintiff, so much so that she was ready to do anything to make him happy and to avoid losing him."

The referee pointed to other features of the case, such as the speed with which the husband had managed to seduce his future wife and observed that, coming from a sheltered background, the young woman was naturally attracted to the fast life led by her lover. He commented on the fact that she had intended to act as a prostitute when she gave her consent to marry:

"Certainly, for the defendant to say in the most sincere way that she saw nothing wrong in her *physical infidelity* shows that she had a serious defect in discretion of judgement on the rights and obligations of married life. The defendant claims that this was only work -a way to earn money and no feelings were involved. She sincerely believes that she remained faithful to her husband and to a certain extent one can begin to understand this attitude. Her husband was the prime mover behind the prostitution of the defendant. She used to go with men to earn money for her husband. She used to give him all the money. He used to take care of their financial administration. When they needed money, he even used to drop hints. In the particular circumstances of this case, however, the writer does not feel that he should go so far as

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<sup>16</sup> According to the usual practice, this referee had to draw up a report giving his opinion as to what the judge's decision should be, on the basis of the evidence presented to him.

to say that the defendant was in some way guilty or responsible for the nullity of the marriage."

This extract indicates the dilemma faced by the legal referee. If he opted for a strict interpretation of the law, he could not avoid the conclusion that a woman who married while intending to act as a prostitute could not give a valid consent to marry because she did not intend to remain faithful to her husband. This is why he echoes the words used by the law, saying that she had a 'serious defect of due discretion of judgement'. She would therefore become co-responsible for the nullity of the marriage and lose any entitlement to be paid maintenance by her husband. However, in the context of the wife's story, her faithfulness to her husband seemed even *greater* than ordinary and was reflected in her readiness to do things she disliked and to break conventional taboos in order to please him. To reward such devotion by financially penalising her appears doubly unjust and cruel.

The referee resolved his dilemma in two ways. As the extract shows, he drew a distinction between physical and spiritual infidelity, implying that although the wife may have been guilty of the former, it is the latter which counts when assessing the validity of her consent to marry.<sup>17</sup> Simultaneously he kept recounting the story of the case in order to bring out the cynical behaviour of the husband and the constancy of his wife's devotion, as reflected in the coherence of her story. Appealing to these 'particular circumstances', he ultimately decided that the wife could not be held responsible for the nullity of the marriage and that her ex-husband should consequently be condemned to pay her maintenance over a five year period. In this way, he implicitly accepted that a prostitute could be faithful to her husband!

In his judgement, the judge agreed with the report of the legal referee and with its conclusions. Like the referee, he also re-told the story of the case, highlighting its morally repellent aspects as he saw them. Thus, he observed:

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<sup>17</sup> He also observed: "certainly this is an interesting field of investigation concerning the real significance of fidelity."

"The character of the plaintiff emerges in a truly disgusting way when, in the light of the thousands of pounds which she (his wife) earned for him and which allowed him to live like a rich man, he went so far as to explain, with great contempt that: 'for me the woman was better for nothing else apart from prostitution'. These were the words he used to refer to a woman who was less than twenty years old, who came from a serious family, had a job with the Wrangler (factory) in a post which is commonly considered as a good job and even had another boyfriend before him."

On the basis of his re-telling of the story, the judge agreed that the wife was not responsible for the nullity of the marriage.

This case is interesting because it illustrates in a particularly vivid way the potential of stories to evoke powerful feelings of moral approval or disapproval. They do so because they foreground culturally valued norms against which the actions of particular characters are assessed. In this case the story told by the wife was not a paradigmatic one in terms of the legal rules it sought to invoke.<sup>18</sup> On the contrary, a woman who intended to act as a prostitute when giving her consent to marry would seem on first glance to be precisely the opposite of the 'spouse who is in good faith' and 'was not responsible for the nullity of marriage'. The law only allows the award of maintenance in favour of a spouse who fits into one of these categories. Yet while the story told by the wife was a subjunctive story in regard to the legal rules, it was a paradigmatic one when viewed from the standpoint of the Maltese morality of inter-personal relations.

This 'culturally paradigmatic' status of the narrative seems to have been partly an outcome of its internal coherence with respect to the norm of unconditional love which it evoked. The 'faithful prostitute' never acts in contradiction to her basic orientation, which is that of loving her husband. Cross-examination is incapable of destroying her credibility. As a result she becomes something of a 'character', whose life actions clearly illustrate the

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<sup>18</sup> Her lawyer clearly did not have the narrative resources with which to script a paradigmatic story in this case. His client's prostitution was a public activity which could have been proven by her husband had she denied it.

norm by which she lives, in the same way as the archaic heroes described by MacIntyre (1984) show no awareness of conflict between their subjective self and their socially dictated role. This is why her story challenged the legal rules, with which it could not easily co-exist. Through its coherence, this narrative condensed culturally valued dispositions in a normative, law-like, manner, directly contradicting the legal rules themselves by exposing their potentially immoral consequences. It created the sort of conflict of norms which Malinowski (1989) described in Trobriand society.<sup>19</sup>

As a result of this tension, both the legal referee and the judge were led to re-interpret and develop the legal notion of fidelity in an attempt to accommodate the particular features of this story. This illustrates the culturally derived power of a coherent story which, if not fragmented by court-room questioning or re-phrased by the efforts of the examining lawyer, is capable of stimulating the re-interpretation and development of legal rules. This is confirmed by the way both the legal referee and the judge re-told morally compelling aspects of the story of the case in order to authorise their re-interpretation of the rules of marriage annulment. Clearly if this story had been rendered incoherent and contradictory through cross-examination, it could not have had these results.

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<sup>19</sup> As the father of functionalism in anthropology, Malinowski might have been expected to ignore situations of normative conflict, which do not easily co-exist with a view of societies as systematically coherent wholes. However his analysis of law in the Trobriands shows a keen awareness of such situations and their implications for social analysis. In particular, one should note his description of the tense relationships between what he saw as the fundamental Trobriand legal principles of Mother-right and Father-love, as reflected in the relationships between a father, his biological son and his matrilineal nephew. This description is contained in a chapter of "Crime and Custom in Savage Society," evocatively labelled: "Systems of Law in Conflict" (Malinowski 1989: 100-111).

#### 4. Narrative and Legal Interpretation.

The two cases here discussed illustrate different aspects of legal story-telling and adjudication. The case of the 'Pain in the Neck' exemplifies how the gap between litigants' stories –produced when they 'script their selves' before their respective lawyers– is reproduced when these stories are re-told in court. It was shown how these conflicting stories place a moral pressure on judges, who try to iron out contradictions to create one official narrative of the 'facts of the case'. The roots of this moral pressure were further explored in the case of the 'Faithful Prostitute'. Here a 'subjunctive' story which did not easily fit into existing legal categories, but which preserved its coherence and was not destroyed by court questioning, provoked a re-interpretation of the legal category of fidelity. Thus in the same way as clients' stories could subvert the professional detachment of lawyers and force them to operate within their perceptions of the case,<sup>20</sup> these stories could also lead judges to reinterpret the legal rules to accommodate them.

This explains why the Maltese courts try to construct a single official narrative of the facts in a case. The participants to litigation all operate on the assumption that court-room questioning must ultimately produce only one story, because stories are powerful and have the potential of moulding legal rules. If the subjunctive story of the 'faithful prostitute' can induce judges to re-think the meaning of legal rules, then clearly courts cannot afford to officially recognise Jackson's (1991) point that there is a: "plurality of narrative discourses at work in the trial" (*ibid.*: 85). Acknowledging this could make it impossible to determine which rules would apply to the case, since even the most subjunctive story may have potential juridical consequences.

Another implication of the above is to change our thinking about the process of reaching a judgement in a case. Often this is conceived as an initial process of fact-finding aimed at determining the 'facts-in-issue', followed by

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<sup>20</sup> See chapter five on this point.

legal argument aimed at establishing which rules, if any, apply to these facts (Jackson 1991). It may be more appropriate to see this process as one in which different narrative frameworks for understanding the evidence are pitted against one another.<sup>21</sup> The story which maintains its coherence at the end of this process would itself provoke investigation of the legal framework to discover which interpretation of which set of rules is best suited to cater for the particular demands the story makes on the legal system.

Finally it would seem possible to make some provisional conclusions about the kinds of cases in which judges resort to what has been called 'expansion' (Mather & Yngvesson 1981), and those where they engage in 'narrowing' (*ibid.*)<sup>22</sup> It appears that the emergence of coherent narratives which are subjunctive from the standpoint of the legal rules but evoke powerful moral feelings within a particular culture are a necessary condition which spurs judges on to the task of developing the interpretation of legal rules.

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<sup>21</sup> I am grateful to Professor Michael Carrithers for suggesting this point to me.

<sup>22</sup> 'Expansion' refers to the process of developing the interpretation of legal rules to cope with new factual situations. 'Narrowing' refers to the converse operation of reducing the complexities of a particular factual situation so as to fit them into the scope of operation of specific legal rules which are rigidly applied and conservatively interpreted.

## Chapter 9: The Problematisation of Evidence

### 1. Introduction.

The cases discussed in the previous chapter have exposed the divergent practical relationships of lawyers and judges to the stories told in litigation. Lawyers represent their clients on the basis of the stories told by the latter. Yet clients' self-scripting is usually achieved by denying aspects of the untold shared narrative which relates them to their opponents. By contrast litigation and adjudication are oriented towards the creation of a single official narrative from these discordant stories. Judges' attempts to recover a pre-existing shared narrative are fuelled by the desire to morally legitimate their decisions, which stories are capable of challenging. This means that while lawyers tend to downplay the links between their clients' stories and those of the other party, these links are precisely what judges stress and build upon. The wider structural implications of these contrasting dispositions will now be illustrated by showing how they motivate ongoing tensions within the Maltese judicial apparatus.

Attention will here focus on the controversy surrounding recent reforms to Maltese procedural law, which aimed at reducing delays in the trial of cases. In particular the opposed reactions of lawyers and judges to affidavits will be seen to reflect their respective, structurally determined, relationships to the stories told in the case. Thus the preferred form of consumption of litigants' narratives will be explained by reference to the story-telling relationships between clients, lawyers and judges. This discussion will in turn serve to launch the final chapter, which will further explore the role of the over-arching social context in shaping the attitudes of Maltese legal professionals to court room story-telling.

## 2. The Reforms and their Outcome.

As the fourth chapter showed, court delays are pervasive in Maltese litigation. In recent years much media attention has been dedicated to this issue. It is increasingly acknowledged as a serious problem which results in the denial of justice and alienates people from the courts.<sup>1</sup> Partly as a reaction to this growing public concern and also with the aim of increasing the efficiency of the courts, the Nationalist Administration in July 1995 enacted a law reforming the Maltese procedural code.<sup>2</sup> This law amended various procedural rules. Yet it was those amendments relating to the trial of law-suits which caused controversy. In particular attention has focused on the amendments to section 202 of the Code of Organisation and Civil Procedure, which define the new procedure to be followed by judges when compiling evidence in civil trials.

In terms of this new procedure, a pre-trial hearing was to be held before the first sitting in the case. The aim of this hearing in the words of the government minister –himself a lawyer– who introduced the amendments, was to allow the court to: “identify and record the points of law and fact in contention and the proof to be given by each witness” (Fenech: 1996b). The second major innovation was that after the pre-trial hearing, judges were given the option of choosing the system by which evidence was to be heard.

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<sup>1</sup> A good example of the tone of the comments made by the Maltese newspapers are two newspaper editorials which both appeared during June 1997, while I was writing this thesis. On the 22nd June, the editorial of the pro-Government weekly *‘It-Torca’* claimed:

“The general impression in this country is that a Power dominates the courts which nobody has been able to tame. It seems that here we really have a ‘state within a state’.... The electoral manifesto of the Labour Party was expressing the voice of the masses when it said: ‘In the administration of justice, the citizen expects the legal process to be *efficient* (my italics), comprehensible and really just. The citizen is not satisfied on any one of these points.”

Two weeks before the editorial of the pro-Opposition *‘The Times’* was entitled: “A Time for Reason.” The opening statement observed that over the previous four years the courts had not suffered from lack of advice on how to speed up proceedings.

<sup>2</sup> The law in question is Act 24 of 1995.

Previously the principle was that all testimony had to be heard orally. Instead judges were now given the option of compiling all<sup>3</sup> evidence by means of written affidavits prepared by parties and their witnesses and deposited in court. However, even if this 'affidavit system' were to be chosen, the opposing lawyer was to continue to enjoy the facility of conducting an oral cross-examination of parties and witnesses on the testimony contained in their affidavits. Finally the third innovation was that judges were then to fix a date for a full hearing of testimony (if the evidence was to be compiled 'viva voce') or for hearing by cross-examination (if the affidavits system was selected). During this sitting all the oral testimony to be presented in the case was to be heard uninterruptedly. There were to be no adjournments except in very special circumstances. This contrasted with the previous system, in which witnesses were heard on several different sittings and adjournments were frequently granted. In the words of the minister who introduced the reforms:

"Advocates cannot be granted an adjournment simply because they do not happen to be present in court for whatever reason. If any witness is sick, the law establishes how his evidence is to be heard and collected so that the case continues to be heard uninterruptedly to a conclusion" (Fenech: 1997).

Before exploring the rationale of these innovations, it is instructive to consider their immediate outcome. Since the amendments to section 202 were brought into force in October 1996<sup>4</sup> and this thesis is being concluded in 1998, only the initial effect of the amendments can be described. I must also admit that my discussion of this point is mainly based on letters and articles which appeared in the Maltese newspapers during my period of fieldwork. However, as many of these articles were written by prominent lawyers and judges, they can be considered a fairly accurate guide to events.

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<sup>3</sup> Previously the use of affidavits tended to be restricted to the testimony of the actual parties to the law-suit.

<sup>4</sup> They came into effect as from the 1st October 1996 by Legal Notice 115, which replaced section 202 of the Code of Organisation and Civil Procedure by a new section 104.

The collective response of judges to the amendments in question was to introduce a new judicial role: that of the Master, which was not contemplated in the amendments.<sup>5</sup> By agreement among the bench, one of the judges assumed this role and was entrusted with around 3,000 cases in which, to quote the current chief judge: "very little was being done" (Said Pullicino 1997). His task was to be that of conducting a pre-trial hearing in this case and in all new cases to be filed in the future. After he had clarified the points in issue and the proof to be made by different witnesses, he was to transfer these files to the other judges before whom the actual court sittings would be held. Consequently while the amendments had contemplated that *all* judges would hold a pre-trial hearing in every law-suit they adjudicated, the effect of the judges' decision was that only *one* of the judges would conduct the pre-trial hearings. Moreover this judge would not be the one before whom these cases were actually heard. According to the Chief Justice, the reason for this was that although:

"...the amendments were well intentioned. Posited in an ideal situation, they could have been an efficacious instrument in order to expedite proceedings. In a situation like ours where the administrative infrastructure is lacking, where the number of judges was inadequate and the culture of accepting certain systems of control on the compilation of evidence and the regulation of the cause by the judge objected to, all these amendments, rigidly applied, could not have the desired beneficial effect without bringing about a traumatic experience. There was, on the contrary, the danger that this would bring about a total collapse of the system" (Said Pullicino: 1997).

He continued:

"It was principally for this reason, therefore, that through an administrative process –which was not contemplated in the amendments and introduced clandestinely– the system of the Master was introduced" (*ibid.*)

In November 1997 there was a change of Government. On meeting with the new minister of justice, the president of the Chamber of Advocates called for the abolition of the affidavits system: the second plank of the newly

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<sup>5</sup> The notion of a master system was adopted from English law.

introduced reforms. He claimed that this worked against the conscience and professional training of lawyers. He hoped, however, that the Master system "would be operated more effectively" (Cremona: 1996). A month later, in December 1996, the minister who had introduced the amendments wrote an article observing that concurrently with the introduction of the amendments he had intended to conduct:

"...a strong PR exercise to ensure that the judges strictly apply the law and create the culture to change" (Fenech: 1996a).

He lamented the fact that his successor in office<sup>6</sup> had not seen the need for such an exercise and urged judges to apply the law approved by Parliament, using their powers to eliminate delays. Three weeks later the new minister of justice conducted an interview with the press, in which he said that he aimed to re-assess the recent changes in the law of procedure. He also intended to eliminate the 'problems' with the Master system and further develop it. However he echoed the previous minister's words when he argued that judges should be stricter in controlling lawyers who:

"tend to use delaying tactics when they believe it is beneficial for their clients" (Mangion: 1996).

A week later the former minister wrote another article in which he explained in detail the new system introduced by the amendments. He argued that if judges failed in their duty to apply the law as amended, other bodies such as the Commission for the Administration of Justice and ultimately Parliament must intervene to ensure that they do so. He attacked the way the Master system had been adopted 'only in name', so that:

"A judge was just assigned to supposedly perform the functions of Master and was lumped with 3,000 cases to look after, thereby further aggravating the courts' delay" (Fenech 1996b.)

The next development occurred four months later, on the 12th April 1997, when the Chief Justice organised a closed seminar to discuss the implementation of the new amendments. In the opening speech he gave at

the start of this seminar, the chief judge reportedly said that it was mainly the effect of the amendments on the trial of cases which had sparked off the seminar. As already noted, he observed that the amendments could not be brought into effect without a trauma and that in order to avoid this, the Master system had been introduced. However, the chief judge admitted that even with this system there had been:

“a great difference between the ideal and the reality. Not due to lack of commitment but because the courts are not being given the necessary means to make the system function properly” (Said Pullicino 1997).

At this stage there was a clear consensus that the master system had not substantially reduced court delays. Indeed, a month later, the former minister returned to the fray, by means of an article entitled: “Wake up minister!” (Fenech 1997), in which he claimed that the situation had worsened, partly due to the inactivity of the judges and the new minister. He claimed that judges were: “adopting their own rules of procedure in defiance of the express provisions of the law” (*ibid.*) and failing to apply the new rules. He also attacked the Master system they had adopted, pointing out that it was humanly impossible for one judge to hold pre-trial hearings in three thousand cases as well as all the new cases filed in court. He added:

“We have at present a serious situation where there are about 1,500 cases which have been presented for hearing during the last eighteen months and which have not yet been set a date for hearing” (*ibid.*)

Other lawyers who wrote in the newspapers were far more pessimistic about the new reforms. One prominent lawyer attacked their conceptual basis, arguing that: “you cannot legislate to reform an ingrained mentality” (Brincat 1997a.). Another questioned whether the judges were “responsible for the abortion of this system of Master” (Said 1997). However, all were agreed that the master system had not improved the delays and in effect created another bottle-neck. It was in this context that, on the 3rd June 1997, the minister of

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<sup>6</sup> By the time these amendments were enacted in 1995, the Minister who introduced them had already been replaced in a Cabinet reshuffle. In 1997 the Minister of Justice was replaced again following the change in Government. The new Minister was in turn replaced, following his resignation in 1998.

justice held a press conference. He announced that following the recent seminar organised by the chief judge he was setting up an 'Advisory Committee for the Law-Courts'. The members of this committee were two members of the judiciary and leading representatives of the legal profession. The committee was given an extensive brief, which included continuous monitoring of the situation and recommending changes to the laws, administrative set-up and the Master system in order to increase the efficiency of the courts. At the time of writing it is not known if the Committee has made any recommendations, nor what their content might be. Clearly, however, this is not the end of the saga.

### 3. Analysis.

My reason for recounting the ongoing history of these procedural reforms is to draw attention to the relationship all the protagonists draw between court delays and the manner in which evidence is compiled. This debate suggests that there is a Maltese culture or "ingrained mentality" (Brincat 1997a.) which resists greater control on the process of compilation of evidence. This mentality is so powerful that it induced judges to introduce the Master system, so as to avoid a: "traumatic change" (Said Pullicino 1997) which could: "lead to the total collapse of the system" (*ibid.*) It has even subverted the Master system itself. This requires further investigation of the causes of this mentality and its manifestations.

During my fieldwork I decided to use the so-called 'affidavits question' as a vehicle to investigate these issues further. Since the chamber of advocates had taken a stand against the introduction of the 'affidavits system', lawyers, clients and judges were interviewed so as to elicit their opinions and chart the resulting trends. As already noted,<sup>7</sup> lawyers objected to affidavits because they saw them as both a threat to their professional detachment from clients and an obstacle hindering them from adequately representing them. There is

a widespread perception among lawyers that affidavits are bad because lawyers write them for clients. Lawyers also stressed that clients often change their stories when questioned in court and that they could not adapt their representation to the changed version if they had previously committed their clients in writing to their original accounts of 'what happened'.

Having discussed affidavits with lawyers, my interviews with clients came as quite a surprise. They complained that their lawyers had not paid enough attention to their affidavits and had left them to write them on their own, hardly glancing at them when they were finished.<sup>8</sup> This chimed with my own observations, since I had also noted a certain lack of interest towards affidavits on the part of established lawyers. Actually these lawyers tended to leave their drafting to secretaries or junior assistants, almost as if they wished to avoid contamination from the affidavits. Since their professional independence was safeguarded by these means, it seemed that there might also be other motives behind the continuing opposition of lawyers to affidavits.

These motives became clearer after my interviews with judges. As a rule, they tended to be less negative about affidavits than lawyers. This is because some see them as an effective way of tackling court delays, which judges link quite clearly to the dynamics of the compilation of evidence. Thus one judge I interviewed generally presides over marriage breakdown law-suits. He told me that it is impossible for him to hear all the testimony which parties would like to present in such cases. If he let them they would spend twenty or thirty court sittings telling their stories and bringing new witnesses. He also said that it is often difficult to judge between these stories. Often both are true, so that it is simply: 'the same life being recounted from different angles'. At the same time, he recognised that parties need a safety valve in order to vent their frustration and anger. He was therefore in favour of affidavits, as long as

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<sup>8</sup> Reference is made to the sections entitled: 'the Professional Ideal' and 'Two Styles of Representation' in the sixth chapter.

the ultimate decision as to whether to allow them or not remained in the hands of judges and as long as lawyers retained the facility of conducting an oral cross-examination of witnesses on the testimony contained in their affidavits. He favoured affidavits since they give parties a chance to have their say without wasting the court's time. He pointed out that he does not take affidavits literally, but always keeps in mind that they might have been doctored by lawyers. There are also various means by which he can assess the credibility of the testimony contained in the affidavit. Similarly, another judge told me that affidavits are useful as part of the evidence presented in a law-suit, but should not be the only proof.

Judges constantly evoked the wider picture of an over-burdened judiciary which does not have the time to listen to all the testimony lawyers would like to bring. One judge pointed out to me that a big difference between judges and lawyers is that lawyers face less pressure, having more time to prepare their case if it is adjourned for another sitting. Judges, by contrast, are under more pressure to decide cases. Consequently if lawyers delay and do not appear for court sittings, this adds to the judge's work and means that he has less time to dedicate to law-suits. He observed:

"If you have the time, then you can study a case and decide which testimony is relevant and which is not. In this way you can better direct the case. The less time you have, the more delays are caused, because you cannot cut out irrelevant testimony in advance."

This judge complained that many lawyers make useless pleas or appeals just to gain time. They also tend to contest all the facts alleged by the other party, so that it is unclear what the real factual points at issue are. Since lawyers also reproduce their *'citazzjoni'* when drafting the initial 'declaration of the facts',<sup>9</sup> it is even more difficult to discover what these facts in issue are. He pointed out that the mentality of Maltese lawyers does not predispose them to co-operate with regard to evidence, since they tend to interrupt one another

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<sup>9</sup>See the section on 'Writing the Case' in chapter six.

and to argue aggressively, taking a short-sighted view of the case. Moreover, lawyers stretch out and dilute their work in a case, staggering witnesses and material evidence, so that:

“Law-suits proceed drop by drop, in hiccups. Every now and then there is a court sitting and the lawyers give the judge a document to satisfy him. Then, when finally the bag (i.e. the case-file) is really full, they let the judge open it. Often these documents contain no useful information.”

From the judges' perspective, therefore, the compilation of evidence appears as a fertile field for the exercise of lawyers' delaying tactics. Court-room story-telling is potentially manipulable by lawyers in a diverse ways, which range from the telling of a never-ending story by the party represented to the summoning of large numbers of witnesses to testify to the same fact. In this context, it is clear why affidavits are less negatively perceived by judges than lawyers. To the extent that affidavits reduce the time which has to be devoted to hearing testimony, judges are predisposed to receive them favourably.

But how do affidavits reduce time? The case of the 'Rented Garage' reveals how it takes less time to read a coherent story printed as a single text than to laboriously create that story from the disjointed utterances of witnesses in the litigious atmosphere of the court. There is, however, a less obvious reason, which leads directly to the central hypothesis here examined. Consider the following example which was mentioned in the local press by another prominent lawyer when recommending a possible use for affidavits in helping to prepare the file of the case for the trial:

“Let's imagine a personal injury claim in a motor accident. There should be no contestation about the age of the alleged victim, his income, his employment, where the accident happened, and similar details. The problem may be how it happened. The injured party has one version, the other party has another version. From their two versions some common ground should appear, as place of accident, time, number of vehicles involved...The disparity may be restricted to certain aspects which define responsibility. The parties should be ordered to delimit their contentions, and if a party wants to drag his feet, then the extra costs should be on his

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<sup>9</sup> See chapter six on this point.

side. Delaying tactics may be beneficial to one party only, and s/he should be penalised for them" (Brincat 1996)

One should here note that this lawyer describes judicial fact-finding in terms of the same process of recovery of an untold shared narrative which I employed in the case of the 'Pain in the Neck'. Such establishment of 'common ground' is seen as a necessary preliminary to the smooth resolution of the case. In this context, the party (for which read lawyer) who "drags his feet" (*ibid.*) does so by denying the existence of this common ground and stressing the particularity of his client's story. Some indications of how and why this is done are given obliquely in this text. If one reads between the lines, it seems clear that the claim that there *should* be no contestation about common sense details<sup>10</sup> is being made precisely because these details *are* frequently contested. The party who 'drags his feet' is therefore one who refuses to delimit his contestations and contests irrelevant details. Such delaying tactics are utilised by lawyers when they are beneficial to their clients.

If insisting on the specificity of their clients' stories increases lawyers' ability to delay cases, then their aversion to affidavits becomes more comprehensible. By externalising parties' stories in a common written medium, affidavits make it much easier for judges to identify the narrative linkages between them, so as to rapidly decide their cases.<sup>11</sup> They do so by tying the parties down to two written stories, restricting their lawyers' opportunities to narratively re-interpret their claims and hence their control over the duration of litigation.

Reactions to affidavits suggest that the resistance within the Maltese courts to greater control over the compilation of evidence is largely motivated by the

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<sup>10</sup> Such as the age of the injured party, his income and so on. See the section on 'the Relations of Production of Testimony' in chapter seven.

<sup>11</sup> As Foucault (1990: 101) observes: "Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it. In like manner, silence and secrecy are a shelter for power."

desire of lawyers to preserve their narrative space for manoeuvre, by leaving clients' stories in a shadowy and inchoate oral form. This also means retaining their ability to delay litigation. Lawyers can utilise this oral narrative space to stress the specificity of their clients' stories, by:

- a) Increasing the distance between the story told by their client and that of the other party. As the case of the 'Pain in the Neck' shows, this is done by emphasising the significance of even minor differences between the parties' stories and ignoring the similarities.
- b) Magnifying the gap between the client's story and legally valid 'facts'. The volume of evidence required can be easily augmented if the lawyer insists that even the smallest and most banal details of the stories of the parties must be proved in court. This can also be achieved if she brings a large number of witnesses to tell the same story, or if the stories themselves are spun out so that entire life-histories are recounted in court. All these tactics are legitimated by the implicit assumption that the distance between judicial reality and ordinary social life is so large that a correspondingly high level of proof is required to ensure the conversion of oral stories from everyday life into written facts in the judicial realm.

A convenient way of describing the combined effect of these delaying tactics is in terms of the 'problematism of evidence'. By referring to 'problematism', my aim is to underline the way in which these attitudes to court-room story-telling complicate the simplest 'facts' so that they require high levels of proof. Referring to evidence implies standing on its head the claim that: "when the facts are clear, it is not difficult to apply the law" (Brincat 1997b.). This assertion, made by a Maltese lawyer arguing in favour of reforms in the system, explains why the problematisation of evidence is so tempting to some lawyers. If the *facts* are rendered opaque, then the *law* becomes more difficult to apply, increasing the scope for delay and the lawyers' collective power over the progress of the case. The strategic uses of such factual problematisation are also revealed by another practice lawyers resort to, which involves the concealment of relevant documents from the opposing party at the start of a lawsuit. Thus while lawyers are supposed to

file copies of all the documentary evidence which their clients give them at the start of litigation, they tend instead to avoid revealing them at this stage. These documents are disclosed later, at moments when their shock-value and strategic utility are highest. As one rural lawyer told me:

"In Malta it's different from England, where lawyers exchange the facts between them at the start of the law-suit. The Maltese lawyer likes to keep all his cards up his sleeve and keep his opponents guessing, telling them: 'now you'll see what we'll come out with'."<sup>12</sup>

When the legal issues involved in a case are clear-cut, then such factual problematisation is one of the few remaining routes by which a lawyer set to lose may exert some control over the proceedings.

The validity of this analysis is confirmed by its ability to explain the perceived need for reforms in the system of compilation of evidence, the precise content of the reforms themselves and the obstacles to their implementation. To start with the need for reforms, historical analyses show that the problem of delays has long haunted the Maltese courts. Consider the startlingly contemporary flavour of the following extract from a report on the state of the Maltese courts prepared by a British Royal Commission in 1812:

"The arts and evasions by which a suit could be prolonged were various and were practised daily with success by fraudulent and ill-disposed persons... By these subterfuges and artifices, litigations were extended indefinitely" (Harding 1980: 36).

Before the introduction of the recent reforms, court delays had accumulated to such an extent that it was quite common for the judge who finally decided the case to be a different person from the one who originally heard the evidence, due to the retirement or death of the original judge (Brincat 1996). Significantly it seems that the system by which evidence was heard by court experts or legal referees was introduced in an attempt to resolve these

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<sup>12</sup> Another lawyer recently wrote that:

"Our (i.e. lawyers) 'southern' practice of keeping a document up our sleeve, so to speak, to get it out when we feel that we should, must be stopped... we should reveal all our cards at the initial stage of the case so that each party would know exactly what the other has in store" (Schembri 1998).

problems (*ibid*).<sup>13</sup> This underlines the role of the compilation of evidence as a fertile source of court delays. The content of the reforms themselves also reveals a concern to prevent future problematisation of evidence. Indeed the common conceptual basis of pre-trial hearings, affidavits and the master system is that they are all means through which the facts to be contested can be precisely defined *at the start of* litigation. The aim is clearly to restrict the possibility of the *subsequent* creation of confusion about what must be proved and how. In this they followed the path blazed by previous procedural amendments in 1913, which had for similar motives introduced the requirement of presenting a written declaration of the facts in issue at the start of litigation.

Finally the obstacles to the implementation of these reforms become clearer once it is understood that they ran counter to lawyers' desire to retain their narrative space for manoeuvre and their ability to delay litigation. This oral narrative space had already been preserved in the teeth of the 1913 amendments, by making the declaration of facts a carbon copy of the legal claims contained in the '*citazzjoni*'.<sup>14</sup> This suggests that the persons who, according to the chief justice: "objected" (Said-Pullicino *op. cit.*) to the "greater judicial control on the compilation of evidence" (*ibid.*) required by the recent reforms, were mostly lawyers. After all judges would hardly have objected to reforms on the basis that they increased their powers! At the same time, they would have had few incentives to rigidly apply reforms which were set to collectively antagonise lawyers as a class.

To understand judicial attitudes, one must remember that Maltese judges are all drawn from the pool of practising lawyers,<sup>15</sup> with whom they share the

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<sup>13</sup> This also explains the ease with which I was appointed legal referee in the case of the Pain in the Neck.

<sup>14</sup> On this refer to the discussion in the section on 'Writing the Case' in chapter six.

<sup>15</sup> As explained in chapter four, one must have practised as a lawyer for twelve years in order to be eligible to become a judge in Malta.

same professional background and assumptions. Together with lawyers, they belong to a 'court community' of the sort described by Blumberg (1975: 328).<sup>16</sup> While their professional training disposes them to avoid harsh reactions to lawyers' attempts to problematise evidence, it also promotes cautious and guarded responses to the administrative reforms promoted by successive governments. Such administrative reforms could easily be classified as 'interference' threatening the independence of the judiciary.<sup>17</sup> In this context, the recent reforms must have seemed too many and too radical for judges to fully implement in the face of the certain resistance of lawyers.

There are two further qualifications which must be made to this analysis. The first relates to the issue of court delays as a whole. While problematising evidence appears as a major cause of court delays, it must be clear that it is not the only one. However many of the other causes can be seen as deriving from the earlier-mentioned strategy, by which lawyers magnify the gap between clients' stories and legally known facts and therefore the distance between everyday and legal versions of the truth.<sup>18</sup> This can be illustrated with regard to two of the other major causes of delays, which are: the absence of lawyers from court sittings and notification problems. As shown in chapter four, the non-attendance of lawyers, can enable them to delay the final judgement in a case in the interests of their clients. Here too it is by stressing his detachment (and therefore that of the law) from his client that

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<sup>16</sup> See chapter one for a summary of Blumberg's argument.

<sup>17</sup> Thus a pre-electoral leaflet issued by the Malta Labour Party in 1997 accused the previous Nationalist Minister of Justice of working 'hand in hand' with the then Chief Justice to introduce the unpopular legislative reforms to court procedure. The leaflet argued that this threatened the independence of the judiciary. In 1998, after the Labour Party won the election, the new minister of justice wrote an article (Gulia 1998b.) in which he said that he was in London at the time, together with the present Chief Justice and that together they were engaging in talks to try and improve the 'Master System'. In an earlier article, he had observed that the reforms would not work if all lawyers and judges did not co-operate with the Government's efforts to improve the system, arguing that: "Government is an easy target for criticism" (Gulia 1998a.). Thus although different people were involved, the underlying structural conflict of roles remained.

<sup>18</sup> Another cause is the multiplication of appeals on minor issues, such as the procedural decisions taken by a judge in the course of hearing a law-suit. Here it is the *law*, rather than the facts which is problematised.

the lawyer can represent him better.<sup>19</sup> Similarly, the legal requirement that clients must be personally notified of certain judicial acts gave rise to endless manoeuvres for ensuring the social invisibility of the client at the moment when notification is attempted. Foiling the court marshal's efforts to effect service creates delays by generating communicative difficulties between the legal realm of the courts and normal social life, effectively distancing law from everyday reality. Moreover, the strategic non-disclosure of documentary proof at the start of litigation serves to maintain the distance between the client's story and that of her opponent in litigation. This is because such non-disclosure keeps the other party in the dark regarding the story of one party, preventing a convergence between their opposed narratives.

The second qualification relates to the responsibility of lawyers for problematising evidence. My analysis may seem to imply that the only purpose for which lawyers might desire to retain their oral narrative space for manoeuvre is in order to increase their ability to delay litigation. However consideration of the case of the 'Rented Garage' indicates that in this way lawyers also retain a certain flexibility in representing their clients, which enables them to adapt the stories they tell on their behalf to incorporate new details which emerge during court-room questioning.<sup>20</sup> It is also clear that a full 'viva voce' trial should in principle<sup>21</sup> make it easier to assess the credibility of witnesses.

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<sup>19</sup> When I asked them about this, most lawyers would explain their non-attendance by opening their diaries and showing how many court sittings they had programmed, which made it physically impossible for them to attend each hearing in every clients' case. While this is certainly true, this situation also creates scope for the strategic selection on their part of *which* particular hearing to attend. Clearly some lawyers did use their non attendance as a way to stretch cases out in their clients' interests.

<sup>20</sup> In this case, for example, the examination-in-chief had revealed that John Zammit had leased the garage before apparently buying it. This fact was then taken up by the lawyer for the defence, who later wove it into his story that Zammit had good grounds for believing that he owned the garage.

<sup>21</sup> If it were not for the multiplication of court delays which means that the impression made by particular witnesses when testifying must often be unknown to or forgotten by the judge who, years later, finally delivers judgement (Brincat 1996).

There are therefore good professional reasons why lawyers should seek to avoid tying themselves down to complete written statements of the factual basis of clients' claims at the start of litigation. One should also keep in mind that the impulse to stress the specificity of clients' stories comes from the clients themselves. Downplaying shared narrative backgrounds is precisely what is required by the narrative self-scripting which has, in chapter five, been shown to motivate clients' descriptions of their cases to their lawyers. The eagerness with which many clients try to detach their story from that of their opponents in litigation can be exemplified by the story told by the plaintiff in the case of the 'Pain in the Neck'. In his affidavit, he took care to state that the defendant, who had crashed into him, appeared unconcerned about any damage that might have been caused to him. He observed that he even had to persuade her to remain on the site of the accident until the police turned up to make a Road Accident Report. This statement could also have been used by the defendant to support her account of the trivial nature of the accident. Yet it seems to have been remembered with such clarity by the plaintiff because of its utility in confirming *his* story, which revolved around the opposition between the defendant's careless attitude and his own responsible behaviour. This illustrates the creative labour by which clients seek to produce their own separate stories out of shared social experience.

The pressure which clients' self-scripting places on their lawyers has already been discussed in chapter six. It was there shown how this induced one lawyer to completely identify his representation of a client with his client's story, so that this story formed the central organising framework in terms of which the lawyer crafted his statement of the legal claims being made. It was also argued that while most Maltese lawyers do not go so far as this, they usually have to balance between the distance from clients stories required by the ideal of professional detachment and the narrative endorsement demanded by patronage. From this standpoint one can reach a deeper understanding of the delaying tactics by which evidence is problematised. It has been shown how these can be usefully categorised into those tactics which increase the distance between the stories of the opposing parties and

those which magnify the gap between everyday reality and legal reality. It should here be observed that these tactics reflect precisely the same effort to balance between the needs of clients and the professional ideal which was noted in the sixth chapter of this thesis. In fact, while increasing the distance between the stories of the parties responds to the needs which clients seek to achieve through narrative self-scripting, increasing the gap between law and everyday life satisfies lawyers' own need for professional detachment. *Both* these tactics work in the interest of clients insofar as they enable lawyers to delay cases in their favour and in that of lawyers insofar as they allow them to stress the distance of the judicial system from everyday reality, thus increasing their work while living up to their professional self image.

It seems, therefore, that a complex mixture of self-interest and professional idealism motivates the durable resistance Maltese lawyers have displayed to all attempts to compel them to externalise their clients' stories in writing at the start of litigation. This highlights the social embodiment and latent social effects of professional ideals themselves. In Malta, it seems that lawyers' insistence on living up to a particular understanding of the requirements of their professional role derives a great deal of its energy from their resistance to the social pressure placed on them to act as their clients' patrons.<sup>22</sup> Paradoxically enough, this same stress on professional detachment has itself become part of the services which lawyers offer clients, providing the conceptual basis justifying attempts to delay litigation on their behalf! By authorising the problematisation of evidence, professional ideals, which appear as ways of eluding social pressure, become the vehicle through which this social pressure is complied with. Moreover, the noble idealistic inspiration of these professional models can blind adherents to their actual social effects, ensuring that they are tenaciously adhered to and justifying lawyers' resistance to reforms which appear to undermine them.

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<sup>22</sup> This is also why lawyers object to affidavits. as observed in chapter six.

In conclusion it could be observed that the outcome of the recent reforms to the compilation of evidence in Malta illustrates the structural implications for the administration of justice of the specific social relationships through which legal representation is carried out. The ingrained attitudes of lawyers and judges have been shown to derive their force not from a generic and capitalised Culture, but from the specific social relationships between judges, lawyers and clients and their respective practical involvement with clients' stories. These attitudes favour the problematisation of evidence, which promotes court delays and amplifies litigiousness. In this way, court-work is increased together with the potential bones of contention between litigants. Factual problematisation must therefore be one of the ways by which a small island community with no major cultural, religious or ethnic differences has maintained a thriving legal tradition, with a large number of lawyers and courts which are deluged with work. To a large extent, the litigiousness of the Maltese, mentioned by many of the lawyers I spoke to, is amplified and propagated by the judicial system. This analysis also suggests the utility of relating the specific practices of lawyers and courts to the wider social and cultural context in which they originate. Such an investigation will be conducted in the next and final chapter of this thesis.

## Chapter 10: Conclusion

"For this Law which I am laying down for you today is neither obscure for you nor beyond your reach. It is not in heaven, so that you need to wonder, 'Who will go up to heaven for us and bring it down to us, so that we can hear and practise it?' Nor is it beyond the seas, so that you need to wonder, 'Who will cross the seas for us and bring it back to us, so that we can hear and practise it?' No, the word is very near to you, it is in your mouth and in your heart for you to put into practice" (Deuteronomy 30: 11-14).

My aims in this conclusion are three-fold. First it is intended to summarise the research findings and to show how they relate to the initial theoretical hypothesis. This will be followed by an attempt to embed my observations on legal representation within the context of Maltese society and the Mediterranean region as a whole. Finally the main contributions this research has made to anthropological understanding and the study of law in society will be identified. Suggestions for further research will here be made and the effects of this study on my own understanding acknowledged.

The initial chapters of this thesis set out the theoretical background which motivated my inquiry. In chapter one, previous studies of lawyer/client interaction were criticised for their excessively narrow focus and reliance on a legalistic conception of power. This made it impossible to accept that clients' perceptions might significantly effect the way their cases are represented by lawyers. Instead a holistic approach was advocated, which would utilise anthropological techniques to describe the social relationships by which legal representation is carried out in a Maltese context. This meant broadening the field of investigation beyond lawyer/client office conferences, to encompass the specifically legal work of drafting judicial acts, court questioning of

witnesses and adjudication. It also required greater sensitivity to the cultural context in which legal representation occurs.

These concerns were echoed in the second chapter, which argued that such an anthropological study of Maltese legal representation should pay special attention to clients' narratives and the way in which lawyers orchestrate their re-telling in court and judges incorporate them in judgements. This emphasis on narrative was justified by reference to the studies of Ricoeur (1984), which define narratives as discursive vehicles mediating between generic legal/moral rules and individual experience. In other words, narrative analysis militates against the drawing of rigid boundaries between the legal knowledge possessed by the lawyer and the cultural competence of the client. Instead the issue becomes how one is narratively transformed into the other and attention is drawn to the social uses of narration as a way of appropriating legal/moral rules so as to legitimate individual experience. This approach appeared analytically fruitful because it does not make any assumptions about the relative power of lawyers and clients and it blends well with an anthropological effort to explain the format of particular narratives by reference to the social context of narration. A narrative spectrum becomes visible, ranging from 'paradigmatic' narratives (which are closely modelled on the legal rules and serve a conservative function) to 'subjunctive' narratives (which challenge accepted rules from the standpoint of individual experience).

The next two chapters set out to describe my research methodology and to introduce Maltese society and its legal system. In particular, chapter four outlined the ordinary course of litigation and the occupational differentiation of lawyers and then gave special attention to legal training. It explored the transmission of professional attitudes in the process of becoming a lawyer. Here the challenge was to trace the genesis of specific conceptions of the nature of law and the lawyer/client relationship to their origins in legal

education. It was shown how law students achieve the right to articulate the law by learning to suppress their subjective narrative voice, while the legal rules are also imparted through the medium of paradigmatic stories. Legal training therefore encourages lawyers to maintain a certain distance from the subjective narratives of their clients, while developing their ability to transform these stories into paradigmatic ones which more fully engage with the legal rules.

Chapter five was a detailed investigation of client story-telling. Particular stories were analysed so as to show how they refract important cultural themes, while also being attempts by clients to control their lawyers by engulfing them in patronage relationships. This was most noticeable in the case of rural and working class clients, whose narratives enable them to author their selves as honourable individuals. By narratively evoking a continuum between legal rules and moral ones, these clients try to base the patronage of lawyers on a recognition of their own honour; creating dependence by asserting autonomy. By contrast lawyers tend to avoid fully endorsing these stories and often question the claims they make; evoking the difference between clients as authors and as characters in their own stories. Even when lawyers confirm clients' stories, they generally do so in terms which transform them into paradigmatic narratives. The reasons for clients' attempts to create patronage relationships were traced to sharply polarised perceptions of lawyers, reflecting their ambiguous social role. It was suggested that the attraction of patronage lies in the control it allows clients to exert over socially distant lawyers.

These themes were further explored in chapter six, which discussed lawyers' reactions. These were in turn related to professional ideals of a detachment from clients' stories which reflects an attachment to the legal rules. Lawyers therefore describe their representation as largely restricted to the writing of

the legal issues involved, leaving the oral proof of the facts in the hands of their clients. These ideals are spatially encoded in the organisation of legal offices and physically embodied in lawyers' self-presentation, which is characterised by the dramatic evocation of professional autonomy. Yet they are belied by Maltese legal practice, which finds it impossible to draw a neat division between legal issues and factual ones.

Various social factors were discussed which induce lawyers to provide some confirmation of clients' stories and to operate within their understanding of the case. Consequently most Maltese lawyers have to balance between the conflicting demands of patronage and professionalism in selecting a particular style of handling clients. They do so in a manner which reflects their own occupational status, with sole-practitioners showing a stronger tendency to act as patrons than firm lawyers. Finally it was shown how the tension between patronage and professionalism also finds expression in the way lawyers draft the judicial acts necessary to open a law-suit. Those sole practitioners who most fully adopt the 'patron' style of client-handling tend to inscribe the legal claims of their clients within the narrative framework of their subjunctive stories, as opposed to the paradigmatic stories favoured by most other lawyers.

In the seventh chapter, the locus of investigation shifted to the court-room, following the ordinary sequence of Maltese litigation, where a litigant's story has to be re-told to the judge after having been communicated to her lawyer. This chapter opened with a description of the court environment, which emphasises the organisation of legal work and the roles of judges, lawyers and laymen. This was followed by a discussion of the relations of production of testimony, which outlined the processes by which testimony is usually elicited in court. The divergent interests of lawyers, judges and witnesses were identified and their effects on the contestation of evidence explored.

These issues were then exemplified by a detailed study of the production of testimony in the case of the 'Rented Garage'.

In this case, the questions asked by the judge and the defendant's lawyer tried to create a paradigmatic story out of the defendant's testimony. This process provoked the resistance of the witness, who tried to assert the validity of his subjective understanding of events, which could not easily be accepted since it did not mesh with legal logic. At the same time, this gap between the defendant's testimony and the paradigmatic story evoked by his own lawyer's questions was exploited during cross-examination by the plaintiff's lawyer. The latter tried to emphasise the subjunctive features of this testimony, so as to detach it from its anchorage in legal paradigms. Consequently this chapter showed how court-room representation is often 'double-voiced' (Bakhtin 1994), insofar as it reproduces, while denying, the distance between clients' understandings of their stories and those of their lawyers noted in chapter five. Legal entitlement appeared closely related to the ability to defend the paradigmatic status of the client's story. Furthermore the different stories told during the production of testimony are dialogically linked and conflicting accounts cannot be given equal credence. Court-room story-telling operates to produce a single official version of the facts and does not tolerate alternative narratives.

Chapter eight also looked at the stories told during court testimony, but it did so by trying to identify their influence on adjudication. A reflexive analysis of adjudication was carried out in the case of the 'Pain in the Neck'. This showed how judges operate on the assumption that there is only one correct version of events. They consequently seek to maintain a certain distance from the conflicting stories elicited by the opposing lawyers and to build on the narrative linkages produced by cross-examination. This helps to create a sense of the legitimacy of judgements which is derived from the way they

recover parts of the untold shared narratives which both the opposing litigants had experienced. These shared narratives are selectively denied by the parties when, as shown in the fifth chapter, they narratively script their selves before their respective lawyers. Such attempts to justify judgements by reconstructing shared stories are fuelled by the moral pressure which even the most subjunctive stories of litigants can place on judges: creating a sense of injustice if they are not responded to.

This point was taken up again in the analysis of the case of the 'Faithful Prostitute'. In this case the court was not faced with conflicting stories, as the testimony brought by the litigants substantially agreed. Here the plaintiff produced a paradigmatic story based on his own exploitative behaviour, which was complemented by his wife's subjunctive story about her devotion to him. The outcome of this case showed how the moral pressure created by the wife's story led the court to reinterpret and expand the legal categories. Thus even if they do not mesh with legal categories, coherent narratives may normatively condense key cultural themes. This in turn provokes a sense of normative conflict which may induce judges to alter the legal framework. This culturally derived power of stories explains why judges try to reduce all the stories told in the case to one official narrative; refusing to acknowledge competing accounts even if these are not paradigmatic and seem to have no anchorage in the legal rules.

The ninth chapter explored the cumulative effects of the practical relationships which lawyers maintain towards litigants' stories. This was done by analysing reactions to recent legislative reforms of the system of compilation of evidence in the Maltese courts. This analysis showed that lawyers have tried to maintain their oral narrative space for manoeuvre and have therefore successfully resisted reforms which aimed to compel them to externalise clients' stories in writing at the start of litigation. Preserving this

oral space conforms to professional ideals and allows lawyers more leeway in representing their clients. Yet it also allows them to problematise the production of evidence to create court delays. This is achieved by contesting minor details so as to preserve and magnify differences between the stories of litigants. It is also done by inflating the quantity of proof required to give stories legal credence and by the strategic concealment of documentary evidence.

The motivation for these practices was primarily traced to the strategic advantages they give to lawyers in representing their clients. They constitute a response to the pressure which clients' narrative self-scripting places on lawyers. The two forms taken by this response reflect lawyers' overall attempt, observed in chapter six, to balance between the demands of patronage and those of professional detachment. As the case of the 'Pain in the Neck' shows, Maltese lawyers act as their clients' patrons when they downplay shared narrative backgrounds: stressing the specificity of their clients' stories as against those of their opponents in litigation. They assert professional detachment when they inflate the quantity of proof, since this implicitly increases the distance between the law and the facts by asserting the need to supply more facts to bridge this distance. Thus it seems that lawyers' vigorous stress on their professional detachment, which derives its energy from the need to counter the moral pressures imposed by clients' narrative self-scripting and itself stimulates it, can serve to authorise the problematisation of evidence in their favour. Consequently, the causes of court delays are rooted in the social relations of legal representation in Malta.

This thesis has illustrated the inter-relationship of the processes and relations through which legal representation is carried out. Legal training, lawyer/client interaction, the production of evidence, adjudication and court delays could be fruitfully analysed if they were not treated as discrete and autonomous

processes, but as socially and systematically related. Simultaneously, however, there is also a wider social context which informs and conditions the carrying out of legal representation.

A handle on this wider social context is provided by Herzfeld (1993), in a recent book concerned with exploring the beliefs and social relations which underpin Western bureaucracy. He observes that paradoxically societies like Greece, which pride themselves on giving warm hospitality to strangers, are often the sites of the most abrupt and high-handed displays of bureaucratic indifference. The reason is that hospitality and indifference are symbolically and socially related. Both appeal to a symbolic vocabulary of shared traits (such as common blood, nationality or descent) in order to affirm the boundary between insiders and outsiders. Furthermore they are both ways of handling ambiguous relationships with strangers. Thus the hospitality shown by Greeks to strangers is often an attempt to involve them within patronage relationships by "inverting the political dependence (of Greeks) in the moral sphere" (Herzfeld 1987: 86). Bureaucratic indifference arises when officials, who are faced by cases which differ from routine ones, revert to the symbolic classifications which are at the basis of the official discourse so as to justify their inactivity. In this way, they deny their shared humanity with clients and therefore the rights of the latter to be treated differently. The only route by which clients can contest this exclusion is if they themselves appropriate the symbolic vocabulary implicit in official discourse, so as to prove that they too, are 'Greek', 'Christian' or 'active responsible citizens' and therefore entitled to the protection of the rules.

Herzfeld sees such practices as somehow characterising all Western bureaucracies. However, he is also clear that the association of warm hospitality with cold bureaucratic indifference is more noticeable in

Mediterranean societies like the Greek one. He ascribes this to a number of causes, among which are:

- 1) These societies have not developed fully integrated capitalist economies and there is therefore a greater need for mechanisms of social incorporation.
- 2) Social relations outside the sphere of the family are highly competitive and premised on a generalised hostility.
- 3) The concept of the nation-state has not absorbed into itself all the idioms of social identity, so that these can function independently of (and be employed to contest) the state structure.

Herzfeld's argument provides a useful reference point because of the parallels between his observations and mine. In Malta, lawyers' clients —like those of the Greek bureaucracy— attempt to create patronage relations in order to morally reverse their politically inferior status in regard to their lawyers. Thus, on one level, it is clear that the ambiguity inherent to lawyer/client relations is socially addressed using the same tactics adopted for relations with strangers. Similarly the stress lawyers place on their professional detachment, which is often dramatically displayed, appeals to the symbolic division between law and fact which underpins the legal rules. It is therefore analogous to the socially produced indifference of the Greek bureaucrats. Here too clients can contest lawyers' detachment by translating legal discourse back to its symbolic roots; a conversion which is neatly epitomised by the way clients shift from talking about '*dritt*' as a metaphor for honourable moral behaviour to '*dritt*' as a legal right.<sup>1</sup>

My material also complements Herzfeld's account in a number of ways. Firstly, I have tried to explore the narrative media through which legal categories and individual experience are translated into one another. Highlighting the mediating role of narrative makes it easier to comprehend

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<sup>1</sup> See the case of the 'Honourable Businessman' in chapter five.

how this process of translation occurs; being reflected in the form of 'paradigmatic' or 'subjunctive' stories depending on the type of conversion attempted. It also makes it possible to discern how incomplete this translation often is, as this incompleteness is reflected in an uneasy over-lapping of both types of story. Secondly, my study indicates a much more intimate relationship between hospitality and indifference, or between patronage and detachment. In fact, I have argued that clients' attempts to cast their lawyers as patrons are both a reaction to Maltese lawyers' emphasis on their professional detachment and themselves induce lawyers to stress their detachment. Patronage and detachment appear as locked in a mutually reinforcing loop. Moreover, the problematisation of evidence shows how the professional detachment of lawyers may be put to work in the context of a patronage relationship with clients, so that legal practice appropriates bureaucratic delay/indifference in the service of patronage.

In Maltese legal practice, therefore, indifference is not so much the result of a generic stance towards strangers, as a valuable commodity which has to be internally produced *within* the society and which can be put to use in the service of patronage relationships. The occupational prestige of legal practice enables Maltese lawyers to produce themselves as professionally detached strangers. Certainly here clients' narrative efforts to script themselves as honourable individuals constitute what Herzfeld describes as attempts to morally englobe lawyers. However, they are more than that. As Du Bouley (1991) has observed in regard to her own Greek fieldwork, the complete stranger provides an opportunity for Greek villagers to enact their idealised selves, as reflected in the generosity of disinterested gift-giving. This is because the generally hostile and competitive nature of interaction with unrelated fellow villagers means that all gift-giving will be interpreted as ultimately self-interested. This in turn creates a conflict with the villagers' Christian beliefs, which affirm the salvific nature of disinterested generosity.

Hence the attraction of giving gifts to complete strangers who, by definition, are not in a position to reciprocate.

This suggests that the impersonality of law, to which corresponds the professional detachment of lawyers, provides an opportunity for clients to narratively portray their idealised selves. This certainly allows them to appropriate the moralistic underpinnings of the legal rules. This was clearly illustrated by the case of the 'Faithful Prostitute', where both spouses characterised themselves in an extreme way in order to engage with the legal rules. In that case, the wife's story of her self-sacrificing love hinged around the claim that she viewed her prostitution as a means of gaining money for the family. She thus scripted herself as a sort of Mary Magdalen; directly evoking the underlying moral referents of the canonically based legal rules. Here the success of her narrative was reflected in its ability to bridge the distance separating her from the protection of the legal rules, in the same way as other moralistic stories were used to bridge the distance separating clients from their lawyers. These are all instances of what Herzfeld (1985) has described as the use of the state rhetoric against the state.

It seems, however, that it would be mistaken to see such story-telling in an overly cynical light: as equivalent to attempts to symbolically bribe lawyers. As observed in the fifth chapter, clients' stories often evoked genuine emotions on their part. Much of the attraction of Ricoeur's (1984) study of narrative was his recognition that while all stories are socially fabricated, this does not prevent them from being experienced as true. In this context, what seems most striking about the case of the 'Faithful Prostitute' is the way in which her story referred to money as a symbolic vehicle capable, once introduced within the family, of transforming her public prostitution into private virtue. Sant Cassia has observed similar rhetoric in Greece. He notes:

"It is hardly surprising, therefore, that as many observers have noted, two very different types of morality operate in modern Greek culture: a highly charged and competitive public context in which men try to get the better of one another, especially when legitimated by reference to family interests (*to synferon*) (Campbell, 1964; Loizos 1975; Peristiany, 1965), and the family context characterised by extreme self-sacrifice, self-abnegation, and disinterested gift-giving. Money, that symbol of immediate exchange and strict equivalence, is embedded in a dual rhetorical opposition. On the one hand it is held up as the highest eroding factor of trust in the outside public world, even threatening relations between kin, while on the other hand it becomes the most potent symbol of love" (Sant Cassia 1992: 250).

The implicit background of the prostitute's story is therefore a view of the public sphere of social interaction as corrupt and flawed. In fact, it is *because* her story distances, by exalting, the disinterested realm of the family from the inevitably flawed and self-interested domain of extra-familial relationships, that she is able to discursively link her prostitution in the public domain to her fidelity in the familial one. As Sant Cassia (1991) observes, the 'naturalistic pessimism' about the social world which is so pervasive in the Mediterranean itself creates a need for certainty, which people try to satisfy by personalising their interactions with others. In this light, honour appears as a form of self-constitution in which individualised narratives are a mode of creating personalised truth (based on the truth of one's person) out of collective scepticism (including scepticism about the collective).

In Malta, clients' stories are therefore best viewed as being both a way to construct legal entitlement and a form of self-constitution which allows individuals to assert the idealised truth of their selves against a corrupt world. This explains why the institutionally grounded detachment of lawyers provokes the assertion of honour. Law provides a detached stage on which idealised selves can be dramatically asserted. The social pressure which finds a narrative outlet in the legal forum is generated by the constraints of life in a small, densely populated, island-state. Here, as in Greece, there is no

fully developed capitalist economy, the idioms of social identity are not monopolised by the nation-state, and the realm of extra-familial social interaction is a competitive one, with trust in short supply (Campbell 1964). Consequently most Maltese are adept at creating personalised fiduciary ties of quasi-kinship, manipulating networks of friends and 'friends of friends' (Boisseivan 1974) in order to achieve their aims. Given the small-size and dense population of the archipelago, social relationships tend to be durable and 'multiplex' (Gluckman 1955). Quite simply, people depend on one another for a variety of services over long time periods. There is a concomitant emphasis on conflict avoidance, since one cannot just 'move away' from potential enemies. In this society, a high value is placed on secrecy, as a means to shield information from the scrutiny of competitive and potentially hostile neighbours (Du Bouley 1974). Yet despite one's best efforts, secrets often emerge and will be eagerly observed. 'Malta is small and people are known,' as one ever-popular Maltese saying puts it.

In such a social context where, as one of my lawyer informants put it: 'everybody keeps a huge file on everyone else', there is a high level of scrutiny directed at the smallest details of personal behaviour. These are interpreted against a long historical background and seen as sending ripples through a complex web of social relationships. Consequently minor details acquire a disproportionate symbolic significance. This has been noted with regard to the factionalism which often accompanies the feast, or '*festa*', staged in honour of the patron saint of each village. As Boissevain (1965) has observed, the feuding behaviour of competing village factions finds expression in a state of '*pika*', where the smallest actions of the opposing faction are responded to. During my fieldwork, lawyers often told me that particular litigants were '*ippikati*', or engaged in a state of '*pika*'. This term was usually used to suggest that these litigants were more interested in fighting one another than with obtaining the most rationally appropriate outcome from

the courts. Not surprisingly, one sign of the presence of '*pika*' is a tendency towards aggressive litigation over minor details. Thus, when it does occur, the intensity of conflict reflects the extent to which people are socially involved with each other.

Another effect of the perceived lack of anonymity is that it limits the space for individuals to present themselves in different ways, so as to "evoke themselves as being members of different categories of people which may be contradictory and cut across each other" (Machin & Carrithers 1996: 53). As I discovered during my fieldwork, my ability to adopt a multiple-native strategy progressively diminished as people whom I had met in one context observed me in another.<sup>2</sup> People are quick to note discrepancies between present posturing and past actions. It follows that the assertion of idealised selves is simultaneously encouraged and contested within Maltese society. This motivates individuals to the creative labour of latching on to the smallest details<sup>3</sup> so as to narratively affirm the truth of their idealised self-image. This process can be exemplified by the case of the 'Pain in the Neck', where both plaintiff and defendant worked to downplay aspects of an untold common story. Both parties involved in this case, which itself originated from a lack of *physical* space, tried to expand the *social* distance between their stories so as to present their idealised selves. They did so by recounting such petty details as the comments passed by the defendant after the collision.

All these factors operate to increase the attractiveness of the detached legal forum to clients and to ensure that they will recount detailed stories in order to manufacture their social distance (Merry 1990) from opponents. As Gluckman long ago observed, if people are involved in multiplex social relationships with

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<sup>2</sup> See chapter three.

<sup>3</sup> According to the competitive logic of '*pika*'.

one another, then disputes will also tend to be multiplex: reflecting a constellation of interests and conflicts rather than revolving around a single issue (Gluckman 1955; Comaroff & Roberts 1986). Consequently it seems that the critical difference between Maltese litigation and the Barotse cases discussed by Gluckman, lies in the way stories are legally processed more than in the volume of story-telling *per se*. While both Maltese and Barotse litigants tend to embed particular disputes within wider narrative frames, their stories are not elicited in the same way by the courts. During the Barotse litigation described by Gluckman, litigants would tell their story directly to the adjudicating body of the '*kuta*', without the intervention of an intermediate class of lawyers. For this reason, the notion of what constitutes relevant evidence was expanded far beyond the proof of events connected with the original dispute, to encompass the entire history of relations between the litigants.

In Malta, by contrast, litigants have to funnel their stories through the medium of lawyers, who emphasise a professional detachment based on the separation of legal issues from factual ones. While lawyer's professional detachment itself provokes clients' story-telling, it also ensures that there is not such a noticeable expansion in the criteria of evidentiary relevance. As shown in the seventh chapter, what can be proved in a case is largely restricted by lawyers to the issues at stake in it, as legally defined. Their response to clients' narratives is instead to engage in what I have called the 'problematism of evidence'.<sup>4</sup> Here rather than extending the boundary of what facts are to be proven, lawyers work so as to complicate the proof of the facts. The strategies by which this is accomplished reflect lawyers' own balancing-act between (a) a patronage which panders to clients' efforts to assert their idealised selves and (b) an emphasis on professional detachment which reflects lawyers' own attempts to avoid entanglement in clients' stories.

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<sup>4</sup> See chapter nine.

The outcome is an inflation in the quantity of proof and in the time spent contesting it, which helps create court delays.

There are two types of criticism, which have been the Scylla and Charybdis of my intellectual voyage. The first generally comes from lawyers and tends to downplay the influence of socio-cultural factors on legal processes in Euro-American societies. In terms of this perspective, 'Western' legal systems have a lot in common and any differences should be explained by reference to formal legal history and different institutional arrangements. The second critique is more anthropological. It goes in the opposite direction, emphasising the importance of particular socio-cultural settings so as to argue that even legal systems which are formally alike are applied differently at ground-level. While the two approaches might seem mutually exclusive, they can also be considered as complementary. After all a balanced legal anthropology should be capable of perceiving the similarities between legal systems. Such similarities increase the relevance of anthropological observations, suggesting that observed features are not restricted to one society. At the same time, they are themselves the basis for comparison. Thus while this thesis has tried to delineate some of the distinguishing features of legal representation in Malta, it should be equally clear that many of the features observed seem to be shared by other legal systems in the Mediterranean and beyond.

This appears to be the case with regard to the dialectical relationship I have described between paradigmatic legal rules and subjective narratives, in which clients use stories to involve their lawyers and invoke the morality embedded in legal rules. Recent socio-legal research has described comparable practices in Anglo-American litigation. This can be illustrated by Twining's (1994) study on the way stories are employed to appeal to extra-legal moral norms in English adjudication and by Sarat and Felstiner's (1995)

analysis of the stories told by divorcing clients in California.<sup>5</sup> However, these examples themselves suggest points of contrast. The stories collected by Sarat and Felstiner are replete with psycho-analytical jargon, while those of Maltese clients tend to make more reference to individual honour. Also Twining's categorisation of moral norms as 'extra-legal' is subtly different from a rhetorical approach which appeals to a morality embedded within the law itself.

This highlights the utility of further research aimed at exploring the way the interface between rules and stories is traversed in different social/legal settings. Since my research has primarily focused on civil litigation, it would be interesting to conduct a study of legal representation in criminal cases. Moreover, there is clear scope for comparative ethnographic studies of legal representation in other societies with different cultures and legal institutions. In England, for instance, it would be useful to see how the doctrine of precedent and the institutionalised separation between barristers and solicitors combine with culturally specific conceptions of self-hood, obligation and the state to condition the story-telling relations of legal representation. Another benefit of such research is that it would lead us to confront anthropological and legal categories, exposing the latent assumptions of both. Thus, this thesis has confronted 'patronage' with 'professional representation' and found that they are not such separate categories as might be supposed. Indeed, the distinct compartmentalisation of these categories could tell us much about the implicit geo-politics of an academic division of labour reluctant to acknowledge the similarities between (Mediterranean) patronage and (Western) legal representation.

This thesis has sought to make an original contribution to the anthropological study of law by concentrating on the social relations of Maltese legal

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<sup>5</sup> See chapter one for a review of Sarat and Felstiner's research.

representation. In so doing, it has followed a path cleared by such thinkers as Gramsci, who observes that a widespread mistake in the sociological characterisation of intellectuals is:

“that of having looked for this criterion of distinction in the intrinsic nature of intellectual activities, rather than in the ensemble of the system of relations in which these activities (and therefore the intellectual groups who personify them) have their place within the general complex of social relations” (Forgacs 1988: 304).

Rather than describing the social role of lawyers in terms of the ‘intrinsic nature’ of their work, legal work has therefore been explained by referring to the social relations within which it is produced. Indeed narrow essentialist definitions of law, which authorise lawyers’ detachment and diminish the professional relevance of social relations, have been seen to reflect and respond to pre-eminently social needs. Here a direct parallel exists between professional imaginings of law and traditional definitions of language by linguists.<sup>6</sup> In this context it is also interesting that many of the lawyers to whom I spoke complained that the Maltese are litigious. While there is no reason to doubt the truth of this assertion, its making by lawyers also suggests strategic motivations (Greenhouse 1989). It shifts responsibility for delays in litigation, by constructing them as an outcome of the external social pressures placed on the courts. Thus this claim obviates the role played by the courts (in general) and lawyers (in particular), in nourishing and amplifying litigiousness. Yet this thesis has shown how lawyers stretch out litigation by problematising evidence; making the law more difficult to apply. While lawyers rationalise their work as catering to a fixed pre-existing need for legality, they also collaborate in producing the need they cater for. Consequently essentialist definitions, based on the intrinsic nature of legal work, risk reproducing professional smoke-screens.

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<sup>6</sup> As Pierre Bourdieu (1992) has observed, idealistic constructions of language as a self-contained asocial system reflect the social position occupied by linguists as functionaries of an impersonal, bureaucratically organised, nation-state. They facilitate the political project of linguistic homogenisation which secures the consolidation and extension of state power.

This thesis has argued that concealment is intrinsic to legal processes. Thus learning the law, while projected as the study of abstract rules, involves acquiring familiarity with a fund of stories (chapter 4). Similarly lawyers depend on their clients' stories to found their representation, while often disguising this dependence behind an attitude of selective inattention to the 'facts' (chapters 5 & 6). Concealment occurs when lawyers transform clients' stories into paradigmatic ones (chapters 6) and also when they deny the existence of a gap between clients' subjunctive stories and the ones they tell on their behalf in court (chapter 7). In all these cases, the application of legal rules is made possible through negating the cultural labour of story-transformation by which the gulf between legal categories and social experience is bridged. Yet this objective dependence of legal rules on the subjective stories of clients was clearly illustrated by the case of the 'Faithful Prostitute' (chapter 8), where a persuasive story was seen to be generating a new legal rule by expanding the category of fidelity.

Litigation therefore appears as the site of hidden processes of abstraction and contextualisation, where narratives are used both as an abstracting device, (to align subjective experience with legal rules), and as a contextualising one, (to apply legal rules to individual experience). This suggests that legal rules/processes are much more responsive to social experience than they seem and than some sociological theories allow. In particular, the Marxist definition of law<sup>7</sup> as a cultural superstructure superimposed over an economic base would seem prone to obscure the sort of constant inter-change between law and social experience which has been observed in Maltese legal representation. Rather than viewing law solely as a process and treating legal texts as a mystifying discourse detached from socio-economic foundations, it seems more fruitful to embed the study of the content of legal rules within that of society. Narrative analysis provides a promising avenue for this, since it

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<sup>7</sup> Briefly reviewed in chapter one.

draws attention to the implicit juridical potential of the stories told in a particular society, while also exposing the narrative potential of legal texts. The latter can be seen to provide a cultural grammar through which action is narratively understood and therefore conceived.

The view of law that I am here promoting is one which considers it as primarily a cultural and linguistic phenomenon. Clearly legal processes have important social effects which are independent of the actual content of written rules and one should not entertain a naïve belief that these rules determine social action in a transparent and predictable manner. However, it seems arrogant and misguided to dismiss the detailed linguistic labour by which laws are drafted, promulgated and applied as simply the production of a mystifying discourse. As my thesis shows, litigation is characterised by a constant tension between legal categories and the experience of clients. Here the social effect of law appears to be cultural: conditioning the sort of stories which may be told with any hope of validation in legal settings. Conversely the case of the 'Faithful Prostitute' showed how cultural competence, or the ability to tell a persuasive story, in itself tends to generate legal entitlement. This view of legal entitlement as the ability to pronounce the 'right word' is found in the Bible quotation which opened this chapter. Bourdieu puts it elegantly:

"Benveniste pointed out that in Indo-European languages the words which are used to utter the law are related to the verb 'to speak'. The right utterance, the one which is formally correct, thereby claims, and with a good chance of success, to utter what is right, i.e. what ought to be...the most rigorously rationalised law is never anything more than an act of social magic which works" (1992: 41-42).

If legal rules are both abstracted from culturally specific narratives and themselves condition the type of stories that can be told, then concealing the real nature of these operations increases their effectiveness (Herzfeld 1993: 65). In this way, acts of literary creativity can be disguised as the automatic

application to the facts of inflexible rules.<sup>8</sup> Moreover, if terms like 'language' or 'culture' seem appropriate for describing the domain where laws achieve their primary social effects, this does not mean embracing an idealistic theory which bases legal entitlement on some innate, universally available, linguistic ability. Instead law appears as a central arena for the 'politics of truth' (Foucault 1980) in a given society: externalising social power relations in a linguistic form. This is why this thesis has emphasised the *social relations* of legal representation, following recent trends in the sociology of language, which have sought to transcend the opposition between economism and culturalism to develop an "economy of symbolic exchanges" (Bourdieu 1992: 37). In short, if law is a form of language, this is not because of its abstract communicative nature, but because it illustrates the way power relations are discursively generated and reproduced.

Highlighting the continuously traversed interface between legal rules and culturally specific stories also brings out certain similarities between legal and anthropological representation. Like lawyers, anthropologists must also: "see broad principles in parochial facts" (Geertz 1983: 170-171). To do so, they must question informants in a way which is as influenced by anthropological categories, as that of lawyers is by legal ones. As Layton (1983) notes, both law and anthropology often use concepts which are: "not exactly matched in local thought" (*ibid.*: 226). This questioning therefore resembles the examination of witnesses by lawyers, insofar as it implicitly encourages the production of paradigmatic stories (Bourdieu 1997: 91).<sup>9</sup> Moreover

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<sup>8</sup> This also explains the often competitive relationship between lawyers and novelists (or anthropologists). The latter are also in the trade of creating culturally persuasive descriptions. For this reason, there is a tendency on the part of legal practitioners to criticise the 'impractical' and 'subjective' character of literary description, which enables them to differentiate their own work on the grounds of its 'practical' and 'objective' character. This reflects a deep unease with the subjective and creative literary features of legal work itself. These features are exposed by the ease with which former lawyers have become novelists, as shown by the lives of novelists like Samuel Richardson, Charles Dickens or Franz Kafka.

<sup>9</sup> See the section on 'Court-room Storytelling' in chapter seven.

anthropologists have also explored the cultural significance of the conceptualisations behind paradigmatic legal categories (Strathern 1996).<sup>10</sup> The ultimate aim of anthropological questioning is to generalise and therefore to abstract descriptive theoretical statements of a normative/paradigmatic kind out of the stories of informants (Carrithers 1992). In a context where descriptive anthropological categories are increasingly reformulated as part of prescriptive legal rules<sup>11</sup> and where anthropologists engage in advocacy (Albert 1997) or witnessing (Apthorpe 1996) it may seem difficult to define the boundary between legal and anthropological representation.

One difference between lawyers and anthropologists lies in their attitude to facts. A study comparing law and anthropology students has observed that while law students are taught to accept highly selective versions of the 'facts' as absolutely true, anthropology students are trained to be: "critical of the presentation of facts" (Rigby & Severeid 1992: 19). Greater sensitivity to the problematic nature of factual representation explains the agonising over modes of representation which is such a prominent feature of contemporary ethnography (Clifford & Marcus 1986). If anthropologists like Abu-Lughod (1993) have opted to structure books around informants' narratives, this is because stories are seen as more suitable than law-like generalisations for conveying the partial, situated and uncertain nature of anthropological knowledge. Here anthropologists are exploiting the power of subjunctive stories to make the world strange by evoking alternative views on reality (Bruner 1986).

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<sup>10</sup> In a recent article. Strathern observes with regard to the legal category of intellectual property rights:

"for non-lawyers the legal category as much serves as a vehicle for experimenting with new conceptualisations of ownership as it delimits a recognisable phenomenon" (Strathern 1996: 17).

<sup>11</sup> As seems to have happened with the anthropological concept of a 'descent group' incorporated in the Australian *Aboriginal Land Rights (Northern Territory) Act* of 1976 (Layton 1983).

Yet while the gap between anthropological and legal modes of representation might seem an unbridgeable one, this thesis has emphasised the hidden connections between stories and rules. In Maltese litigation the most subjunctive story-telling is always implicitly juridical, since such stories challenge the legal rules and may lead to the creation of new ones.<sup>12</sup> In the light of this research, one is led to explore the trends which have led some contemporary anthropologists to emphasise narrative as a preferred mode of description. This was not always so. In the heyday of functionalist anthropology, a more rule-oriented mode of description prevailed (Evans-Pritchard 1951: 46). This was at a time when the scope of anthropological research was clearly restricted to the 'traditional' cultures of non-Western peoples. Yet as anthropology has come closer home, its rule-making ability seems also to have diminished, making way for more reflexive and less authoritarian styles of representation.

A recent article by Apthorpe (1996) suggests a reason for this shift. Trying to identify the difficulties preventing anthropologists from making a contribution to policy, he talks about anthropology's preoccupation with: "rich descriptive and interpretative analysis as, opposed to efforts supposed to lead to law-like generalisations and predictions" (*ibid.*: 176). Yet he suggests that while this might seem to be an obstacle, it is actually a strength, since:

"An interpretative and narrative account pays attention to processes and explanations for these processes. Some of these will be recognised and readily seen to be crucial by various actors and observers. A study which plays down prescription while emphasising description is also harder to ridicule: it leaves room for stakeholders to learn and benefit from the enriched understanding offered without feeling directly threatened. So policy anthropology should put its best narrative powers forward to succeed in performing expert witness well" (*ibid.*).

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<sup>12</sup> See chapter eight.

It follows that increased resort by anthropologists to narrative modes of representation allows contributions to policy making *because* it avoids a head-on confrontation with other disciplines which utilise law-like generalisations. This is clearly the case with regard to economics, sociology and political science, which all utilise law-like language to move from description to prescription.<sup>13</sup> Thus as anthropologists have come closer home, they have also had to come to terms with an academic division of labour dominated by subjects utilising law-like generalisations. In this context, resort to narrative appears to be more of a way of carving out a niche for anthropological claims to expertise than the outcome of a sudden insight into the complex relativity of contemporary social life. Consequently anthropological narratives have a direct relevance to legal reform and other forms of policy making. Like the stories told by Maltese clients and witnesses, these narratives are implicitly juridical. Anthropology is a disguised site of emergence of the rules and other cultural generalisations by which social life is understood and acted upon.

In the context of this broadened perception of the scope of anthropological representation, I would like to highlight the utility of a legal anthropology which would incorporate narrative analysis to explore the modes of production of social order in contemporary societies. One of the advantages of such an approach is that it would make it possible to overcome the long-standing opposition within legal anthropology between rule-centred and processual models for understanding human action (Comaroff & Roberts 1986). A view of humans as story-tellers gives due weight to the role played by social/legal rules in conceptualising and explaining action, while also fore-grounding the importance of the individual histories within which these rules are evoked,

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<sup>13</sup> This process is illustrated by the progressive reification of 'norms' which commence as convenient ways of describing patterned social behaviour and eventually come to mean that this behaviour is itself normative. or carried out in obedience to explicit norms (Bourdieu 1997).

denied or selectively lived.<sup>14</sup> As earlier recommended, this approach would interrogate the potentially juridical principles evoked by individual stories as well as the narrative possibilities present in the formal legal rules.

This thesis has sought to contribute to legal anthropology by exploring the intersection of legal rules and stories within Maltese legal representation. In so doing certain observations have been made which could help orient future research. In particular it seems useful to consider the description of adjudication in the case of the 'Pain in the Neck', where it was perceived as the recovery of an untold shared narrative selectively denied by the parties. Such a process of recovery only works because of the over-lapping and dialogic inter-relationship between the story-telling of different individuals. Yet it is easily obscured by a relativistic perspective on narrative, which sees culture as a multitude of detached, individual stories. By contrast, this thesis has argued that it is the social inter-locking of stories, both with other stories and with the legal rules, which makes them a useful target for analysis.

I would like to end on a reflexive note. If I have tried so laboriously to rescue the subdued voice of clients stories from the bland anonymity of legal rules, this is also because of my own identification with their efforts to assert the significance of their individual experiences against indifferent legal categories. In choosing the doubly detached forum of an anthropology thesis in an English university, I have tried, as a Maltese lawyer, to weave my own narrative departing from established ways of writing about law. To the extent that this work provokes a more critical awareness of the concealed cultural impact of contemporary legal systems, I will consider myself vindicated.

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<sup>14</sup> As observed in chapter two.

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- 2) Annual Report for period from 1/1/1995 to 30/12/1995, prepared by the Attorney General's Office of the Government of Malta.

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All references to Maltese procedural law have been taken from the 'Code of Organisation and Civil Procedure', Chapter 12 of the Laws of Malta, prepared under the authority of the Statute Law Revision Act (1980) by the Law Commission set up under that Act and published by the Malta Government Printing Press.

The maps on page 87 have been taken from the Microsoft Encarta 97 Encyclopedia CD Rom. The statistics on the occupational distribution of legal professionals included in the fourth chapter are taken from the 'Legal and Court Directories' of 1992 and 1994, published by the Maltese Lawyers' Association: the '*Camera degli Avvocati*' .

