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## **THE BRITISH RIGHT TO RULE MALTA, 1800-1813**

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### INTRODUCTION

The question of the nature of the legal authority exercised in Malta by British officials prior to 1813 has been a rich source of debate and controversy. The moment at which the British officials had a legal power to exercise full legislative and executive authority is elusive, despite its prominence as a seminal moment in Maltese constitutional history.

It is true that, as far as United Kingdom (U.K.) constitutional law is concerned, the legal effects of conquest and cession are similar as regards the authority of the Crown to legislate for an acquired territory.<sup>1</sup> However, this principle does not remove the importance of resolving which of these possibilities explains British authority in Malta prior to 1813. Whether legal authority arose because of cession or conquest matters because, as we shall discover, the events on which these alternative possibilities are founded occurred at different times. If, for example, cession explains the legal and

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<sup>1</sup> *Sammut v Strickland* [1938] A.C. 678, 701.

constitutional authority of the British Crown in Malta, we need an explanation of the legal source of that authority prior to cession.

It is proposed to revisit some of the arguments concerning the question of British legal sovereignty over Malta, and thus the nature of the authority exercised by the British Civil Commissioners who held office prior to Sir Thomas Maitland.<sup>2</sup> In particular, we shall examine the moment at which sovereignty was acquired by the British, as well as the cause of this transfer.

The decision of the Privy Council in *Sammut v Strickland*<sup>3</sup> made it a settled proposition of U.K. law that the ‘sovereignty’ of Malta had passed to the British Crown at least by October 1813.<sup>4</sup> This was the date of the first appointment of a British official with the title of ‘governor’ (Sir Thomas Maitland) and his publication, in Malta, of a Proclamation in the name and on behalf of George III to the effect that the King had determined ‘henceforth to recognise the people of Malta and Gozo as subjects of the British Crown and as entitled to its fullest protection’.<sup>5</sup> British ‘sovereignty’ was confirmed

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<sup>2</sup> This article is part of a wider legal analysis of the *bandi* and *avvisi* promulgated under the hand of Samuel Taylor Coleridge, who served as Acting Public Secretary in 1805. The project is funded by a grant from the British Academy whose assistance is gratefully acknowledged.

<sup>3</sup> *Sammut v Strickland* [1938] A.C. 678

<sup>4</sup> *Id.* at p. 697.

<sup>5</sup> Quoted in *Sammut v Strickland* [1938] A.C. 678, 698; cited in Hardman, William, *A history of Malta during the period of the French and British occupations, 1798-1815*, by the late William Hardman. Ed. with an introduction and notes by J. Holland Rose. Longmans, Green, and Co., London, New York, 1909, at p.531.

unambiguously in international law by the Treaty of Paris 1814<sup>6</sup> and the subsequent Congress of Versailles 1815. However, the decision of the Privy Council did not resolve the vexed question of the source of British authority between 1800 and 1813, which continues to be a subject of speculation.

The Privy Council in *Sammut v Strickland* accepted that voluntary, informal, cession was recognised in United Kingdom law and that it had the same legal effects as formal cession; but doubted whether this was the case for Malta.<sup>7</sup> The decision does not resolve fundamental questions affecting the period between 1800 and 1813. This is so because the appointment of a governor in 1813 is compatible with the confirmation of ‘sovereignty’ which had transferred earlier but which, for political reasons, could not be openly asserted.<sup>8</sup> In other words, the possibility exists that ‘sovereignty’ had vested in the British Crown prior this legal and political fact being acknowledged in 1813. Modern commentators accept that there is no confident consensus on the issue of both the moment and the cause of British legal authority.<sup>9</sup>

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<sup>6</sup> Art 7 of the Treaty of Paris 1814 provided: ‘The Island of Malta and its Dependencies shall belong in full right and Sovereignty to His Britannic Majesty.’

<sup>7</sup> Sovereignty from 1813 was accepted ‘whatever may have been the juridical position in the period before 1813’, [1938 A.C. 678, 698.

<sup>8</sup> E.g. to maintain good relations with Russia. Malta, in the right of the Order of St John, had been ceded to Russia by France prior to the French surrender in July 1800. Alexander I renounced his claim to champion the cause of the Order of St John by acceding to the Treaty of Alliance in 1812 after the French invasion of Russia.

<sup>9</sup> See J. Cremona *The Maltese Constitution*, San Gwan 1997, Chapter 1.

## NORMATIVE AND POSITIVE CONCEPTIONS OF LEGAL AUTHORITY

When considering the moment at which British officials had full legal authority to exercise executive and legislative power in Malta it is best to avoid seeking a general definition of 'sovereignty' because of the contested nature of the term.<sup>10</sup>

For present purposes we are considering the moment at which the British Crown enjoyed a convincing claim to the exclusive, legal, right to rule without attention to the claims of another state. Such a legal right is not sufficiently based on the simple fact of being capable of exercising force. The exercise of force must be compatible with some reasonable account of legitimacy as the basis of legal authority. Generalising from accepted positivist legal theory<sup>11</sup> it can be suggested that Britain would have legal authority if (i) the rules which are accepted in Malta as legitimate for the governance of the territory (creating a significant and weighty obligation that they should be generally obeyed) derive their authority from an hierarchy of norms; (ii) this hierarchy culminates unambiguously in British political institutions (specifically the Crown and the Crown in Parliament) and not others; and (iii) and that there is a presumption that the commands or rules which emanate from them ought to be obeyed. It is not, therefore, a sufficient reason for the acceptance of the rules as legitimate that they are morally good or part of an efficient way of achieving common purposes; a necessary condition of legitimacy is their place within the

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<sup>10</sup> For a critical summary see J. Hoffman, *Sovereignty (Concepts and Social Thought)*, Milton Keynes 1998

<sup>11</sup> Specifically, H.L.A. Hart *The Concept of Law*, Oxford 1966, particularly Chapter VI on the concept of a legal system.

hierarchical normative structure culminating in British institutions whose will ought to be obeyed.

There are (at least) two perspectives on this issue. First, is the ‘normative’ approach. This recognises legal authority, and makes it legitimate, in terms of a ‘normative order’.<sup>12</sup> By ‘normative order’, in this context, is meant a hierarchy of rules which determine legal authority and condition the way in which it is exercised. As a normative order it displays ‘autopoiesis’ in the sense of being self-referring; each rule is explained in terms of another, also valid, rule. The perspective does not require a particular individual, institutional will or political fact, which is outside the normative framework and necessary, as it were, to give the system validity.<sup>13</sup> From this perspective, the rules of international law, which include the claims of the Neapolitan Crown, are centrally important. In this paper the opinions of Vattel will be taken as representative of international law. This work, which was published in 1758,<sup>14</sup> was considered to be an important handbook for diplomats by the end of the eighteenth century.<sup>15</sup>

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<sup>12</sup> N. MacCormick *Questioning Sovereignty*, Oxford 1999, Chapter 1.

<sup>13</sup> In the sense of Austin’s sovereign or Hart’s ultimate rule of recognition, both of which are political facts and not subject to the validity condition which they, nevertheless, originate.

<sup>14</sup> Edition cited is E. de Vattel, *The Law of Nations*, London 1797, Book 1.

<sup>15</sup> F.H. Hinsey, *Sovereignty*, 2<sup>nd</sup> edition, Cambridge 1986,

The normative order can also include rules of domestic law in so far as they serve to define and limit the exercise of power. English law on the government of colonies is appropriately considered in this context.

The second perspective is 'positivist'. On this account legal authority is not ultimately dependent upon an order of rules but on certain ascertainable facts. Following classical positive legal theory<sup>16</sup>, Britain would exercise full legal authority in Malta from when (i) it does, in fact, exercise a monopoly of legitimate force, (ii) it does not, in fact, accept the need to follow any other power, (iii) its rules are habitually obeyed by the bulk of the people and (iv) its rules are obeyed from the 'internal point of view' by officials. This last point means that the civil servants and judges accept that the application of a rule emanating from Britain as a sufficient reason. This must be one that precludes the following of rules from other sources, or reasons-all-things-considered, for their decisions and actions.

Each of these perspectives will be utilised in the discussion that follows. Two different theses or explanations for British legal authority will be considered: the 'conquest' thesis and the 'informal voluntary cession' thesis. These theses explain the core facts of the British acquisition of power in Malta in different ways and the value and significance of these explanations will be evaluated in terms of the two general perspectives on the nature of legal authority referred to above.

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<sup>16</sup> Particularly H.L.A. Hart Chapter VI

## THE CORE FACTS.

The discussion interprets certain core facts of Maltese history at this period that are taken to be uncontroversial. In 1523 Charles V, Holy Roman Emperor and King of Sicily, granted Malta and its dependencies, to the Knights of St John who were responsible for the government of the island from 1530. The terms of the grant included a clause under which the island would revert to the Sicilian Crown if it were abandoned by the Order. Suzerainty over Malta was retained by the King of Sicily in the sense that the annual payment of a falcon was made as a feudal due, but, in reality Malta, under the Knights, had the principal attributes of a sovereign state.<sup>17</sup> In June 1798 French forces, in the course of the ill-fated expedition to Egypt, landed in Malta and caused the withdrawal of the Knights from the island and from government. The French occupation swiftly led to discontent amongst Maltese people, particularly caused by the confiscation of money and valuable property from the Church and also from the secular institutions of the treasury and public bank, by taxation, and by military conscription. On September 2<sup>nd</sup> 1798 there was an organised insurrection led by prominent Maltese and supported by commanders from the villages which caused the French to retire to the fortress in Valetta where they were besieged. To break the stalemate the Maltese needed assistance. The effective assistance came from the British navy, commanded by Nelson who, first using Portuguese forces under his command and later elements of the Royal Navy, provided arms and a blockade of the island. The siege continued

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<sup>17</sup> See Pirota, G. A. *The Maltese Public Service 1800-1940*, Msida, Mireva: 1996, 5.

and British influence increased with the active approval of a significant proportion of Maltese leaders. By September 1799 a British officer, Sir Alexander Ball, was appointed by Nelson as 'chief director of the island' with final responsibility for civil government. Ball's authority at this time was that of the Neapolitan, not the British, Crown. In December 1799 British armed forces, a force of about 1200 soldiers and marines, landed on Malta and so the administrative presence was significantly bolstered. The besieged and blockaded French forces eventually surrendered on the 5<sup>th</sup> of September 1800, but did so solely to the British military commander, Sir Thomas Pigot. Maltese representatives and Ball, the representative of the Neapolitan Crown, were excluded.

Following the surrender, the military rule under Pigot operated in parallel with Ball's continuing civil administration, the authority of which, at least nominally, continued to be the Neapolitan Crown. Ball was recalled in February 1801. Fears of a solely military government by Britain were allayed in May 1801 when Charles Cameron, described in the Instructions he received from the British Crown, as 'civil commissioner', was appointed. Sir Alexander Ball succeeded Cameron in July 1802 but not as civil commissioner, rather as 'minister plenipotentiary to the Order of St John'. The context for this was that in March 1801 a new British government had opened peace negotiations with the French. A significant term of the resulting Treaty of Amiens was the restoration of the Knights of St John to Malta. A Neapolitan garrison, intended, by the Treaty, to replace British forces, arrived on Malta. The restoration of the



Order was deeply opposed by many if not all significant opinion in Malta and on June 15<sup>th</sup> 1802 a Declaration of Rights<sup>18</sup> was issued under the authority of the Congress of the Islands of Malta and Gozo declaring that the ‘King of the United Kingdom of Great Britain and Ireland is our Sovereign Lord, and his lawful successors shall, in all times to come, be acknowledged as our lawful sovereign’. The Treaty of Amiens was never implemented (a major dispute was over Malta) and the war resumed in May 1803. At that time, May 1803, Ball was appointed ‘civil commissioner’ and he successfully obtained the removal of Neapolitan troops. Ball continued as civil commissioner in this, his second administration, until his death in October 1809. His successor was the military commander, Major-General Hildebrand-Oakes who was himself replaced in 1813 by Sir Thomas Maitland, the first to be described by the British as ‘Governor’.

Leading authorities on Malta disagree on the interpretation and significance of these events. The ‘formal cession’ thesis is approved in *Sammut v Strickland* and by Hardman.<sup>19</sup> According to this argument, the legal status of Malta position only loses its ambiguity in 1813 with the appointment of Thomas Sir Thomas Maitland as the first official properly entitled to be called ‘Governor’. This argument is flawed because it poses rather than resolves the question with which we are concerned, namely the entitlement of the British

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<sup>18</sup> Widely reproduced; see, for example, Cm 9657 Appendix F; H. Frenzo, *Maltese Political Development 1798-1964: A Documentary History*, Malta 1993.

<sup>19</sup> Hardman

Crown in relation to Malta prior to that date. For this reason it will not be discussed further.

What will here be called the ‘conquest thesis’ argues that, by 1800, the British Crown legally possessed a right to rule by right of military conquest. The thesis is founded in particular upon evidence that the French forces occupying Valletta surrendered exclusively to the British.

The ‘voluntary-informal cession’ thesis, on the other hand, asserts that a necessary component to the British right to rule was a form of voluntary submission by the Maltese through their representatives; the Declaration of Right of 1802 being the most important expression of this consensual act. On this view the Maltese had obtained the right to cede their country, through their own actions in expelling the French, who had, in turn, assumed sovereignty on the basis of a conquest and the expulsion of the Order of St John.

## CONQUEST

The conquest thesis was adopted by the contemporary British author, Granville Penn, writing in 1805.<sup>20</sup> He seems to have considered that the French surrender was a sufficient basis for full legal authority,<sup>21</sup> an authority that was confirmed

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<sup>20</sup> G. Penn, *The Policy and Interest of Great Britain, with respect to Malta, summarily considered* London 1805.

<sup>21</sup> *Supra*, especially p.128.

or endorsed by the consent (what he called the voluntary suffrage) of the population.

Unsurprisingly, the conquest thesis was adopted by British officials later in the Nineteenth Century in the context of preparing the constitutional reforms of 1836. The position accepted by Lord Glenelg, then the Secretary of State, was that, between conquest and voluntary cession, the better view of the acquisition of British legal authority was conquest (i.e. in 1800) confirmed by an act of cession by the Neapolitan Crown at Paris and Versailles in 1814 and 1815 respectively. It was, for Lord Glenelg, the better view because it involves a definite acquisition of sovereign power not open to the constraints and qualifications that can be read into any voluntary cession dependant on the consent of the Maltese.<sup>22</sup>

The argument for a transfer of sovereignty by ‘conquest’ has two necessary features. First, that the ‘right’ flows from the exercise of military force which is decisive of the outcome and which is self-directed in the sense that it is not under the acknowledged authority of some other command. The question is whether something more is required. In *Foltina*<sup>23</sup> British courts suggested that, as a matter of British law, the right to rule a territory was obtained from the moment of effective military control; that the ‘right’ and the

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<sup>22</sup> See the critical review of the reports on the Maltese legal system by Stoddart CJ, which are bound as appendices to PRO CO158/91 (Stoddart’s Reports). Stoddart was criticised for seeking to reinvigorate the thesis that Malta had been ceded by its population to Britain. This claim is criticised in commentary written by the Lieutenant-General on the island whose criticisms are endorsed by Lord Glenelg.

<sup>23</sup> (1814) 1 Dods 450

power coincide with each other. Roberts-Wray, however, suggests that some form of manifested intention to rule is also needed. An example of such an intention would be installation of an effective civil government; mere military rule is not enough.<sup>24</sup> International law may be more demanding in that sovereignty can only transfer, lawfully, on the basis of ‘subjugation’, not conquest alone but through formal annexation after the cessation of hostilities.<sup>25</sup>

In what follows it will be assumed that the ‘conquest thesis’ is at its most compelling when the fact of military control is linked to the manifestation of an intention to rule. The claims and credibility of the thesis will be discussed on that assumption.

### *Conquest: assessment*

There is no doubt that British military forces, first the Royal Navy (from September 1798) and the army (from December 1799), played an important role in the defeat and removal of the French armed forces. The argument for conquest is that this role was decisive. The claim is that, but for the British interventions, the blockade of the French would have gone on much longer and may even have been unsuccessful. In particular, it is suggested that the siege had the

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<sup>24</sup> Sir K. Roberts-Wray *Commonwealth and Colonial Law*, London 1966, 105, citing *Re Southern Rhodesia* [1919] A.C. 211, 239-241.

<sup>25</sup> See, for example, Sir R. Jennings & Sir A. Watts *Oppenheim’s International law*, vol 1 9<sup>th</sup> edition, London 1992, 699.

seeds of disaster within it unless it could be brought to a successful conclusion quite quickly. The siege relieved the French of their responsibilities to feed and supply the population but made it easier to feed and supply themselves. Without the British blockade of the harbour through which the French forces sought to supply themselves and, later, assistance in the land battle from British troops, the siege may have become a burden on the Maltese greater than the population could bear.<sup>26</sup> The British claim to have been the decisive military force is focused on the blockade which, after the initial Portuguese involvement albeit on British instructions, was undertaken by British forces.

The claim of conquest is more challengeable in respect of the role of British land forces. Maltese representatives, it seems, regarded these forces as ‘auxiliaries’ simply assisting their insurrection and conquest of most of the island from the French<sup>27</sup>. Furthermore, there was some belief that British troops hindered the action by abandoning some of the ‘unhealthy’ forward posts and by desertion to the enemy;<sup>28</sup> and it was noted that whilst the Maltese lost some 300 casualties during the siege, the British lost none. It needs also to be

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<sup>26</sup> This view was expressed in 1836 in the commentary made on Stoddart CJ’s first Report of 1836; the view were endorsed by the Secretary of State for War and the Colonies, Lord Glenelg, see PRO CO158/91.

<sup>27</sup> Humble Representation of the Deputies of Malta and Gozo’ in October 1801, English translation, with annotated alterations, is in PRO CO158/2, 272(188); in Hardman, 410-415.

<sup>28</sup> See letter from Sir Alexander Ball to Sir Henry Dundas, of early 1801 (undated), PRO CO 158/1, 3 (13).

remembered that from February 1800 Neapolitan troops were also present in the Malta assisting the siege.<sup>29</sup>

The claim that the role of the British armed forces was decisive is reinforced by the fact that it was the British commander, Major-General Pigot, who received the French offer of terms of capitulation, conducted the negotiations and agreed and signed the articles of capitulation on September 5<sup>th</sup> 1800. In these negotiations Pigot made no reference either to Sir Alexander Ball (then, at least in formal sense, representing the Neapolitan Crown<sup>30</sup>) or to Maltese representatives. The claim made by some supporters of the cession thesis,<sup>31</sup> that that capitulation was signed on behalf of His Britannic Majesty ‘and his allies’, is not supported by the text.<sup>32</sup> The exclusion of the Neapolitan and Maltese presence seems to have been at the insistence of the French commander, General Vaubois, who was reluctant to recognise either as a legitimate power.<sup>33</sup> Major-General Pigot was content to accede to this refusal. His view was consonant with the conquest thesis. He later wrote: ‘The Maltese had certainly made great exertions and were entitled to a great deal of merit for

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<sup>29</sup> A. V. Laferla, *British Malta*, Valetta 1938, Introduction V.

<sup>30</sup> Laferla, IV

<sup>31</sup> Stoddart CJ’s first Report of 1836 into the Maltese Legal system, PRO CO/158/91.

<sup>32</sup> See, for example, Article 11 of the Articles of Capitulation which expressly excludes other troops (appendix to Stoddart CJ’s reports, PRO CO158/91); see also Hardman, 322.

<sup>33</sup> Laferla, XII

their bravery and perseverance yet, with all their exertions, could never have compelled the French to surrender without the British fleet and army'.<sup>34</sup>

Military victory and subsequent military control may, as suggested above, not be sufficient for the acquisition of a right, of legal authority to rule. The assumption in this paper is that there must also be evidence of an intention to rule. A manifestation of this intention may not only include the establishment of a civil government but also an intention to exclude the claims of others, including a denial not just of the power of others but also of their right. If such actions are then effective in the sense of obtaining habitual obedience of the population and official rule-following from the 'internal point of view', a reasonable claim that can be made.

The evidence is that the British military was, after the French surrender, prepared to act, with the authority of a conquering power, i.e. in ways that implicitly denied any duty to consult or deal with any other party. Apart from the bitterness of their exclusion from the surrender negotiations, the Maltese representatives considered that the British ignored their interests in the way in which the removal of the French was achieved. In particular, the British failed to take steps to secure compensation for the spoliation that had been a feature of the French occupation. The British did not accept the French offer of hostages<sup>35</sup> as a guarantee for the repayment of monies taken by the from the Università and other institutions, such as the Monte di Pieta; and they failed to

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<sup>34</sup> Laferla, XI

<sup>35</sup> See PRO CO 158/19; also Marchese Testaferrata to Earl Bathurst January 1812 (Hardman, 512).

insert any clause in the Articles of Capitulation indemnifying the private property rights of the Maltese.<sup>36</sup> Furthermore, the British furnished transports to carry the French garrison and its spoils to French ports. The British attitude contributed to the political and administrative difficulties that tainted the first decade of the British administration of the island.

Evidence of an intention to rule to the exclusion of others can be found in statements of intention, in the implications of actions, and from the way in which the formal rights of others were denied. Pigot's refusal to admit the Neapolitan or Maltese interest into the surrender negotiations with the French has already been noted. At the time of the negotiation he also ordered the lowering of the Neapolitan colours, which, under Nelson's supervision, had flown alongside the British flag.<sup>37</sup> As regards recognising the claims of the Maltese, which the British might have been expected to do had they seen themselves as acting in merely a protective role, Pigot dissolved the Congress of the Maltese which Ball had convened during the siege in order to govern that

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<sup>36</sup> Article 12 does not require the French to furnish compensation. The British agree to uphold lawful property transactions effected during the occupation. The clause does not require restitution for money and goods taken by the French. Article 12 states 'All alienations or sales of moveable or immoveable property whatsoever, made by the French government while in possession of Malta, and all transactions between individuals, shall be held inviolable.'

<sup>37</sup> Laferla, V, XI. In January 1800, nine months before Pigot's actions regarding the surrender, Ball persuaded Nelson to send a warship to Sicily forcibly to bring food to Malta. According to Ball, His Sicilian Majesty had refused to allow the grain to be sent. Nelson's action was not necessarily inconsistent with Neapolitan rights in Malta since Naples was then under French occupation; the Neapolitan Crown subsequently endorsed the action (See PRO CO158/12) .



part of the island not occupied by the French. Pigot had been instructed that ‘...it was not proposed to share with other parties the advantages to be derived from the conquest of Malta’,<sup>38</sup> and, as he later explained, his orders in relation to the capitulation were intended to ensure that Malta could be regarded as a conquest of Britain.<sup>39</sup> Ball, it seems, was of the same view and, later, emphasised that his Congress was only formed to co-ordinate the activities of the Maltese and preserve public order;<sup>40</sup> it was not a revival of the so called ‘Consiglio Popolare’, nor was it intended to be a representative body exercising legislative powers in peace time.<sup>41</sup> More generally, and despite the fact that he was formally the representative of the Neapolitan Crown, Ball, effectively exercised the civil government between September 1799 and February 1801. He pursued policies intended to obtain Maltese support for British rule. Notably, he revived the institutions of the government as well as the paternalist polices of the ancien regime. Controversially, (because of the cost to the British taxpayer), he re-established the Università, which controlled the prices of staple foods; the Monte di Pietà, which provided cheap finance, was also reinstated; as well as the hospitals to provide health care.<sup>42</sup>

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<sup>38</sup> Foreign Office Records, Malta, 6 (1799-1800); Hardman, 322.

<sup>39</sup> See letter Pigot to Lord Hobart, 31<sup>st</sup> May 1803, Hardman, 488.

<sup>40</sup> Hardman, 498-9.

<sup>41</sup> An account of the proper role of the Consiglio can be gleaned from, Pirota, G. A. *The Maltese Public Service 1800-1940*, Msida, Mireva: 1996p.24 23-24.

<sup>42</sup> The origins of the Ball’s polices can be seen in the memorandum sent to Lord Hobart prepared in December 1800: CO 158/1/1. Its central principles guided British ministers and became the founding principle of British administrations prior to 1813: see Instructions to Cameron 14<sup>th</sup> May 1801 cITE ; se also Pirota, Chapter 3, 43-44.

The most compelling evidence of a British intention to take on sovereign legal authority for Malta following the military occupation came in May 1801. After a brief period of exclusively military rule under Pigot, Charles Cameron was appointed ‘civil commissioner’. Cameron’s letter of appointment included Royal Instructions in which Malta is described ‘as a dependence of the Crown of the United Kingdom of Great Britain....’. Other parts of the Instructions reveal that, for the British, the sovereignty in the island now vested in the Crown. This is explicit, for example, in the section on taxation: ‘a great part of the public Revenue of the Island was derived under the Order of St John of Jerusalem, should continue to be managed and enforced upon the former footing with such alterations only *as the Change of Circumstances by which the right of Sovereignty formerly vested in that order, but now exercised by His Majesty* have rendered obviously requisite (emphasis added).’ These words make it clear that sovereignty, ‘formerly vested’ in the Order, had, by 14<sup>th</sup> May 1801, transferred to the British Crown. Earlier, in a treaty concluded between His Britannic Majesty and the Dey of Algiers dated 19<sup>th</sup> March 1801 concerning the release of Maltese held in slavery, there is the following recital: ‘Whereas the Island of Malta has been conquered by His Britannic Majesty’s arms, it is now hereby agreed and fully concluded...that the inhabitants thereof shall be treated upon the same footing as the rest of His Britannic Majesty’s subjects, and the said island shall be considered in all respects like the other places subject to the Crown of Great Britain.....’<sup>43</sup> The Maltese are to be

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<sup>43</sup> Hardman, 349.

treated like other British subjects; a treaty indicating less certainty as to the status of the Maltese would have required the Maltese to be treated ‘as if’ they were British subjects. The recital also records the official British view that Malta was acquired by conquest.<sup>44</sup>

The conquest thesis can also claim habitual obedience from the bulk of the population. There is no evidence of any actual revolt against British rule though there is evidence of serious dissatisfaction, threatening revolt, particularly over the negotiations leading to the preliminary Treaty of Amiens in the summer of 1801,<sup>45</sup> as well as fears about its implementation a year later. The point of such dissatisfaction, at least for the Maltese representatives, was to seek proper protection from the British, rather than a rejection of British rule; nor was it a preference for some other constitutional settlement. This desire was subsequently clearly manifested in the Declaration of Right 1802, which is discussed below. The fact that the Definitive Treaty of Amiens was not implemented meant that the issue was not put to the test.

As mentioned above, a defining feature indicating the factual existence (under positivist legal theory) of a legal system and, therefore, the claim that governance is law-based, is that the officials follow the rules in question ‘from the internal point of view’. British officials, nor surprisingly, followed instructions from London, and nowhere else, in the aftermath of the establishment of British military and civil power. This is best illustrated in

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<sup>44</sup> From a political perspective it is important to note that this was the period (from March 1801) when negotiations for the Treaty of Amiens, under which Malta was to be restored to the Order, began.

<sup>45</sup> Letter from Cameron to Hobart, 29<sup>th</sup> July 1801.

respect of Ball who followed British instructions despite being formally the legal representative of the Naples. It is the position of Maltese officials which is more important. There is no evidence of dissension from British rule other than during the period of the Amiens negotiations. These negotiations did raise the question of the legitimacy of British rule not only for political representatives but also, it seems, for officials.<sup>46</sup> In fact the position of officials was not really put to the test. The Amiens problem disappeared in the late summer and Autumn of 1802 as the British reluctance to give effect to its terms became apparent. More importantly it was British policy to retain Maltese occupancy of a high proportion of civil offices and to revive and continue the long standing institutions of Maltese public life,<sup>47</sup> though the number of British office holders increased significantly from 1803.<sup>48</sup>

The position of the Maltese judges is similar. In the instructions to Charles Cameron, in his letter of appointment of May 1801, it is made clear that there is to be no imposition of British law but, rather, the continuation of existing Maltese law.<sup>49</sup> Following this. Cameron's first proclamation to the Maltese people, of the 15<sup>th</sup> July 1801, promised to uphold the laws and to respect the 'dearest rights' of the Maltese, their persons, property and holy religion.<sup>50</sup> For example, in an address to the Maltese judiciary on 11<sup>th</sup>

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<sup>46</sup> Letter from A. Macaulay to Ball, Hardman, 409, quoted Pirotta, 57.

<sup>47</sup> Pirotta *op cit* pp. 44-45.

<sup>48</sup> Pirotta *op cit* p. 58.

<sup>49</sup> In PRO CO158/1, 53, 57-58

<sup>50</sup> Hardman, 342.

December 1800, Lord Keith wrote that they were under the ‘protection’ of the British nation;<sup>51</sup> a formula that conspicuously avoids an explicit claim as to where legal sovereignty resided. The Maltese judiciary were not required not apply the laws in the name of the British Crown. The judges, therefore, are relieved of the need to deal with a conflict between British and Maltese law and can follow the latter ‘from the internal point of view’ without contradicting any alleged obligation to British law.

The continuation of Maltese law is also a requirement under the normative approach to the transfer of sovereignty or legal authority in a country. Under British law, the existing, non-British, legal system was retained for a conquered country ‘until they are altered by the conqueror’.<sup>52</sup> This is consistent with the complementary assertion of the right of the British Crown to alter the law as it saw fit and, in the case of Malta, choosing not to do so.<sup>53</sup> Local laws would be abrogated if they were inconsistent with an Act of Parliament extending to the country in question, or if they were ‘repugnant to the fundamental religious or ethical principles of Europeans’.<sup>54</sup> Continuation by

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<sup>51</sup> Hardman, 339.

<sup>52</sup> *Campbell v Hall* (1774) [1558-1774] All ER Rep 252, 253, 98 E.R. 1045.

<sup>53</sup> Although the laws were subsequently altered by Orders in Council-cite as well as new bandi and avvisi.

<sup>54</sup> *Blankard v Galdy* (1693) 2 Salk. 411, 87 E.R. 359. Such limits, found in the earlier cases, are not mentioned in *Campbell*. The earlier cases are summarised in *A Memorial* from the Master of the Rolls to the Privy Council in 1772. This memorial requires continuity of existing laws unless those laws are contrary to Christianity, are *malum in se* or are silent on some matter requiring legal regulation, Peere Williams Reports, Vol. 2, 74, case 15 (London 1826).

the conqueror of local laws is also consistent with ‘legal’ sovereignty as defined in international law. Vattel considered that international law limits a conqueror (for how long is not made clear) to ruling on the basis of existing laws, where, as in Malta, the quarrel occasioning the conquest has been against a sovereign (here, the French in 1799) rather than an aggressive people.<sup>55</sup>

According to the ‘conquest’ thesis, therefore, the British Crown is exercising legal authority which is legitimate from, at least May 1801 when the intention to rule was manifested by the appointment of a civil commissioner. First is the fact of unchallenged military occupation on the basis of which British forces exercise the monopoly of force; second, the evidence of the British intention to rule as sovereign, to the exclusion of other claims; third, the fact of habitual obedience by the majority of the population, for what ever reason, to British rule (the response to Amiens was to seek a closer union with Britain), and, fourth, the fact that at least the most senior officials followed their instructions ‘from the internal point of view’ as reasons for their actions (albeit that the principle of continuity meant this was never tested) and that these instructions reflected the will of the British Crown and no one else.

But the conquest theory has to explain various obfuscations of British policy. Conquest without an intention to rule as sovereign does not create a convincing case for the transfer of fully legitimate legal authority. The evidence of Britain’s intention to rule, given above, can be contrasted with a range of different signals of intention that the British were giving out during the

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<sup>55</sup> Vattel, 389, section 201

same period. For supporters of the ‘formal cession’ thesis, such as Hardman, these obfuscations indicate the lack of clear intention on the issue of legal authority.<sup>56</sup>

Examples of such obfuscations are, that after British military dominance was obtained various steps were taken, such as the lowering of the Neapolitan flag, that appear as denials of Neapolitan legal sovereignty. Nevertheless, there were assurances made that this act did not imply offence to the Maltese, the Neapolitans or Russia;<sup>57</sup> and Britain, through its ambassador in Naples, was claiming that there was no decided intention of permanent possession.<sup>58</sup>

As regards the Maltese, there was a reluctance by the British to make any intention to declare openly that the British were exercising sovereign authority. General Pigot’s first proclamation to the Maltese, 19<sup>th</sup> February 1801, was similarly guarded.<sup>59</sup> In July 1801 Cameron, the ‘civil commissioner’ broached the idea of a formal declaration that the Maltese were subjects of the British Crown, but this was resisted in a way that suggested that Britain continued to hedge its bets, particularly, as mentioned below, in the context of

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<sup>56</sup> Hardman, 330.

<sup>57</sup> Laferla, XI

<sup>58</sup> E.g. a letter from Lord Grenville to Hon. A. Paget (the British ambassador in Naples) 17<sup>th</sup> October 1800: ‘You will, however, explain to the Neapolitan Ministers that it is by no means His Majesty’s intention, by this temporary acquisition of a military position during the war, to prejudge the question of a future disposition to be made of the Island at the conclusion of a general peace...’, Hardman, 329.

<sup>59</sup> Hardman, 341-1; Laferla, 14.

the Amiens negotiations.<sup>60</sup> In the Royal Instructions of 1813 to Sir Thomas Maitland, the first Governor of the Island, there appears the following: ‘...the anxious desire which the Maltese were understood to possess *of being acknowledged publicly* as subjects of the British Crown has favoured the disposition of His Majesty’s Government to establish the civil authorities of the Island upon a permanent footing...’<sup>61</sup> (emphasis supplied). This, of course, can be read as implying an earlier acquisition of a right to rule which has merely lacked public acknowledgement, or of an earlier uncertainty as to the right to rule which has now been resolved in favour of establishing a permanent government.

The conquest thesis understands these matters not as weakening the claim that legal sovereignty, in the sense of legal authority to rule, passed at least by May 1801 if not September 1800, but as indicating the exercise of such sovereignty. The obfuscations indicate a political uncertainty not an uncertainty as to legal right. The positivist, political, conception of sovereignty is compatible with the idea that there can be legal limitations on how it is exercised and so accepts the idea of holding legal authority in order to transfer it. Similarly the normative conception of legal authority has no difficulty with a *bona fide* transfer of sovereignty which is short lived and involves a further

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<sup>60</sup> The reason behind Cameron’s request for a public declaration of sovereignty in July 1801 was the fear of a Maltese revolt as over Britain’s negotiating stance with France (see letter from Cameron to Hobart, 29<sup>th</sup> July 1801, Hardman, 359-60).

<sup>61</sup> Hardman, 527.



transfer. This is expressly accepted, by British law, in ‘*The Foltina*’<sup>62</sup>. By March 1801, when the Addington Ministry took office in London, Britain was preparing to enter negotiations at an international level in which it would deliver up the island to the Order of St John, and so any clear assertion of sovereignty, at the diplomatic level or publicly to the Maltese, would have, on balance, increased political difficulties. The policy of temporary occupation became obvious in the terms of the Preliminary Treaty of Amiens concluded in October 1801. In this agreement the British government undertook to permit the restoration of the Order of St John to Malta under the protection of the Russia. The Definitive Treaty, by contrast, reflected determined and effective Maltese opposition to the terms of the preliminary Treaty<sup>63</sup> at least to the extent that Article X, though continuing to provide for the restoration of the Order, also required the neutrality of the island, the withdrawal of British civil and military authorities, the establishment of a Neapolitan garrison (intended to be present only until the Order could raise sufficient forces to garrison the

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<sup>62</sup> (1814) 1 Dods 450, 451.

<sup>63</sup> There was concern that the Order, which had had its assets in France, Germany and Bavaria confiscated, would have insufficient revenue to govern the Island and that it would soon fall ultimately to France: see e.g. Windham HC Debates 3<sup>rd</sup> My 1802, *Cobbett’s Parliamentary Record* Vol. 36 1801-1803, 1820 London, 570-1. The actual geopolitical landscape was thought to make neutrality a mere fiction and that the Island would in fact be under French influence. See also ‘Representation’ of the Maltese People 2<sup>nd</sup> October 1801.

Islands<sup>64</sup>) and, in particular, enhanced the political rights for the Maltese, particularly in so far as the Grand master of the Order was to be elected from amongst the native Maltese. Under the conquest thesis these are simply political questions concerning the future of the island and should not be conflated with the question of the legal right to rule: the two are distinct issues.

Subsequent events, under the conquest thesis, simply reinforce the claim that a legitimate, legal right to rule had passed to Britain at least by May 1801. In June 1802 Sir Alexander Ball had been appointed as the minister plenipotentiary to the Order of St John under instructions to implement the Treaty by arranging for the evacuation of the British forces and their replacement by Neapolitans<sup>65</sup>. Upon his arrival on 10<sup>th</sup> July 1802 he took over from Cameron and, without the title, exercised the functions of Civil Commissioner. Neapolitan forces arrived in **when**. But by the Autumn of 1802 there were developing British doubts about the advisability of implementing the Treaty of Amiens. These were caused by Russia's refused to guarantee the neutrality of Island, by fear that the ultimate outcome of the Treaty would be the re-acquisition of Malta by the French because the Neapolitans were effectively in the hands of France, and by continued French expansion on

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<sup>64</sup> The Kingdom of the Two Sicilies had effectively become a vassal state of France; French forces were in central Italy; and there was suspicion that the Neapolitan troops would be indirectly under French control.

<sup>65</sup> His French counterpart, General Vial, with whom he was to co-ordinate the actions necessary to fulfil the obligations under Article 10 of the Treaty of Amiens arrived on the Island on 26<sup>th</sup> August 1802.

matters not covered by the Treaty, such as the annexation of Piedmont in the Autumn of 1802. This expansion could be counterbalanced by Britain using Malta to strengthen its strategic presence in the Mediterranean and better protect the route to India. Despite the recognition, in his title, of Neapolitan sovereignty, Ball clearly took his instructions from London and exercised his powers on that basis. Secret instructions were sent to Ball in October 1802 ordering him to suspend the evacuation of British forces altogether,<sup>66</sup> and Ball refused to admit the Grand Master when he insisted on travelling to Malta to take possession of the government in accordance with the Treaty. The evidence that Britain was not complying with the Treaty in respect of Malta was the principal, ostensible, reason for the renewal of hostilities in May 1803. Ball was appointed Civil Commissioner in May 1803 and immediately instructed the removal of Neapolitan forces from the Island. This was so because domination of the Kingdom of Naples by Napoleon meant that accepting Neapolitan rights over Malta would have been tantamount to handing control to the French. These actions are an unequivocal denial of both politically and legally based sovereignty over Malta by the Neapolitan Crown. Under the conquest thesis such a denial is consistent with the fact and right of Britain to exercise proper, legal, authority in Malta, a right which has been convincingly established since 1801.

In summary the conquest argument is that effective military control (the ability to exercise the monopoly of force) was with British forces from

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<sup>66</sup> Hardman 449-50

September 1800 and there was a clear intention to rule at least by the appointment of Cameron in charge of civil government in May 1801. Senior officials regarded the British Crown as source of final authority. Obfuscations in British policy are indications of perfidiousness or of political but not legal uncertainty and the policies underlying the Treaty of Amiens are exercises of sovereignty, not reasons for doubting its existence. The limited concern demonstrated by the British for the views of the Maltese and their representatives illustrates the behaviour of a conquering sovereign rather than a protector or occupier with delegated and limited powers. Of course, a difficult legal test was avoided by the early decision to continue with existing Maltese laws and institutions. This was not only removed the likelihood of a conflict between British and Maltese law coming before the Maltese courts, thus requiring the judges to disclose their constitutional allegiances, but is also compatible with the norms appropriate to a conqueror of an enemy power a distinct from an enemy people. Under the conquest thesis this policy of continuity pursued by British administrators is thus an important signifier of the transfer of sovereignty rather than the converse.

### *Voluntary Informal Cession*

A strong proponent of the voluntary informal cession thesis is Roberts-Wray.<sup>67</sup> His principal argument is that the British Crown acquired Malta following a voluntary cession by its people in 1802. The position is also, of course, the preferred view of both the Maltese and British courts, in the Twentieth Century, as expressed in *Sammut v Strickland*<sup>68</sup> and, following that case, it is endorsed by *Halsbury's Laws of England*.<sup>69</sup> There was also strong assertion of the voluntary cession thesis by contemporaries. Thus elected Deputies in a 'Humble Representation of the Deputies of Malta and Gozo' in October 1801,<sup>70</sup> referred to how they 'gave up their country' (or 'consigned the government') to the British and obeyed the British generals who they treated as 'ministers of the sovereign their hearts had elected'. The central document on which voluntary cession is based is the Declaration of Rights of July 1802, signed by Maltese deputies. The British maverick official, William Eton, who campaigned against the British administration and supported a restoration of Maltese governmental traditions, also argued for cession<sup>71</sup>. The voluntary cession thesis was also

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<sup>67</sup> 'It was unquestionably a colony acquired by cession...it is submitted that the Maltese ceded the island by the Declaration of Rights. The words of the treaty suggest an acknowledgement of title rather than cession', Roberts-Wray, 685. Roberts-Wray accepts formal cession as an alternative.

<sup>68</sup> *Sammut v Strickland* [1938] A.C. 678 (headnote), referring to *Strickland v Galea*, 22<sup>nd</sup> June 1935.

<sup>69</sup> *Halsbury's Laws of England*, 4<sup>th</sup> edition, 2003 reissue, 2003 London, Vol. 6, Paragraph 772 where it is stated: 'Malta was a colony acquired by cession by the people of Malta in 1802, confirmed by the Treaty of Paris in 1814.'

<sup>70</sup> English translation, with annotated alterations, is in PRO CO158/2, 272(188); in Hardman, 410-415, 411.

<sup>71</sup> W. Eton, *Authentic materials for a history of the people of Malta*, 1802-7 London, Chapter 1.

strongly asserted, to the irritation of British government officials, by Chief Justice Stoddart in his reports of 1836.<sup>72</sup> Maltese constitutional theory is also predominantly supportive of the voluntary cession thesis.<sup>73</sup>

*Informal Voluntary Cession, assessment.*

The argument for voluntary informal cession is an argument of right in the sense that it does not, like the argument for conquest, depend upon the fact of having power and being obeyed. Rather the argument is that informal voluntary cession is the best interpretation, in normative terms, of the fact that, in the early years of the nineteenth century, British officials, obeying instructions from London, were habitually obeyed by the Maltese in general, and officials in particular, in ways that indicate that a transfer of legal authority had taken place.

Voluntary informal cession requires there to be a polity for the Maltese, through their representatives, to cede. There are two possibilities canvassed. One is that Malta, under the Order, already had the attributes of sovereignty.<sup>74</sup> This sovereignty may or may not have passed to the French after their occupation or conquest in 1798. In any event it was restored to the Maltese by their role in the siege and was then ceded to the British. The other is that Malta remained, during French occupation, under the formal sovereignty of the Neapolitan Crown, but that the failure of Naples to protect the Maltese from the

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<sup>72</sup> Stoddarts' Reports. See PRO CO158/91.

<sup>73</sup> Cremona *The Maltese Constitution*, San Gwan 1997, Chapter 1.

<sup>74</sup> Pirota, 5.

French left the Maltese free, a natural right recognised by international law, to protect themselves in the most effective way open to them—a form of sovereignty.

United Kingdom law recognises informal voluntary cession<sup>75</sup>. International law is not so clear but does not expressly deny it, Grotius is thought to have recognised a form of informal cession, though the passage cited requires the consent of the ultimate sovereign,<sup>76</sup> in this case Naples. Consent to British protection for Malta was given by Naples in February 1799; but this is not the same as ceding sovereignty. Vattel's understanding of international law was that a state overcome by force and unable to obtain protection from its sovereign, is free to provide for its own safety without regard to its sovereign's will.<sup>77</sup>

Cession, as a thesis explaining the legitimacy of British rule (the acceptance of British authority to rule as a matter of law and subject to the claims of no others), cannot explain an unconditional transfer of the right to rule to Britain; it cannot explain a state of affairs in which the Maltese are to enjoy equality with British subjects under the constitutional law of the United Kingdom. According to the thesis, voluntary informal cession is justified by reference to facts which indicate a highly conditional attitude by the Maltese to their subordination to Britain. In particular the Declaration of Rights June 1802,

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<sup>75</sup> *Sammut v Strickland* [1938] A.C. 678.

<sup>76</sup> H. Grotius *De Jure Belli Ac Pacis* translated F. Kelsey, (*Classics of International Law*), Oxford 1925, Book 11, Chapter VI, III.

<sup>77</sup> Vattel, sections 201 and 202.

which is seen as the central moment of voluntary cession,<sup>78</sup> is clearly conditional. In it a Congress of the islands of Malta and Gozo<sup>79</sup>, declared that ‘the King of the United Kingdom of Great Britain and Ireland is our Sovereign Lord, and his lawful successors shall, in all times to come, be acknowledged as our lawful sovereign.’ However, the transfer of sovereignty is conditional upon the satisfaction of a range of demands which include the following: that Britain has ‘no right to cede these Islands to any power’ (clause 2); that there should be a Maltese constitution established which is to be binding on and limiting of the power of the British government (clause 3), and that the power of taxation and legislation should, subject to British consent, be with the Consiglio Popolare (clause 5).

Under the conquest thesis (or any view which denies the foundational significance of the Declaration) the Declaration of Right is best read, not as a document granting sovereignty, but as a reminder to the British of their obligations as (already, by conquest) sovereign. Under a ‘Hobbesian’ account, in particular, sovereignty is unlimited other than by the duty of the sovereign to protect his people from lawlessness and civil war. If nothing else, the Declaration might be thought of as a reminder of this principle. The Declaration of Rights stemmed from Maltese nationalist concerns at being sold-out to the Order (and indirectly, through the Order’s weakness, to the French) by the British through the Treaty of Amiens. It was written at a time

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<sup>78</sup> Roberts-Wray, 685-6.

<sup>79</sup> According to Laferla, the same as where members of Ball’s Congress formed during the siege, Laferla, 32.



when the sacrifice of the Maltese for the greater good of international peace<sup>80</sup> was within the British contemplation and consequential insurrection was threatened by some Maltese leaders.<sup>81</sup>

The more obvious objection to the claim that the Declaration of Rights is a foundational source of British legal authority is that there is no evidence of acceptance of its conditions by the British. On the contrary, the British seemed to have ruled Malta, certainly from the time of Cameron's appointment as Civil Commissioner in May 1801, independently of Maltese interests as expressed through their representatives. In particular, the British government steadfastly refused to contemplate creating either a Maltese legislative or consultative assembly after the siege.<sup>82</sup> British rule in this early period was characterised by institutional rebuilding and continuity, which hardly indicates a disinterested British concern to advance Maltese interests since its primary purpose was to cement Maltese loyalty to the British Crown.<sup>83</sup>

Under the international law of the time, the Declaration can read more like a request for protection rather than the transfer of sovereignty. From this a possibly stronger version of the voluntary informal cession thesis emerges.

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<sup>80</sup> Lord Hobart's reply to the Maltese deputation to London in the Spring of 1802, at the height of the Amiens negotiations was that the abandonment of Malta was 'an indispensable sacrifice' necessary to secure a general peace (letter dated 20<sup>th</sup> April 1802, Hardman, 424-5, 425.)

<sup>81</sup> Pirota, 57.

<sup>82</sup> See footnotes 41 to 42, above, and accompanying text.

<sup>83</sup> Pirota, 44 *passim*.

Vattel argued that there was legal recognition at international law for a request for protection from a stronger state by a weaker state, including where the formal legal sovereign was unable or unwilling to provide protection.<sup>84</sup> This voluntary subjection may be ‘on certain conditions agreed to by both parties; and the compact or treaty of submission will thenceforward be the measure and the rule of the rights of each’. If the protector state fails in its engagements, it loses what rights it may have had over the protected state and the latter resumes its former, albeit vulnerable, independence and liberty. A similar consequence follows if the protector state goes beyond its powers in the compact and claims greater authority than was agreed.<sup>85</sup> However, if the weaker, protected, state acquiesces expressly, or by inaction, then, over time, the continuing, over-reaching authority of the protector state is legitimated: ‘patient acquiescence becomes in length of time a tacit consent that legitimates the right of the usurper’<sup>86</sup>. On this view the unconditional British right to rule dates from the time the Treaty of Amiens had been set aside; in respect of British intentions this was by Autumn 1803. From that time, on this view, the Maltese representatives no longer threatened rebellion and, though objecting on political grounds to a range of British decisions, may be said to have acquiesced in the British right to rule, even though important terms of the Declaration of Right 1802 had not been put into effect. It is suggested that this is a more convincing explanation of the thesis of informal voluntary cession

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<sup>84</sup> Vattel, sections 193 and 201.

<sup>85</sup> Vattel, sections 196 and 198.

<sup>86</sup> Vattel, section 199

than one based on the Declaration, though it is one that has a more indeterminate date, certainly later than July 1802.

By delaying the moment in which sovereignty passes until July 1802, the Autumn of 1803 or later, the informal voluntary cession thesis has a different explanation for the obfuscations, the vicissitudes, of British policy from after the French surrender. Where, for the conquest thesis, this is explained in terms of the exercise of sovereignty, the cession thesis explains it in terms of British uncertainty about whether or not a transfer of legal authority had taken place. rights and obligations, not just as uncertainty as to how to exercise sovereign power. The informal voluntary cession thesis also explains the British policy of maintaining existing Maltese laws and institutions as, again, a consequence of the British position as protector, not as sovereign.

Britain did agree to uphold the existing laws and regulations applicable in Malta, though, as indicated above, the official statements about this do not involve a promise not to change the laws, nor an undertaking to alter them only with the consent of the Maltese through their representatives. The cession theory explains the intention to preserve legal continuity as Britain performing, from 1800, a protective rather than sovereign role, and this interpretation can be reinforced by the fact that, under Cameron's instructions, the civil and criminal laws are only to be changed if, in the view of the military, they are required for safety and defence or if the changes are 'evidently beneficial and desirable, as to leave no doubt of [the change's] expediency or of it being generally acceptable to the wishes, feelings and even prejudices of the

inhabitants'. The administration of justice was to continue 'in conformity to the Laws, and Institutions of the ancient Government of the Order...' though here Britain did seem to reserve an unqualified right to make changes ordered from London or, ordered locally in respect of 'unforeseen emergencies' (the latter needed to be reported to London).<sup>87</sup>

However, maintaining legal continuity can also be explained in ways that are consistent with the conquest thesis since, as we have seen, maintaining the continuity of the laws of the conquered people is a requirement of the normative conception of sovereignty by conquest. The British conquest, if such it be, was for self-defence and the quarrel was with a usurper (the French). Where there is no quarrel with the people, the right of conquest is to dispossess the usurper but then 'to rule according to the laws of the state'-so long as the people voluntarily submit.<sup>88</sup> As we have stated, British officials, in maintaining the laws, were doing no more than that which international law, as they might have understood it, required of a conqueror.<sup>89</sup> Maintenance of the laws was also, at least, the starting point for the right of conquest of a settled people under English constitutional law. Of course, consistent with this is the right to

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<sup>87</sup> In PRO CO158/1, 53, 57-58. The term 'administration of justice' presumably refers to the judiciary and the court system. Attempts to reform these were an important priority for Ball, certainly by November 1803 (see Laferla, 53.)

<sup>88</sup> Vattel, section 201.

<sup>89</sup> The distinction between the substantive civil law and the 'administration of justice', in Cameron's instructions and noted above (see footnote 88 and text), indicates the greater right of the conqueror to change the constitutional law of the conquered state a compared with private rights. By the Twentieth century this has emerged as an accepted principle of international law (see *Alvarez v US* 216 US 167.)

legislate if the conqueror, Britain, so chooses, and this right to legislate is only restricted by reference to Britain's constitutional laws on, for example, the scope of the Royal Prerogative.<sup>90</sup> The maintenance of the existing laws of the conquered country is either a legal duty of the conqueror or merely an act of prudence aimed at minimising popular dissent and constitutional dilemmas for the Maltese judges. It is as reasonable to interpret legal continuity as an act of sovereignty as it is to interpret it as evidence of the recognition of another's sovereignty. The issue was not tested in the courts by a case challenging the *vires* of British officials to change the existing laws.

## CONCLUSION

This article has focused on the problem of establishing the most convincing basis for Britain's legal right to rule in Malta at the beginning of the Nineteenth Century. It is suggested that there are convincing reasons for acknowledging that the British Crown was the legitimate and sole law making authority (the sovereign) from, at latest, July 1801. This claim of legitimacy is based upon interpreting the historical events against the measure of main-stream positivist legal theory. This theory identifies a legal system in terms of an hierarchical body of rules culminating in a commanding sovereign or a politically accepted constitutional rule; and this body of rules is habitually obeyed (for whatever reason) by the bulk of the population and accepted as a necessary and sufficient reason for action by officials. It is also suggested that legitimate rule from this

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<sup>90</sup> See e.g. *Campbell v Hall* (1774) [1558-1774] All ER Rep 252

date is also compatible with the broader normative structure by which sovereignty is defined in, particularly, international law. The view is strengthened, it has been suggested, by the weakness of the contrary claim of informal voluntary cession; the central point of whose weakness is its dependence on consent by the Maltese which was conditional but acceptance by the United Kingdom of a power to rule which was constitutionally unconditional. The 'obfuscations' of British rule in this early period (such as a refusal to give the Maltese a clear statement of their status and continuing to give assurances to the Neapolitan court that its legal title was not compromised) are, on this view, manifestations of Britain's political interests rather than uncertainties as to its legal and constitutional rights.