PUBLIC LAW

LECTURES IN *ADMINISTRATIVE LAW* XXVIII

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.

Challenging Legislative Acts by the Executive

The Parliament has the ability to grant the Executive branch the power to create laws in the form of subsidiary legislation, which is often referred to as legal notices. For example, we can look at **Legal Notice 162 of 2016**, which deals with issues related to maintaining adequate sanitary levels in buildings. This specific legal notice was introduced by the Minister for Planning, and its creation was made possible by the provisions outlined in **Chapter 552**, specifically within the **Development Planning Act**. These rules, established by the Parliament, give the Minister for Planning the right to create legal notices that address matters concerning sanitation regulations.

Just as we've seen with administrative actions, there are situations where individuals might want to challenge legislative acts, not least those enacted by the executive branch. This could be because the Minister, while creating a legal notice, went beyond the scope of authority granted by the legislative body, in this case, the Parliament.

Unlike administrative acts, which can be reviewed before specialized tribunals or the Administrative Review Tribunal (ART) or through **Article 469A**, the process for reviewing legislative acts is different. Of course, we will proceed to examine the various available options for addressing this matter in the subsequent sections.

ARTICLE 11(1) OF THE INTERPRETATION ACT

An instrument through which subsidiary legislation can be challenged is **Article 11(1)** of the **Interpretation Act**, which is formulated as follows:

"…where an Act of Parliament or other Act passed by the

> *Legislature of Malta or an Ordinance confers power to make rules or regulations or other subsidiary legislation of a like nature, any such legislation made by virtue of those powers after the coming into force of this Act shall as soon as may be after it is made be laid on the Table of the House and if, within the period of twenty eight days after it is so laid, the House resolves that it be annulled or amended, the same shall thereupon cease to have effect or shall be so amended, as the case may require, but without prejudice to the validity of anything previously done there under or to the making of new rules, regulations or other subsidiary legislation of a like nature".*

Certainly, the outlined instrument is exclusively available for Members of Parliament. Within a period of 28 days after a Legal Notice is presented in Parliament, a Member of Parliament has the option to propose a private members motion to either modify or revoke the specific Legal Notice. An instance of this occurred when the Minister for Planning introduced **Legal Notice 103 of 2016** concerning Regulations for Billboards and Advertisements. The Opposition found these regulations contentious and took advantage of this mechanism. However, it's important to note that these motions tend to have a low rate of success. They are often put forward by Opposition members, who usually lack the required numerical majority to get a motion passed in Parliament.

What's notable here is that this avenue for redress is accessible solely to members of the Legislative body, specifically Members of Parliament. It is not open to the general public.

ARTICLE 116 OF THE CONSTITUTION

Article 116 of the **Constitution** bears significant relevance to this discussion. According to its text:

> *"A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without*

> *distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.*"

Upon a simple reading of **Article 116**, it becomes evident that it grants the right to initiate legal action to challenge the validity of a law, as long as the issue does not pertain to human rights violations.

This avenue for redress, known as the "*actio popularis*", is open to everyone without the necessity of the claimant demonstrating a specific legal interest.

A clear instance of the use of **Article 116** can be found in the case of **Paul Demicoli**.[1] In this case, it was established that, when enacting health and safety subsidiary legislation, the Minister had not followed the provisions of the main law, which explicitly excluded "owners, occupants, or possessors for whom the work is being carried out" from the reach of the legislation, except in specific situations. Indeed, in the specific case of Demicoli, his situation was adversely affected by the Minister's decision to encompass these individuals within the scope of the subsidiary legislation. This situation led to Demicoli, the owner of a construction site where a neighbouring property collapsed during work being conducted on his own site, becoming subject to the regulations detailed in the subsidiary legislation. The widening of the legislation's scope had notable consequences for his situation. As a response, Demicoli challenged the subsidiary legislation in court, and the court ruled in his favour.

Hence, our legal framework notably permits individuals to raise challenges within the regular court system, specifically the First Hall of the Civil Court, for the purpose of contesting laws, including subsidiary legislation.

However, it's important to consider that **Article 116** must be understood in conjunction with **Article 95(2)(e)** of the **Constitution**. This latter article specifies

[1] **Paul Demicoli vs Ministru tal-Politika Soċjali, Segretarju Permanenti fil-Ministeru tal-Politika Soċjali, u l-Avukat Ġenerali** (CA) (12th July 2019)

that it is the Constitutional Court that holds the authority to hear and make rulings on various matters, including appeals stemming from decisions made by any original jurisdiction court in Malta concerning the validity of laws, except for cases based on claims of fundamental rights violations. In light of this, it becomes evident that matters related to the validity of laws (excluding those claims arising from allegations of fundamental rights violations) under **Article 116** should be directed to and decided upon by the Constitutional Court.

However, in the mentioned Paul Demicoli case, the Court of Appeal indicated that the First Hall, whether operating under its typical role or its constitutional role, is essentially a unified entity. Consequently, once legal proceedings are initiated in the First Hall, they are carried out correctly, regardless of whether, eventually at appeal stage, the court chooses to address the matter within its conventional jurisdiction or its constitutional jurisdiction. In essence, the issue of jurisdiction, as anticipated by **Article 95(2)(e)** of the **Constitution**, did not prove to be a substantial challenge.

CHALLENGING HUMAN RIGHTS IN THE LEGISLATIVE REALM

What occurs when the validity of laws intersects with the provisions outlined in **Articles 33** to **45** of the Constitution—these being the human rights provisions found in **Chapter 4** of the **Constitution**?

The wording of **Article 116** presents a dilemma when deciding which provision to utilize for contesting a legislative act that involves human rights.

Article 116 mentions the validity of laws, and notably, personal interest is not required when human rights are not at stake. One might infer, through an extended interpretation, that **Article 116** can thus be invoked for cases involving human rights, but in such instances, personal interest is necessary. If this remains unclear, you can still turn to **Article 46** of the **Constitution**, which specifically deals

with claims of human rights violations. This article doesn't impose limitations on whether the challenge involves a law or, for all that matter, an administrative act made by the government or public authorities that are deemed to violate the human rights detailed in **Articles 33** to **45** of the **Constitution**. As we discussed previously, **Article 46(1)** comes into play whenever there is "*…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*." The manner and degree of this contravention are left open to interpretation.

What is definite, therefore, is that, regardless of the approach taken, the plaintiff must have direct involvement in the matter. To be fair, **Article 34** of the **European Convention** also explicitly states that an applicant must be himself the victim of an infringement of a human right.

In fact, precedent suggests that challenging unconstitutional laws in front of the First Hall Civil Court (with the option to appeal before the Constitutional Court) is possible. Nevertheless, as I've previously mentioned, a notable challenge emerges for the plaintiff if they cannot establish a legal interest in the traditional civil sense. In other words, the interest must fulfil the following criteria: (a) it must be juridical, implying that the claim should at least suggest the existence of an infringed right; (b) it should be both direct and personal, meaning the interest is tied to a dispute about that right or its consequences, with "personal" indicating that it pertains to the plaintiff unless in the context of a public action; (c) the interest must be current, arising from an ongoing state of right violation, denoting an actual breach of the law that either obstructs or negatively impacts the legitimate enjoyment of that claimed right by the individual asserting the right. [2]

Thus, even when questioning the constitutionality of a law, there must be a personal legal interest at stake. A third party, such as a relative or friend of the individual, is not permitted to initiate such legal action.

[2] **Aquilina vs Demicoli** (FH) (12th December 2013)

To illustrate this, consider the enactment of the **Foreign Interference Act** in 1982. However, it was only when its provisions were applied against Massimo Gorla, a foreign national invited to address a public gathering in Malta, that its conflict with the **Constitution** was effectively argued. The discussion about whether the law was in line with the **Constitution** was promptly initiated upon his arrest and appearance in court. The opportunity to question the constitutionality of the law wasn't possible until a valid legal interest became relevant. In this scenario, the mere circumstance of an individual being brought before the court under a specific law empowered them to contest its compatibility with the **Constitution.**[3]

On the international stage, the dynamics appear to differ. The European Court of Human Rights has exhibited a more lenient stance compared to the Maltese courts when it comes to interpreting the concept of juridical interest, specifically the requirement of being a victim. For example, in the **Klass** case[4], the court ruled that an applicant had the right to bring a case before the European Court to challenge the mere existence of secret measures or legislation permitting such measures, without having to prove that these measures had been applied to them.

Returning to the context of Malta, the situation becomes even more complex when a law is declared unconstitutional by the Constitutional Court. This is because a law that has been deemed unconstitutional in one instance is not automatically removed from the statute books. As a result, a scenario can arise where a law is deemed unconstitutional by a court on one day, and in a subsequent lawsuit initiated by a different plaintiff on another day, the same law is upheld as constitutionally valid by the Court. Interestingly, this is exactly what transpired in the case of **Untours Insurance Agency Ltd[5]**, where mandatory arbitration was deemed constitutionally justifiable following three prior

[3] **Police vs Massimo Gorla** (CC) (25th October 1985)
[4] **Klass vs Germany** (ECHR) (6th September 1978)
[5] **Untours Insurance Agency Ltd et. vs Victor Micallef et.** (CC) (25th January 2013)

judgments that had declared it invalid.

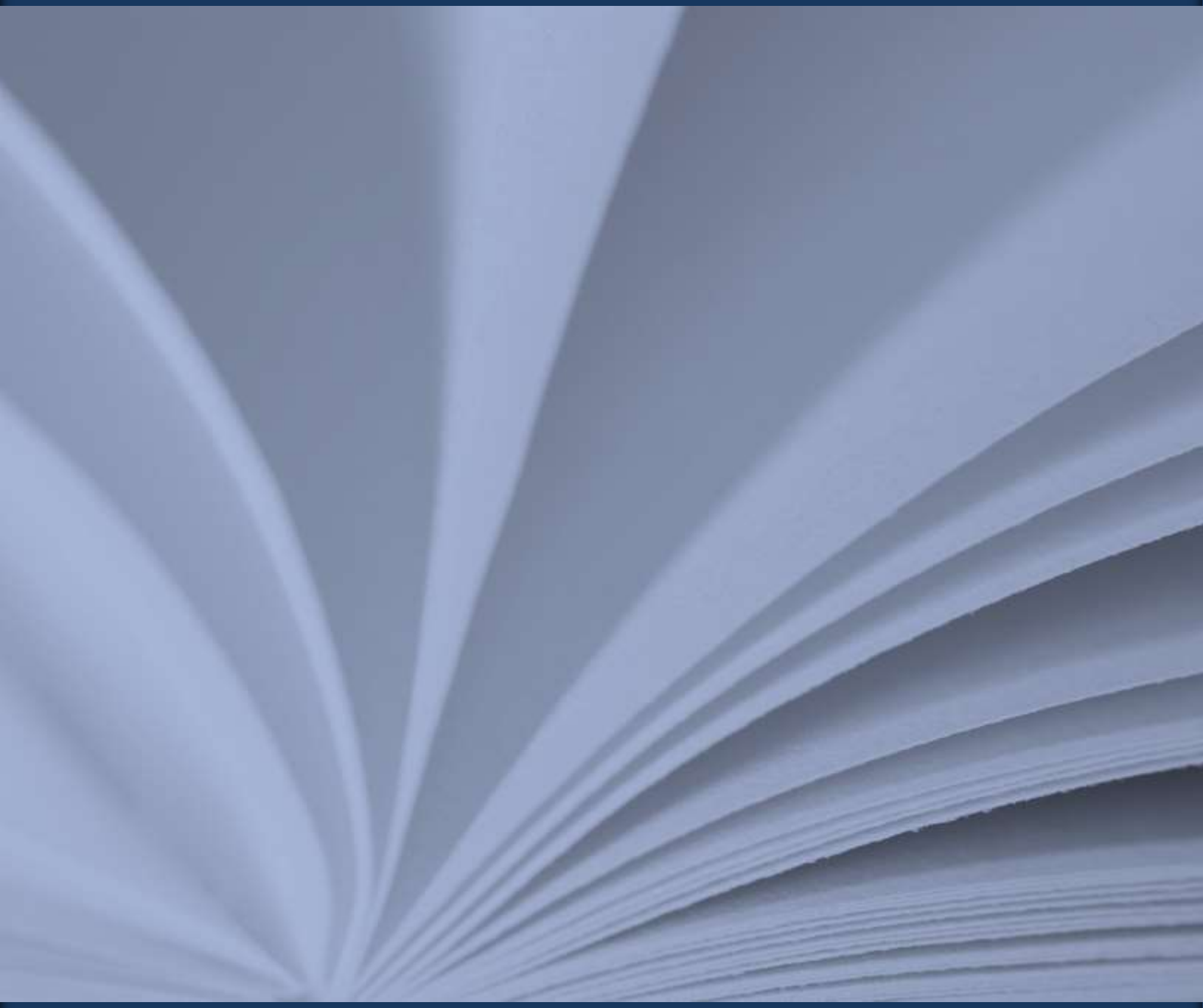
Many scholars take issue with this state of affairs and would agree that if a court deems a law unconstitutional, whether under **Article 116** or **Article 46(1),** it should consequently lose its legal validity and be automatically expunged from our legal provisions. Their reasoning often centres on the fundamental principle that in a democratic country governed by Constitutional Supremacy, as is the case in Malta, a law found to violate the **Constitution** should not persist.

Nevertheless, **Article 237** within **Chapter 12** of the **Laws of Malta** establishes a clear provision that a judgment shall not disadvantage any individual who was not personally, or through their legal representative, party to the case leading to that judgment. This point is reinforced by **Article 242** of the same chapter, which specifically addresses this scenario. Indeed, **sub-article 1** of **Article 242** stipulates that when a judgment declares a legal instrument unconstitutional, the registrar is required to send a copy of the judgment to the Speaker of the House of Representatives. During the first session of the House following the receipt of the judgment, the Speaker is obligated to inform the House of the receipt and present a copy of the judgment.

However, this is not merely a formality. **Sub-article 2** of **Article 242** outlines that the onus then falls on the Prime Minister, who has the discretionary power (denoted by "may," not "shall"), within six months from the date when the judgment becomes res judicata, to eliminate, "to the extent necessary in his opinion," any aspects of the legal instrument that are inconsistent with Malta's Constitution or relevant human rights and fundamental freedoms as defined in the judgment. This includes the possibility of creating regulations to remove the relevant instrument or its provisions.

In summary, what we are underscoring is that the responsibility to correct laws declared unconstitutional by the Constitutional Court lies exclusively with the

Prime Minister, as long as Parliament decides not to intercede.



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