PUBLIC LAW

LECTURES IN *ADMINISTRATIVE LAW* XXVII

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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.

Challenging Administrative Acts

Previously, I dedicated an extensive segment entitled ‘What is an Administrative Act?'. Within that section, I asserted that a thorough grasp of the fundamental nature of administrative acts mandates consultation of the definitions stipulated within the confines of the indigenous legislative structure. Two instances exemplifying these definitions are readily identifiable within the legal framework of Malta, precisely encapsulated in **Chapter 12** and **Chapter 490.**

The scope of the designation "administrative act," as defined in **Chapter 12** through **Article 469A**, a subject we are poised to extensively explore in the near future, encompasses the act of a public authority issuing various instruments, including but not limited to orders, licenses, permits, warrants, decisions, or denials, in response to claims presented by a petitioner.

Similarly, within the construct of **Chapter 490**, the **Administrative Justice Act**, "administrative act" encompasses the act of the public administration issuing instruments, which encompass orders, licenses, permits, warrants, authorizations, concessions, decisions, or denials, in response to petitions submitted by members of the general populace. It is of significance to note that the definition within **Chapter 490** exhibits a more comprehensive vocabulary in comparison to the definition within **Chapter 12**. This contrast is particularly evident in the incorporation of supplementary designations such as "authorizations" and "concessions."

Notably, both definitions of administrative acts as encountered in **Chapter 12** and **Chapter 490** explicitly exclude measures devised for the purpose of internal organizational or administrative functions within the domain of the public administration.

Having established this foundation, we are now aptly positioned to engage in a comprehensive exploration of the available remedies designed to address challenges arising from administrative acts. We initiate our analysis by introducing the institution of the Parliamentary Ombudsman.

THE PARLIAMENTARY OMBUDSMAN

The parliamentary ombudsman was always chosen by two-thirds of the Members of Parliament under ordinary legislation. However, with the constitutional amendments introduced by **Act XLII of 2020**, the independence and autonomy of the Ombudsman was strengthened by entrenching the method of appointment as well as his removal and suspension.

The Ombudsman's distinct role lies in its operational independence, functioning separately from governing executive bodies while being accountable to Parliament, earning the title of Parliamentary Ombudsman. He operates as a Commissioner for Administrative Investigations, responsible for examining complaints concerning decisions, actions, or inaction by public entities including government departments, statutory bodies, corporations, agencies, foundations, and government-controlled companies.

When individuals, whether physical or legal entities, regardless of their nationality, are dissatisfied with administrative outcomes, they often consider turning to the parliamentary ombudsman as a natural recourse.

The House of Representatives Committees and the Prime Minister can also refer matters for Ombudsman investigation. If complaints to internal grievance units remain unresolved, they can also be escalated to the Office of the Ombudsman along with relevant documents. Having said this, the Ombudsman doesn't review decisions made by courts and tribunals, upholding the separation of powers and judicial system integrity. In fact, the Ombudsman can choose not to

investigate if remedies are available through independent tribunals.

The Ombudsman, therefore, investigates citizen complaints involving mismanagement and maladministration by public authorities. Maladministration involves unjustified delays, unequal application of rules, inconsistent administrative practices, information withholding, unequal treatment, impolite behaviour, mishandling errors, inflexible rule enforcement leading to inequity, failure to communicate appeal rights, compensation failure, and lack of impartiality.

As outlined in **Article 13(2)** of the **Ombudsman Act**, in cases where matters of considerable public interest are involved, the Ombudsman retains the authority to initiate investigations autonomously, without being reliant solely on a formal complaint.

Additionally, the Ombudsman can delegate authority to three specialized commissioners overseeing health, environment and planning, and education. Each commissioner concentrates solely on their designated area and enjoys complete autonomy and independence in carrying out their duties. Although they investigate complaints independently, they remain part of the Ombudsman's overall structure.

Upon receiving a complaint, the Ombudsman's initial step is to assess its eligibility for consideration. If the complaint is deemed unsuitable for investigation, the complainant is informed of the decision not to pursue it. Conversely, if the Ombudsman finds the complaint appropriate, a thorough investigation ensues. However, it's crucial to realize that submitting a complaint to the Ombudsman doesn't pause legal time limits (known as prescription periods) for initiating legal actions. For instance, if you ask the Ombudsman to investigate a complaint, like when Transport Malta denies your taxi license citing discrimination, the ongoing time frame for challenging that decision in court—let's say, six months—

continues to run despite involving the Ombudsman.

The Ombudsman's final opinion remains unalterable unless the complainant presents new evidence during the investigation, shifting the case's perspective. It's worth emphasizing that the Ombudsman's decision doesn't affect a complainant's legal rights if they disagree.

As per **Article 14(2)** of the **Ombudsman Act,** the Ombudsman cannot consider a complaint submitted after six months from the complainant's initial awareness of the raised issues. However, the Ombudsman can use discretion to investigate a complaint beyond this period if there are extraordinary circumstances justifying such action.

Certain case categories are beyond the Ombudsman's jurisdiction. This encompasses matters involving private individuals, companies, and professionals like lawyers or doctors in private practice, along with issues concerning private contractual or commercial transactions. Likewise, complaints against high-ranking figures such as the President, House of Representatives members, and Cabinet members are exempt from Ombudsman scrutiny. Additionally, the Ombudsman cannot review court proceedings, decisions, or pending legal matters to preserve judicial independence. Furthermore, investigations into police activities, the Armed Forces of Malta (with some exceptions), and commissions formed under specific laws are excluded. Reviewing procedures before the Public Service Commission is limited unless all possible remedies have been exhausted. Cases under the Malta Broadcasting Authority, specific powers of the Attorney General, legal advisors to the Government, and certain Auditor General functions are beyond the Ombudsman's reach. Similarly, security service matters and issues tied to non-governmental organizations are also excluded. Moreover, the Ombudsman is unable to investigate topics relating to national security, relations between Malta's government and other entities, actions based on the **Extradition Act** by

the justice minister, and the Prime Minister's authority under **Article 515** of the **Criminal Code**.

Nevertheless, even in instances where the Ombudsman has the authority to step in, it's crucial to highlight that his directives don't possess the legal binding potency akin to judgments from a court or tribunal. In simpler terms, the Ombudsman doesn't possess the ability to compel adherence to his recommendations or supersede decisions made by public authorities. In other words, his final opinion doesn't wield the power to enforce compliance. In the most favourable scenario, if a complaint is upheld, the ombudsman can ask the relevant authorities to provide a plan for executing his suggestions within a specified timeframe. When remedies are delayed or declined, the Ombudsman has the authority to communicate his report and recommendations to the Prime Minister and the House of Representatives. Additionally, he can choose to make these cases public by sharing them through local media reports. However, his influence remains limited to these actions.

Additionally, in various scenarios where authorities reject applications for things such as planning permissions or licenses, the ombudsman's ability to provide assistance might be significantly constrained due to the time limits that must be adhered to when challenging or reversing decisions related to denied permits or licenses before the relevant forums. For instance, consider planning permission applications submitted to the Planning Authority. In these cases, legislative intent dictates that if a party is dissatisfied with the denial of permission, the appropriate course of action involves challenging this decision before a specialized body called the Environment and Planning Review Tribunal (EPRT), as established under Chapter 551 of the Laws of Malta. Turning to the ombudsman for recourse could potentially mean forfeiting the opportunity to access the sole avenue for appeal within a 30-day period from the date of the decision's publication on the Department of Information website, as stipulated by the aforementioned **Chapter 551**.

APPEALS (POINTS OF FACT AND POINTS OF LAW) -VS- JUDICIAL REVIEW (POINTS OF LAW ONLY)

Before delving into forums where decisive authority lies, I want to emphasize the distinction between jurisdiction over law and jurisdiction involving a combination of fact and law.

The inclusion of the term 'points of fact and points of law' within the jurisdiction of the reviewing body indicates that this body possesses the authority to scrutinize both factual elements and legal matters. This aligns with the functions of specialized tribunals like the Environment and Planning Review Tribunal (EPRT), which can assess both the legality of the appealed decision and the facts as evaluated by the Planning Authority leading to the decision. If the EPRT disagrees with either, it has the power to overturn the decision based on its own assessment of the facts and the law. The Administrative Review Tribunal (ART) operates similarly, as outlined in **Article 7(1)** of **Chapter 490**[1]**.** This process is commonly referred to as an 'appeal,' which differs from 'judicial review,' a topic I will discuss next.

Conversely, when a review is constrained to 'a point of law', as exemplified by the First Hall Civil Court operating as a court of judicial review under **Article 469A** of **Chapter 12,** the jurisdiction is strictly confined to legal matters. In such cases, the judge lacks the authority to modify the facts as determined by the public authority based on personal preference. Hence, the sole course of action available is for the judge to identify any legal unlawfulness in the decision taken by the public authority, declare it void and refer it back to the decision-making authority for a reassessment. This process is commonly referred to as 'judicial review'.

[1] "*7 (1) The Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points of fact*"

One important point to note is that you shouldn't mistake judicial review as being weaker than an appeal heard by a specialized Tribunal or the ART simply because the latter processes consider both factual and legal aspects, whereas judicial review focuses solely on legal matters. The truth of the matter is that judicial review stands as the ultimate legal recourse because the lawfulness of all executive decisions are ultimately susceptible to the courts' review.

The crucial point to remember, however, is that if there is a remedy available through a specialized tribunal or the ART as mandated by the law, **Article 469A** cannot be invoked. In such cases, individuals must first pursue their remedy through the specialized tribunal or the ART, as prescribed by law. Frequently, the legislation that establishes specialized tribunals often includes a dedicated provision indicating where individuals should seek judicial review following a tribunal's decision. Similarly, the **Administration of Justice Act** outlines a similar procedure to follow after ART decisions.

You might also question why judicial review is restricted to concentrating exclusively on legal considerations and avoids examining the factual facets of executive actions, even if they seem peculiar. The answer to this query can be found in the principle of separation of powers, where in the grand scheme, it recognizes that it is the responsibility of the executive, and not the courts, to put policies into action and make decisions.

SPECIALIZED TRIBUNALS AND THE ADMINSITRATIVE REVIEW TRIBUNAL (ART)

Over the years, there has been an increase in the establishment of specialized tribunals like the EPRT. As already pointed out, the proceedings conducted within these tribunals bear resemblance to an appeals process, as the tribunal possesses the authority to take the decision-making role away from the original authority.

In fact, they often are referred to as appeal boards because, as I said, they possess the prerogative to reexamine determinations made by public authorities, taking into account both legal principles and factual considerations to independently assess those facts and render a verdict that may significantly differ from the original decision.

As previously discussed, a notable illustration is the Environment and Planning Review Tribunal, established with the purpose of adjudicating appeals concerning determinations associated with planning applications on points of fact and points of law. A similar tribunal is the Tourism Appeals Board (TAB). This board possesses the authority to revise choices rendered by the Malta Tourism Authority (MTA) in response to complaints lodged by individuals. In its review, the Tourism Appeals Board considers both factual circumstances and legal principles.

Nonetheless, it is imperative to bear in mind that these specialized tribunals, despite their judicial-like functions, fall under the purview of the Executive branch of the government, rather than the Judiciary. Indeed, these entities are often referred to as quasi-judicial bodies because they emulate certain aspects of courts, yet they lack formal incorporation into the judicial realm of the state.

These specialized tribunals commonly comprise members who possess expertise in the particular field relevant to the grievance at hand. Additionally, these tribunals often adopt a less rigid and expeditious procedural approach. Typically, the individuals overseeing these tribunals are appointed by the Executive itself, and their reappointment is also within the Executive's discretion. This dynamic gives rise to an intriguing circumstance in which these appeal boards or tribunals are integrated into the same segment of the Executive that initially rendered the decisions subject to challenge.

As earlier pointed out, decisions rendered by quasi-judicial bodies are deemed

definitive in matters of factual assessment, but not in matters of legal interpretation. In other words, ultimate authority for decisive resolution rests with a court of law, vested with the authority to nullify a determination of a quasi-judicial entity if it is revealed that the decision was marred by a legal error.

In 2009, the Administrative Review Tribunal (ART) was established through the enactment of the **Administrative Justice Act**, found in **Chapter 490** of the **Laws of Malta**. The primary objective was to consolidate the functions of numerous preexisting tribunals under a single framework. As an instance, decisions formerly subjected to review by a specialized tribunal named the VAT Appeals Board, which pertained to the decisions of the VAT Commissioner, were subsequently transferred to the jurisdiction of the ART.

Indeed, the ART is presided over by a magistrate and supported by experts, convening within the premises of the court in Valletta. Nonetheless, it remains pertinent to avoid misconstruing the ART's location within the court building as an indication of its inclusion within the judiciary. On the contrary, the ART remains situated within the Executive sphere. Consequently, it is imperative to recognize that despite its locale, the ART remains an integral part of the Executive branch, rather than the Judiciary.

Despite the inception of the ART, a range of specialized tribunals persist in operation to this day. A prime illustration is the already mentioned EPRT, which was established in the year 2010 under **Chapter 504** of the **Laws of Malta**. Interestingly, this came about in the same year as the establishment of the ART. The EPRT retains its role in adjudicating appeals arising from determinations of the Planning Authority, as the legislative framework continues to refrain from transferring planning-related matters to the jurisdiction of the ART. In more recent times, another instance unfolded in 2009 with the establishment of the Building Construction Tribunal under **Chapter 623**, specifically within the context of the **Building and Construction Authority Act**. Consequently, administrative decisions

rendered by the newly instituted authority responsible for overseeing building compliance in Malta are similarly exempted from ART review. This signifies that, despite the introduction of the ART, various specialized tribunals continue to persist due to legislative decisions, illustrating the coexistence of different bodies within the broader administrative justice landscape. Certainly, the potential for the ART to assume additional responsibilities in the future rests within the realm of parliamentary discretion. However, it remains evident that, for political expediency, there exist certain domains that will invariably remain outside the scope of the ART's jurisdiction.

Meanwhile, numerous misconceptions continue to circulate regarding the Administrative Review Tribunal (ART). One prevalent misinterpretation involves the belief that the ART can solely probe into questions of law. Put simply, it is commonly thought that the ART's scope is confined to annulling an administrative decision based solely on legal grounds, and subsequently remanding the case to the public authority for a fresh decision. However, I find this understanding to be inaccurate. **Article 7(1)** of **Chapter 490,** already referred to earlier, clearly stipulates that the ART is empowered to scrutinize administrative acts of the public administration, both from a point of law and a point of fact. The inclusion of the term 'points of fact' unequivocally implies that the ART is endowed with the jurisdiction to investigate factual components, and where necessary, supplant the authority's factual discretion with its own judgment. This means that the ART functions as an appellate forum, distinct from the First Hall Civil Court, which operates as a judicial review entity under the purview of **Article 469A** of **Chapter 12**—this topic will be further explored shortly.

Another widespread misconception revolves around the competence of the ART, often misconstruing its scope as encompassing the authority to review decisions rendered by diverse entities specifically enumerated in any of the Schedules attached to **Chapter 490**. However, a clarification is provided by **Article 25(2)** of **Chapter 490**, which states that *"The ART shall henceforth have*

jurisdiction in lieu of the persons, bodies and administrative tribunals mentioned in the laws listed in the Third Schedule." Paradoxically, the anticipated 'Third Schedule' is non-existent. Instead, a Schedule 1 exists, outlining various specialized tribunals. Nevertheless, this Schedule 1 is unrelated to the jurisdiction of the ART. Its function is to list those specialized administrative tribunals which, similar to the ART, are expected to uphold the Principle of Good Administrative Behaviour articulated in **Article 3** of the same **Chapter 490**.

Finally, it is worth underlining that **Chapter 490** contains a specific article, namely **Article 22(1)**, which explicitly outlines that any party engaged in proceedings before the ART, who finds themselves aggrieved by a tribunal decision, holds the right to appeal to the Court of Appeal, situated either in its superior or inferior jurisdiction. To determine whether the appeals court operates in its superior or inferior jurisdiction, reference has to be made to Schedule 2 of **Chapter 490**. What is perhaps more noteworthy is that the said **Article 22(1)** does not expressly restrict the Court of Appeal to solely examining points of law, as is commonly perceived with appeals from decisions of specialized tribunals (like the EPRT or the Tourism Appeals Board). A meticulous reading of **Article 22(1)** unveils no supporting reference for such an assertion. Consequently, unlike the scenario with the EPRT, an appeal from an ART decision need not be confined exclusively to points of law.

At face value, this means that while the court's authority following an EPRT decision is typically limited to nullifying a decision and remanding it for reconsideration, there appears to be no apparent impediment to prevent the Court of Appeal from potentially replacing the factual evaluation of an ART decision and delivering a verdict without the necessity of referring it back to the ART for reconsideration.

In conclusion, it must be pointed out that the pivotal factor in deciding where to challenge an administrative act, namely whether before a specialized tribunal

or the Administrative Review Tribunal (ART) established under the **Administrative Justice Act**, is unequivocally dictated by the provisions enshrined in the pertinent legislation. In other words, individuals who are dissatisfied with the outcome of an administrative act, do not possess the autonomy to select their preferred recourse; instead, they are obliged to navigate the legal framework and see whether a remedy exists before a specialized tribunal or the ART. However, it's possible that none of these avenues provide a solution. Let's explore that next.

ARTICLE 469A OF CHAPTER 12

What if there isn't a legislative provision that permits us to contest an administrative act in front of a specific tribunal or the ART? To address this query, the first action is to examine **Article 469A** in **Chapter 12** of the **Laws of Malta** which is as follows:

> *'**469A**. (1) Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:*
>
> *(a) where the administrative act is in violation of the Constitution;*
>
> *(b) when the administrative act is ultra vires on any of the following grounds:*
> *(i) when such act emanates from a public authority that is not authorised to perform it; or*
> *(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or*
> *(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or*
> *(iv) when the administrative act is otherwise contrary to law.*
>
> *(2) In this article - "administrative act" includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within*

the said authority: Provided that, saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition; "public authority" means the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law.

(3) An action to impugn an administrative act under sub-article (1)(b) shall be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier.

(4) The provisions of this article shall not apply where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law.

(5) In any action brought under this article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The said damages shall not be awarded by the court where notwithstanding the annulment of the administrative act the public authority has not acted in bad faith or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.

(6) For the purposes of this article, and of any other provision of this and any other law, service with the government is a special relationship regulated by the legal provisions specifically applicable to it and the terms and conditions from time to time established by the Government, and no law or provision thereof relating to conditions of employment or to contracts of service or of employment applies, or ever heretofore applied, to service with the government except to the extent that such law provides otherwise.'

Consequently, a solution is available to challenge those administrative actions that fit the definition outlined in **sub-article 2** of **Article 469A**. In simpler terms, this includes any type of directive such as orders, licenses, permits, warrants, decisions, or even refusals in response to a claimant's request. Importantly, the

definition of an administrative act here is not limited to just the items listed; it's broader due to the use of the word 'including'. Notably, if a public authority doesn't provide a response to a claimant's written request within two months after being served, this lack of response will be considered as a rejection. However, as with **Chapter 490**, actions related to the internal organization or management of the authority are explicitly not covered by this article.

Within this spirit, it is imperative that person instituting action under **Article 469A** must show juridical interest in the traditional sense, that is to say, in Maltese terms, *'interess personali, ġuridiku u attwali'*.[2] In simple terms, if someone wants to take action using **Article 469A**, they need to demonstrate that they have a direct, legal, and existing interest in the matter. This is different from the situation in the UK, where the law was altered in 1981, and now the right to bring a case is rarely a big concern when applying for a judicial review. Thus, in Malta, if I'm a non-governmental organization (NGO), I can't decide to file a case against a public authority just because someone else has experienced a violation under **Article 469A.** In other words, I can't take legal action on someone else's behalf in this context. Notwithstanding so, environmental non-governmental organizations (eNGOs) are making their presence felt in the realm of judicial review, even when their direct and personal interest might not be immediately clear. Remember the case we talked about earlier involving mandatory procedural requirements, **Kamra tal-Periti et al.**?[3] In that case, the Court of Appeal also ruled that in matters of environmental and planning protection, eNGOs, besides of course the individuals directly involved, can also have a say. This decision brings to mind similar judgments of the Court of Appeal like **The Ramblers' Association of Malta vs The Malta Environment and Planning Authority** from May 27, 2016, and **BirdLife Malta et al. vs The Environment and Resources Authority** from July 14, 2021 where a similar reasoning was upheld. So, when it comes to judicial review in planning and environmental issues, it appears that eNGOs now

[2] Personal, direct and current

[3] **Kamra tal-Periti, Din l-Art Helwa u Flimkien ghal Ambjent Ahjar vs l-Awtorita' tal-Ippjanar u b'digriet tas-26 ta' Frar 2019 issejhet fil-kawza Enemalta Plc** (FH) (4th November 2022) (260/18)

have an open door!

Furthermore, it must be kept in mind that **Article 469A** doesn't offer a mechanism for an appeal where a challenged decision is examined for mistakes in both law and fact, similar to what specialized tribunals (like the EPRT) and the ART provide. In those tribunals, they can replace the original decision maker's discretion (usually a public authority's) with their own judgment, without needing to send the case back to the original decision maker for a fresh decision. On the other hand, within the framework of **Article 469A**, the Civil Court responsible for the case is exclusively focused on evaluating the action's compliance with the law. If the action is found to be against the law, the case is sent back to the public authority for a re-evaluation. This is because **Article 469A** operates within the domain of judicial review, not appeal. In this context, the reviewing court cannot assume the decision-making role of the primary decision maker. It can only declare that the actions of the primary decision maker are unlawful and nullify them.

What's also significant is **sub-article 4**. This part narrows down the scope to those administrative actions where *"the way to challenge or seek a solution for a specific administrative act in a court or tribunal isn't established by any other law."* This means that decisions made by the Planning Authority about planning applications, for instance, can't be challenged using this article, because there's already a remedy available – the EPRT established under the EPRT Act, which we've discussed extensively.

One more important thing - **Article 469A** is limited to review of administrative acts taken by bodies established by law as opposed to bodies established under a law. A body established by law is one that was set up by law, the purpose of which falls over without the existence of such body. A body established under a law is one that was set up under a law which law would still serve a purpose, with or without the existence of such body. For example, the University of Malta is

seen to be a body established by law, in this case the **Education Act** (**Chapter 327** of the **Laws of Malta**). Its decisions are therefore susceptible to **Article 469A** since no ad hoc challenging remedy exists elsewhere. On the other hand, Gozo Channel Ltd is a body established under a law, in this case the **Companies Act**. The purpose of the **Companies Act** does not fall over if one were to decide to close on Gozo Channel Company Limited. Decisions of Gozo Channel Company Limited should, therefore, fall outside the purview of **Article 469A** despite it may be claimed that it provides a public service. Likewise, **Article 469A** is not open to philanthropic organizations or private entities because these, too, fall outside the ambit of bodies established by law.

Additionally, a legal action to challenge an administrative action must be initiated within a timeframe of six months. This period begins either from the moment the concerned individual becomes aware of the administrative action or from the point at which they reasonably could have become aware of it, whichever comes first. In my opinion, this is a reasonable duration, especially when compared to situations where, for instance, the time to challenging a planning authority decision on a planning application is as short as 30 days.

Another important point is that **Article 469A** cannot be used as a means to seek compensation for any harm caused by the alleged wrongdoing of a public authority, whether in terms of tort or quasi-tort, stemming from the administrative action. Therefore, simply annulling an action doesn't automatically create liability. However, there are two exceptions that we incidentally covered while discussing errors of law: these exceptions involve instances of 'bad faith' or 'unreasonableness,' or when the plaintiff's request could have been lawfully and reasonably granted using other powers. Still, demonstrating bad faith is a complex task. Proving unreasonableness is even more intricate, given the vague nature of the concept.

Given all the outlined considerations, what grounds can be used to challenge

the legitimacy of an administrative act? The wording of **Article 469A** might lead one to believe that it encompasses a wide range of potential legal violations that can be contested. It even explicitly includes 'acts that violate the **Constitution**' aside from actions unauthorized by the authority, breaches of principles of natural justice, non-adherence to mandatory procedural requirements, acts that constitute an abuse of the authority's power, actions carried out for improper motives, or decisions based on irrelevant factors. These topics have been thoroughly discussed in previous sections. Moreover, **Article 469A** introduces a comprehensive provision: 'any administrative act which is otherwise contrary to law.' This provision essentially serves as a broad safeguard, encompassing anything that might be tainted by a legal error or a violation of legal principles. Breaches of legitimate expectations and actions that revoke vested rights could be well-suited to fall under this provision.

There's an important clarification to make. While it's accurate that **Article 469A** does mention covering the judicial review of administrative acts in violation of the constitution, the reality is somewhat different. The courts have consistently emphasized that administrative acts tainted by violations of human rights (as defined in **Articles 33** to **Article 45** of the **Constitution**) fall outside the jurisdiction of **Article 469A**. A notable case exemplifying this concept is the **Christopher Hall** judgment[4], according to which case, the avenue to pursue when human rights are involved lies in **Article 46** of the **Constitution** which reads as follows:

> *'**46**. (1) Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.*
>
> *(2) The Civil Court, First Hall, shall have original jurisdiction to hear*

[4] **Christopher Hall vs Direttur tad-Dipartiment Għall-Akkomodazzjoni Soċjali** (CC) (18th September 2009)

and determine any application made by any person in pursuance of sub-article (1) of this article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45(inclusive) to the protection of which the person concerned is entitled:

Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[…]'

This situation might appear perplexing since above **sub-article 2** suggests that this recourse is generally considered a 'last resort' measure whereas **Article 469A** was likely conceived to serve as a feasible route, as there is no explicit indication that human rights violations were meant to be exempted from the category of 'acts in violation of the constitution'. The legislative intent seemed clear in aiming to provide citizens with the ability to pursue both administrative and constitutional remedies arising from an administrative act through a single legal action, that being **Article 469A**.

Nevertheless, as previously mentioned, the Courts have definitively rejected this approach. Consequently, **Article 469A** can only be cautiously employed for instances involving constitutional violations, while its usage for human rights violations remains constrained.

One final consideration here is that the individual initiating a case under **Article 46(1)** must be directly impacted by the specific action or omission being disputed. To rephrase, if a person not directly involved wishes to contest an unconstitutional administrative action using human rights as a basis under **Article 46(1),** they must establish a legal interest, and without this interest, they are unable to proceed with the challenge.

This differs from the situation described in **Article 116** of the **Constitution**, which we'll delve into when talking about remedies for contesting legislative actions from the executive branch that don't pertain to human rights violations. Under **Article 116**, any individual can challenge a law that contradicts the **Constitution**, without having to demonstrate a legal interest. We will discuss this further shortly.

Let's move on to another point, and I assure you, this will wrap up our discussion on **Article 469A**.

Article 460 of the same **Chapter 12** states that commencing any legal proceedings against the Government, any authority established by the **Maltese Constitution** (except the Electoral Commission), or any person holding a public office in an official capacity requires a specific procedure. This procedure involves serving a judicial letter or protest that clearly outlines the claimed right or demanded action, and it must be served at least 10 days before filing any judicial act or demanding a warrant. The purpose of this provision is to notify the Government and other entities about potential legal actions in advance, with the aim of resolving matters amicably. However, there are exceptions to this procedure. Specific exceptions listed in the article encompass actions related to redress under Article 46 of the Constitution, warrants of prohibitory injunction, correcting acts of civil status, urgent actions, or disputes referred to arbitration. Undoubtedly, **Article 469A** is not one of those exceptions.

So, what is the situation with **Article 469A**? As we've observed, filing an action under **Article 469A** comes with a time limit of 6 months from the date of the administrative act. Yet it would seem that, prior to pursuing a lawsuit for the judicial review of an administrative action, you'd typically need to notify the Government 10 days prior to initiating the lawsuit, as previously explained. This appears to be the prevailing stance of the courts - I say 'prevailing stance'

because, in the **Paul Gauci** case[5], the First Hall of the Civil Court seemed to navigate some complex arguments to establish that the 10-day period in **Article 460** doesn't apply to **Article 469A**. However, if I were in your shoes, I wouldn't take the risk of not sending that notification letter.

Another pertinent question arises regarding **Article 460**, which explicitly mentions claims against the government but not against public authorities distinct from the government, that is the public service. What's the situation there? Case law is somewhat diverse, yet it appears that the stance established in the case of **Paul Licari vs Malta Industrial Parks[6]**, involving a public authority outside the public service, is gaining traction. Specifically, this judgment suggests that the 10-day rule in **Article 460** pertains to the public service alone and not the broader public sector.

ARTICLE 32(2) OF CHAPTER 12

Article 32(2) of **Chapter 12** holds an intriguing historical background. In the absence of any specific statutory provision, Maltese courts utilized the residual jurisdiction granted to the Civil Court by this **Article 32**. It previously stipulated that the Civil Court First Hall *"shall take cognizance of all causes of a civil...nature… in regard to which it has not otherwise been provided for in this Code or any other law."*

This article was removed by **Act No. XXXII of 2002** and replaced with the following text::

> '**32**. *(1) One Judge shall sit in each section of the Civil Court*
>
> *(2) The Civil Court shall take cognisance of all causes of a civil and*

[5] **Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage** (FH) (9th July 2019)

[6] **Paul Licari vs Malta Industrial Park Ltd** (FH) (10th July 2017)

commercial nature, and of all causes which are expressly assigned by law to the said Civil Court.'

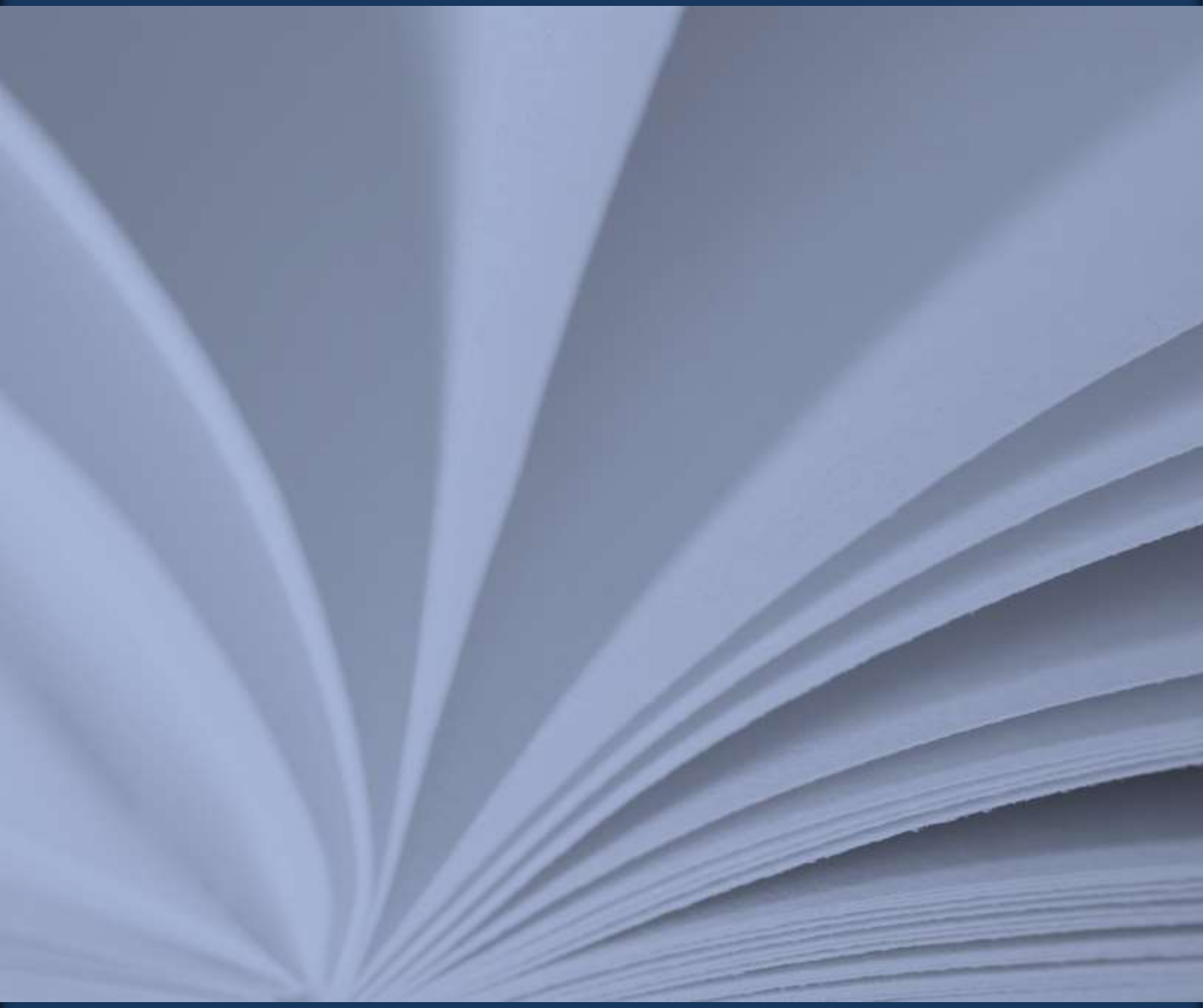
Despite these amendments, which were evidently intended to limit the courts' residual powers, the court's stance in the **Pinu Axiaq** case[7] clarified that the changes made to the wording of **Article 32(2)** through the amendments introduced by **Article 16** of **Act No. XXXI of 2002** didn't alter the fundamental essence of the principle of judicial review.

Indeed, the **Victor Vella Muskat** case[8], delivered some time later, took a strong stance by affirming that the ordinary courts indeed hold the power to examine the legality of decisions rendered by the Tribunal for the Investigation of Injustices under **Article 32(2)** of **Chapter 12**. Importantly, this assertion stood firm even if the claim wasn't directly grounded in the judicial review of the tribunal's decision as laid out in **Article 469A** of **Chapter 12**. Instead, the case revolved around more general allegations of decision unlawfulness. This indicates that there were no obstacles preventing the regular courts from addressing the concerns raised by the appellant.

What I'm leading to here is that if neither a tribunal (that includes the ART) nor **Article 469A** or **Article 46** provide a viable avenue for contesting the illegality of an administrative act, **Article 32(2)** could serve as a gateway for seeking redress.

[7] **Director General Law Courts vs Pinu Axiaq** (FH) (2nd January 2003) which was then confirmed by the Court of Appeal on 3rd March 2006

[8] **Prime Minister vs Victor Vella Muskat** (FH) (25th September 2006)



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