

Journal of Civil Law Studies

Volume 4

Number 2 *Mediterranean Legal Hybridity: Mixtures and Movements, the Relationship between the Legal and Normative Traditions of the Region; Malta, June 11-12, 2010*

Article 15

12-1-2011

Maltese Court Delays and the Ethnography of Legal Practice

David E. Zammit

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>

 Part of the [Civil Law Commons](#)

Repository Citation

David E. Zammit, *Maltese Court Delays and the Ethnography of Legal Practice*, 4 J. Civ. L. Stud. (2011)
Available at: <https://digitalcommons.law.lsu.edu/jcls/vol4/iss2/15>

This Conference Proceeding is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

MALTESE COURT DELAYS AND THE ETHNOGRAPHY OF LEGAL PRACTICE

David E. Zammit*

Abstract.....	539
I. Introduction	541
II. Fieldwork in Malta.....	543
III. Scope of this Investigation.....	544
IV. Lawyer/Client Interviews	544
V. The Social Uses of Professional Ideals	548
VI. The Procedural Reforms of 1996.....	553
VII. Professionally Distancing Law from Fact.....	558
VIII. Delay and the “Colonial Encounter”	562
IX. Conclusion	566

ABSTRACT

This article¹ starts by critiquing two recent attempts to sociologically account for court delays in Mediterranean societies.

* Senior Lecturer in Law & Anthropology, Head of Department of Civil Law, University of Malta, Malta; Executive Editor, Mediterranean Journal of Human Rights; LL.D., University of Malta; Ph.D. in Legal Anthropology, University of Durham. His central research interest is the ethnographic study of legal processes.

1. An earlier draft of this paper was presented at the European University Institute’s 10th Mediterranean Research meeting held in Montecatini Terme

The first account was produced by the sociologist David Nelken and uses the concept of legal culture to explore the causes of court delays in Italian criminal trials, while the second account was produced by the anthropologist Michael Herzfeld, who sees court delays in Crete as metonymically encapsulating a broader cultural context. It is argued that both accounts omit an important dimension of the issue, which is how such delays are produced and justified at the level of legal practice itself. By referring to the author's fieldwork in the Maltese civil courts it is argued that court delays are best explained with reference to the social relations involved in legal practice, particularly those between lawyers and clients. Delays must be related to the ways in which lawyers see their role in litigation and these professional understandings are in turn connected to the kinds of expectations that their clients have of them.

In this article particular attention will be paid to discursive invocations of these professional understandings by Maltese lawyers in the mid-1990's, while resisting administrative reforms intended to streamline the procedures through which evidence is compiled in court. Delays were justified as necessary consequences of the lawyer's professional role as locally understood. This is possible as, although often considered as synonymous with corruption, delay as a professional strategy is capable of signalling an extraordinary range of meanings. In particular, delay makes it possible for lawyers both to affirm and to traverse the distance between everyday and legal concepts of evidence, truth and reality. Delay is an intrinsic part of the practical symbolism through which the specificity of "the legal" is enacted. Through delay Maltese lawyers cope with the specific demands of their clients by performing specific professional understandings of legal representation as a matter of balancing between patronage and professional detachment. The generative matrix of these professional understandings can itself be located in the colonial encounters which shaped Maltese legal history and its mixed jurisdiction.

(March 25-28, 2009). I am grateful to the participants of the workshops for their helpful feedback and advice.

I. INTRODUCTION

Although it evokes orientalisng scholarly tropes about “weak states” in Southern Europe and “Mediterranean time,” the issue of delays in Mediterranean court litigation appears as an interesting target of ethnographic investigation. This is not only because these delays feature so prominently within internal and external discourses about corruption, the nature of the state and (the lack of) efficient governance, but also because the study of how they are created and justified in practice requires precisely the sort of detailed examination of the practices of judges, advocates and other court-room actors that is needed in order to overcome the dichotomy between “law in the books” and “law in action.”²

Recent research by the anthropologist Michael Herzfeld and the sociologist David Nelken can serve to indicate why researching court delays may produce a broad range of insights into Mediterranean states and societies. Nelken³ focuses on the causes of court delays in Italian criminal trials. He seeks an explanation in a range of factors drawn from both “internal legal culture” (including the organizational structure of the courts and a tendency to multiply procedural safeguards) and “external legal culture” (including such factors as the general tempo of Italian social life and the contested character of the state). By contrast, Herzfeld⁴ sees court delays in Crete as rooted in a broader cultural context, where the accusatory rhetoric of clients and the attitudes they bring to their dealings with state officials are matched by various defensive responses on the part of the bureaucrats, particularly delay. While these investigations consider court delays as a sort of window capable of giving us glimpses into very diverse aspects of Greek and Italian social and cultural organisation, they can also be criticized for neglecting to examine an important dimension of the phenomenon, which is that of legal practice itself.

2. This distinction originated in the work of Roscoe Pound’s distinction and has now become the starting point of most research in the field of Law and Society.

3. David Nelken, *Using the Concept of Legal Culture*, 29 AUSTRALIAN J. OF LEG. PHIL. (2004), available at <http://repositories.cdlib.org/cslls/lss/20> (Last visited November 9, 2011).

4. MICHAEL HERZFELD, *A PLACE IN HISTORY* (Princeton University Press, Princeton, 1991).

Asking how delays are experienced and justified at the level of legal practice means adopting an ethnographic perspective which focuses our attention less on generic features of culture and social structure, or even of legal culture,⁵ and more on the practical choices which must be made by the parties involved, particularly the lawyers, in the course of the actual litigation when these delays materialise and must be somehow justified or accounted for.

Using the ethnography of legal practice as a prism through which to explore court delays requires a microscopic focus on the social relationships through which the work of legal representation is carried out, particularly those between lawyers, clients and judges, and it also requires us to remember that each of the parties involved is a “theorising agent”⁶ in his/her own right. As court litigation is largely controlled by legal professionals, such as lawyers and judges, *their* theories concerning appropriate professional practice must be interrogated in order to discover how court delays can coexist with a professional self-image. Framing the inquiry in this way follows the trend in the sociology of the professions to view professionalism as primarily an “emic” or folk-concept and investigate it as such.⁷ It has the added advantage that it avoids making unwarranted and ethnocentric assumptions that the content of professional ideals is the same in all European legal systems, that the pursuit of these ideals necessarily leads lawyers to promote the public interest,⁸ or that delay is an inevitable result of corruption and a failure of professionalism.

An ethnographic approach, which concentrates on the role played by professional ideals in the daily practice of lawyers, makes it possible to overcome what has been described as the:

5. That is, assuming that legal culture is conceived as a distinctive way of structuring and organising the legal field. *See*, Nelken *supra* note 2.

6. MICHAEL HERZFELD, *ANTHROPOLOGY THROUGH THE LOOKING GLASS*, (Cambridge University Press, Cambridge, 1989).

7. *See*, Pierre Bourdieu, *Thinking about Limits*, in *CULTURAL THEORY AND CULTURAL CHANGE* 42 (Mike Featherstone ed., Sage, London, 1992); TERRENCE JOHNSON, *PROFESSIONS AND POWER* (Macmillan, London, 1972); Sarah Cant & Ursula Sharma, *Reflexivity, ethnography and the professions (complementary medicine). Watching you watching me watching you (and writing about both of us)*, EDITORIAL BOARD OF THE *SOC. REV.* 246 (Oxford, Blackwell Publishers 1998).

8. RICHARD L. ABEL, *AMERICAN LAWYERS*, (Oxford University Press, New York & Oxford, 1989).

“arbitrary separation between the sociology of law and the sociology of the legal profession.”⁹ Such an approach makes visible the complex inter-relationships between professional ideals and the specific social and cultural contexts in which they are implemented. At the same time a purely ethnographic, “present-tense” approach itself needs to be embedded within the broader social and historical framework provided by social anthropology.

II. FIELDWORK IN MALTA

This paper will draw on my anthropological fieldwork, carried out in the Mediterranean island-state of Malta, to examine the ways in which Maltese lawyers interpret and invoke professional ideals in the course of their legal practice and when confronting recent administrative reforms to the court procedures for compiling evidence. These themes will here be approached from the standpoint of my fieldwork on legal practice in Malta. Initial fieldwork was carried out for a total of twenty-two months between April 1996 and May 1997, followed by shorter periods of field research in 2002 and 2006.¹⁰ It was based on participant observation in the offices of four Maltese lawyers¹¹ and in the civil courts. I had access to these offices because I have a law degree, having trained in law before studying anthropology. My research concentrated on the ways in which lawyers and clients negotiate the “facts” of the case, the production of evidence during court litigation and its assessment during adjudication. The aim was to acquire a holistic understanding of Maltese legal representation in civil litigation by exploring the social relations through which it is carried out. Through focusing on legal practice, I tried to build on my own legal background so as to carry out a more reflexive and practice-orientated ethnography, of the sort that sociologist Pierre

9. Ruth Buchanan, *Constructing Virtual Justice in the Global Arena*, 31:2 L. & SOC. REV. 364 (1997).

10. I am grateful to the Universities of Malta and Durham for funding my research. This was made possible through a staff scholarship by the University of Malta and an ORS grant on the part of the University of Durham.

11. According to my calculations, there were during the period of my research close to three hundred lawyers involved in court litigation.

Bourdieu has recommended.¹² In 2010, I expanded the scope of my research to explore the historical development of court delays in Malta by means, primarily of documentary research.

III. SCOPE OF THIS INVESTIGATION

This paper will initially focus on the pressures clients place on their lawyers in office interviews. Against this backdrop, the way Maltese lawyers interpret and invoke professional ideals in their legal practice will be explored. This will be followed by an ethnographically informed case study of the reforms attempted by the Maltese government in 1996 to court procedures for compiling evidence, which will attempt to account for the failure of these reforms and in the process highlight the defensive and largely obstructive responses of legal professionals and the role played by professional ideals in legitimating these responses. This article will then explore how Maltese legal practice was described by practitioners in 1912 and relate this to the trends which were observed during my fieldwork. Finally, some more general conclusions about the character of the Maltese legal system will be attempted.

IV. LAWYER/CLIENT INTERVIEWS

Office interviews with lawyers, in which clients communicate the facts and receive legal advice and guidance, are an indispensable starting point to explore the social uses of professional ideologies. These interviews are central to lawyer/client interaction as during their discussion of the case both parties will also informally negotiate their relationship. During my fieldwork, story-telling was the most prominent feature of the interviews I observed. While my training in law had led me to expect clients to state “facts” structured according to legal categories, what I experienced was a more confused and contested process. Rural and working class clients in particular would smuggle stories stressing their own morally upright behaviour

12. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (Polity Press, Cambridge, 1997).

within their narrative accounts of the facts. Such stories were told despite the inattention of lawyers and even though they seemed legally irrelevant. In one case, for instance, a small rural businessman seeking his lawyers' help in some financial transactions, explained that he had always "walked straight," (*i.e.*, acted honourably) and that while he was prepared to give away free gifts, he could not tolerate being robbed by others. Similarly, a working-class widow who was trying to repatriate her husband's money kept insisting with her lawyer that she did not want this money for herself, but so as to leave it to her children equally in the event of her death. The persistence of clients in recounting these personalised stories seemed even more paradoxical since lawyers told me that *their* only aim was to get the facts straight and disclaimed any interest in the moral qualities of their clients: "who should only be judged once."

Certain features of clients' stories throw light on their significance. These narratives create moral sympathy for clients because they inject powerful cultural values into descriptions of past actions. This can be illustrated by the story of the rural businessman earlier mentioned. He talked about "walking straight", because in Maltese "walking" is used metaphorically to morally evaluate the way in which a person relates to others. A person who "walks straight" is one who avoids corrupting social obligations which deviate one's life-walk, impeding straightforward adherence to moral ideals. Consequently the businessman endowed himself with an honourable autonomy, which could be used to exert pressure on his lawyer,¹³ authorising him to express powerful emotions and thump on his desk in anger at being robbed. Through these stories, moreover, clients also try to translate their moral virtue into legal entitlement in their lawyers' eyes. This is made explicit in the businessman's case, since the expression: *nimxi dritt*, or "I walk straight" plays on the way *dritt* in Maltese not only means straightness, but also a legal right, or even the undifferentiated whole of legal and moral rules.

13. Analogously, by stressing her impartial concern for her children, the widow sought to portray herself as a good wife and mother as the role was traditionally conceived in Malta.

This analysis indicates that clients' narratives are best understood not solely as ways of communicating the facts, but also as attempts to control their relationships with their lawyers. They operate as what linguist Deborah Tannen¹⁴ has called: "involvement strategies," since they are a medium through which clients can involve lawyers in personal relationships based on shared moral values, obliging them to actively "advocate" their interests. Anthropologists have observed such patronage relationships in Malta¹⁵ and elsewhere in the Mediterranean region.¹⁶ Their ideological structure has been aptly described as: "the moral englobing of political asymmetry that allows the client to maintain self-respect while gaining material advantage."¹⁷ Clients use various strategies to try to create these patronage relationships.¹⁸

These efforts to create patronage derive from complex social causes, which can only be briefly indicated here. Some seem to be common to other Mediterranean societies. Thus, Herzfeld¹⁹ has related the need for mechanisms of social incorporation in Greek society to the absence of a fully integrated capitalist economy, the competitive and hostile character of extra-familial social relations and the weakness and relative youth of the nation-state.²⁰ Other causes relate more specifically to Malta, such as the

14. DEBORAH TANNEN, *TALKING VOICES: REPETITION, DIALOGUE AND IMAGERY IN CONVERSATIONAL DISCOURSE* (Cambridge University Press, Cambridge, 1989).

15. JEREMY BOISSEVAIN, *SAINTS AND FIREWORKS: RELIGION AND POLITICS IN RURAL MALTA* (Progress Press Co. Ltd, Valletta, Malta, 1993).

16. JOHN K CAMPBELL, *HONOUR, FAMILY, AND PATRONAGE* (Oxford University Press, New York & Oxford, 1974).

17. Michael Herzfeld, 'As In Your Own House:' *Hospitality, Ethnography and the Stereotype of Mediterranean Society*, in *HONOUR AND SHAME AND THE UNITY OF THE MEDITERRANEAN* 86 (Gilmore ed., Princeton University Press, Princeton, 1987).

18. For instance, I often observed Maltese clients give gifts to their lawyers and trying to involve them in discussions about non-legal matters. Gifts ranged from the proverbial bottle of whisky in Christmas to providing free access to a beach resort owned by the client.

19. MICHAEL HERZFELD, *THE SOCIAL PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF WESTERN BUREAUCRACY* (Chicago University Press, Chicago, 1993).

20. Herzfeld explains that consequently the Greek 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. *Id.*

historically derived sense of alienation of the Maltese from a state apparatus belonging to a foreign colonial power²¹ or the modelling of political power on Catholic religion with its stress on saintly mediators between person and God.²² In a small-scale society impersonality can become a scarce (and valued) commodity. As one Maltese proverb has it: “Malta is small and people are known.”²³

Popular perceptions of lawyers and the court system may also motivate clients to try to create patronage relationships. Rampant delays in litigation have given a bad name to the Maltese courts and clients may seek their lawyers’ patronage to ensure that their cases are handled efficiently. The ambiguous social role of lawyers as mediators between their clients and the state legal system may make it difficult to discover whose side the lawyer is on. If middle-class clients complained about the links between lawyers and criminals, those coming from a rural or working-class background saw lawyers as part of a dominating and exploitative upper class. Significantly, it is the clients who were the most socially distant from the urban professional classes who often seemed to be trying hardest to involve their lawyers in patronage relationships.

It seems clear, therefore, that Maltese lawyers often come under intense pressure from clients, especially those coming from a rural or lower-class background, who try to create personal relationships with them in order to control the way they carry out their work. Clients make indirect attempts to develop these patronage ties, evoking moral sympathy through the way they narrate the “facts” of the case. This strategy is difficult to rebuff, given the “inescapably moral”²⁴ quality of the stories through which the “facts” are communicated.

21. EDWARD L. ZAMMIT, *A COLONIAL INHERITANCE: MALTESE PERCEPTIONS OF WORK, POWER AND CLASS STRUCTURE WITH REFERENCE TO THE LABOUR MOVEMENT* (Malta University Press, Malta, 1984).

22. BOISSEVAIN, *supra* note 14.

23. In Maltese this reads: “*Malta zghira u n-nies maghrufa.*”

24. JEROME BRUNER, *ACTS OF MEANING* 50 (Harvard University Press, Cambridge, MA, 1990).

V. THE SOCIAL USES OF PROFESSIONAL IDEALS

Lawyers' professional ideals have here been approached from the standpoint of their interviews with clients. This is because these ideals are not simply abstract principles to which lawyers pay lip-service. On the contrary, they have a direct practical application, helping to equip lawyers to cope with the pressures clients place on them. These social uses of professional ideals are revealed by the way they are taught to new generations of lawyers. Until recently professional ethics were not fully incorporated into the standard academic curriculum of the University of Malta. They are still mostly transmitted to young lawyers by practitioners during the liminal period of transition from the University to legal practice.²⁵ Moreover a Maltese code of professional ethics for lawyers was only published in 1996.²⁶ Thus the transmission of professional ideology is still largely seen as part of a process of oral socialisation through which young lawyers learn to view themselves as members of a professional community with its own distinct interests.

An important practical use of professional ideals is that of justifying lawyers' non-response to their clients' stories. During my fieldwork, I often observed lawyers keeping a sceptical distance based on the need to preserve their professional detachment. This refusal to fully endorse clients' narratives was signalled by the ironical comments lawyers sometimes made, the contextual absurdity of which showed they were not taken in.²⁷ A sense of professional detachment could also be transmitted through

25. Generally professional ethics are taught in the final year of the LL.D. course, which was until very recently perceived as a period when the academic teaching of law was at an end, so that students concentrate on their apprenticeship and on preparing their theses. Professional ethics are also favourite subjects for speeches on such occasions as the granting of the professional warrant, or in seminars organised by the law students' society.

26. Reference is made to the *Code of Ethics and Conduct for Advocates*, published in 1996 by the Commission for the Administration of Justice, The Palace, Valletta, Malta.

27. For instance, in one case, a landlord kept telling his lawyer what a gentlemanly relationship he enjoyed with his tenants, while he also sought advice on how he could legally increase the rent. His lawyer calmly observed that as the tenants were professional people, it was going to be difficult for the landlord to make fools of them!

formal clothing, the organisation of space in legal offices²⁸ and an aloof attitude when interacting with clients. These invocations of professional ideals clearly reflect attempts by lawyers to resist entanglement in patron/client relationships.

The connection between the professional ideals upheld by Maltese lawyers and their clients' involvement strategies can be perceived by exploring the way the task of legal representation is described according to professional ideology. The comments of one established and highly respected lawyer are typical in this regard. When interviewed on this point, this lawyer 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.²⁹ 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 courtroom setting of an oral hearing, which he termed a "search for truth" undertaken before the judge. He therefore objected to the use of written affidavits³⁰ as an alternative way of collecting evidence; claiming that they tempted lawyers to write their clients' stories for them and risk perjuring themselves. He also observed that he had never witnessed a signature in the absence of the person concerned.

Thus, professional ideals portray legal representation as a process where the lawyer's concern with the issues at stake is distinguished from that of her client. Lawyers are concerned solely with the "case," consisting of the legal arguments and claims to be made.³¹ It is the client's primary responsibility to prove the "facts," on the basis of which these legal arguments are raised. This distinction establishes a conceptual boundary between the domain

28. Professional detachment was conveyed by maintaining a spatial demarcation between the 'front office,' where clients wait and their files are located and the 'inner office,' where lawyers sit surrounded by law-books.

29. In Maltese this reads: "*Il-fatti f'idejn il-kljent.*"

30. 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. Maltese judges are increasingly requesting the presentation of affidavits instead of oral testimony.

31. Lawyers are prepared to accept more involvement with the facts in criminal cases.

of the client, which is one of potentially changeable oral stories of dubious credibility, and the domain of 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. In fact, Maltese lawyers constantly assert their detachment through expressions like: "trying to win the case for the client," which imply they have no personal interest in the outcome.³²

This professional model of legal representation is significant for two principal reasons. Firstly, it is almost diametrically opposed to the way most clients would like to construct their working relationships with lawyers. Whereas clients would like to start from a moral consensus with their lawyers concerning the facts of the case, the professional model requires lawyers to base their court-room representation on a *prima facie* assessment of the facts which is solely intended to clarify the legal issues involved. Clients often believe that once they take on a case, lawyers assume responsibility for ensuring a successful outcome in the court-room. By contrast, the professional model places the burden of producing convincing evidence firmly in the hands of the client, restricting the lawyer's role to "purely legal" argumentation.³³ Consequently, although the client might feel that this is unethical, the professional model authorises a lawyer to institute a court case on behalf of an insistent client even if the lawyer believes that he will lose the case because his evidence is not sufficiently persuasive or credible.³⁴ Evidence belongs in the clients' hands and lawyers are distanced from any responsibility for it.

Secondly and more importantly, it seems clear that professional ideals which have the effect of distancing them from

32. Strictly speaking, lawyers have no financial interest in winning lawsuits. This is because their fees are calculated according to an official tariff, according to such matters as the value of the object of the suit. Naturally, however, lawyers who consistently lose suits will probably fail to attract as many clients as others.

33. Thus, clients' views on affidavits contrast to those of lawyers. In fact, clients complained to me that their lawyers had barely glanced at the affidavits they wrote. While clients expected their lawyers to take responsibility for the evidence, this is precisely what the latter wanted to avoid.

34. Of course the lawyer has a recognised duty to inform his client that he thinks he will lose the case.

responsibility for the “facts” can be very useful to lawyers in a social context where clients try to use their narration of the “facts” to implicate them in patronage relationships. I suggest that Maltese lawyers favour an extensive interpretation of the meaning of professional detachment when representing clients in litigation precisely because it allows them to escape the pressures which clients exert through the medium of the “facts.” If this is correct, then it shows how the interpretation of professional ideals is influenced by the practical context in which it occurs.

This analysis is open to the objection that I have over-emphasised the homogeneity of Maltese lawyers, ignoring the occupational differentiation of the profession and possible differences in style and approach which might lead to different interpretations of professionalism. However, the internal differentiation of the Maltese legal profession is not very great. My statistics³⁵ show that when my ethnographic research commenced in the mid 1990’s, 44% of lawyers were sole private practitioners, 28% were employed with law-firms and 13% with the Government. The remainder was either non-practising or employed with various private companies. Moreover, Maltese law-firms are usually small partnerships where the type of work closely resembles that of a sole practitioner. Indeed, only four of the law-firms listed in 1994 had a membership of seven or more and the largest of these grouped eleven lawyers. In the exercise of their profession, most firm lawyers find that it is important to be flexible and to be prepared to carry out different types of work, even if they have specialised in certain fields.³⁶

Stylistic differences in handling clients exist and they do seem to be broadly correlated to occupational status. Sole practitioners are more likely to devote time to listening to their clients and to provide some endorsement of their stories, while firm lawyers tend to place a higher premium on efficient time management. However most lawyers find it necessary to

35. Data was culled from the ‘Legal and Court Directory’ produced by the *Camera degli Avvocati*, the Maltese lawyers’ association. The directory contains a list of practising lawyers which can be considered as fairly exhaustive, given that practically all practising lawyers are members. I consulted the 1994 and 1992 issues of this Directory.

36. This is due to the small size of Malta, which means that the number of legal jobs available in any area of practice is necessarily limited.

strategically balance between patronage and professionalism when handling clients. The attractions of professionalism are obvious, since it frees lawyers from clients' pressures and allows greater efficiency. Yet there are important reasons why even firm lawyers find that they cannot avoid acting as if they were, to some extent, their clients' patrons.³⁷ Thus, as already observed, many clients want to create patronage relationships and lawyers, who operate in a very competitive market, are eager not to alienate them. Moreover certain clients do not feel able to confide secrets to their lawyers unless they have a personal relationship with them.³⁸ Finally, as was previously argued, patronage relations are in a way in-built into clients' stories.

It follows that despite the existence of occupational and stylistic differences among Maltese lawyers, they generally attempt to strike a balance by providing limited endorsement of their clients' narratives while also trying to emphasise their professional detachment from them. Few lawyers are willing to forego the benefits of belonging to the "*Professjoni Libera*," or "free profession" as they call it, by wholeheartedly identifying themselves with their clients in patronage relationships. Indeed, one such case reported to me is highly instructive. The lawyer concerned is criticised by some of his colleagues both because he develops close patronage relations with his clients *and* because he drafts long, verbose, affidavits on their behalf. This criticism clearly shows how lawyers equate professional detachment, in the sense of keeping the necessary distance from the client, with professional legal representation, in the sense of confining oneself to the legal issues and leaving ultimate responsibility for the "facts" to the client.³⁹ Clearly, most Maltese lawyers believe their

37. By, for instance, occasionally waiving payment for legal advice and giving more attention to clients.

38. JULIETTE DU BOULAY, *PORTRAIT OF A GREEK MOUNTAIN VILLAGE* (Oxford University Press, Oxford, 1974).

39. A similar model of legal representation is found in the Maltese code of ethics for lawyers (*op. cit.*). Significantly, this code prescribes that an advocate representing clients in civil litigation: "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.

professional detachment requires them to performatively avoid excessive involvement with the “facts,” viewed as a potential source of “symbolic pollution,” in Mary Douglas’ terms.⁴⁰

VI. THE PROCEDURAL REFORMS OF 1996

Having explored the way lawyers interpret professional ideals in the ordinary course of their legal practice, it is now possible to reach a deeper understanding of the obstacles impeding certain reforms which the Maltese Government carried out in 1996 to the system by which evidence is compiled in court. By focusing on this particular case-study, the broader social effects of professional ideals will be highlighted. Firstly, however, it is necessary to explain the pre-1996 system for compilation of evidence and the public discontent which motivated these reforms in the first place.

Litigation before the Maltese civil courts occurs in two successive phases. A preliminary written phase, in which the litigants send each other their respective written legal claims and statements of defence, is followed by an oral phase when the parties and their witnesses testify and the lawyers question witnesses and present their own arguments. During the written phase and together with their legal claims, the litigants are obliged to send each other a “declaration of facts” which should contain their respective statements of the “facts” at stake. Together with this, each of the litigants is also expected to file a list of the documents and a list of the witnesses which s/he intends to produce during the case. After the preliminary exchange of their written claims, the case then shifts to the oral stage where each of the litigants has a chance to testify and to produce any witnesses mentioned in her list. Testimony is usually heard in a certain order: starting from the plaintiff and continuing with his witnesses and followed by the defendant and his witnesses. Witnesses are first examined by the lawyer for the party who summoned them and then cross-examined by the opposing lawyer. Their replies are

40. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (Routledge and Kegan Paul Ltd, London, 1988).

transcribed by the court clerk. Often, important documents are handed over to the court by witnesses in the course of testimony. After all the witnesses have been examined, the judge defers the case so that he can pronounce his judgement.

What this account omits are all the delays which are caused when this system is implemented in practice. These are due to various causes. For instance, litigants often find it impossible to summon all their witnesses to testify on the same day. Consequently, cases are usually postponed for three months so as to hear the testimony of new witnesses. Some litigants tend to name fifty or sixty witnesses and expect to be allowed to summon them all to testify! Additional problems are caused when particular witnesses do not come to court or cannot be traced and the case is normally put off to allow lawyers to try to contact these witnesses. There are many other causes of delay which cannot be mentioned here. It is important, however, to note that delays mostly arise during the oral phase of litigation, when testimony is being produced. Court delays had multiplied during the late 1990's and remain a persistent cause for concern today.⁴¹ Thus, statistics given by the Minister of Justice for 1997⁴² indicate that by the end of January 1997, there were a total of 22,861 cases pending before all the Maltese courts, many of which were pending before the civil courts.⁴³ By comparison, government statistics⁴⁴ indicate that at the end of March 2011, there were a total of 23,133 pending cases before all the Maltese courts.⁴⁵

41. See the report on the recent visit conducted in Malta by the Council of Europe's Commission for the Efficiency of Justice, *Court Backlog under Scrutiny*, TIMES OF MALTA, Nov. 24, 2011 (Malta, Allied Newspapers Ltd.).

42. These figures were given by Justice Minister Charles Mangion in a reply to a Parliamentary Question. They were reproduced in *The Times of Malta* on March 5, 1997.

43. Of these, 1067 cases were pending before the Court of Appeal; 8318 before the Civil Courts, and 11,150 before the Magistrates' Courts.

44. Statistics for 2011 were culled from the reports published on the Malta Ministry of Justice's website. Ministry for Justice and Home Affairs, available at <http://www.justiceservices.gov.mt/courtservices/Statistics/default.aspx> (Last visited November 11, 2011).

45. Of these, 1348 were pending before the Court of Appeal, 6450 before the Civil Courts, 15,223 before the Magistrates' Courts and there were 112 pending cases before the Criminal Court. In order to ensure comparability of this data with the that given in 1997, I have added together the data for pending Civil cases which was compiled on March 31, 2011 with the published data concerning pending Criminal cases of March 2011. The figure for the total

At the time increased media attention had begun to focus on the issue of court delays, as is still the case today. It is acknowledged as a serious problem which results in the denial of justice and alienates people from the courts.⁴⁶ Partly in reaction to this growing public concern and in order to enhance the efficiency of the courts, the Maltese government in July 1996 enacted a law to reform various procedural rules.⁴⁷ This law contained provisions relating to the trial of law-suits which caused controversy. In particular attention focused on 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.”⁴⁸ 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.

pending Appeal cases was reached by adding together the data concerning pending cases before the Constitutional Court, the Criminal Court of Appeal and the Civil Court of Appeal in both Gozo and Malta in its Superior and Inferior sections. The figure for the total pending Civil cases comprises cases pending before the Family court apart from those pending before the First Hall of the Civil court. The figure for the total pending cases before the Magistrates' Court was reached by adding together all the pending Civil cases before the Magistrates' Court together with all the Criminal cases for both Gozo and Malta and excluding the statistics for cases pending before the Small Claims tribunal, which did not exist in 1997.

46. A good example of the tone of the comments made by the Maltese newspapers is represented by two newspaper editorials which both appeared during June 1997, while I was writing up my research. While the editorial of the conservative daily *The Times* emphasized the need to speed up court proceedings, that of the left-wing weekly *It-Torca* claimed “In the administration of justice, the citizen expects the legal process to be *efficient* (emphasis added), comprehensible and really just. The citizen is not satisfied on any one of these points.”

47. The law in question is Act 24 of 1996, which amended the Code of Organisation and Civil Procedure. The provisions of this law which concern us were brought into effect by means of a legal notice in 1996.

48. J. M. Fenech, *Procedural Law and the Courts*, THE SUNDAY TIMES, Dec. 29, 1996 (Malta, Allied Newspapers Ltd.). See also J. M. Fenech, *Justice within a Reasonable Time*, THE SUNDAY TIMES, Dec. 1, 1996 (Malta, Allied Newspapers Ltd.); J. M. Fenech, *Wake Up Minister*, THE SUNDAY TIMES, May 11, 1997 (Malta, Allied Newspapers Ltd.).

Previously the principle was that all testimony had to be heard orally. Instead judges were now given the option of compiling all evidence by means of written affidavits prepared by parties and their witnesses and deposited in court.⁴⁹ 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 uninterrupted. 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.

Before exploring these innovations further, it is important to consider the way they were implemented. The collective response of judges to the amendments was to introduce a new judicial role: that of the Master, which was not contemplated in the amendments.⁵⁰ 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 Justice “very little was being done.”⁵¹ 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. The Chief Justice justified these changes on the grounds that:

49. Previously, the use of affidavits tended to be restricted to the testimony of the litigating parties themselves.

50. The master system was modelled on English procedures.

51. Joseph Said Pullicino, *Chief Justice on effectiveness of amendments to the C.O.C.P.*, THE SUNDAY TIMES, Jun. 1, 1997 (Malta, Allied Newspapers Ltd.).

[I]n 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* (emphasis added). It was principally for this reason, therefore, that through an administrative process—*which was not contemplated in the amendments and introduced clandestinely* (emphasis added)—the system of the Master was introduced.⁵²

In November 1996, 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, which was the second plank of the newly 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.”⁵³ Following this, there was mounting criticism of the new Master system from various lawyers and judges, on the grounds that it had only served to create another bottle-neck, since one judge could not possibly hold pre-trial hearings in 3,000 cases together with all the new lawsuits that were being filed.

The next development occurred in April 1997, when a seminar was organised to discuss the implementation of the new amendments. Opening this seminar, the Chief Justice admitted that the Master system was not working as well as originally planned.⁵⁴ Then, in June 1997, the Minister of Justice announced the setting up of an Advisory Committee for the Law-Courts. The committee was given an extensive brief, which included continuous

52. *Id.*

53. R. Cremona, *Chamber of Advocates meets new Justice Minister: Call for abolition of affidavits system*, THE SUNDAY TIMES, Nov. 7, 1996 (Malta, Allied Newspapers Ltd.).

54. Pullicino, *supra* note 51.

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. While I was unable to discover whether this committee still exists and what recommendations it might have made, the failure of the 1996 reforms to alter significantly the mode of trial in Malta was already clear by January 1999 when the President of the Chamber of Advocates delivered a speech in which he called on the legal profession to give the new Master system a proper try, asking them: “not to discard the system before attempting to employ it in its entirety.”⁵⁵

VII. PROFESSIONALLY DISTANCING LAW FROM FACT

My reason for recounting the history of these failed reforms to trial procedures is to highlight the relationship all the protagonists drew between court delays and the manner in which evidence is compiled. They argued that there is a Maltese culture, or “ingrained mentality,” which resists greater control on the process of compilation of evidence.⁵⁶ This mentality is so powerful that it induced judges to introduce the Master system, so as to avoid “a traumatic change [which could] lead to the total collapse of the system.”⁵⁷ Moreover, this mentality had even subverted the Master system itself. However, in the light of the preceding discussion of the way Maltese lawyers interpret their professional role, the repeated failure of these reforms does not seem so surprising. If Maltese lawyers believe that professionalism is asserted through avoiding excessive involvement with the facts of the case by leaving them in the hands of their clients to prove, then they might not be too keen about reforms which operate precisely by obliging lawyers to take more responsibility for the factual aspect of cases.

Taking more responsibility for the facts is the common thread which links the various reforms proposed in 1996 to the system of compilation of evidence of the Maltese courts. This is

55. R. Cremona, *Call on legal profession to give master system a proper try*, THE SUNDAY TIMES, Jan. 21, 1999 (Malta, Allied Newspapers Ltd.).

56. J. Brincat, *The Alarm Clock*, THE SUNDAY TIMES, May 18, 1997 (Malta, Allied Newspapers Ltd.).

57. Pullicino, *supra* note 51.

most evident in the case of the proposed system for compiling evidence through affidavits, which provoked lawyers' protests that it obliged them to act unprofessionally. However even the proposed "pre-trial" and Master systems function by requiring the parties to state the facts as they see them at the start of the case in a less formal arena than that of ordinary litigation. In such a setting, lawyers would not have had such a clearly defined role as they have during a court-room trial and it would be more difficult for them to assert their detachment from the factual aspect of the case. Lawyers would be more personally involved in telling and validating their clients' stories.

In resisting these reforms, lawyers followed a well established tradition. As part of an attempt at reforming the Maltese courts, the British Royal Commission of 1913 had recommended that a written "declaration of facts" be submitted by litigating parties at the start of their lawsuit. While this requirement was incorporated into the law, it was negatively perceived by the lawyers, who scented a threat to their professional detachment. Their collective reaction was to draft these "declarations of facts" in such an elliptical way as to turn them into what are effectively summaries of the statements of the *legal* claims being made in the case; thus leaving the "facts" to emerge in the course of the oral court-room hearing.⁵⁸

Analogously, lawyers expressed resistance to the 1996 procedural reforms in both direct and indirect ways. As the earlier-quoted extract from the Chief Justice's speech made clear, it was actually *judges* rather than lawyers who aborted the system of pre-trial hearings by "clandestinely"⁵⁹ introducing the Master system. However, as the Chief Justice also noted, they were anticipating the objections lawyers would make; given their objections to "certain systems of control on the process of compilation of evidence."⁶⁰ All Maltese judges are drawn from the pool of practising lawyers, together with whom they constitute a tightly-

58. So as to explore this issue, I examined the first fifty law-suits filed in February 1997. There were only three instances in which the 'declaration of facts' filed by the plaintiff was substantially different from the '*citazzjoni*' (the statement of the plaintiff's legal claims), containing additional details which were not mentioned in it.

59. Pullicino, *supra* note 51.

60. *Id.*

knit court community. Maltese judges are keen to uphold their independence in the face of possible government interference. They are therefore disinclined to rigidly apply administrative reforms which could antagonise lawyers, especially if these reforms appear to raise problems of professional ethics. These attitudes seem also to have contributed to widespread non-compliance with the rule that all evidence be produced in one court sitting and to a notable lack of enthusiasm for the new option of compiling most of the evidence by means of affidavits.

Through their resistance Maltese lawyers managed to safeguard their understanding of their professional role in the face of administrative reforms which threatened to define it differently. While the logical implication of this analysis is that the causes of court delays are rooted in the way these lawyers have understood their professional role in litigation, it is important to avoid an overly idealistic account of these professional understandings. By leading lawyers to avoid taking responsibility for the “facts” and to insist that these must be proved by clients in the courtroom, they create room for various lawyerly tactics through which the process of producing evidence is made more elaborate and time consuming. These tactics depend for their success on the increased time it takes to produce oral, as opposed to written, evidence in court. Written affidavits also take less time to read and make it easier to establish the points of contrast and similarity between the versions of the different parties and their witnesses. Conversely, if the “facts” are orally produced, then it becomes possible to:

1. Produce irrelevant testimony or contest all the evidence presented by one’s opponent in litigation. This is because the relevant “facts in issue” remain unclear for a longer time.
2. Summon many witnesses to testify to the same “facts.”
3. Conceal valuable evidence from the opposing party in litigation, until it becomes strategically appropriate to disclose it.

The outcome of these tactics can be described as the “problematism of evidence.” By referring to “problematism,” I want to highlight how difficult and

problematic the process of compilation of evidence can be made and to suggest that such an outcome may often be actively intended. After all, it can be in the interest of both lawyers and their clients to create delays. In this way, lawyers can gain more control over the evolution of litigated cases and acquire more space to manoeuvre in the interests of their clients. Moreover, a client who looks set to lose a case may benefit from such delays. It seems, in brief, that professional interests may easily fuse with professional ideals in a powerful combination which explains the perseverance with which lawyers have resisted attempts to reform the system by which evidence is compiled.

This analysis leads to the conclusion that there is a clear connection between the specific way in which Maltese lawyers interpret their professional role, pervasive court delays and the failure of Government efforts to reform the administration of justice. Other implications stem from a deeper consideration of the tactics through which the production of evidence is “problematized.” As I have shown, the leitmotif behind these tactics is that they create obstacles to the effort to bring “law” and “fact” into some sort of facile correspondence with each other, although creating such a correspondence is the central function of court litigation. By expressing professional ideals which separate “law” from “fact” and lawyer from client, these tactics also reinforce a particular way of imagining Maltese law, which constructs the legal domain in separatist, exclusive and self-referential terms.⁶¹ The production of delay and inefficiency in court proceedings hence becomes invested with symbolic meaning. In particular, delay makes it possible for lawyers both to affirm and to traverse the distance between everyday and legal concepts of evidence, truth and reality. Delay is an intrinsic part of the processes by which the specificity of “the legal” is affirmed in practice. This inverts Nelken’s analysis, as delay appears as a tool by which lawyers themselves construct, in their own way and for their own purposes, the distinction between “internal” and “external” legal culture.

61. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 184 (Basic Books, New York, 1983).

VIII. DELAY AND THE “COLONIAL ENCOUNTER”

Through delay Maltese lawyers cope with the specific demands of their clients by enacting specific professional understandings of legal representation as a matter of distancing “law” from “fact” by balancing between patronage and professional detachment. Yet these professional understandings must themselves be explained against the backdrop of Maltese legal history. In fact the resistance put up by the Maltese legal profession in the past to legal and judicial interventions by the British colonial authorities seems to have legitimised separatist and exclusive ways of conceiving of Maltese law and the lawyer’s professional role today. The emergence of such conceptions can be seen as being partly a by-product of the very process of attempting to describe the Maltese legal system in the context of unequal discursive exchanges between Maltese legal professionals and foreign colonial agents.

In this regard it is interesting to take a look at the proceedings of a British Royal Commission which visited Malta in 1911 (henceforth the “Mowatt Commission”).⁶² As part of its remit covered reforms to Maltese judicial procedure, the Commission, which was presided over by a British MP and two judges, interviewed various prominent personalities from the Maltese legal community, including the Chief Justice, the Crown Advocate General, the Court Registrar and the President of the Lawyers’ Association.⁶³ These were questioned exhaustively on a range of subjects, focusing understandably on procedural issues which could be causally linked to delays in civil litigation. Most of the questions dealt with the procedures for opening a court case, giving testimony, conducting the hearing and appeals. Court officials were asked to provide statistics on the time which various proceedings took and on related costs. Yet these inquiries tended to raise broader issues concerning the nature of the legal system and key characteristics of Maltese law.

62. Francis R. Mowatt & Mackenzie Chalmers, *Report of the Royal Commission on the Finances, Economic Position and Judicial Procedure of Malta*, in PARLIAMENTARY PAPERS (London, 1912).

63. In Malta this is called the “Chamber of Advocates,” originally the “*Camera degli Avvocati*.”

A good example of the way in which procedural questions tended to evoke more substantive answers occurred when Sir Mackenzie Chalmers, one of the Commissioners, asked Mr. Leo Benjacar, the then Registrar of the Maltese Courts about a particular case—*Cini v. Townsley*. He immediately launched into an account of the facts of the case before being pulled up short by Chalmers, who informed him that: “We are not concerned with the merits of the claim, but with the length and nature of the proceedings.”⁶⁴ More than a simple mistake, this exchange suggests a lower sensitivity on the part of the Maltese respondent to the distinction between procedural and substantive law, which is prominent in the common law tradition.⁶⁵ Other answers are even more telling. Questioned about the maximum amount of days before an appeal can be put down for hearing in the list of the Court of Appeal, Mr Benjacar observed that this would amount to 57 days, but that this period would apply “whether the amount is only £5 or whether it is £500.”⁶⁶ He later attempted to justify the way court processes did not distinguish cases on the basis of their value:

I should like to remark that it is not always the (financial) nature of the case that makes it a big case; very often it is the nature of the exceptions (legal pleas). Sometimes a case of a few pounds becomes an important case because of the nature of the exceptions.⁶⁷

What is being elaborated here is thus a conception of law as an autonomous field of activity possessing its own internal criteria of value and which ought not to be assessed in terms of external monetary criteria. This conception was itself developed in reaction to the Commissioners’ questions which were premised on the need to assess the cost and financial importance of cases, reserving full access to the legal process to those who had the means. Thus, in a

64. Mowatt & Chalmer, *supra* note 61, at 243.

65. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001).

66. Mowatt & Chalmer, *supra* note 61, at 235.

67. *Id.* at 240.

statement redolent of a Victorian subordination of legal process to social hierarchy, Commissioner Chalmers suggested removing the possibility of an appeal in minor cases before the Magistrates' court:

We hold rather strongly that in these small cases between small people, where everything is irregular, the Judge ought rather to act as a judicial arbitrator and to decide on substantial merits than to work out points of law. The elaboration of points of law, where everything is irregular, between small people, is in fact, an injustice.⁶⁸

This picture of Maltese judicial proceedings as obeying an intrinsic logic which cannot be reduced to the financial interests or social hierarchies involved, is reinforced by another theme to which the Commissioners gave a lot of attention, which is the actual temporal schedule adopted by the courts to structure the hearing of cases. Since the Mowatt Commission had been instructed to tackle what the colonial authorities considered to be unacceptable delays in Maltese court cases, they tried to follow up particular cases to find out what caused these delays. They were clearly surprised to discover that the system adopted for the hearing of civil cases seemed to be based on the assumption that instead of a single session in which the case would be tried, there would be a series of hearings, which could reach thirty or forty over a number of years and which were usually separated from each other by periods of some three months or so. Each of these hearings was ostensibly dedicated to tackling a particular aspect of the trial, such as the examination of a particular witness, or a request for an interlocutory degree. Often, however, even these issues were not dealt with due to the failure of one of the witnesses or lawyers to "appear" in court. In any case the court would then adjourn the hearing to another date until all the aspects of the case had been tackled. On any particular day, the judge would have a list of thirty or forty cases scheduled to be tried in this piecemeal way by him.

Various aspects of this "system" were criticized by the Commissioners, who observed that: "under that system a case of

68. *Id.* at 278.

any complication may last indefinitely, because every witness suggests another.”⁶⁹ They therefore made many suggestions to speed up this process, based on the way hearings were structured before the English courts. Yet most of these suggestions were rejected by their Maltese interlocutors, who tended to justify existing delays and to imply that speeding up court processes would be detrimental to justice. When asked whether Judges could limit themselves to scheduling four or five cases per day (instead of thirty or forty) and actually finish them, Mr. Benjacar objected that “It would come to this: that if one of the lawyers reported himself ill, the judge would lose a day.”⁷⁰ When the Commissioners repeated this recommendation at a later stage, to the Advocate General, Dr. Frendo Azzopardi, he observed: “The question is whether a case can be disposed of in one or two sittings.”⁷¹ The way in which he justified this reluctance to even consider changing the system is interesting for at least two reasons. Firstly, he invoked the functional integrity and specificity of “the system” to try to blunt the Commission’s unfavourable comparisons of the Maltese hearings to those held before the English courts, observing: “When you have a certain system, all the details of that system work very well and correctly, but when you have to alter the whole system, it is very difficult.”⁷² Secondly, the above quoted extract implies that trying to speed up the trial unduly could lead to cases being “disposed of” in a way which is legally unsatisfactory. As Mr Benjacar claimed, when rejecting the idea that a case could be adjourned to the next day instead of three months, “You must give the plaintiff or the defendant, or their counsel, time to look up books or precedents.”⁷³

These quoted exchanges barely scratch the surface in terms of the insights that could be gleaned from a careful reading of the Mowatt Commission’s proceedings. But the above suffices to make clear the apparent continuity which exists between colonial

69. *Id.* at 241.

70. *Id.* at 240.

71. *Id.* at 280.

72. *Id.* at 281.

73. *Id.* at 240.

and post-colonial reform projects for the Maltese courts⁷⁴ and the discourses of resistance which they provoked. In both cases it is clear that the specificity of law is insisted upon and any attempt to reduce delays by changing the procedural rules relating to court trials is depicted by Maltese legal professionals as simultaneously threatening their professional identity and the integrity of the legal system.

IX. CONCLUSION

The implications of this research appear in sharper relief if it is placed in a comparative perspective. A touchstone is provided by Sally Merry's⁷⁵ study of the legal consciousness of working class American clients. She showed how these clients often view court proceedings as a way to escape the close and constricting communities in which they are embedded. Litigation offers the possibility of socially distancing oneself by asserting one's rights as a citizen of a bureaucratically organised nation-state. By comparison, the present study focuses on the other side of the coin, by showing how *lawyers* try to socially distance themselves from their clients and invoke professional ideals for this purpose. Yet this professional detachment cannot always be maintained. Maltese lawyers cannot afford to excessively discourage their clients and must therefore walk the tightrope between patronage and professionalism. Paradoxically, this may create a situation where the professional ideals of lawyers are themselves utilised to service their patronage relationships with their clients; since they allow lawyers to create delays by "problematizing" the compilation of evidence.

This article aims to demonstrate how particular understandings of professional detachment represent practically motivated attempts on the part of advocates to symbolically separate law from fact and their role in litigation from that of their

74. Indeed, affidavits, pre-trial hearings and the introduction of the office of the "Master of Rolls" were among the solutions considered by this commission.

75. SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (Chicago University Press, Chicago, 1990).

clients. It further argues that the association between delay and professional detachment has a long history in Malta which is rooted in the relationship of opposition between formal (colonial) administration and informal (Maltese) law; an opposition which has been maintained and reproduced for over two hundred years. This may go some way towards explaining why Maltese law, a hybrid product that still bears the marks of its colonial origin, is a difficult and problematic medium of governance. The reasons why this is so are clearly evidenced by the prophetic words of Sir Adriano Dingli, drafter of the Maltese Civil Code, with which I would like to end this article. In 1880, in a letter appended to the Keenan report, which advocated the compulsory Anglicisation of the Maltese educational system, Dingli objected to this reform as:

It would be the worst public course, for the attainment of the desired consummation, to resort to compulsory measures, in a place like Malta, where the effects would be disastrous to the immediate personal interests of the professional classes . . . perseverance in this might engender an acrimonious feeling, which the rising generation would share in, and which might continue long after its origin would be forgotten.⁷⁶

76. GEOFFREY HULL, *THE MALTA LANGUAGE QUESTION: A CASE STUDY IN CULTURAL IMPERIALISM* 30 (Said International, Malta, 1993).