

**[p.1] British Policy towards the Religion,
ancient Laws and Customs in Malta
1824-1851**

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Part II. The Revision of the Codes of Law

In confirming to Malta the ancient Maltese laws, the Colonial Secretary had been consistent in a policy which was applied generally to all the ceded colonies in 1815. The decision not to introduce the Common Law of England was valued in the island, but the reluctance of the Colonial Office, through disinterest, to reform the existing Codes was strongly criticised and appeared as one of the major grievances in every Maltese petition presented between 1824 and 1851.¹

The laws of Malta consisted principally of the Code Rohan, a compilation made in 1784 by the Grand Master, supplemented by the Proclamations and enactments of the British Civil Commissioners and Governors. Precedents of foreign tribunals where Roman Law was established and the comments of European jurists were admitted as authorities. The Code Rohan was severe in many respects, the death penalty being applied to thirteen crimes including most forms of theft and infraction of the quarantine laws. Stephen, later, spoke of the system as being one of the most barbarous in existence.² The Commissioners of Inquiry in 1812 reported that the laws were defective and inadequate, but it was not considered advisable to make any sudden change: they recommended reform, in the first instance, in the constitution and practice of the courts.³ Their recommendations were accepted by the Colonial Office and enacted by Sir Thomas Maitland in Malta.

It was not until 1826 that the Colonial Office was reminded of the necessity to revise the Maltese Codes. Sir John Richardson, in his Report of the Laws of Malta, recommended the re-enactment of the whole body of the Criminal Code with the abolition of all reference to foreign authorities as a basis for [p.2] judgement.⁴ Richardson was convinced of the urgency of the reform and proceeded to prepare a draft revision. He was unable to complete the revision owing to ill-health, but suggested that it should be committed, under the Governor's authority, to the English lawyers holding office in Malta, who were to be assisted by such Maltese judges as the Governor considered advisable to consult. Richardson himself had received valuable assistance from a Maltese lawyer, Ignazio G. Bonavita, who, in 1823, had compiled a survey of the Criminal Laws⁵ which served as a basis for Richardson's Report.

Despite the competence of the Report, no attempt to pursue its recommendations was made until 1830. The Governor, Sir Frederick Ponsonby, then decided that the moment was opportune to proceed with the revision of the Criminal Code. The Codes of the Ionian Islands had recently been revised by the Judge of the Supreme Court there, Kirkpatrick, and

¹ Maltese Petitions to the King in Council, in Ponsonby to Goderich, 20 July 1832. No. 58. C.O. 158/73. Ponsonby to Goderich, 22 July 1832. No. 60. C.O. 158/73. And Maltese Petition to the House of Commons, 7 July 1836, C.O. 168/37.

² Stephen's minute on Austin and Lewis to Lord J. Russell, 28 October 1839. C.O. 158/118.

³ Report of the Commissioners of Inquiry, 1812. C.O. 158/19.

⁴ Report of Sir John Richardson 19 August 1826. C.O. 158/54.

⁵ Memoria sulla legislazione Criminale di Malta 1823. R.M.L. Bibl. MS. 1033.

Ponsonby knew that the Colonial Office was well disposed to apply the policy of revision in turn to the Codes in Malta.

Almost immediately, controversies regarding the revision developed, and were to delay the completion of the work until 1854. The greatest obstacle to the peaceful development of Ponsonby's policy was presented by the Chief Justice in Malta, Sir John Stoddart, who planned to make the revision a perfect code. Ponsonby maintained that it was more important to produce as soon as possible a definite improvement on the existing system, and that an approach to an ideal code could be based later on the experience gained. From this initial difference of opinion, other disputes arose which were to widen the breach between the Chief Justice and the Governor, who was supported by the Colonial Office. The most important problem to be solved was that of the basis which was to be adopted for the revision of the Code; was it to be framed so as to induce the closest resemblance between the law of England and the law of Malta, or was it to embody the best and most applicable provisions of the Codes promulgated on the Continent? Stoddart's plan was based on the former principle; Ponsonby thought that such a task would take a century to complete, and the Colonial Office agreed that it would certainly involve "a range of inquiry co-extensive with the whole science of jurisprudence."⁶ Moreover they conceded that the Law of England was less fitted than that of any civilised country for transplantation in Malta. The second course, that of adapting a given system of law to the peculiar state of society in Malta was the only practical solution. It was noted that the five codes of France had been adopted in modified form, with some success, in Belgium and many of the states of Germany and Italy, as well as in the Ionian Islands. The Secretary of State, Goderich, did not deny that there were advantages to be derived from the introduction of the English system particularly in a colonial possession of the Crown, nevertheless he maintained that he could not

"press on towards one great object to the disregard of all the principles which stand in its way. If it be necessary to establish in Malta the [p.3] legal maxims of this Kingdom, it is not less necessary to respect the wishes, nay, even the prejudices of the ancient inhabitants. If it be wise to act upon large views which extend to a remote futurity, it is also essential to protect the interests of the existing generation. Many years must elapse before the principles of English Law can have taken firm root in the judgement and affection of the Maltese people. But during that interval they cannot be left destitute of a Code of laws sufficiently ample to be readily understood and so effective as to ensure exact obedience."⁷

Therefore the completion of Richardson's scheme was to be undertaken, not as the final settlement of the problem but as

"preparatory at some future period to the introduction of so much of the law of England as could be advantageously reconciled with the feelings, interests and peculiar circumstances of society at Malta."⁸

This statement of policy, which was based on a draft prepared by James Stephen,⁹ was consistent with the general Colonial policy in respect of the Codes of other colonies which had been acquired as a result of the Napoleonic wars. It was unfortunate, however, that the despatch communicating the decision should have been sent some five months after the beginning of the controversy in Malta, for in the interval Stoddart had proceeded with his plan to introduce into the revision as much as possible of the law of England.

⁶ Goderich to Officer Administering govt. 6 October 1831. C.O. 159/12.

⁷ Ibid.

⁸ Ibid.

⁹ Draft after Ponsonby to Goderich, 8 May 1831. C.O. 158/68.

Not only did Stoddart differ from the Governor on the basic principle to be adopted for the revision, but also on the methods by which the revision was to be completed. He urged the appointment of a Royal Commission to examine the laws of Malta, and when this proposal was rejected by the Colonial Office, he drafted a formal commission for the execution of the inquiry by himself, Kirkpatrick and Barron Field, the Chief Justice at Gibraltar. In this way he hoped to confine the revision to English judges. This was a policy strongly criticised by Ponsonby,¹⁰ Hankey, Kirkpatrick and eventually by the Secretary of State.¹¹ In his advice to Goderich, James Stephen, on this and other points of policy, took into consideration the recommendations and opinions of Richardson, whom he held in great esteem. If the revision was to be the adaptation of a European Code to the circumstances of Malta, it was necessary to call upon the advice of Maltese judges to guide and temper the changes. On 5 November 1831, a Commission was issued to five judges, Stoddart, Kirkpatrick, Barron Field and two Maltese, Bonnici and Bonavita; they were instructed to “remedy in an effectual manner the present complicated and defective system of Maltese Jurisprudence.” In 1832, the Commissioners were joined by Robert Langslow who had been appointed Attorney General in Malta.

Under an artificial and spasmodic harmony between the Commissioners, three Books of the Revised Code were drafted by September 1832. This success [p.4] was due to the presence of Kirkpatrick who was considered “indispensable,” and to the absences of Stoddart on official duty in the Court of Special Commission. Ponsonby had had to attend the meetings of the Commissioners in order to hold the balance between the Maltese judges and Stoddart supported by Langslow. The Attorney General had been appointed on a request from Ponsonby that he might have someone to support the local Government and put an end to the disputes; he found that Langslow intensified the difficulties by encouraging and supporting the Chief Justice.

It was under such circumstances that the language problem first became acute in Malta, for in order to despatch the Revised Code to the Colonial Office, Ponsonby, in November 1832, asked the Commissioners for a transcript in the original Italian with an English translation. Stoddart and Langslow maintained that to use Italian as the authoritative text would be contrary to the general principles of legislation applicable in every other dependency of the British Empire. Unity with a colony, they urged, should be forced both by language and law. They stated that they had spoken Italian during the meetings of the Commissioners solely for the benefit of Dr. Bonnici who knew no English. Since November 1832, they had rewritten much of the Revised Code ‘de novo’ in English, but by doing so had altered many of its essential sections.¹²

Ponsonby, Kirkpatrick and the two Maltese judges agreed that the language of the law should remain Italian. It would be a “premature move” in fact, a practical impossibility at that time to make English the language of the Courts. Of the six superior judges only two were proficient in English; of the six Lords Lieutenant, who presided at the Local Courts of Session, and the twenty-one Deputy Lieutenants, who were the Civil Magistrates and Chief Executive Officers in the several casals — none knew English.¹³ Sir Thomas Maitland’s regulation of 1820 imposing an English language qualification for advocates and attorneys had been relaxed in 1827 by Ponsonby on the ground that it was unjust to deprive these persons of their livelihood, when the Government had done so little or nothing, to promote the English language by education. Ponsonby intended some educational reform which he hoped would

¹⁰ See Warburton to Goderich, 28 August 1831. C.O. 158/69.

¹¹ Minute in Kirkpatrick to Goderich, 8 September 1831. C.O. 158/70.

¹² Governor’s Memo in Ponsonby to Stanley, 5 June 1833. C.O. 158/76.

¹³ Ibid.

eventually alter the circumstances in Malta, but in the meantime the language of the Courts was Italian and the revised Code was in Italian. The Governor also argued that the principal point of the revision was one of policy, to ascertain in what manner the amendment of the law could be made to give most satisfaction to the people for whose benefit it was intended.¹⁴

Lord Stanley, the Secretary of State for War and the Colonies in Grey's Cabinet, was convinced by Ponsonby's arguments and had no hesitation in directing that Italian was to be established as the authoritative text of the new Codes, although care was to be taken to provide a clear literal translation in English.¹⁵ His decision, however, did not silence Stoddart who continued to ply the Colonial Office with lengthy dispatches in defence of his [p.5] argument. The disputes continued in Malta and in February 1834 Ponsonby was compelled to suspend the Commission.

The Revised Criminal Code was eventually completed by Bonnici and Bonavita, who prepared also a sketch of a Code of Criminal Procedure. These papers were despatched for the approval of the Colonial Office in March 1834. Ponsonby then recommended that the Maltese judges assisted by three Maltese advocates should be commissioned to draw up Civil and Commercial Codes and a Code of Civil procedure, which were to be based on the principles and rules of the most approved Codes of foreign countries and with Italian as the authoritative text. Such a Commission was issued in November 1834.¹⁶

Ponsonby's action, with its implied censure in the exclusion of Stoddart and Langslow from the new Commission was, at first, approved by both the Under-Secretary of State, Robert Hay, and by Stephen. Stephen further advised that it was unnecessary for the Colonial Office to express any opinion on that occasion of the conduct of Stoddart and Langslow. "The dissent of this department from their judgement" he wrote "has already been repeatedly and emphatically expressed and to recur to that topic, on an occasion like the present, when they are chargeable with no act or omission of culpable nature or indeed of any kind whatever, might I think be regarded as a harsh and ill-timed exercise of authority. The measure itself is an indirect but very intelligible censure, and will be so felt by Sir John Stoddart, by the Attorney-General and by the Maltese public at large."¹⁷ Stephen, however, immediately qualified his approval of Ponsonby's policy of excluding any Englishman from the Commission, for this would mean little prospect of any adoption of English maxims of government or of jurisprudence to qualify those of the ancient Maltese or modern Continental codes. It was agreed that the Governor should be instructed to include in the work of the new Commission a lawyer of British birth; and ultimately, Kirkpatrick was requested to assist in the revision of the Civil and Commercial Codes.

Some doubt was also expressed in the Colonial Office when the revised Penal Code and Code of Procedure was compared with the Neapolitan Code, for it bore so close a resemblance that Ponsonby was reminded that the ultimate aim of policy was to transfer to Malta the Law of England. Nevertheless, it was decided that the new Codes should be promulgated for a period of five years during which the Judges in Malta were to record their observations on their practical effects.¹⁸

Before this could be accomplished, Lord Glenelg took over the Seals of the Colonial Office and further delay ensued. He conceived the idea of a final revision of the Codes in London at which a Maltese judge was to assist. Bonavita was sent and explained points of the Codes in conference with the officials in the Colonial Office. Glenelg then decided, in a

¹⁴ Ponsonby to Hay, 8 April 1834. Private. C.O. 158/79.

¹⁵ Stanley to Ponsonby, 22 July 1833. C.O. 159/12.

¹⁶ Ponsonby to Spring-Rice, 26 November 1834. C.O. 158/80.

¹⁷ Minute on Ponsonby to Spring-Rice, 26 November 1834. C.O. 158/80.

¹⁸ Hay to Ponsonby, 28 November 1834. C.O. 159/12.

characteristic flourish of well-meaning principle, that in order to judge the Codes properly more than legal knowledge or general principles were required, that in order to ascertain the real opinions of the Maltese as to the proposed Codes, they were to be [p.6] published in Malta and made the subject of public debate and criticism.¹⁹ The Secretary of State, supported by Stephen, miscalculated on the immediate potentialities of the Maltese community to assume that they were sufficiently developed in political outlook and education to take full advantage of the opportunity offered to them, that they could and would suggest important amendments to the Codes. The vast majority of the Maltese were unable to read the Codes whether in Italian or English, and the criticism of a complicated Code of Criminal Law was a difficult task for those for whom it was the first essay in democracy. Stephen might argue that there were not many subjects “less stimulating” than the formation of a Penal Code,²⁰ but his words would have been accepted more immediately within the precincts of the Inns of Court.

Ponsonby and Bonavita were unanimous in their criticism of the new departure of policy; they foresaw considerable delay before the final promulgation of the Codes, during which time renewed opposition to them would come from Stoddart and Langslow, while the Maltese people, without an elected representative assembly, and unaccustomed to a reference to public opinion by the Legislative authority, would understand the action as casting doubts on the propriety of the Codes; and to enforce the Codes after the public debate would be considered by them to be an absolute and an arbitrary measure.²¹ The Governor’s warnings went unheeded. On 21 July 1836 the Codes were promulgated and were to be enforced after three months public discussion; the terms was later extended to nine months at the request of the Maltese Bar.

There is no evidence that Glenelg was depressed at the results of his policy, but it created no positive effect. It produced one criticism from a Maltese advocate who was more in favour of the Codes than opposed to them; it delayed the enactment for a further three years, and it provided the circumstances in which the statements and actions of the Chief Justice in Malta could no longer be tolerated by the Governor and by the Secretary of State. Stoddart opened the new session of the Court of Special Commission in November 1836, with an invective against the new Penal Code and against the Maltese Commissioners who had been associated with it. His criticism was heard by Austin and Lewis, who had been commissioned by Parliament in September 1836 to inquire into the Affairs of Malta. They were shocked by his statements which they considered unfair and inderorous.²² Glenelg, also, was much annoyed and decided that the problems of the position of the Chief Justice in relation to the Local Government and his conduct in Court were to come within the terms of reference of the Parliamentary inquiry.

Stoddart, since his appointment in 1826, had caused considerable embarrassment to the local Government by interfering with the Executive. During the absences of Ponsonby, altercations between the Chief Justice and the Chief [p.7] Secretary, Harkey, had caused disquiet among both the British and the Maltese communities and had prevented the peaceful administration of government. On the issue of the revision of the Codes, Stoddart had maintained an opposition to the policy of Ponsonby; at times resorting to unprecedented action in an attempt to prove the basis of that policy invalid. In November 1835, on the occasion of the opening session of the Court of Special Commission, Stoddart had taken the

¹⁹ Glenelg’s Memo, 9 November 1835, on Cardew to Glenelg, 2 October 1865. C.O. 158/86.

²⁰ Stephen’s Memo, 28 December 1885. C.O. 158/86.

²¹ Ponsonby to Glenelg, recd. 24 December 1835. C.O. 158/86. Bonavita to Glenelg, 28 December 1835. C.O. 156/86.

²² Austin and Lewis to Glenelg, 6 November 1886. Confidential C.O. 158/116.

opportunity of interrogating all the Maltse advocates in their proficiency in the English language. The advocates resented his action and petitioned the Secretary of State. Glenelg criticised Stoddart's action as "distasteful" and maintained that the Bar should be protected from such insults.²³

The exclusion of Stoddart from the Commission to draft a revised Civil Code had been approved by the Secretary of State, but Stephen had noted at the time that if further criticism of the Chief Justice's actions was made, Glenelg could scarcely avoid recalling him. It was not only Stoddart's public criticism of the Penal Code and of the Commissioners in his capacity as Chief Justice that finally determined Glenelg to terminate his appointment, but that in the address Stoddart was seen to be identifying himself with the cause of the Maltese liberals in their demand for the extension of the principle of trial by jury. Stoddart had long advocated this principle and in 1839 had applied a recommendation made by Richardson by introducing trial by jury in criminal cases of a capital nature.²⁴ The Local Government had been concerned at the anomaly created by the operation of the principle with the Code Rohan. There is no doubt of Stoddart's popularity with the Maltese mainly because of his outspoken opposition to the Local Government; a popularity which had been sustained despite Stoddart's policy to introduce both the English law and language into Malta's legal system. Trial by jury had become for the Maltese principle of individual independence. Stoddart had befriended the leader of the Maltese liberals, Camillo Sceberras, with whom he corresponded frequently. It was probably by this association that he first learned of the "sovereignty controversy." Stoddart became convinced himself and supported with learned argument the Maltese theory, that they were independent people throughout the blockade of 1799, that Britain could not have taken possession of the island without their consent and that British sovereign rights over Malta rested upon conditional compact.²⁵ The Maltese liberals also approved Stoddart's criticisms of their own law Commissioners, Bonnici and Bonavita. To them any Maltese co-operating with the Government was suspect; they believed that such a person had received bribes or advancement. Bonavita and Bonnici were worthy of better support from their own people for they were men of integrity and distinguished lawyers.

The Parliamentary Commissioners, Austin and Lewis, were instructed by Glenelg not only to consider how far it was right than the Judges should retain or exercise the power of delivering public addresses in open Court upon any [p.8] question which was not before them judicially but also to report by what methods the most effectual security could be taken against future collisions between the Administrative and Judicial authorities of the island. "In so doing" he wrote, "the Commissioners will not fail to bear in mind that there is no part of the Dominions abroad in which the King is more entitled to require of His Servants an habitual discretion of conduct, sobriety of demeanour and mutual forbearance, and a failure in these qualities, if not to be regarded as a fault meriting severe censure, must yet be viewed as a disqualification for any high and confidential employment."²⁶ In their Report on the Functions of the Chief Justice, the Commissioners recommended the strict limitation of his powers;²⁷ by a subsequent Report on the Maltese Appellate Courts they recommended the abolition of his office and that of the Attorney General.²⁸ The Secretary of State was able to

²³ Glenelg's additions to Draft to Cardew, 17 March 1836. C.O. 158/88.

²⁴ Under Maitland a limited recognition of jury procedure had been recognised in the Piracy Commission.

²⁵ Stoddart's "Report on the Law of Malta and the administration thereof" in Cardew to Glenelg, 15 February 1836. C.O. 158/91.

²⁶ Glenelg to Bouverie, and to Austin & Lewis, 1 December 1836. C.O. 159/14.

²⁷ Report in Austin & Lewis to Glenelg, 14 January 1837. C.O. 158/118.

²⁸ Report in Austin & Lewis to Glenelg, 19 April 1838. C.O. 158/116.

apply the recommendation without difficulty, despite Stoddart's spirited defence,²⁹ as his Commission had been made "durante bene placito."

The disappearance of Stoddart brought no immediate enactment of the revised Codes. They were referred backwards and forwards from the Colonial Office to three successive Governors, to the Parliamentary Commissioners, to an eminent Scottish jurist, again to Bonavita, to Micallef the Crown Advocate of Malta and eventually to the Legislative Council. Stephen was at first disposed to accept the recommendation made by Austin and Lewis that it might be expedient to promulgate the Codes for a period of three to five years, that amendments then suggested would probably be more valuable than the best prospective amendments which might be suggested by lawyers in England. He considered that the Ionian Codes with all their faults were a vast improvement on the former law and that the Mauritius Codes which had been promulgated in the same manner were also a great advance in the right direction. "For many years past," he wrote in August 1841, "attempts have been made in vain to substitute Codes at Malta for their old barbarous system. These attempts have been defeated by the subtlety with which English lawyers have scrutinized and weighed them. I am, I confess, for getting on so that it be in the right course without being exceedingly critical as to the allay of error provided that the responsibility for that error is undertaken by the Colonial and not by the Home Government. This I am aware may seem a rough and unskilful mode of proceeding but experience convinced me that the more cautious is not the more wise."³⁰ The Secretary of State, Lord John Russell approved the provisional enactment for three years. The Governor Bouverie then realised, upon receiving the Revised Code from Austin and Lewis that it was transcript of the Neapolitan Code with some omissions, and with some alterations which would be necessary to adapt for trial by jury procedure. He considered it so obscure, subtle and remote from the spirit of English [p.9] legislation as to be practically useless and inapplicable in a British colony. He urged the Secretary of State to consider its revision in the spirit of English law while maintaining the previous decision regarding the language of the text, and recommended that, the work be committed to Andrew Jameson.³¹ Stephen spent much time studying Jameson's Report which was received in the Colonial Office in September, 1843. He believed Jameson's criticisms of the Revised Codes well founded but advised the Secretary of State to instruct the Governor to refer the Report to the Law Commissioners in Malta. Bonavita declined entering into a consideration of its details on the ground that Jameson's proposed alterations and amendment would, if adopted, change the whole spirit and basis of the Code. The Report was therefore passed to Micallef, the Crown Advocate, who recommended in September 1844 that the greater part of Jameson's amendments might be adopted. His recommendation was submitted to discussion in the Council of Government where it was agreed to accept the main provisions of the Report. Among the most important amendments adopted by the Council, were included the extension of trial by jury to all offences against the respect due to Religion; the modification of the scale of punishments as regards imprisonment, the abolition of arrest at home, and the suppression of the theory of attenuating circumstances. In February 1846, the Secretary of State Gladstone was prepared to approve the enactment of the new Penal Code, and as a preliminary measure it was to be published in Malta for public discussion. Meanwhile in London Russell's

²⁹ Stoddart to Normanby, 18 February 1839 and following despatches. C.O. 158/117. Stoddart found defenders in Lord Brougham and the Earl of Ripon. See debate in House of Lords; 18; 19, 30 April and 27 June 1839.

³⁰ Stephen's minute on Bouverie to Russel, 20 August 1841. C.O. 158/120.

³¹ Bouverie to Stanley, 14 May 1842 and minutes C.O. 168/122. In 1843 Jameson was appointed Sheriff Substitute for Ayrshire.

ministry was formed in July 1846 with the enlightened Earl Grey as Secretary of State for War and the Colonies.

In July 1848, at the same time as he presented his plan for a partly elected Legislative Council for Malta, Richard More O’Ferrall, the first Civil Governor to be appointed in the island,³² requested instructions regarding the enactment of the Penal Code. Earl Grey was prepared to leave the decision entirely to the Governor; if More O’Ferrall was of the opinion that the Maltese had had sufficient opportunity to make known their opinions the Code could be enacted for five years. More O’Ferrall held the enactment of the Code in abeyance, while he concentrated on the prior policy and the practical details of instituting a partly elected Legislative Council, and when this was granted to Malta by Letters Patent of 11 May 1849, the Penal Codes, the Code of Civil Procedure and a Report revising the Laws relative to the organization of the Courts of Justice were among the matters immediately referred to it at its opening session in January 1850.

The discussion of the Penal Code proceeded without dissension until the Legislative Council began its consideration of the section dealing with “Offences against the respect due to Religion.” In the original revision, the Law Commissioners had agreed upon equal punishments for the disturbance of religious ceremonies of both Roman Catholic and the Anglican Churches and for insulting the Ministers of the two denominations, but dealt more leniently similar offences against the respect due to any “tolerated” worship. Jameson had [p.10] amended these articles to provide for equal punishment for any offence against religion whether committed against the Roman Catholic, Anglican or any other Church or society of Christians, and every other society of persons who might lawfully assemble for the performance of their religious worship or ceremonies. In the Legislative Council, an elected member Monsignor Casolani moved an amendment to Jameson’s draft which provided heavier punishment in the case of offences against the Roman Catholic Church, and described that religion as “*dominante*” in Malta; the other religions were referred to as “protected” or “tolerated.” After considerable discussion, the amendment was accepted by the Legislative Council which proceeded to pass an Ordinance of enactment of the Penal Code. Upon its receipt at the Colonial Office, Earl Grey immediately rejected it. He instructed More O’Ferrall’s successor, Sir William Reid, to refer the Ordinance back to the Legislative Council with his decision that it could not be confirmed unless in the section on Offences against Religion it provided for equal punishment for offences against the Roman Catholic and Protestant Churches, and also that the term “*chiesa dominante*” if retained should be explained as meaning no more than the expression “established Church” in Malta. The Legislative Council agreed to alter the clauses and the Ordinance was re-submitted to the Secretary of State. Reid was anxious for its acceptance. He was convinced that in the event of a war the defence of Malta would require the cordial aid of the Maltese people and that their support would be readily given, if Britain accepted their wishes on questions of domestic policy. He indicated that the Legislative Council, having accepted Grey’s recommendation, considered the difficulties on the religious problem as solved, and it had proceeded to give notice of a resolution in February 1852 which was unanimously supported, for the formation of a militia force to aid the garrison. Reid requested the Secretary of State that if he was unable to confirm the amended Ordinance he should communicate further with the Governor before resorting to legislation by Order of the Queen in Council.³³

The permanent officials in the Colonial Office, Barrow and Merivale were on the whole satisfied. Merivale had never seen any particular objection to the application of the term “*dominante*” as meaning predominant to the Roman Catholic Church in Malta. He

³² Richard More O’Ferrall appointed Governor of Malta in November 1847.

³³ Reid to Grey, 8 and 9 February 1852. C.O. 158/161.

referred again to the imputation in Sir Thomas Maitland's Minute of 1813 preserving to the Maltese "the maintenance of their ecclesiastical establishment," an undertaking which had been observed by the British government during the forty years of its administration in Malta. He shared little of the apprehension felt by the Chief Secretary, Lushington, that the term "*dominante*" interpreted as meaning the same as "established" might give ingenious lawyers an opportunity to deduce from it the enjoyment of some legal privileges attaching to the Church in England which might not have been claimed previously by the Roman Catholic Church in Malta. The matter, said Merivale, was reduced to a question of words although there was no doubt it was a question in which words were important. The Parliamentary Under-Secretary Of State, Frederick Peel, objected strongly [p.11] to the term "*dominante*" but was willing to consider any term which might be suggested as a substitute for it.³⁴ Grey had no time to consider the despatches before the Russell administration fell in February 1852. Pakington, who was appointed Secretary of State for War and the Colonies in Derby's brief ministry, instructed Reid in August 1852 that he could not accept that part of the Code in which the Roman Catholic Church was designated as "*dominante*," nor did he consider that the explanatory paragraph "*La designazione della Chiesa Cattolica come la chiesa dominante ha, in queste isole, gli stessi effetti che ha, in Inghilterra, la designazione della Chiesa Anglicana, come la chiesa ivi stabilita*," removed the objection to the word; but he was willing to consider any other term which might be suggested by the elected members of the Legislative Council, led by the Bishop of Mauricastro and Dr. Adrian Dingli, which conveyed the idea of the Roman Catholic Religion as with rights guaranteed by the fundamental Law of Malta but not carrying the notion of domination or supremacy.³⁵

Despite the considerable excitement caused among the Maltese population by the new instruction from the Secretary of State, Sir William Reid prevailed upon the elected members of the Legislative Council to abandon the term "*dominante*" which was replaced by the words "*chiesa del paese*." The Governor was immediately confronted with a petition of protest from the Archbishop of Malta, and yet another from the British residents led by the Archbishop of Gibraltar who were dissatisfied that the Church of England had not been mentioned expressly in the Penal Code, but had been included under the general description of "dissentient" churches. In forwarding the petitions to the Colonial Office, Reid recommended that as soon as the new draft of the Code was received in London it should receive the sanction of Her Majesty's Government. He regretted the prolonged agitation on the subject of religion in Malta, which he considered had a tendency very seriously to injure British interests there. Merivale was not all surprised at the feeling of the Anglican memorialists. He thought that in a British possession the established Church of England ought to have been recognised in a more respectful manner than by being "lumped with other dissentient communities from Romanism." "But this sort of consequence was fairly to be expected," he wrote to Newcastle "when Earl Grey gave Malta a representative Council." The Duke of Newcastle, the Secretary of State for War and the Colonies in Aberdeen's ministry, to whom the papers were passed in February 1853 disagreed with Merivale. He thought it lamentable that the members of the Church of England, having just succeeded in a struggle to erase the offensive term "*dominante*" from the Code, should make use of their victory to begin a fresh quarrel on what he considered a comparatively minor point. He respected their zeal and sympathised in their feelings, but he greatly deprecated their discretion. He assured Reid of his desire to keep faith with the Church in Malta whilst being resolved to secure religious liberty and freedom from domination and insult to the Church of England and all other [p.12] denominations of

³⁴ Enclosure and minutes in Reid to Grey, 9 February 1852. C.O. 158/161.

³⁵ Pakington to Reid, 2 August 1852. C.O. 159/28.

Christians.³⁶ He approved the Governor's reply to the memorialists that the Penal Code as amended unquestionably secured to all British subjects whether Roman Catholic or Protestant an absolute equality of protection in the exercise of their respective religions. Newcastle was prepared to confirm the Ordinance enacting the amended Penal Code as soon as the official translation was received at the Colonial Office.

The complete papers were not despatched from Malta until 22 June 1853. By that time support for the Anglican memorialists had appeared in the House of Lords with Lord Shaftesbury's request on 6th June that a copy of the section of the Penal Code relating to religion should be laid on the table of the House. From then Newcastle felt under no engagement to delay the confirmation of the Code.

On the 15 August, however, the ministry was attacked in the House of Commons by A.F. Kinnaird, the member for Perth, and other critics of the Chapter of the Code relating to religion; in order to avoid a division the Prime Minister Lord John Russell agreed that the Code required further consideration and would be submitted to the Law Officers of the Crown.³⁷ Three days later, Newcastle wrote privately to Reid suggesting that perhaps a better method of proceeding would be to give the assent of the Crown to the Penal Code omitting the Chapter on religion; he was as anxious as Reid to avoid further agitation in Malta. The private correspondence was submitted to Russell who concluded that the assent of the Crown could safely be given to the Penal Code omitting the chapter on religion, since the undertaking to submit it to the Law Officers had been given on the supposition that the disputed Chapter should be reconsidered. Merivale, in the Colonial Office, pointed out that under the Malta constitution the Crown could not confirm part of an Ordinance; that it would be necessary to disallow the Ordinance and proceed by Order of the Queen in Council. Newcastle agreed that this was the most intelligible course to take, though he thought it very objectionable in many points of view. It was inconsistent with the policy he had indicated and almost promised in his earlier despatches to Reid. He felt certain that it would revive bitter religious animosity amongst the Maltese population, and he considered it at variance with the sound principles of Colonial government which left matters of local concern to be locally adjusted, but he accepted it as a course of action compelled on the Government by the representations made in the House of Commons. Newcastle might have proceeded by confirming the Ordinance and subsequently repealing the disputed chapter, but he rejected this proposal of Fredrick Peel, on the ground that it might be construed a violation of the letter of the Government's engagement to the House of Commons and appear at the same time to identify the Government in a greater degree than he wished with the objections to the Chapter raised by the members of Parliament.³⁸

Throughout the discussions Merivale had kept before Newcastle the problem of the consequence for Malta of the non-enactment of the disputed Chapter. [p.13] The variety of regulations relating to offences against religion had been promulgated during the several centuries of rule by the Grand Masters of the Order of the Knights of St. John. They were severe, inconsistent and out-dated; many of them no longer enforced. Sacrilege was punishable by a life sentence in the galleys, blasphemy by the pillory. The reformed codification contained in the Chapter of the new Penal Code was mild in comparison and of undoubted advantage to the better government of the colony. The exclusion of the Chapter was for this season also regretted by the Secretary of State.

The Ordinance of the Legislative Council was disallowed, and a draft Ordinance of the Queen in Council promulgating the Penal Code excluding the Chapter relating to offences

³⁶ Reid to Newcastle, 28 January 1853, and Newcastle's minute. C.O. 158/165.

³⁷ Hansard Vol. cxxix 3rd series. 15 August 1858, Debate on Malta, Penal Code.

³⁸ Minute on Reid to Newcastle, 22 June 1853., C.O. 158/167.

against religion was submitted to the Law Officers of the Crown in November 1853. At the same time the Law Officers took under their considerations the disputed Chapter and made several recommendations with respect to greater discrimination and mitigation of the punishments to be applied. Newcastle declined on the principle to legislate for Malta on these matters and forwarded the Law Officers recommendations to Reid for the guidance of the Legislative Council, if it was found necessary to provide special legislation for the protection of religion in the island after the promulgation of the Penal Code. Newcastle, however, was by this time of the opinion that unless definite evil was apprehended from the omission of the disputed Chapter it was more desirable to leave such offences, rare as they were to be expected, to be dealt with under the general provisions of the law as breaches of the peace or of public order and decorum.³⁹

The Order of the Queen enacting the Penal Code was promulgated in Malta and brought into operation in June 1854. The revision had been beset with difficulties not only of those inherent in the production of a Code to replace a medieval system, but of those attendant upon obtaining its practical application and acceptance in an island that was, at one and the same time, a British colony and strategic base with locally elected representation, Roman Catholic and Italian speaking. Against the backcloth of recurrent ministerial changes and of the political development of the Maltese during the first half of the nineteenth century, the work of Ponsonby, More, O'Ferral, and Reid, of Richardson, Stephen, Bonavita, Bonnici and Jameson, of Earl Grey and Newcastle contributed to the process by which the penal revision gradually evolved. The ultimate use of the reserved power of the Crown to legislate by Order of the Queen in Council was applied reluctantly by Newcastle, not to decide an issue of principle, for the Members of the House of Commons and of the Malta Legislative Council were agreed on the fundamentals of equality before the law, but in the interests of the stability of a war cabinet and of the benefits to be derived from the Code by Malta.

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³⁹ Newcastle to Reid, 5 February 1854. C.O. 159/25 [Printed for Parliament May 1854].