

LECTURES IN
ADMINISTRATIVE LAW
XXV

Robert Musumeci

Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

Human rights

The precept of the rule of law mandates that public authorities, irrespective of the nature of their engagement, bear the solemn responsibility of ensuring the preservation and enforcement of human rights. In essence, human rights represent a fundamental cornerstone of democratic societies, serving as a bulwark for safeguarding the freedoms and rights of every individual.

In the context of Malta, these rights are deeply embedded within our constitutional framework and further buttressed by our commitment to various international accords including the **European Convention of Human Rights**¹ and the treaty of accession to the European Union signed in Athens on the 16th April 2003.²

THE MALTESE CONSTITUTION

Enshrined within the framework of the **Maltese Constitution** lies **Chapter IV**, explicitly designated as "Fundamental Rights and Freedoms of the Individual". Still, **Article 32** makes it clear that these rights and freedoms are subject to such limitations of that protection as are contained in those same provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

¹ **Act No. XIV of 1987 (Chapter 319 of the Laws of Malta)**

² When Malta joined the European Union in 2004, an amendment was introduced to **Article 65**, an unentrenched part of the **Constitution**. The amendments are indicated in italics in the following excerpt:

'Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta, in conformity with full respect for human rights, generally accepted principles of international and Malta's international and regional obligations, in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16 April 2003'.

Herein, a succinct exposition is provided, elucidating the scope of **Articles 33** through **45** encompassed within the aforementioned **Chapter IV**:

ARTICLE 33: Protection of the Right to Life - The fundamental principle is that no individual should deliberately lose their life. However, this article is subject to certain restrictions. For instance, a court may still order the execution of someone convicted of a criminal offense under Maltese law. Additionally, in situations involving the use of force, a person's death won't be considered wrongful if it resulted from appropriately employed force, such as in cases of self-defence, safeguarding others or property, legal arrest, preventing escape, quelling a riot, insurrection, or mutiny, or stopping the commission of a crime. This also holds true if the person dies due to lawful acts in times of war.

ARTICLE 34: Safeguard from Arbitrary Arrest and Detention – The central principle in this context is that no individual should be deprived of personal freedom. However, this provision is subject to specific circumstances under which personal liberty may be restricted through detention. Detention is permissible when individuals are incapable of entering a plea in criminal cases, for the enforcement of court sentences or orders both domestically and internationally, as a penalty for contempt or related offenses against courts or the House of Representatives, to ensure adherence to legal responsibilities, to bring individuals before courts or the House of Representatives, when there is reasonable suspicion of a crime, for the well-being or education of minors, to prevent the spread of infectious diseases, to address mental health or addiction concerns, or to prevent unlawful entry or facilitate legal removal from the country. Detention is also viable in emergency situations if it is reasonably necessary to address a crisis. Nonetheless, individuals under detention must be promptly informed of the reasons, with interpreter assistance provided if needed. If detained for court appearances or suspected crimes, they must be presented before a court within 48 hours; otherwise, they must be released unconditionally or with conditions ensuring their presence at future trials. Furthermore, those who have been

unlawfully detained have the right to seek compensation.

ARTICLE 35: Prevention of Forced Labor - No person shall be compelled to undergo forced labour. However, there are important exceptions to this principle. The term "forced labour," as used in this article, excludes various scenarios, namely: (a) labour demanded as a result of a court sentence or order, (b) labour required of an individual lawfully detained for the purposes of their personal hygiene, facility maintenance, care, treatment, education, or welfare, (c) labour expected from members of disciplined forces during their duties or, in the case of conscientious objectors to military service, labour mandated by law as an alternative to service, and (d) labour required during times of public emergencies or other community crises posing life-threatening situations.

ARTICLE 36: Shield from Inhuman Treatment - Every person is safeguarded from being subjected to punishment or treatment that is cruel, inhumane, or degrading. Moreover, this article establishes that no legislation can permit collective punishments. However, this provision does not hinder the imposition of collective punishments on disciplined force members in accordance with the rules governing their discipline.

ARTICLE 37: Safeguard against Property Seizure without Compensation - The confiscation of property, regardless of its form, is prohibited unless proper legal procedures are followed. Furthermore, any rights or claims to property cannot be revoked without complying with specific legal requirements. This principle remains valid unless a law is established that permits such actions. Nonetheless, such law must ensure: (a) fair compensation, (b) the availability of an unbiased court or tribunal to assess interests, rights, and compensation, and (c) the right to appeal to the Court of Appeal in Malta.

ARTICLE 38: Privacy Protection – The fundamental principle of respecting an individual's privacy within their home, personal belongings, and communications

remains unviolated. This signifies that no individual can be subjected to personal searches, property inspections, or entry into premises by others, except with explicit consent or as part of parental discipline. However, the Parliament has the authority to establish laws that allow for searches or entries when reasonably necessary for purposes such as defence, public safety, maintaining order, upholding morality, ensuring public health, facilitating planning, utilizing mineral resources, or advancing public-interest property development. Additionally, these laws may empower government departments, local authorities, or corporate bodies established for public purposes to enter premises for purposes like inspection, taxation, or legal work, or for implementing court orders, as long as these provisions are reasonably justifiable in a democratic society.

ARTICLE 39: Ensuring Access to Fair Legal Proceedings - Every person accused of a criminal offense must receive a fair trial within a reasonable period, conducted by an independent and unbiased court established by the **Constitution** itself. It's crucial to emphasize that the **Constitution** specifically requires a court established directly by itself, and not by any tribunal, in this context.

ARTICLE 40: Preservation of Conscience and Worship Freedom - Every individual has the right to freedom of conscience and the unrestricted ability to practice and profess their selected religion. However, there are situations where laws can be enacted to limit this right, provided that such laws are reasonably required to ensure public safety, order, morality, health, or the protection of the rights and freedoms of others, and are reasonably justifiable in a democratic society.

ARTICLE 41: Safeguarding Freedom of Expression - All individuals possess the right to freedom of expression, encompassing the liberty to hold opinions without interference, as well as to actively seek, receive, and disseminate information and ideas through any medium. Yet, laws may be enacted for legitimate reasons, such as safeguarding defence, public safety, morality, or the rights of others, without violating this principle. Laws can also place restrictions on public officers

as long as they align with democratic values.

ARTICLE 42: Preservation of Assembly and Association Freedom - Every person enjoys the entitlement to express themselves freely, including the freedom to hold opinions without hindrance, and the right to actively acquire, obtain, and share information and concepts through various means. However, there are instances where laws can be established for valid purposes, such as upholding defence, public safety, morality, or the rights of others, without contravening this principle. Additionally, laws can impose limitations on public officials, as long as these limitations are in harmony with democratic principles.

ARTICLE 43: Restriction on Deportation - Extradition in Malta is only allowed through treaty arrangements and under legal authority. Extradition for political offenses is prohibited.

ARTICLE 44: Protection of Freedom of Movement - This article ensures the freedom of movement for Maltese citizens, granting them the right to travel within Malta, choose their residence, exit, and enter the country. Emigrants who were Maltese citizens, along with their spouses, widows, widowers, and children, have the opportunity to retain or regain citizenship. However, this freedom can be restricted under certain circumstances such as defence, safety, order, morality, health, and legal obligations. Laws can be enacted to impose reasonable movement restrictions based on these interests, as long as they are proven to be justifiable in a democratic society.

ARTICLE 45: Protection on the grounds of discrimination - This article guarantees that no law shall exhibit discrimination by providing unequal treatment or advantages based on factors like race, origin, political opinions, colour, creed, sex, sexual orientation, or gender identity. However, it's crucial to recognize that this right isn't without limitations. There's room for restrictions or exemptions, as well as the possibility of conferring specific benefits or privileges, as long as these

actions are reasonable and can be justified in a democratic society within the context of the unique circumstances of individuals, and the other stipulations set out in the **Constitution**.

Clearly, the aforementioned rights span a broad spectrum, encompassing civil, political, economic, and social aspects. Nonetheless, it is important to note that, with the exception of **Articles 36** (Prohibition of torture) and **39** (Right to a fair trial for a criminal offense before a court), these rights are not absolute and come with certain limitations.

In addition to the limitations outlined within the articles themselves, these rights are also subject to further restrictions. **Article 47(9)** of the **Constitution** explicitly states that **Article 37**'s applicability does not extend to laws enacted before March 3, 1962. Meanwhile, **Article 47(3)** firmly establishes that the provisions within the **Criminal Code (Chapter 9)**, **Code of Police Laws (Chapter 10)**, **Code of Organization and Civil Procedure (Chapter 12)**, **Commercial Code (Chapter 13)**, and **Civil Code (Chapter 16)** cannot be challenged for inconsistency with the principles laid out in **Articles 33 to 45** — the fundamental human rights provisions of our **Constitution** — until a period ending on June 30, 1993.

Nevertheless, in the face of these constraints, our courts have demonstrated ingenuity. They've adeptly manoeuvred through these intricate channels using the lens of the **European Convention for the Protection of Human Rights**, which has seamlessly integrated into our domestic law. This topic will be explored in the upcoming discussion.

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS

After the adoption of the **Maltese Constitution** in 1964, the **European Convention for the Protection of Human Rights** was subsequently integrated into Maltese Law in 1987 through the establishment of **Chapter 319** of the **Laws of Malta**.

In contemporary Malta, individuals have the opportunity to initiate legal proceedings addressing human rights violations by invoking the safeguards provided by both these crucial human rights instruments. In such cases, the Court is empowered to apply whichever provision offers the individual the most favourable protection. This approach is commonly known as the "Parallel Protection" doctrine.

This significant progress has altered the landscape of Human Rights Law in Malta, suggesting that certain constraints specified in the **Constitution** could potentially be bypassed, facilitated by the **Convention's** provisions.

I begin with the seminal case involving **Allied Newspapers Limited**³ in which it was demonstrated that the **Convention** can potentially invalidate **Article 47(9)** of the **Constitution**, which excludes the applicability of **Article 37** to laws enacted before March 3, 1962. In this instance, property had been expropriated under **Chapter 88**, enacted in the 1930s. When the government's actions were contested, they argued that actions under **Chapter 88** were not in breach of **Article 37** due to **Article 47(9)**, implying constitutional validity. Nonetheless, the Constitutional Court made it very clear that **Chapter 319**, albeit an ordinary law, grants independent protection to fundamental rights through the European **Convention** and its protocols reproduced in the First Schedule of that chapter. The court dismissed the government's argument, emphasizing that **Chapter 319's** protection of fundamental rights and freedoms is distinct from the **Constitution's** provisions.

Moving to a different aspect, several court rulings have highlighted the potential to employ the **Convention** in order to question the government's justification for the initial land expropriation. This is significant because the authority to dispute the grounds for expropriation doesn't originate from **Article 47** of our **Constitution**,

³ **Allied Newspapers Limited vs Attorney General** (CC) (2nd December 2003)

rather, it is safeguarded by **Article 1, Protocol 1** of the **Convention**. A sequence of expropriation instances clearly illustrate how the **European Convention** offers a wider path for individuals whose property has been taken away. In these cases, property owners can contest the government's actions, demanding an explanation for the expropriation and consequently determining whether it was driven by public interest.⁴

Another instance demonstrating the effectiveness of the **Convention** is found in the **Lawrence Pullicino** case⁵. Actually, this case marks the initial conflict arising just two years following the enactment of **Chapter 319**. In this instance, the applicant faced charges of wilful homicide, and due to the prevailing conditions in the **Criminal Code** at that time, bail could not be granted by the Magistrate, even if the circumstances warranted it. The **Criminal Code** was safeguarded from the human rights provisions within the **Constitution**. The applicant effectively contended that under **Article 5** of the **Convention**, the absence of discretion on the part of the judicial officer to grant bail hindered a proper assessment of whether continued detention was necessary. The applicant astutely challenged the **Criminal Code** provision based on the **Convention** rather than the **Constitution**. The court reasoned out that there exists no impediment preventing the legislator from granting additional rights to individuals that aren't encompassed within the **Constitution**.

Having said the above, there have been occasions when the state imposed constraints on fundamental rights while staying within the prescribed boundaries. An illustrative example revolves around a legislative action by the Minister, involving the formulation of regulations for implementing wiretapping within prisons. This instance is still considered noteworthy albeit it pertains to a legislative act rather than an administrative one. It serves to underscore the possibility that there could arise scenarios where the executive branch is deemed to have

⁴ **Raymond Vella u Victoria Bugeja bhala Diretturi u in rappresentanza tas-socjeta` Fekruna Ltd. vs Il-Kummissarju ta' l-Artijiet** (CC) (24th May 2004)

⁵ **Dr L. Pullicino vs Commander Armed Forces et** (CC) (12th April 1989) (Vol.LXXIII.I.54)

acted justifiably when limiting certain rights. The case I have in mind is **Pulizija v Camilleri**⁶ which goes back to 1999. In this case, the applicant challenged the validity of various prison regulations, which included constraints on correspondence and telephone conversations. Among these regulations was **Regulation 59**, which stated: "*All telephones within the prisons shall be equipped for monitoring and recording of conversations. Any Director may authorize the intentional hearing of such conversations to safeguard members of the public or to safeguard the security or safety within the prisons or to prevent furtherance of any illegal activity.*" The Court acknowledged that **Article 38** of the **Constitution** and **Article 8** of the **Convention** aim to safeguard individuals from unwarranted intrusion by public authorities into their private and familial spheres. However, this right was not absolute, and the court recognized that under specific conditions outlined **Article 8(2)** of the **Convention**, the State had the authority to intervene. This provision acknowledges that detaining an individual post a court decision or during preventative custody inherently entails certain constraints on their private and family life. In essence, the court underscored that in a democratic society, a balance needed to be struck between the legitimate concerns of maintaining public order, security, and prisoner rehabilitation. As a result, the Court concluded that recording telephone conversations was acceptable under the specific circumstances, particularly when related to the planning of illicit activities. Therefore, the interference was justified.

All of these considerations circle back to the principle of proportionality, which emphasizes that the methods employed to attain a lawful objective must be proportionate to the intended results. An essential element resides in determining whether the public authority had valid reasons for imposing constraints while pursuing the common good. This necessitates an assessment of whether the limitations placed on individuals by public authorities through administrative actions align with both the **European Convention** and our **Constitution**, and if they withstand scrutiny under the principle of proportionality.

⁶ **The Police vs M. Camilleri** (FH) (12th April 1999)

Meanwhile, it's important to recognize that there are situations where our **Constitution** offers more robust protections than the **Convention**. A prime illustration is the distinction in the handling of criminal charges. While the **Convention** might seem to allow tribunals to handle criminal cases, Malta adopts a more rigorous approach, reserving the oversight of criminal charges exclusively for "courts" vested with the specific authority to adjudicate on criminal offenses as per **Article 39**. Consequently, Malta appears to subject criminal charges to heightened scrutiny. This trend has gained prominence, especially in cases involving penalties for money laundering, which are imposed by the Financial Intelligence Analysis Unit (FIAU), an administrative body rather than a court. Although administrative penalties are permissible even under the European Union law directive (**Directive 2015/849/EU**), significant administrative fines are not merely compensatory, they function as deterrents. Considering these nuances, the Constitutional Court often determines that the administrative fines imposed by the FIAU carry a criminal character. In alignment with **Article 39(1)** of the **Constitution**, only a court, regardless of the administrative label, possesses the authority to impose such fines.⁷

⁷ See for example: **Federation of Estate Agents v Direttur Ġenerali Kompetizzjoni** (CC) (3rd May 2016)



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