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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN MALTA

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Abstract

This work covers judicial review, the power of the courts to pen any government action within the four corners of the law. It examines the development of judicial review in England in common law, its application since the late nineteenth century of this law within the Maltese legal system, and the development by the Maltese courts of the doctrine of *ultra vires*; the work analyses the evolution of *ultra vires* from a simple examination of competence and form, to a more intrusive examination of the exercise of any discretion by a public authority; including the application of novel notions of judicial review such as legitimate expectations, the extension of the reasonableness test; as well as the extension of the rules of natural justice to cover administrative acts and not only judicial or quasi-judicial ones.

The work also covers the attempts made by the Executive to limit and circumscribe judicial review particularly through Act No. VIII of 1981 and the valiant attempts made by the judiciary to thwart such exclusion of scrutiny.

This thesis also examines the different norms applicable to different forms of judicial review, whether of administrative acts under article 469A of the Code of Organization of Civil Procedure, judicial review of delegated legislation under the constitutional provision of the *actio popularis*, and the scrutiny of decisions and actions of Administrative tribunals. Proposals are set forth for reform in this area to group all judicial review under one title.

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Introduction

This work covers a subject which constitutes the core of Maltese Administrative law and which has always fascinated me. Apart from constitutional review, our courts are empowered to scrutinize any administrative act performed by a public authority. This power is indeed wide for the interpretation of the grounds of review rests with the courts which have resisted attempts to statutorily limit their scruting of government action .

It is fascinating to examine the court's attempts, some bold, others subtle, to thwart the harmful effects of Act No. VIII of 1981 which restricted judicial review only to actions in breach of an express provision of the law. In spite of the peremptory nature of these statutory provisions, the courts ignored them, or else interpreted the provisions of the law as including a requirement by reading between the lines , or else limited such restriction only to where there is by law discretion to exercise but not a duty to perform.

The development of this court scrutiny in Malta has however, hovered between wary and cautious review of the acts of the Executive with all its multifarious agencies and corporations, and audacious scrutiny even in the face of adversity and legislative attempts at ousting jurisdiction to review. The application of English common law, applied by our Courts in the absence of any statutory provision, did not stop with the enactment by statute in 1995 of the rules of judicial review. English common law is still applicable in instances not covered by the new statutory provisions, and is always a source of interpretation for terms and phrases culled from such law, codified in Maltese law and which are still undefined such as the rules of natural justice or abuse of power.

The most pressing problem in this area of law is the fragmentation of the laws applicable to different kinds of judicial review; for article 469A of the Code of Organization and Civil Procedure entitled *Judicial Review of Administrative Action* covers only the acts of the Administration, excluding therefore both judicial review of decisions of administrative tribunals as well as that of subsidiary or delegated legislation. The fact that judicial review in Malta is covered by three separate legal instruments causes confusion, uncertainty and the inevitability of different norms, rules and time periods applicable to every separate action. The time has come to consolidate all judicial review under one legal roof. In this respect the enactment of a new Administrative Code, applicable by the ordinary courts or special administrative courts has, in my view, become necessary.

Procedural problems have also plagued the application of the law in this area.; such as the questions as to who is bound by the rules of judicial review, the obnoxious requirement of filing a judicial act, under pain of nullity, prior to any action against Government, the definition of public authority, the limitations regarding action for damages, and above all the rule relating to the exhaustion of other remedies.

This work, which reflects the legal position as on 31 May 2018, covers these points and issues as well as the vicissitudes in the development of judicial review in Malta, the prospects for the future, and proposal for reform. My sincere hope is that it will spur further discussion and debate on this subject; for judicial review and the *ultra vires* doctrine allows the judiciary, within the parameters of the separation of powers doctrine, to control the Executive, a feature of paramount importance in any democratic country governed by the rule of law.

Literature Review

The subject has been thoroughly examined and analysed by several legal writers in the United Kingdom owing to the fact that in the absence of any constitutional judicial review, the scrutiny by the courts of governmental action has been mainly that of judicial review in administrative law. Writers such as De Smith, Jowell and Wolff have encapsulated in their writings the main grounds of review under English law.

Up to 1995, English common law formed the direct source of judicial review in Malta. According to a judicial doctrine declared in several local judgments as early as 1936, the Maltese courts could in their discretion apply English common law whenever there was a lacuna in Maltese public law. This the Courts did, even though they were more cautious and conservative in disturbing a governmental discretion; wary of intruding into such matters as reasonableness and abuse of power so long as form and substance were *intra vires*.

It is therefore natural that Maltese case law forms the basis of most of the literary source as regards the application of the subject in Malta. Local literary sources on the subject are few, if non-existent. Professor Wallace Gulia had published in 1975 a 21 page essay on governmental liability [1] rather than judicial review though the two subjects sometimes overlap. The rest of the literature constituted mainly of LL.D thesis which dealt with the subject one in 1993,[2] the other in 1994.[3] Then, in 2017 a 127-page monograph was published encapsulating the salient points and jurisprudence relating to article 469A of the Code of Organization and Civil Procedure.[4]

As regards the development of judicial review in Malta, I have relied mostly on Maltese jurisprudence and the abovementioned works; however, most issues regarding substance and

[1] Wallace Gulia: *Governemntal Liability in Malta* (RUM) (1973).
[2] Marsann Farrugia: *Judicial Review of Administrative Action in Malta* (UOM) (LL.D Thesis) (1993).
[3] Caroline Bencini *Ultra Vires in Maltese law.* (UOM) (LL.D.Thesis) (2005).
[4] Ivan Mifsud: *Judicial Review of Administrative Action in Malta* (BDL) (2017).

procedure after the introduction of article 469A in 1995 have not been discussed or debated in any literary work; consequently I venture to offer my opinion regarding a number of issues.

The introduction of article 469A did not dilute the importance of English common law; indeed the latter is still a source of interpretation for the codified grounds of review; since there is no definition of the terms *natural justice* or *abuse of power* in Maltese statute. To what extent for instance is the ground of review of legitimate expectation both as a procedural and substantive ground, applicable to Maltese law? But the thorniest question of all, after codification, is the issue of the sphere of application. Article 469A lists the grounds of review, but is silent on their application. It apparently subjects all administrative acts to such review; at least a positivist interpretation of the main article on judicial review leads to this conclusion.

I have therefore questioned this positivist attitude and argued that English common law remains of paramount importance in order to curtail each ground of review to its proper sphere of application; not any administrative act is subject, for instance, to the norms of natural justice.

This problem is encountered also in matters discussed under Chapter IV which I have styled *Obstacles to Review.* The work particularly examines the ouster clauses in Maltese and UK legislation, the effects on jurisprudence following the well-known *Anisminic* case in the United Kingdom, its application in Maltese jurisprudence, and the valiant attempts by the Courts to interpret ouster clauses as restrictively as possible to the point of allowing errors within jurisdiction, but not mistakes of law. A typical example is the ouster clause contained in article 115 of the Constitution of Malta protecting the Public Service Commission from court review. The Courts have now and again stated that such immunity from court scrutiny

does not apply to breaches of human rights[5] or non-observance of rules laid down by the Commission itself.[6]

Attempts have been made in Malta and abroad by the Executive to oust court scrutiny. In Malta the most brazen attempt in this regard was Act No. VIII of 1981. This Act has been scrupulously scrutinized in my work. I have examined its political and legal origins, the intention of the legislator as expressed in Parliament and through official declarations, the historical context in which it was enacted. I have also examined how in spite of Act No. VIII of 1981, which limited court review to breaches of express provisions the law, the courts bypassed such obstruction; either by interpreting statutory provisions to include certain implicit norms; or else as happened after 1987 until the repeal of the Act in 1995, by ignoring it completely. This matter had not been analyzed in the light of subsequent case law.

A similar question is the issue of *prerogative*. In the United Kingdom prerogative has every now and then been raised as a plea against court scrutiny in administrative action; such as for example the executive prerogative of acceding to international treaties, deciding foreign affairs issues, declaring war or keeping the peace. It is not yet clear to what extent such exceptions applicable in English common law would apply to Malta. In the only case decided in this regard in recent times,[7] relating to the Ombudsman's right to scrutinize promotions in the Armed Forces, the Court ruled out any *iure imperii* protection of so called *acts of state*. Athough that judgment related to an interpretation of statute – which always prevails over prerogative – rather than an application of a prerogative itself, the Court declared that the Ombudsman was entitled to monitor such actions of the Armed Forces . However, the area of acts such as recognition of governments, signing and ratification of treaties remains

[5] *Architect V. Galea v. Chairman PSC* (CC)20 February 1987) (Kollezz. Vol. LXXXI.1.1).
[6] *D. Gatt and I Portelli v. Prime Minister* (CA) (6 September 2010) (1548/01 and 1626/01).
[7] *Chief Justice Emeritus Dr Joseph Said Pullicino v. Minister Justice and Home Affairs et* (CA) (31 October 2016) (164/15).

unexplored territory as regards judicial review in Malta. To my knowledge there has been no legal analysis of such notions in local legal literature. The same applies to the interpretation of certain grounds of review such as natural justice and abuse of power.

The fact that according to the Maltese courts' jurisprudence article 469A applies only to pure administrative acts, has created a plethora of laws and procedural rules for distinct judicial review of different acts; a Minister's power to pass regulations and its scrutiny by the courts falls under the *action popularis* contained in article 116 of the Constitution; while a review of an administrative tribunal's decision falls under the general principles of law and, even after 54 years from Independence, under English common law. This creates confusion and uncertainty. No book has ever dealt with this issue. My work has tackled these problems and proposed solutions.

As regards the *ultra vires* doctrine in the context of delegated or subsidiary legislation, although there is one work on this subject,[8] no analysis has ever been made about the Court's new direction in this regard namely that article 116 of the Constitution, the *actio popularis*, which applies to any instrument having the force of law when challenged on grounds other than human rights, covers also the challenging of the validity of delegated legislation when it is allegedly *ultra vires* the parent Act. I have questioned this method, even because article 116 was never applied since 1964 when the Constitution was promulgated as the source of the courts' power to review delegated legislation. It was only introduced in 2005[9] with the consequence, that while all actions of judicial review require plaintiff to prove juridical interest, review of delegated legislation does not; this new interpretation has also added the complication that appeal from judgments on the validity of delegated legislation under article 166 are made to the Constitutional Court even though there is no constitutional issue

[8] Vanni Bruno: *The Ultra Vires doctrine in the context of Maltese delegated Legislation* (UOM) (LL.D Thesis) (1975).
[9] *Carmelo Borg v.Ministry responsible for Justice and Home Affairs* (CA) (8 November 2005) (839/05).

involved. This unsatisfactory state of affairs in my view needs to be addressed through a homogenous chapter on judicial review.

Other procedural issues which have not been debated elsewhere, and which are peculiar to the Maltese scenario are the interpretation of the term *administrative act*, and who can be a promoter of the action, and in this I have included a thoroughly critical analysis of the requirement (not found in any statute) of *juridical interest* or legal standing in public law actions, and how this hampers judicial review to the point of blocking access to a Court. This can then possibly raise an issue under article 39 of the Constitution and article 6 of the European Convention on Human Rights. The same applies to the issue of who can be a respondent in a judicial review action, the liberal interpretation given by the Maltese Courts to the term *public authority*, and the issue whether a government company in which Government has a controlling interest falls under such definition. On these issues no literary sources in Malta have ever tackled these problems.

The same applies to issues relating to the question of *exhaustion of other remedies.* I have tackled this issue by examining the jurisprudence of courts of constitutional jurisdiction and the ordinary courts of law; as regards the former, the issue has been raised as to whether the remedies contained in article 469A offer an adequate alternative remedy to the human rights action under article 46 of the Constitution; as regards judicial review actions under administrative law, the issue revolves around the question whether any other ordinary alternative remedy was utilized prior to filing an action under article 469A; this issue has been even dealt with by examining a number of judgments – some conflicting each other – in this regard.

A thorough analysis has been conducted of the copious jurisprudence – sometimes conflicting – on the interpretation of the term *administrative act*. I say conflicting because certain matters

such as the recognition of persons as tenants in government owned premises has been deemed to be a reviewable administrative act, in other cases it has not; the same applies to matters such as transfers or promotions within the public service. Are such matters merely internal measures of organization or reviewable administrative acts? Furthermore, local jurisprudence has also been confusing since in certain cases the courts have decided that once any ground of review, such as abuse of power, is alleged then the act becomes instantaneously reviewable. I have analysed this trend of thought which, though laudable in its scope, does not match with the strict statutory definition of the term *administrative act*. Besides, it has transpired in my research that there are conflicting judgments as to whether in a contractual relationship *iure gestionis* between the State as owner and the private individual as lessee or emphyteuta of property, or in any other kind of contractual relationship e.g. berthing rights, the rules of article 469A apply; some judgments, for instance, consider the recognition of a tenant at law in government-owned premises as an administrative act, others as an unreviewable incidence of a civil relationship.

The part, indeed the core, of the subject which has been analysed not only on the basis of the Maltese case law, but also foreign literary works which exist in abundance, is that relating to the grounds *of review*. Most analysis of the English source of ground of review has been based on the most important works on judicial review such as *De Smith's Judicial review,*[10] Paul Craig's *Administrative Law*,[11] Wade and Forsyth *Administrative Law,*[12] Auburn et *Judicial Review*,[13] *Judicial Review Handbook*[14] by Michael Fordham, *The Scope and Intensity of Judicial Review.*[15] While I have relied mostly on these works, the sphere of application in Maltese law constitutes my own analysis. In this respect there has been

[10] Woolf, Jowell et:*De Smith's Judicial Review* (Seventh Edition) (Sweet and Maxwell) (2008).
[11] Paul Craig : *Administrative Law* (Seventh Edition) (Sweet and Maxwell) (2016).
[12] Wade and Forsyth *Administrative Law*: Eleventh Edition (Oxford University Press) (2014).
[13] Auburn Moffitt Sharland: *Judicial Review: Principles and Procedure (*Oxford University Press) (2013).
[14] Michael Fordham QC *Judicial Review Handbook* (Sixth Ed.) (Hart Publishing) (2012).
[15] Edited by Hanna Wilberg and Mark Elliott(Bloomsbury) (Hart Studies in Comparative Law) (Hart Publishing) (2017).

increased local awareness by scholars about the possibilities of judicial review . In the area of decisions by urban planning institutions I have consulted Professor Kevin Aquilina's book *Development Planning Legislation :the Maltese Experience* [16] and indeed only a few months ago the first ever work on the subject was published[17] . Several articles[18] by scholars as well as theses have been written on particular aspects of the subject.

One of the first points to be examined in this work is the introduction in article 469A (1) of the challenging of an administrative act as being in breach of the Constitution. This strange provision, in my view is a clear indication that the legislator wanted to allow an applicant to raise, in one action, both constitutional and administrative law *ultra vires* issues. The courts, however, have rejected this attempt at fusing both actions, assuming upon themselves the power to restrict the meaning of a legal provision which has no reservations, by limiting this ground of review to constitutional matters *other* than human rights under the Constitution or the European Convention Act. I describe what was clearly the original intention of the legislator in this respect, an intention which has to be respected rather than be misconstrued or, if legally unpalatable to the Courts, should be struck down if unconstitutional; but not construed according to unjustified criteria excluding human rights actions under article 469A. No analysis of this matter has ever been made though in one work, the suggestion was made

[16] (Malta Mireva Publications May 1999 , xciii+616pp).
[17] Ivan Mifsud :*Judicial Review of Administartive Action in Malta* (BDL)(2017)..
[18] Kevin Aquilina : *Empowering the Citizen under the Law: the Administrative Justice Bill* Published in *Law and Practice*, Issue 11, December 2005;Kevin Aquilina "*Rationalising Administrative Law on the Revocation of Development Permissions*" BOV Review No 34 August 2006; Kevin Aquilina *The Right to a Fair and Public Trial in Administrative Broadcasting Proceedings (*IRIS Legal Observations of the European Audiovisual Observator IRIS 2009-8:16/24; Kevin Aquilina : *Notes on Judicial Review of Administrative Action* (2009) (UM) (Faculty of Laws) . NatashaBuontempo:*Governmental Liability in Tort and in the Cases of Judicial Review* (MA in Law Thesis)(2004)(UM).

in favour of fusing the two actions, criticizing the arbitrary interpretation by the Courts of article 469A(1) (a).[19]

As regards ordinary substantial *ultra vires*, where an administrative act exceeds its powers of the empowering Act, my analysis has mainly hovered over the interpretation by our Courts of the notion of *public interest* in the Housing Act 1949 relating to the issuing of requisition orders. Some works have been written on the subject;[20] but no modern analysis has been made, an analysis which has become necessary in view of the fact that since 1987 the requirement of public interest was introduced in human rights review as a consequence of the incorporation of article 1 of Protocol I to the European Convention on Human Rights in Maltese law through the European Convention Act 1987 (Ch. 319). Conflicting judgments mark this part of local jurisprudence with judgments allowing requisition orders issued in the public interest even when assigning private property to the party in government to be used as a club;[21] while recently allocation of private requisitioned premises to a village band club was deemed to be in the public interest,[22] but not to a political party.[23] The recent trends of thought in local jurisprudence have been analysed and criticized since this area of law remains vague and hazy, to say the least, ensuring uncertainty rather than clarity.

Again, in article 469A there is no definition of the term *rules of natural justice*, nor is its sphere of application defined. There are a number of Maltese decisions on this point, the

[19] Ian Refalo: *Administrative Law: Case Law Summary and Comments* (2016) (UM)(Faculty of Laws) 283. "It is also difficult to understand how section 469A (1) (b) (iv) can be understood as a reference to all laws with the exception of fundamental human rights provisions. Certainly the legislator would have wanted to declare administrative acts in violation of such laws to be also void. This distinction though made by the Court, does not emerge from the words of the law."
[20] Patrick Holland: *The Housing Act 1949: relationship to Iure Imperii*; (RUM) (LL.D Thesis) (1958) and Alfred Grech: *Judicial Review of Administrative Discretion with particular reference to the Housing Act 1949*. (UOM) (LL.D Thesis) (1975).
[21] *Albert Galea et v. Patrick Holland ne* (CA) (29 January 1980).
[22] *Josephine Vella et v. Director Social Accomodation et* (CC) (25 May 2012 (15/07).
[23] *Philip Grech v. Director Social Accomodation* (CC) (7 December 2010) (60/06).

earliest being in 1946,[24] and the subject has been dealt with in some pre-1980 works.[25] The notion has developed in our jurisprudence by its extension to cover new areas e.g. giving reasons for one's decision. The enactment of the Administrative Justice Act 2007 (Ch. 490), with a statutory list of the principles of good administrative behaviour relating to procedural fairness, promises an evolution of this concept in the future such as the discovery principle as well as the publicity of hearings.

The work has examined the question of the sphere of application by treading into areas which until now have locally escaped court scrutiny on the basis of this ground of review. Usually the application of the rules of natural justice has been applied *ex post facto to* the administrative act. But is it possible to apply them *before* the implementation of an administrative act, such as when a public authority decides to expropriate private land for a public purpose? Is there an obligation of any public authority *before* expropriating any land to ask for the views of the affected owner? Till now this has not been the case though in the United Kingdom this is how the rules have been interpreted and applied. Of course an *ad litteram* interpretation of article 469A as regards natural justice would reach the conclusion that any administrative act is subject to this ground of review; while this position would be difficult to uphold, the work puts forward the proposition that there is nothing to prevent the local courts from developing further the sphere of application extending courts scrutiny to previously unreviewable acts. [26]

As regards the reasonableness test, the question has been examined as to the nature of the threshold required to prove abuse of power in Maltese case law. This ground of review is a slippery slope; a too cautious attitude by the courts can lead to a surrendering or abdication of

[24] *Antonio Sammut v. John Bell Mc Cance et* (FH) (20 May 1946) (Kollezz. Vol. XXXII. II.350) (Mr Justice W. Harding).
[25] Michael Refalo: *Natural Justice in Administrative Law* (UOM) (LL.D Thesis) (1979).
[26] *Giovanni Fenech v. Commissioner of Land* (FH) (2 April 2004)2341/00) (Mr Justice T. Mallia).

responsibility of a court of law to review government action; a too intrusive approach can be in breach of the spirit if not the letter of the separation of powers doctrine. This issue has been analysed by examining local jurisprudence quoting cases where either the threshold has been raised too high such as for example requiring proof of intention to harm in acting unreasonably, or too low such as deciding that any *ultra vires* act is necessarily unreasonable. The issue assumes practical importance since article 469A limits the payment of damages in *ultra vires* cases to instances where the public authority acts unreasonably or in bad faith.

Besides, such relatively new notions of judicial review, as legitimate expectations as part of the reasonableness and abuse of power ground of review, have been examined, including the source, if any, recognized by the local courts in blindly accepting this new ground of review. In the light of the few studies[27] on the subject the analysis has been that of local jurisprudence and the comparison between different cases to try and trace a common thread as regards the parameters of the legitimate expectations doctrine. It is a ground of review which is bound to develop in the future.

Therefore, in this context the issue has been examined as to whether a finding that an exercise of discretion has been *ultra vires* substantially also amounts automatically to an unreasonable exercise; some Maltese judgments have committed the error of assuming that the application of a decision beyond the parameters of law is necessarily unreasonable. Based on an analysis of Maltese cases, I have expressed an opinion that this is not so; even though the error continues being committed.

Another issue which has been dealt with in my work is the establishment of the Administrative Review Tribunal under the Administrative Justice Act, and the problems this

[27] Peter Grech *Keeping One's Word: Legitimate Expectations in Administrative law*", *Id-Dritt*, Law Students Association (Għ.S.L.) Vol. XVIII and Mark Soler: *A Maltese Perspective of Protecting Legitimate Expectations* (UOM) (LL.D Thesis) (2017).

has caused as regards the double parallel jurisdiction of such tribunal and that of the ordinary courts in judicial review. This issue has been examined in some works.[28] This tribunal established in 2007 had the power to review any administrative act – defined in the same terms as in article 469A – leading to confusion and uncertainty as to which forum to apply for judicial review; some judicial review cases regarding reasonableness have been decided by such Tribunal; following a 2016 amendment any duplication with article 469A has been eliminated, the latter article being the exclusive competence of the ordinary courts; but it still retains a right to review administrative acts on points of fact and law. On this latter point there were no literary sources which could assist me in this matter, and therefore the analysis of the procedural problems which the existence of this Tribunal has caused is the fruit of my own analysis and considerations.

A not inconsiderable number of cases have foundered on the procedural obstacle contained in article 469A relating to the six month rule; any judicial review case has to be commenced within six month from the date of the act, or even from the date when a person *should have known* about such act; inevitably this has given rise to a wide range of decided cases, particularly as regards the application of such time rule in cases relating to inertia or non-action by a public authority, and when the six month period should start running in such cases. An analysis has been made of the relative case law, sometimes conflicting, as to the moment when such period starts running. Again, I had to rely exclusively on Maltese decided cases on this matter.

As regards the action for damages, this area of law has not been spared of some interesting procedural questions. There is no doubt that the scope of article 469A (5) dealing with this matter was to limit actions on tort and quasi-tort arising from *ultra vires* cases by allowing

[28] Rosalyn Micallef: *An Evaluation of the Role played by the Administrative Review Tribunal in Maltese Law* (UOM) (LL.D. Thesis) (2014), and Caroline Farrugia: *The Implications of the Administrative Justice Act 2007*(UOM) (LL.D. Thesis) (2008).

them only in cases where the public authority acted unreasonably or in bad faith. This provision has undoubtedly lured the Court to a wide interpretation of unreasonableness in order to afford a practical remedy to a complainant. This might be one of the reasons why unreasonableness and acting *ultra vires* have sometimes been used interchangeably. However, another issue which this provision has raised in our case law is whether one can sue for damages under the Civil Code in *ultra vires* cases. In other words, whether article 469A obliges plaintiff in any *ultra vires* case which can be classified under the term *administrative act* , to sue for damages *only* in cases of unreasonableness and bad faith; or whether over and above one can apply the provisions of the law on tort under the Civil Code which is not restricted in the same way. I have analyzed the conflicting case law on this point.

In *Conclusions* I have highlighted certain problems and proposed solutions, particularly the need of an enactment gathering all judicial review under one legal roof, the extension of the term *public authority* to include any authority, even private, which performs a public function, the alignment of legal standing in Malta to the common law position of *sufficient interest*, the extension of the six month limit, and the development of grounds of review to include some of the grounds listed in Australian law on which the original first draft was based, and the fusion of the administrative and constitutional law action.

Research Methodology

A thorough analysis of the judgments of the Maltese courts was necessary to trace common trends, but also conflicting statements of the law; since from such jurisprudence it is evident that reference is repeatedly made to English case law, and common law, the work is based on research of English case law and common law and its effect on Maltese jurisprudence. Since the sphere of application of the statutory grounds of review are not clearly defined or delineated, research on such matter under English case law was conducted and then compared

with its application in a Maltese scenario based on current Maltese case law, and possible future unexplored scenarios. Though the main comparative approach on issues such as sphere of application, obstacles to, and exemptions from, judicial review, is with the position in the United Kingdom, references are also made to French Administrative law, particularly as regards the *detournement du pouvoir* ground of review and the derogation from review for internal matters of organization within the public administration. A brief comparative analysis with Australian administrative law was also included in view of the fact that the original version of the statutory norms of judicial review as proposed in the first place was almost exclusively based on Australian statute.

This work is based in part on treaded ground, and in part on other areas of law which have not been examined before in a scholarly work. It is estimated that over the years, but particularly since the statutory incorporation of the judicial review norms twenty three years ago, a thousand local judgments have been delivered in judicial review cases. This has given the opportunity to the scholar to anlayze the contents of these decisions, underline the common thread where there is one, explain the development of notions which would have been anathema decades ago, note the ambivalence in certain areas and contradictions in others; in brief the *corpus* of jurisprudence on this subject has enabled the scholar to lay down certain basic principles which have remained solid and firm in face of adversity. This work is an attempt at critically analyzing this *corpus* in a matter which is essential in any democratic legal system: the control of executive power.

Overview of the Parts

The study is divided into three main parts.

The first two Chapters contained in Part I, deal with the historical evolution of judicial review in England and Malta considering that up to 1995 the common law norms of judicial review were imported lock stock and barrel by the Maltese Courts into our legal system; the second Chapter then consists of a bird's eye view of the development of judicial review in Malta, the vicissitudes, the moments of pride and shame. The following two chapters then deal with obstacles to review particularly the sphere of application limited to administrative acts by public authorities, and the several attempts at limiting judicial review and other procedural issues such as juridical interest, the applicability of article 469A in time, and the question of which entities constitute a public authority whose acts are liable to review.

Part II consists of five chapters, each chapter tackling every one of the five grounds of review namely, acts which are contrary to the Constitution, or amount to an excess of authority, or are in breach of procedural fairness, or amount to an abuse of power or are contrary to law. These cover Chapters VI to X.

The Third Part covers procedural issues such as the exhaustion of other remedies, the six month time limit, the need to notify Government through a judicial act, prior to commencing judicial review proceedings and the question of damages arising from an administrative act in breach of article 469A are discussed in the penultimate Chapter.

The final Chapter covers conclusions and recommendations of the author and some final remarks.

Table of Abbreviations

AFM	Armed Forces of Malta
ART	Administrative Review Tribunal
Assoc.	Association
Auth.	Authority
CA	Court of Appeal
CAInf	Court of Appeal Inferior Jurisdiction
CC	Constitutional Court
CCA (INF)	Court of Criminal Appeal Inferior Jurisdiction
CE	*Conseil d'Etat*
Ch.	Chapter
CM	Court of Magistrates
CMSJ	Court of Magistrates Superior Jurisdiction (Gozo)
Corp.	Corporation
Dept.	Department
Dev.	Development
Dir.	Director
DOI	Department of Information
ECHR	European Convention on Human Rights
ECrtHR	European Court of Human Rights
Env.	Environment
Ex p.	*ex parte*
FH	First Hall of the Civil Court
Gen.	General
Għ.S.L.	Għaqda Studenti tal-Liġi (Law Students Association)
Govt.	Government
HOR	House of Representatives
Kollezz.	Kollezzzjoni Decizjonijiet Qrati Superjuri (*Collection of Decisions Superior Courts*)
LAB	Land Arbitration Board
Ltd.	Limited
Maj.	Major
Med.	Mediterranean
Mme	Madam
Ne	nomine
NGO	Non-governmental organization
Pr	proprio
Prof.	Professor
PSC	Public Service Commission
RUM	Royal University of Malta
SCT	Small Claims Tribunal
STOM	*Sunday Times of Malta*
TOM	*Times of Malta*
UK	United Kingdom
UOM	University of Malta
USA	United States of America
War.	Warrant

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General Introduction

The history of judicial review of administrative action in Malta is indeed a chequered one. Its vicissitudes stem from the fact that until 21 September 1964 Malta was a British colony. Even though this constituted an advantage in the sense that British common law and its liberal developments over the years influenced Maltese legal concepts about the subject, yet the importance of Malta as a fortress colony sometimes prevented the full development of court scrutiny of government action. Indeed, the notorious doctrine of *iure imperii*, in several cases prevented the Courts from granting remedies for certain government actions, the more so if they touched on military matters or anything remotely linked to a reserved matter.[1] Yet the Maltese Courts were bold enough to declare – even if overruled by the British Judicial Committee of the Privy Council[2] – that self-representation once given to a colony which had voluntarily ceded itself to the Crown, prevented the exercise of Royal Prerogative for legislative purposes on non-reserved matters.[3] They also showed particular courage in annulling the election of members of the second chamber, under rules made by the Governor following the issuing of the relative electoral writ, changing therefore the rules of the game when the game had, so to speak, started, a judgment confirmed by the said Judicial Committee [4]

[1] Under several Constitutions applicable when Malta was a British colony, certain matters were reserved in favour of the British authorities in spite of the granting of self-government. See: John J. Cremona: *The Maltese Constitution and Constitutional History since 1813* (PEG) (1994).
[2] *Edgar Sammut ne v. Mabel Strickland* (Judicial Committee of the Privy Council) (30 June 1938) (1938) A.C. 678.
[3] *Mabel Strickland v.Edgar Sammut ne* (CA) (4 March 1938) (Kollezz. Vol. XXX.I.75).
[4] *Walter Agius et ne v.Alfredo Parnis noe* (CA) (14 August 1928) confirmed by the Judicial Committee of the Privy Council on 23 January 1930 in *Strickland ne v. Grima ne* [1930] AC 285.

Judicial review, however, developed in the shadow of the convenient *iure imperii* doctrine, unevenly applied by the Courts almost at random, which prevented court scrutiny of acts done by the State in the exercise of its sovereign power . Following a first blow in 1936,[5] the doctrine was dealt a fatal blow in 1972 in *Lowell v. Caruana.*[6] From then on only the British common rules of common law, alien to any continental *iure imperii* doctrine, would regulate the issue.

For some time, most cases related to judicial review hovered over the regular exercise of the power given to the Housing Secretary under the Housing Act 1949 (Ch. 125) to requisition private property and then allocate the premises to persons who were in search of social housing; or at least that is how the power was exercised in the beginning. Apart from abuses in robbing people of their property without adequate compensation, requisitioned property started being allocated for non-housing purposes under a provision which allowed requisitioning of premises "in the public interest".[7] Was it in the public interest to requisition private property and allocate it to the party in government as a club? (One judgment saw nothing wrong in such an allocation);[8] or meet the demands of a village band club to acquire premises, or extend the size of its current club by requisitioning the property of others?[9]

Judicial power of review assumed new importance in view of the centralization of political power. For some time in Malta, particularly in the period between 1973-80 , everything was gradually centralized in public power – the advance of the State occupying exclusively and monopolistically several areas such as housing, telecommunications, importation of essential

[5] *Marquis James Cassar Desain v. James Forbes ne* (CA) (7 January 1935) (Kollezz. Vol. XXIX.I. 43).
[6] Per M. Caruana Curran (FH) (14 August 1972).
[7] Art 4 of the Housing Act 1949 used to read as follows: "***4.*** *(1) If it appears to the Housing Secretary to be necessary or expedient in the public interest or for providing living accommodation to persons or of ensuring a fair distribution of such living accommodation, he may requisition any building, and may give such directions as appear to him to be necessary or expedient in order that the requisition maybe put into effect and complied with."*
[8] *Albert Galea v. P. Holland noe* (CA) (29 January 1980).
[9] *Carmelo Vella v. Housing Secretary* (CA) (30 December 1993) (Kollezz. Vol. LXXVII.II. 390).

foodstuffs, import substitution schemes, health care etc. Indeed, it was this obsession with making everything public and restricting the private sphere in 1980 which led to perhaps the most well-known case of *detournement de pouvoir* in Maltese jurisprudence. Was it reasonable for a Minister to exercise his power in issuing a licence to a Catholic hospital to attach as a condition that at least half the hospital beds and facilities had to be made available to the National Health Service?[10]

It was as a reaction to such cases – where the courts ruled against such abuse of power through the unwritten rule of common law of reasonableness, – that Parliament shamefully legislated to oust court scrutiny through the enactment of a law (Act No. VIII of 1981) which eliminated the test of reasonableness all together as a ground of review. Court scrutiny was limited only to cases where the Executive was in breach of an *express* provision of the law. Since the test of reasonableness was developed in British common law on the assumption that when Parliament grants a power or discretion to a public authority it *presumes* that it has to be exercised in a reasonable way,[11] it was obvious that the new statute was aimed at eliminating the most effective, even if wide, ground of review just by the stroke of a pen. For the uninitiated it appeared as an innocuous statutory provision. For the keen sharp eye of the administrative lawyer it sounded the death knell of proper court scrutiny.

Or so it seemed. In the tradition of the British Courts in shunning, when possible, any attempt at limiting their power to scrutinize, the Courts in Malta, at least in one memorable case,[12] by-passed Act No. VIII by interpreting statutes in such a way as to keep executive power within the orbit of judicial review. If a ship registration was cancelled without giving the owner reasons for such cancellation, and the ship-owner had by, an express provision of the

[10] *Prime Minister v. Sister Luigi Dunkin (*FH) (26 June 1980) (675/80) (Mr Justice J. Herrera).
[11] *Rooke* (1598) 5 Co Rep 99b:77 ER 209 "Notwithstanding the words of the Commission give authority to the Commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law." (Coke LJ).
[12] *Anthony Ellul Sullivan v. Lino Vassallo noe (*CA) (26 June 1987) (Kollezz. Vol. LXXI.II. 356).

law, the right to make representations regarding such cancellation, how could such representations be made if the *reasons* for the cancellation were not communicated to the interested party? And so it went on through the mid-eighties: a struggle between the judiciary and the executive, culminating in the constitutional case in *Mgr. G Mercieca pro et noe v. Prime Minister*[13] where the Courts, applying the *ius necessitatis* principle, refused to abstain from hearing a case for the very simple reason that if they were to abstain, there would be no more appointed judges to take their place. *Ut melius valeat quam pereat!*

In 1995, fourteen years after the enactment of the notorious Act No. VIII of 1981, Parliament belatedly intervened to codify the grounds of review. In introducing the Bill in the House as part of a radical overhaul of the Code of Organization and Civil Procedure encompassing over three hundred amendments, the Minister piloting it, made it clear that the new provisions were based on the law of the Commonwealth of Australia. The final version however distanced itself from Australian sources and mainly based itself, as shall be seen, on French Administrative law with a strong dose of English common law. Act No. XXIV of 1995 listed, in a new article 469A of the Code, the grounds of review: such as when the Administration acts in violation of the Constitution, or performs an act which it has no authorization to perform; or ignores the principles of natural justice or any mandatory procedural requirement, or abuses of its power by taking into account improper or irrelevant considerations, or acts, in any other away, contrary to law.

The codification in law of the grounds of review was a welcome addition. But by no means was the innovation free of problems of a juridical nature. Did the new provision cover administrative tribunals or the executive's delegated power to legislate? Do the grounds reflect the common law ones to which the Maltese legal system was accustomed? Is the test of reasonableness adequately guaranteed under the abuse of power ground of review?

[13](CC) (22 October 1984) (Kollezz. Vol. LXVII.I.42).

Besides, the inclusion of violation of the Constitution by the Executive as a ground of review under ordinary law within a written constitution legal system can give – and has given – rise to some legal perplexities.

Indeed, the Maltese legal system has come a long way from the *Busuttil v. La Primaudaye*[14] distinction protecting the Executive and limiting the remedies available to John citizen in challenging actions or omissions of the Executive. Not only have the norms of judicial review been codified but even after the 1995 amendments, British common law remains absolutely indispensable for the proper *interpretation* of the grounds of review and in some matters still a **direct** source of Maltese Administrative law in certain aspects of judicial review.

This work will examine in depth not only the historical aspect of judicial review in Malta and abroad, in particular the United Kingdom where it all began, but also the extent to which, then and now, the Maltese Courts have been creative in averting exclusion of scrutiny, and developing, along with constitutional review, a proper balance between controlling abuse through substantive and procedural *ultra vires*, and allowing the Executive to perform the job entrusted to it to execute its electoral mandate without undue interference. In doing so emphasis will mainly hover over article 469A of Chapter 12, since most cases of judicial review have centred around adminsitarive acts as defined in that law.

[14]Per Mr Justice A. Chappelle (FH) (15 February 1894) (Kollezz. Vol. XIV:301).

PART I

CHAPTER I

Historical Evolution of Judicial Review in England

One can say that the doctrine of judicial review of administrative action in the United Kingdom had a rather strange beginning. It all started in 1598 with an arbitrary allocation by the Commissioner of Sewers of repair expenses of the river bank amongst properties bordering on the River Thames. Even though such Commissioners had wide discretion in levying such charges, Coke LJ ruled that *'their proceedings ought to be limited and bound with the rule of reason and law'.*[1]

Sir Edward Coke, at a time when the sovereignty of Parliament had not yet been proclaimed, did not mince his words in stating in one case,[2] that an act of parliament could even be annulled by the courts if it infringed "common right and reason". Making such obvious statements, at least in those countries with a written constitution, might seem common today but to proclaim that the King was under the law was a treasonable statement at that time. Coke justified such assertion by the proposition that though the King was endowed with several skills and gifts, the science of the law required expert persons to decipher and decide. Cicero's dictum: *Servum legum sumus ut liberi esse possimus* immediately springs to mind. The law, binding and inconvenient though it might be, is there to protect the King and his subjects.

Similarly, in the early seventeenth century in the *James Bagg* Case[3] where the Mayor and Chief Burgesses of the Borough of Plymouth had removed one of their members, James

[1] *Rookes* case (1598) (5 Co Rep 99b; 77 ER 209).
[2] *Thomas Bonham v. College of Physicians* (1610)8 Co Re. 107; 77 Eng. Rep. 638.
[3] (1615) 11 Co. rep. 93b.

Bagg, from the office of Chief Burgess on the ground of his misconduct[4], Lord Coke stated that:

> although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without … hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party.

Indeed the norms relating to such judicial review evolved in English Common law as a consequence of the perennial struggle between the Executive and the Judiciary, the latter affirming its right, in the name of the rule of law, to review any measure or action except a law enacted by Parliament – which smacks of unreasonableness or excess of *vires.* Since Parliament is deemed to be supreme and such doctrine is the corner stone of the British Constitution, the judiciary had to develop some kind of review which would check the Executive. Indeed, the rules of judicial review in the United Kingdom are a corollary to the doctrine of parliamentary supremacy; for if the Administration with its multifarious agencies and institutions and innumerable officers and agents were to wantonly disregard the provisions of a law, in letter or in spirit, it would run counter to the supreme will of the Houses of Parliament. Judicial review therefore developed both as regards substantial and procedural ultra *vires*, on the basis of what Parliament *presumed* or intended in delegating a power or discretion to the Executive. Indeed, the very ground of review based on reasonableness is based on the assumption, rather than an express provision of the law, requiring that power granted to a member of the Administration or a public officer be exercised in a reasonable way.

Consequently in the absence of constitutional judicial review, the English courts developed in common law, a review based on the rule of law, requiring any authority including the

[4] *Ibid.* "The most serious charge was that he had turned his back side to the previous Mayor Fowens, and scoffingly, contemptuously and uncivilly, with a loud voice, said to the aforesaid Thomas Fowens, these words following, that is to say, (Come and kiss)."

Executive to act according to the law whether in an express or implied legal provision. This in fact is the legal basis for judicial review, whether administrative or constitutional. It survived attempts to curtail such review even at the time of the divine rights of kings. As parliamentary sovereignty came to be proclaimed following the Glorious Revolution of 1688, the remit and sphere of influence of the courts and their independence from the Executive was also asserted. The courts in developing the review of the actions of the executive authority had to mould their pronouncements in common law against the back cloth of the parliamentary supremacy doctrine.

The historical reason behind parliamentary sovereignty rule stems from the struggle between Parliament and the Crown. After the Glorious Revolution, the Houses of Parliament gradually but steadily gnawed at the royal prerogatives, and through constitutional practice and convention transformed the monarchy from an absolute to a constitutional one. It therefore was difficult to accept any restriction to the sovereignty of one of the three branches of the State which had proved itself to be the standard-bearer of the rights of the subjects *vis-a-vis* their Sovereign. The development of parliamentary democracy in the United Kingdom was such that, unlike the experience in the American colonies prior to Independence in 1776, the Legislature was the bulwark of the citizens' freedoms not their natural adversary.[5] The doctrine was succinctly paraphrased in the famous writings of Blackstone in the following manner:

> It has sovereign and uncontrollable authority…this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. It can in short do everything that is not naturally impossible.[6]

[5] "If any persons may be safely trusted with this power they must surely be the Commons, who are chosen by the people; for their privileges and powers are the privileges and powers of the people...Can any good man think of involving the judges in a contest with either House of Parliament?" (Lord Chief Justice de Grey in the *Crosby's* case (1771) 3 Wils. K.B. 188, 202-3; 95 E.R. 1005, 1013.

[6] Blackstone (1765: 156*) Commentaries on the Laws of England*, Book the First, the Rights of Persons: Oxford Clarendon Press.

The courts of law in England have however made it abundantly clear that this salient feature of British Constitutional law is the creature of common law; there is no statute proclaiming it: it developed through judge made law, and the courts are the ultimate arbiters of what is in breach of such doctrine.[7] Yet, the courts of law, through common law, in spite of their deference to the parliamentary supremacy doctrine, developed a *corpus* of decisions which gradually but steadily developed into the common law norms regulating judicial review of administrative action as we know them today.

In doing so, however, the courts were careful not to go too far; not only by following a slow development process of picking one cherry at a time, but also through self-restraint out of respect to the political truth that a government must be allowed in normal circumstances to go about doing its business to rule, govern and decide, in its own sphere of power and functions. The more the democratic process developed, the more one had to respect the will of the people as manifested by their elected representatives. Therefore the striking of that fine balance became important: not going too far to respect the separation of powers doctrine, not laying too back to the point of being irrelevant.

Legal Theories of Judicial Review

The theoretical basis of judicial review, both *administrative*, and in those countries which have supreme constitutions, *constitutional* review, has been the subject of different positions, theories and attitudes. The two main schools of thought are the following: one rests the basis of judicial review on the *ultra vires* doctrine, the other on the rule of law; although traditionally the first was more cited as the *raison d`etre* of judicial review, the preponderant opinion today is that the rule of law offers a better philosophical and legal justification for

[7] See Jeffrey Goldsworthy: *The Sovereignty of Parliament* (Oxford Clarendon Press (1999) p. 238. "It is for the judges..to say what they will recognize as valid and binding legislation. They invented the doctrine of parliamentary sovereignty; they have the power to curb their own invention." (Brazier Rodney 1998: 155) *Constitutional Reform: Reshaping the British political system* (Oxford University Press).

court scrutiny.[8] *Ultra vires* presumes that a public body is in breach of an express or implicit provision of an act of Parliament, and therefore such doctrine is intimately linked with the parliamentary sovereignty doctrine. The *ultra vires* doctrine has been criticized as being based too narrowly on the doctrine of Parliament's intent, linking review to some kind of action of the executive under the authority of a parliamentary act; this would leave out of consideration such executive powers as are not based on any legal provision, such as executive prerogative or powers innate in the role of government in any democracy.

On the other hand, if one were to base the philosophical and legal basis of judicial review on the rule of law and the separation of powers, such explanation would be more comprehensive.[9] Rather than limiting oneself to parliamentary acts and their express or implied intention, one can rest the doctrine of review on the basis of the supremacy of law over the whims of men, and the role of the judiciary, separated from the other powers within the State to keep the other organs in check, not only constitutionally but also in what they do under ordinary law.[10]

This explanation, of course, has lent itself to different interpretations with the ultimate question being: which are the outer boundaries of judicial review? To what extent can they be stretched? Different authors give different answers. Lewans[11] for instance opines that the UK courts, in normal judicial review, have gone a bit too far particularly after the *Anisminic* case,[12] and puts forward the argument that the U.S. and Canada in recent cases have deferred

[8] Auburn Moffitt Sharland: *Judicial Review: Principles and Procedure (*Oxford University Press) (2013): 7.
[9] See Prasda Anirudh and Singh Chandrasen Pratap (Eastern Book Company (2012) (Lucknow India) *Judicial Power and Judicial Review 15:* "The right to judicial review in Britain is merely a practical aspect of the rule of law. Thus if power is used in a way not authorised by Parliament the courts protect or compensate the citizens, and there is no sovereign immunity in any true sense."
[10] See *Emmanuel Borda v. Roger Ellul Micallef noe* (CA) (20 May 2009) (1908/01) "This jurisdictional power of the ordinary courts – guaranteed by the Constitution – is an integral part of the authority of courts in a democratic country like Malta, and is derived from the concept of the rule of law on which is based the State of Malta."
[11] Matthew Lewans: *Administrative Law and Judicial Deference* (Hart Publishing) (2016):4.
[12] *Anisminic Ltd. v. Foreign Compensation Commission* (1969) (2 A. C. 147).

to administrative officials applying the law without interference, particularly where the law expressly grants them such right; unless the conclusions and effects of such decisions are particularly unjust or unreasonable.

In countries which accept the supremacy of their constitution, judicial review regarding legality of acts of Parliament comes natural to them. But one should remark that judicial review under common law of the actions of the Executive preceded constitutional review as developed for the first time under the United States Constitution and interpreted in the landmark judgment of *Marbury v. Madison.*[13] One can make the case that while in constitutional review, it is natural to submit that a written constitution should be a *grundnorm* which prevails over ordinary law, the extension of judicial review under ordinary law to cover such grounds of review as legitimate expectations, unreasonableness or natural justice is more problematic to justify. Indeed, one must observe that grounds of review under common law have evolved over decades, with a strong trend towards extension of such review in recent times. This, as shall be seen, has met with opposition from the Executive, which has sometimes persuaded Parliament to insert ouster clauses in legislation to prevent judicial review in certain cases, sometimes with success.

The development of grounds of review under common law in Britain has extended to cover situations which were not subject to such review a hundred years ago: such as the extension of the rules of natural justice to cover not only judicial decisions of the Executive, but each and every time that the Administration takes decisions affecting substantial rights of any

person;[14] or the doctrine of legitimate expectation, developed first as a procedural rule of review, and then as one of substance.[15] The same applies to the ground of unreasonableness, a

[13] 1803 (1 Cranch) 137.

[14] "The technique by which the courts have extended the judicial control of powers is that of stretching the doctrine of *ultra vires*...they can readily find implied limitations in Acts of Parliament, as they do when they hold that the exercise of a statutory power to revoke a licence is void unless done in accordance with the

nebulous concept which if abused by the courts can create stalemate in public administration; and certainly in certain cases the fine distinction between what is unreasonable as different from obnoxious or unfair leads one to think that judicial review may be used as a means of striking down administrative acts with which one simply disagrees.

Before examining the development of judicial review under common law and its application in Malta in the past hundred and twenty years, it is imperative that certain notions are kept separate and distinct.

Appeal and Review

First of all, the distinction must be kept between an *appeal* and r*eview*. Appeals are granted by law in most civil and criminal cases. On appeal, both points of law and fact can be questioned.[16] An appellant may challenge the acceptance by the lower court of a witness as being trustworthy and credible; or he may submit that the law was interpreted in the wrong manner. Again usually an appeal suspends the execution of the judgment of the lower court.

In review what is at stake is the *legality* of the act of the administrative officials or organs. Was the act lawful?[17] Is it in breach of any provisions of the law, or the implied condition in

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principles of natural justice." Wade and Forsyth *Administrative Law*: Eleventh Edition (2014) (Oxford University Press) 28. See also Tom Bingham: *The Rule of Law* (2010) (Penguin Books) 61.

[15] *Council for Civil Service Union v. Minister for Civil Service* (1985) (AC 374.

[16] See *Franco Busuttil v. Development Control Commission* (CA Inf.) (27 January 2003) (38/01); *Mario Camilleri v. Development Control Commission* (CA) (Inf.) (28 October 2002) (15/01); *Manwel Vella v. Development Control Commission (*CA Inf.) (28 October 2002) (18/00); *Barbara Cassar Torregiani v. Planning Authority* (CA Inf.) (27 October 2003)925/01) and *Ballut Blocks Services Ltd v. Minister for Resources and Rural Affairs et* (FH) (4 March 2014) (49/13) (Mr Justice J. Zammit McKeon) where the distinction between review and appeal is eloquently described.

[17] See *Emmanuel Zahra v. Maritime Authority et* (CA(Inf.) (10 January 2007) (8/05): "Ìt is right and proper to reiterate that the discretionary power invested in the Authority by law cannot be considered as absolute; and this because the said discretion must always be exercised within the parameters of the law and according to those restrictions which case law has indicated. Primarily the Authority is expected to act not only *rite* but also *recte*` . Judicial review regards legality and not whether the decision was right and appropriate; see *Bezzina and Sons Ltd. et v. Malta Maritime Authority (FH) (19 May 2014) (1069/06) (Mme Justice J. Padovani Grima);* "The Court therefore concludes that it does not appear that anything irregular occurred in the selection process *per se*,

the granting of that power by statute? The question one asks in judicial review is not whether the decision by the Administration was useful, needed, necessary or right, but whether it was *lawful.*[18] Indeed where there is no appeal from a decision of a public authority in a tendering process the only way a review can be made is on the basis of legality under article 469A and not otherwise.[19]

Again, a good number of judgments which shall be examined stress the point that in judicial review, the courts never substitute their own discretion to that of the administrative officer or organ;[20] but merely declare whether the act was lawful or not.[21] In one notable exception

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even though conceptually one can disagree with the decision of the choice of the selected consortium or with the excessive secrecy maintained when the present plaintiffs were denied a copy of the signed contract, in spite of their request"; see also *Kenneth Abela v. Minister for Environment et* (CA) (5 October 2001) (996/95) and *The Hon. Dr Albert Fenech v. Minister for Health et* (FH) (27 December 2013) (Warrant No 1893/13) (Mr Justice JR Micallef) where a request to stop the Health Ministry from splitting a department into two was rejected: "The Court considers that scrutiny of the policy and actions of Government Ministers is right, and the rule applies to this case that Government Ministers "*are accountable Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge*" per Diplock L.J. in the case *R v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1962] AC 617. See also *Michael Trapani et v. Commissioner of Land* (FH) (30 October 2003) (1438/00) (Mr Justice G. Caruana Demajo): "Government policy is determined by the Executive and not the Courts and no court will interfere unless there is a breach of the law" and *Simon Gallard v. Prime Minister* (FH) (21 October 2003) (4/03) (Mr Justice G. Caruana Demajo): " If as plaintiff wishes, this Court assumes the power to interfere in the taking of decisions regarding national policy whether related to immigration or other matters, this would run counter to the fundamental constitutional principle that the three powers of the state, the legislative, executive and judicial, be entrusted to different organs in the interests of the protection of the very freedoms applicant desires. See also *James Maxwell Watson ne v. Leonardo Sacco et* (CA) (12 March 1951) (Kollezz. Vol. XXXIV.I.36) and *John Holland ne v. Julian Schembri* (CA) (20 May 1991). The limited nature of a judicial review action is in no way in breach of access to a court as required by article 6 of the European Convention on Human Rights (*Lawrence Borg ne v. Attorney General* (FH) (7 October 2009) (19/07) (Mr Justice G. Valenzia).

[18] *Police v. Gorg Galea* (FH) (3 February 2016) (695/99) (Mr Justice JR Micallef): "In particular an exercise of judicial review, properly speaking, does not include any intervention to see whether the tribunal or quasi-judicial body was consistent in deciding on the basis of the facts produced before it, or whether the appreciation of the facts or the lack of considering other facts, was relevant or not, or whether the tribunal should have adopted a legal concept in a certain way instead of another. Above all no action of judicial review is intended to re-open the merits of the case."

[19] *Gafa' Saveways Ltd v. Department of Contracts et* (FH) (13 July 2010) (212/06) (Mr Justice J. Zammit McKeon).

[20] See *David Axiaq v. Public Transport Authority* (CC) (14 May 2004(602/97): "In a case of judicial review the court cannot substitute its discretion for that of the authority in question and for example order that a licence which had been refused by the competent authority be issued. See also *Adriana Gatt Terribile v. Ghajnsielem Local Council* (CMSJ) (15 April 2008) (75/04) (Magte. A. Ellul) and *Antoinette Greta Grima v. Minister for Education* (FH) (2 January 2015) (1097/14) (Mr Justice JR Micallef): " The task of the Court is that of *cassation* of the act complained of; the Court does not burden itself with the task of granting of remedies by implementing an administrative act; for such act is granted by law only to the public authority concerned."; and *Raymond Avallone pr et ne v. Planning Authority* (FH) (27 July 2017 Warrant No 957/17) (Mme Justice L. Schembri Orland); *Mediterranean Film Studios Ltd v. Albert Galea* (FH) (26 October 2001) (502/00) (Mr

however, the Court, having found that an administrative freeze of pharmacy licences amounted to an abdication and therefore abuse of the exercise of a discretion gave the defendant public authority a period of time to exercise its discretion. When it did not, it ordered defendant to issue the pharmacy license to applicant.[22]

Judicial Review and Governmental Liability

The second issue relates to the distinction between judicial review and governmental liability. Although there are areas which overlap, the distinction rests on the difference between actions to declare an action of the administration as unlawful and therefore void;[23] and an

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Justice G. Caruana Demajo); *C.P.E.A Ltd v. Commissioner of Police et (*FH) (26 June 2014) (1756/00) (Mme Justice L. Schembri Orland); *Halida Kuduzovic v. Prof Juanito Camilleri ne et* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef); *Dr Tanya Sciberras Camilleri ne v. Dr Emmanuel Mallia ne et* (FH) (14 April 2015) (1038/13) (Mr Justice JR Micallef) and *Adrian Deguara v. Superintendent for Pubic Health (*CA) (27 February 2015 (350/14): " It is not the task of this Court to substitute its opinion for that of the (General Services) Board and the latter's decision must be confirmed, even if the Court holds a different opinion from that of the Board, so long as it is one which could have been reasonably taken in the circumstances. See also *Guseppa Portelli v. Director Joint Office et* (CMSJ) (3 October 2017) (127/07) (Magte. J. Vella Cuschieri): "The plaintiff's action is one based on the "dislike of the manner in which the discretion itself was exercised and not on "a valid objection to the proceedings"(De Smith and Evans *Judicial Review of Administratiev Action* (4th Ed. (1980): 278-79). See also *Emidio Azzopardi et v. Malta Environment Planning Authority) (*CMSJ) (14 December 2007) (7/05) (Magte A. Ellul) *and Gaetano Cutajar v. Commissioner of Land (*FH) (14 February 2018 (405/15) (Mr Justice JR Micallef).

[21] See *Lawrence Borg nomine v. Governor Central Bank* (CA) (9 March 2007) (2959/96) "When speaking of discretion, one must necessarily envisage a situation where a choice has to be made between more than one line of action. If there is no choice of more than one line of action, then one speaks of duty rather than discretion." See also *Gafa Saveway Ltd v. Malta International Airport PLC* (FH) (7 March 2008) (514/04) (Mr Justice T. Mallia) and *Johanna Van't Verlaat v. Malta Medical Council* (CA) (28 April 2017) (948/09). See also *Reginald Fava pro et noe v. Superintendent for Public Health noe et* (CA) (11 May 2010) (278/10) and *Rita Livori et v. Tarcisio Cassar* et (CA) (31 January 2014) (494/00); however if a court quashes disciplinary proceedings as being in breach of natural justice rules, this does not mean that fresh disciplinary proceedings may not be instituted against applicant (see *Michael Buttigieg v. Prime Minister et* (FH) (20 October 2016) (1263/10) (Mr Justice JR Micallef) and *David Gatt v. Prime Minister* et (FH) (20 October 2016) (1262/10) (Mr Justice JR Micallef).

[22] *Reginald Fava et ne v. Malta Medicines Authority et (FH) (10 July 2012) (594/07) (Mr Justice C. Farrugia Sacco): "*At this stage the Court cannot tolerate any longer the transgression of the rights of the citizen and the behaviour of defendant who continues acting as he pleases, and after the arbitrary breach of so many laws, continues defying openly the laws, and orders of the Court." See, however, *Halida Kuduzovic v. Prof Juanito Camilleri ne et* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef) "An authority empowered with a discretion may be ordered to exercise such discretion in case it had failed to do so, but cannot be ordered what to decide or to exercise it in a particular way."

[23] *Aaron Haroun v.Prime Minister et* (8 June 2017) (772/00) (Mr Justice JR Micalle): "So long as the exercise remains one relating to "cassation", the Court does not interfere with the issue of whether the decision or the act are substantially correct."

action to declare the administration responsible for a particular set of facts or course of action which have caused damage in contract or tort, or under any other cause, to a person, and therefore to pay damages and make good for that damage.[24]

The historical development of Judicial Review in English common law

English juridical thinking, influenced by Dicey's erroneous evaluation of the administrative law systems on the continent, has always been skeptical about administrative law: indeed the phrase itself until recently was shunned, on the assumption that its adoption or application implied some kind of special jurisdiction of judicial organs or tribunals, destined and designed to favour the Executive and grant it express and hidden immunities and privileges against the ordinary citizen. Dicey took pride in the assertion that in England everyone even the Executive was subject to law and to the ordinary courts. In time, this notion was discarded, for an accurate and deep analysis of the continental system revealed that the special administrative courts were anything but a front for the Executive, and jurisprudence on the continent had developed not dissimilarly from the grounds of review under common law, which had imposed judicial restraint on the Executive and crossed its path each time the administration abused of its powers or acted beyond the limits of law. Notions such as *detournement de pouvoir* are not dissimilar from unreasonableness or taking irrelevant considerations into account under common law.

Still for a number of decades, this wariness about anything continental, and administrative law in particular, prevented a proper development of the subject in England. Indeed in the

[24] For a review on governmental liability in Malta see Wallace Ph. Gulia *Governmental Liability in Malta* (Royal University Press-Malta) (1974). See also Caroline Bencini: *Ultra Vires in Maltese Administrative Law* (LL.D Thesis (UM) (2005) 17: "Administrative legality demands that administrative authorities act in accordance with the law. Administrative liability refers to the liability or responsibility of the government *ex delicto* or *ex contracto*. An act may be deemed to be *ultra vires* and be consequently annulled without giving rise to the tortous or contractual liability of the Administration under the provisions of the Civil Code."

landmark judgment in Malta of *Cassar Desain v. Forbes*,[25] Chief Justice Sir Arturo Mercieca as late as 1935 was still quoting English writers to the effect that:

> *Droit administratif* rests upon ideas absolutely foreign to English law and this essential difference renders the identification of *Droit Administratif* with any breach of English law an impossibility. (A. Lawrence Lowell: *The Government of England* Volume II Edition 1919 p. 382-383).

It must be said that at first judicial self-restraint was the order of the day to the extent that as a rule, judicial review was limited to express breaches of clear provisions of the law. Judges became more adventurous and audacious as time passed, in part in parallel with the development of democratic structures, the creation of the multifarious welfare state and the need for accountability and transparency in decision-making by the Administration. Every executive power has to be founded in law was definitely stated by Lord Camden in 1765 and his dictum in *Entick v. Carrington*[26]: "If it is law, it will be found in our books. If it not to be found there, it is not law." In the case of trespass by king's messengers in a publisher's house he said:

> No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.

Similar pronouncements were made in other cases as to the supremacy of law in contrast to arbitrary power whether it was awarding damages in the case of alterations in streets made by

[25] (CA) (7 January 1935) (Kollezz. Vol. XXIX.I.43).
[26] (1765) 19 St. Tr30.

commissioners[27] or such mundane matters as the erection of public conveniences by local authorities.[28]

In the nineteenth century with the first creation of statutory bodies and public corporations, the courts of law were adamant in preventing such new institutions from enjoying the privileges of the Crown and its servants in their operations.[29] In other cases at the turn of the century judicial review was used as a means to question and challenge new trends in workers' representation and the recognition of trade unions. One of the more notorious judgments in this respect was the *Osborne* case,[30] where the imposition of a levy by trade unions on payment of salaries or allowances to members of parliament, a rule which formed part of the constitution of the Labour Party, was questioned. The House of Lords ruled that such power was beyond that granted to trade unions by the Trade Union Act 1871.

In the inter-war period, judicial review was at its sharpest whenever property rights were involved and the ordinary citizen suffered any prejudice to his proprietary rights at the hands of the State. In *Errington v. Minister of Health*[31] plaintiffs challenged an order regarding their property made by a corporation under the Housing Act 1930 for clearance in pursuit of a social housing project. The challenge was based on bold grounds such as that the demolition of the buildings in the area was not the most satisfactory method of dealing with conditions in the area and that the expense for the local authority would be more than the town could bear at that time. The High Court decided that such an Order would greatly diminish the value of the property owned by the objecting parties, and the decision of the Minister was related to the rights of the objecting parties and therefore it was a decision in respect of which he was

[27] *Leader v. Moxon* (1773) 2 Wm Bl 924: 96 ER 546.
[28] *Mayor and Co. Westminster Corporation. v. London and Northern Western Railway*: 1905 AC 426: "it is well settled that that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably."
[29] *Mersey Docks and Harbour Board Trustees v. Gibbs* (1866) L.R. 1 H.L. 95.
[30] 1910 AC 87 (HL).
[31] (1935) 1 K.B. 249.

exercising quasi-judicial functions. Since the rules of natural justice had not been observed, the order was quashed.

Judicial Review after the War

Judicial restraint however was the order of the day for a very long period of time even after the war. The landslide victory of the new Labour Government after the war and the introduction of social reforms, following the vast centralised powers vested in the central government during the War, discouraged the courts of law from being daring in their judgments.

However, the creation and development of the Welfare state after the war, with the establishment of tribunals to deal with litigation regarding entitlement to a range of social benefits was the moment when judicial review made its first great strides forward. It could not be accepted that judicial organs which were not courts of law, and indeed had subtracted from the original jurisdiction of the civil courts, would exit from the orbit of judicial review. Such review would ensure that, though for reasons of administrative efficiency and expedience tribunals had been set up, with flexible and expeditious procedure, they remained authorities deciding rights and obligations and therefore had to maintain the minimum standards applicable to a court of law in substance and procedure. This was confirmed in the well-known Report of the Franks Committee in 1957 on Administrative Tribunals and Enquiries[32]. The Committee declared that the work of administrative tribunals and of public inquiries should be characterized by openness, fairness, and impartiality and their Report applied these aims in great detail.

[32] Cmnd 218 (1957).

During the war and immediately after it, the surge of a spirit of collectivism for survival, and the centralization of power in times of imminent crisis, spurred a change in attitudes. In *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation,*[33] which is regarded as the classical judgment interpreting the reasonableness test for any exercise of discretion, the Court of Appeal remarked that the power of the courts was that of interfering with an act of executive authority only if it be shown that the authority had contravened the law. The case related to the imposition by a local authority of a condition in a cinema license to the effect that no children under the age of 15 should be allowed in the cinema, even if accompanied by an adult.

Further Development of Judicial Review

Throughout the twentieth century the frantic development of judicial review was aided by the development in common law of the rules of natural justice and their applicability and that of abuse of power and unreasonableness. In so far as they are relatively vague, these notions gave the right leeway to the courts of law to develop new or extended grounds of review of administrative action. The effect has been significant.

For instance in *Ridge v. Baldwin*,[34] these rules were applied not only to strictly judicial bodies, but also to administrative organs and bodies or offices who take important decisions affecting the rights of individuals. In the *Ridge* case the House of Lords ruled that the dismissal of a chief constable who had not been convicted of any criminal offence was serious enough to warrant the application of these rules even though it was submitted that the dismissal had been effected by an executive or administrative authority rather than a judicial one.

[33] (1948) 1 KB 223.
[34] (1964) 2 QB 417.

Anisminic Case

In the mid-fifties and sixties, the resilience of the courts of law to examine and verify the lawfulness of delegated discretion to the Executive culminated in the 1969 *Anisminic case*.[35] In this case an express provision of the law precluded any court review of decisions of the Foreign Compensation Commission set up under law in order to distribute funds made available by the Egyptian Government in compensation for damage and expropriation sustained by foreign companies during the 1956 Suez war. The Egyptian Government, after seizing the property of the plaintiff British company, authorised its sale to an Egyptian organization. Subsequently the plaintiffs agreed to sell to this organization at an agreed price its assets in Egypt, without prejudice however to any claim the British company might have against any governmental authority other than the Egyptian Government. In 1959 in virtue of a treaty, the Egyptian Government passed over to the British government funds to make good for any loss sustained in respect of certain properties including *Anisminic*'s. The Foreign Compensation Commission refused the claim by plaintiff company on the basis that it had not proven that the Egyptian organization was its successor in title within the meaning of regulations. In spite of the fact that there was no court review of decisions of the Commission, the House of Lords ruled that the Commission had exceeded its jurisdiction by misconstruing the successor in title provision.

This judgment raised some eyebrows, for the simple reason that this doctrine of jurisdictional error, as it came to be known, seems to have stripped the administration of any power or right to construe law, even when such power was exclusively granted to it by statute in any particular case. Disagreement with an executive decision was not, some argued,[36] a ground for review. This judgment however showed to what extent the courts of law had developed

[35] *Anisminic* (n. 12).
[36] Matthew Lewans: *Administrative Law and Judicial Deference* (n. 11): 5.

judicial review to the point of delineating a legal stratagem and reasoning to bypass an ouster statutory provision.[37]

Legitimate Expectation

Similarly, the development of the legitimate expectation theory, first as a procedural norm and ground of review, and then as one of substance, in the late sixties, triggered off since the *Schmidt* case[38] a new ground of judicial review, sufficiently general and vague to constitute an interesting and promising development of judicial restraint of executive power.

In that case plaintiffs challenged their expulsion as foreign students who were given a temporary visa to study in British educational institutions. Even though plaintiffs did not succeed in their action, Lord Denning *obiter* remarked that an alien who had been given leave to enter the United Kingdom for a limited period had a 'legitimate expectation of being allowed to stay for the permitted time and, hence, if that permission was "revoked before the time limit expires, [the alien] ought to be given an opportunity of making representations [to the Home Secretary]." In *Council for Civil Service Unions v. Minister for the Civil Service (38A),* Lord Diplock, deciding a case relating to a Ministerial order prohibiting employees in security-related jobs and positions from joining a trade union, defined such expectation as follows:

> A legitimate expectation may arise from an express promise 'given on behalf of a public authority', and some benefit or advantage which [the applicant] had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment.

[37] This judgment was quoted with approval by a Maltese court in *Grezzju Ellul v. Joseph Spiteri* (FH) (19 October 2006) (142/02) (Mr Justice T. Mallia).
[38] *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch. 149.

However, the doctrine was gradually extended to cover matters of substance: denying legitimate expectation was not only tantamount to *procedural* unfairness, but to a *substantive* issue leading to a ground of review on substance, detached from the notion of natural justice and procedural fairness.[39]

There is no doubt that the courts of law in England have expanded judicial review in the past thirty years beyond recognition from the position held by the judiciary in the mid-fifties. The expansion of administrative law as a subject is the result of the expanding role of the Executive in a modern state: thousands of pages of subsidiary legislation are passed by the Executive every year, some of it regulating the citizens' life on important matters such as criminal penalties or administrative fines; the development and proliferation of public corporations has also required more court scrutiny of these public agencies established by law.

Besides, the introduction of the Human Rights Act 1998,[40] in the United Kingdom, has practically incorporated the European Convention on Human Rights of 1950 into UK legislation. The fact that courts of the United Kingdom, are only one step short of judicial review of the contents of a Westminster Act of Parliament, but still have the power under the Act to declare that there is a violation of the Convention in any particular piece of legislation,[41] has emboldened the courts of law to be more scrupulous and exacting in their ordinary judicial review of the actions of the Executive. Certainly even boldness and audacity have their limits and should never degenerate into judicial adventurism. However, there is no

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38A: (1985)(AC 374

[39] See Peter Grech: *Keeping One's Word: Legitimate Expectations in Administrative law*" – *Id-Dritt*, Law Students Association (Għ.S.L.) Vol. XVIII.

[40] 1998 C. 42.

[41] Article 4 Human Rights Act 1998: *If the court is satisfied -*
(a)that the provision is incompatible with a Convention right, and
(b)that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

limit to the way the courts of law keep on developing the norms relating to grounds of judicial review; not by creating totally new ones, but by inserting novelty in the existing grounds giving them new interpretations.

CHAPTER II

The development of judicial review of administrative action in Malta

The Pre-1995 Legal Position

The rules relating to judicial review in Malta are intimately linked with the application of English common law in our legal system. The Maltese courts have affirmed the right, at their own discretion, to apply English rules of common law whenever the Maltese system has *a lacuna* in public law, particularly administrative and constitutional law.

Maltese jurisprudence,[1] even after Independence, has affirmed this judge-made rule based on pure judicial discretion; for there is no obligation of any Maltese court of law to apply British common law. It remains within the exclusive discretion of the court to do so. This rule hinges on four requirements: (a) there has to be *lacuna*, a void, an unregulated area in law (b) that *lacuna* must be in public not private law (c) the rules which would apply would be those relating to English *common law,* not statute or any other instrument having the force of law[2] and (d) the entire matter remains within the total discretion of the court to apply or not English common law to fill a void.

This doctrine and source of Maltese public law is extremely relevant to the subject of judicial review for the simple reason that until 1995 there was no law in Malta providing for judicial review of administrative action; consequently the rules on judicial review based on English common law were applied. It shall be seen that even after the insertion in the Code of

[1] See *John Lowell v. Dr C. Caruana nomine* (FH) (14 August 1972) (Mr Justice M. Caruana Curran) and *Prime Minister et v. Sister Luigi Dunkin* (FH) (26 June 1980) (675/80) (Mr Justice J. Herrera).
[2] In *Malta Transport Authority v. Attorney General et* (FH) (12 May 2011) (592/09) (Mme Justice A. Lofaro). the Court erroneously applied an English statutory rule limiting actions for *certiorari* to six months from the act giving rise to the grievance, declaring an action to be time-barred.

Organization and Civil Procedure of a chapter on judicial review, English common law remains relevant as a source of interpretation of the grounds of review now statutorily recognized in Maltese law and in some cases as a direct source.

It must be said that some form of judicial review, originating from local jurisprudence, predated the creation of this doctrine in Maltese case law, particularly when such review was based on a clear breach of an express provision of the law. The first case of judicial review of such nature was that of *Scerri v. Grech* in 1899.[3] The Court ruled that it had no right to revoke any licence for the sale of wine and spirits since such power was vested in the administrative authority. The court could not decide on whether the grant of such license was just or opportune, unless such grant amounted to a breach of the rights of others. This was the first in a series of judgments to the effect that a court of law in judicial review never substitutes its discretion for that of the Executive; though in this case the message seems to be that a court would review such issuing of licence only if it is in breach of an express provision of the law, including any rights under civil law appertaining to others. In fact while rejecting the request to revoke the license, it ordered defendant not to allow third parties to enter an adjacent courtyard owned by plaintiff.

Cassar Desain v. Forbes

The first judgment to pronounce the English public law doctrine was *Cassar Desain v. Forbes* [4] though as shall be seen there are some aspects in the judgment which do not fully tally with the doctrine. It is true that Chief Justice Sir Arturo Mercieca presiding over the Court of Appeal ruled that:

> Save any differences that may be due to diversity of place and circumstances, and in the absence of any statutory provisions to the contrary, it is by the principles of the public law of

[3] (FH) (28 April 1899) (Mr Justice G. Pullicino) (Kollezz. Vol. XVII.II.58).
[4] (CA) (7 January 1935) (Kollezz. Vol. XXIX.I 43).

England that the relations and dealings between the Crown and its subjects are governed in Malta.

The case related to the construction of a military aerodrome in Hal-Far as a consequence of which adjacent agricultural land was flooded causing damage to the owners; therefore this case related more to governmental liability than judicial review. However, the court also stated that in conquered or ceded countries that have already laws of their own, these laws remain in force until changed by competent authority: and the common law of England as such has no authority therein. 'Malta', the Court affirmed, "was one unique example of a real voluntary cession among the dependencies of the Crown. Consequently, English public law applied in Malta **but the common law of England was not the common law of Malta**". (Emphasis added)

The court in fact refused to apply any special privileges in favour of the Crown such as the immunity from court proceedings relating to damages arising from acts of state found in English common law, and applied instead the norms contained in the Civil Code, including the rule known as *culpa in eligendo,* that is to say that one is vicariously responsible for the actions of one's own contractors or employees only if one was negligent in choosing them. Since the Crown had not availed itself of such rule and in any case the action of the Crown was not only a tortuous action, it upheld plaintiffs' request for damages.

English public law applies in cases of a lacuna

A clearer definition of the doctrine is found in the post-independence case of *A.M Callus v. Hon Dr. Antonio Paris* noe et[5] namely that:

[5] (CA) (28 February 1969).

So long as the principles previously accepted and applied by our Courts on the basis of English public law have not been superceded by the Constitution, and are compatible with it and with any other law in Malta, there is no reason to put them aside.

This principle was applied with approval in *Mintoff v. Borg Olivier*[6] which related to an action under article 116 of the Constitution questioning the validity of a law as not having been approved according to the Standing Orders of the House of Representatives. The court of first instance stated, and the Constitutional Court approved, that:

"English public law can be invoked where our law has no provision on the matter".[7]

However, in this case, although English common law prevented any legal proceedings relating to the validity of laws approved by the House of Commons, such rule did not apply to Malta since there was a provision on the matter namely the written Constitution, and the Maltese Parliament was supreme only within the parameters of a more supreme constitution. Consequently, constitutional review could inquire into whether the internal rules of procedure of the House had been abided by or not.

Finally in *Lowell v. Caruana*[8] the Civil Court rejecting the application of the continental doctrine of *iure imperii* and *iure gestionis* in government liability cases, ruled that:

Public administrative law in Malta is substantially that adopted from English law and already incorporated in our jurisprudence and the teachings of our jurists, and was not in any way abrogated or modified by the advent of national Independence; on the contrary the rule was probably strengthened by the provisions of the Constitution which entrusted the protection of certain rights and the constitutional validity of laws to these courts. .[9]

[6] (CC) (5 November 1970).
[7] Even though the matter remains one of discretion in the hands of the courts, "there is no case where the principle has been rejected or declared not to apply." (Ian Refalo: Administrative Law: Case Law Summary and Comments: 7).
[8] (n.1).
[9] For a criticial appraisal of this judgment see John Vassallo: *Lowell v. Caruana*: *Governmental Liability in Malta* (*Id-Dritt* Law Journal (Malta) (1977) (Kollezz. Vol. VIII: 80).

By rejecting the *iure imperii/iure gestionis* doctrine, the courts finally and permanently laid down the principle that in public law it is British law that matters. This gave rise to the legal basis for judicial review of administrative action in Malta. As the common law grounds of review were amplified by the English courts, they became applicable to Malta through jurisprudence; not automatically or *per force*, but by the discretionary powers of the Maltese courts to apply them; and apply them they did for otherwise the law makers' inertia in legislating on the matter would have left a dangerous void in matters of judicial review.

In local jurisprudence, in the absence of any statutory provision prior to 1995, the Maltese courts availed themselves of the residual power of jurisdiction given to the Civil Court by the Code of Organization and Civil Procedure;[10] for article 32 used to provide that the Civil Court First Hall "*shall take cognizance of all of causes of a civil...nature….in regard to which it has not otherwise been provided for in this Code or any other law."*[11] (*Emphasis added*) This article, along with the English common law norms on judicial review of administrative action, would provide the legal back bone for court scrutiny of the actions of the Executive until and even beyond 1995.[12]

That English common law was a source of judicial review is witnessed by what happened after the *Blue Sisters case*,[13] which annulled an unreasonable condition attached to a private hospital licence on the basis of English common law grounds of review. Government sought

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[10] *Riccardo Ullo Xuereb v.Enrico Magro ne* (FH) (9 March 1901) (CA) (17 June 1908) (Vol. XX. I.147).See also W. Ph. Gulia, '*The Residual Powers of the First Hall, Civil Court in Malta'* (1978) 9 *Id-Dritt Law Journal* 56.

[11] This article was deleted by Act No. XXXII of 2002 and substituted with the words: ***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 commercial nature, and of all causes which are expressly assigned by law to the said Civil Court.*

[12] In *Director General Law Courts v. Pinu Axiaq (FH*) (7 January 2003) (2633/00) (Mr Justice A. Magri) the court of first instance stated: "The right of this Court to review the validity or otherwise of the pronouncements of the tribunal does not emanate from the said article **but from the general principle conferred upon this court, namely the right to ensure that the principle of fair hearing was respected, and that such tribunal did not act *ultra vires*.**(emphasis added) ; see also *Abouzidan Mohib v. Jrirah Akram* (FH) (30 May 2017) (909/15) (Mme Justice L. Schembri Orland) and *XXX v. Commissioner for Value Added Tax* (ART) (26 July 2017) (56/12) (Magte G. Vella).

[13] *Prime Minister v. Sister Luigi Dunkin noe* (FH) (26 June 1980) (675/80) (Mr Justice J. Herrera).

to limit judicial review, and through its parliamentary majority, passed through Parliament Act No. VIII of 1981, which limited such review only to breaches of *express* substantive or procedural legal provisions.

Act No. VIII of 1981

In fact Act No. VIII of 1981 amended the provisions relating to jurisdiction of the Maltese Courts.[14] It provided that no court in Malta had jurisdiction to declare any act of Government or its officials or corporations, agencies and bodies established by law as null or invalid, unless such act or thing was *ultra vires*; *ultra vires*, however, was defined as, and confined to, 'an act or thing that is clearly and explicitly prohibited or excluded by any written law.' Again, procedural *ultra vires* was limited to when *'due form or procedure had not been followed in a material respect and substantial prejudice had ensued from such non-observance.'*

The general limiting effect of this legislative intervention is evident. Substantive *ultra vires* was limited to breaches of express provisions of written law; and procedural *ultra vires* had to be a breach of procedure which constituted a serious prejudice and in an important matter or respect. The general thrust of the Act therefore was to *limit* review under the pretext of *regulating* it for the first time. The negative form of its wording is ample proof of this.

[14] A new sub-article (2) of article 743 of the Code of Organization and Civil Procedure was introduced by section 7 of Act No. VIII of 1981, which provided as follows:
(2) No Court in Malta shall have jurisdiction to enquire into the validity of any act or other thing done by the Government or by any authority established by the Constitution or by any person holding a public office in the exercise of their public functions or declare any such act or thing null or invalid or without effect, except and unless –
(a) such act or thing is ultra vires; or
(b) such act or thing is clearly in violation of an explicit provision of a written law; or
(c) The due form or procedure has not been followed in a material respect and substantial prejudice has ensued from such non-observance:
Provided that an act or thing which is within the general or special; powers of a person or authority shall not be deemed to be ultra vires unless the act or thing is clearly and explicitly prohibited or excluded by a written law.

Contained in the same law were provisions to the effect that a precautionary warrant of prohibitory injunction against Government could only be issued after that the defendant representing Government confirmed on oath that it was intended to perform the act against which the warrant was requested. Similarly if an act of the Administration was cancelled or revoked, then no court of law could inquire into its validity during the time of its operation.

To the eye of the layman, this provision seemed innocuous; in reality it was a repudiation of English common law rules such as the ground of review relating to the rules of natural justice or the test of reasonableness of the exercise of executive discretion based on an *implied* rather than an *express* intention of Parliament.[15] The first statutory intervention therefore on judicial review was not to give it a solid legal footing but to *limit* its application. It was indeed a knee jerk reaction to the embarrassment suffered by Government in the *Blue Sisters* case.[16] The Attorney General at the time commented years later that the judiciary was showing subservience to English case law; and case law as it stood based on English common law 'left matters too much to the discretion and therefore also the whims of the judicature.'[17]

[15] A press release dated 5 February 1981 issued by Government on the publication of the Bill stated that "the blind application of a foreign law even when clear and correct in its own country creates difficulties when applied elsewhere. Recently conflicts arose in the Maltese courts which forced judges to fill the lacuna themselves – something which not even in England – where common law was created by judges – is anymore lawful. Government is elected by the people and accountable to them; therefore it has to be adjudicated above all by them and not by the courts. The practice that when anything which government does and is disagreed with by someone, even by a single citizen, the court is made to intervene, should come to an end. " " Indeed this is the very antithesis of judicial review!

[16] A perusal of the Debates of the House of Represenattives regarding this law proves this point. At one stage the piloting Minister asked the Opposition how many actions for abuse of power had been decided in the past. Now apart from the fact that there were pre-1981 abuse of power actions (e.g. *Prime Minister v. Sister Luigi Dunkin (FH) (*26 June 1980) and *Denaro v. Tabone (FH)* (24 June 1970*),* the Opposition rightly retorted that just because no widespread use of a right had been made does not justify its deletion. 'see Debates HOR: Fourth Legislature Sitting No 469 (18 February 1981) p712' *Ugo Mifsud Bonnici*: "Now if you tell me that there was not a large number of such cases, I reply: "It is true that there were not a lot of such cases, but this argument does not hold water; for even if there were not so many cases why should you legislate so that such action can never be presented ? Why should we perform a legal abortion of such rights?".

[17] "Judges had reversed the previous reverence to one in which they claimed jurisdiction in practically all cases and all circumstances, even if after considering the matter they might conclude that the act in question was valid. They claimed the right to judge every act of administrative discretion even if Parliament had provided otherwise. "(Edgar Mizzi: *Malta in the Making 1962-1987* (Malta) (1995):348.

As had happened with other attempts in other countries each time the Executive tried to limit judicial review, the courts reacted ingeniously to bypass such ouster legislation.[18] In at least two cases this was done with audacity, in 1987 by interpreting the express provision of the law to include the requirement of giving reasons even though the law did not expressly cater for such a need,[19] and in 1988 by applying the rules of natural justice in cases where serious prejudice to vested rights occurred, even though such rules were not expressly laid down in a written law.[20]

Indeed, in the first case, the court of first instance gave an ingenious and creative interpretation to the ousting provision. It said:

> The court has jurisdiction to decide on the *validity* of the challenged act but does not have the competence to decide itself on the *merits* of the case which remains in the hands of the Executive. This distinction then echoes, and up to certain point covers, the last part of the first plea of the defendants where they themselves distinguished between the acts of the Executive and the orders which the Courts may give to the Executive.

The court then stated as an example that it could declare that an income tax assessment was not valid at law, but could not then determine the chargeable to tax itself but only revert the case to the Inland Revenue Commissioner for assessment.

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[18] See Burlo', Degabriele and Mizzi: *A Review of Act No VIII of 1981* (*Id-Dritt* Law Journal) (1984): 75: "by applying general legal principles, (and simultaneously fulfilling the role of protector of the doctrine of supremacy of Parliament) as well as by fulfilling its functions as a buffer between State and individual, the judiciary may adopt the attitude that notwithstanding Act No. VIII of 1981 it is still possible to review administrative discretion on grounds not mentioned in the Act".

[19] *Anthony Ellul Sullivan v. Lino Vassallo noe* (CA) 26 June 1987) (Kollezz. Vol. LXXI.I. 356).

[20] *Mary Grech v. Minister for Development of Infrastructure* (CA) (29 January 1993); see also *Maria Grech v. Raymond Mintoff et* (FH) (6 December 1985) (Mr Justice W. Gulia) where the rules of natural justice were applied to the Tribunal for the Partition of Inheritances in spite of Act VIII of 1981. See also *Tonio Vella v. Commissioner of Police et* (FH) (5 December 1986) (Mr Justice J.D. Camilleri), where in a constitutional case regarding the interpretation of police powers of arrest under the Criminal Code, it was stated, even after Act No. VIII of 1981 that "the concept of reasonableness should qualify any exercise of an executive discretion; so that even if not expressly mentioned in the law empowering such discretion, the legislator in normal circumstances intended that such discretion be exercised reasonably."

Similarly in another case, although the Court affirmed that an express provision of the law, did not encompass an interpretation of it, but only what it says,[21] went on to decide that the executive discretion had been in breach of ordinary law,[22] and also the Constitution regarding the effects of a requisition order, even though the case was one under administrative law. The Court concluded that therefore the discretion was still subject to review under Act No. VIII of 1981.

Consequently a provision which was clearly intended to block the common law grounds of judicial review was reduced and diluted by interpretation either to a provision on the remedies which a court may grant once it had decided that a public authority had exceeded its powers or else by stratagems interpreting a law as expressly requiring something, when it was not clear at all that it did.

Introduction of Article 469A of Chapter 12

It was only in 1995 that Parliament enacted Act No. XXIV of 1995 which introduced Sub-Title VII to Title VIII in Part I of Book Second of the Code of Organization and Civil Procedure entitled *Judicial Review of Administrative Action* (Article 469A).

A perusal of the debates of the House of Representatives relating to this article is not of any particular assistance. This is so because the introduction of legislation relating to judicial review, regulating it and establishing the grounds of review and their limits, was included in a law which amended 356 sections of the Code of Organization and Civil Procedure and therefor the thrust of the amendments and the consequential debate were not related to the insertion of this new article 469A in the Code. These amendments followed a White Paper

[21] *Lawrence Micallef v. Housing Secretary* (FH) (13 November 1985) (Mr Justice W. Gulia): "A written law means another written law and not an interpretation which may be given to the said legal provision."
[22] The Criminal Code (Ch. 9) and The Housing (Decontrol) Ordinance (Ch. 158).

issued in November 1993 entitled *Justice within a Reasonable Time.* The White Paper was launched after several deliberations made by the Permanent Law Reform Commission and an *ad hoc* Committee within such Commission. In the White Paper the Commission proposed the introduction of a set of rules under the title of *Judicial Review of Administrative Action* in the Code of Organization and Civil Procedure. Administrative action was defined as 'an action or decision of an administrative character made, proposed to be made or required to be made, as the case may be, (whether exercised in virtue of discretionary powers or not) in terms of law, other than an action taken by the President of Malta, in the exercise of the functions of his office, and includes any order, licence, permit, warrant or decision, but excludes delegated legislation." The Commission then stated that:

> In preparing its draft the Commission has made use of the Australian Administrative Decisions (Judicial Review) Act 1977 (as amended in 1978 and 1980). The Australian provisions are in reality a statutory codification of the common law position obtaining in most Commonwealth countries. This, it is hoped, will ensure the standard use of terms in the law, and will make possible by the Court reference to case law obtaining in foreign jurisdictions on the matter.

The Australian statute of 1977 had listed the grounds of review as follows:

> *(a) That a breach of the rules of natural justice occurred in connection with the making of the decision;*
> *(b) That procedures that were required by law to be observed in connection with the making of the decision were not observed;*
> *(c) That the person who purported to make the decision did not have jurisdiction to make the decision;*
> *(d) That the decision was not authorized by the enactment in pursuance of which it was purported to be made;*
> *(e) That the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;*
> *(f) That the decision involved an error of law, whether or not the error appears on the record of the decision;*
> *(g) That the decision was induced or affected by fraud;*
> *(h) That there was no evidence or other material to justify the making of the decision;*
> *(j) That the decision was otherwise contrary to law.*

Abuse of power was defined as:

(a) Taking an irrelevant consideration into account in the exercise of a power;
(b) Failing to take a relevant consideration into account in the exercise of a power;
(c) An exercise of a power for a purpose other than a purpose for which the power is conferred;
(d) An exercise of a discretionary power in bad faith;
(e) An exercise of a personal discretionary power at the direction or behest of another person;
(f) An exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
(g) An exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
(h) An exercise of a power in such a way that the result of the exercise of the power is uncertain; and
(j) Any other exercise of a power in a way that constitutes abuse of the power.

Consequently the draft law, attached to the White Paper, reflected these grounds of review. In fact a new article 469A introduced in the attached draft closely followed article 5(1) and (2) of the Australian Act. They are almost identical.

Article 469A introduced by Act No. XXIV of 1995 produced a very shrunk and diluted version of the original article 469A in the White Paper. The new provisions, which are still operative today for judicial review, contain only the following grounds of review: when the administrative act is in violation of the Constitution,[23] or *ultra vires* because it emanates from a public authority that is not authorised to perform it, or when such authority fails to observe the principles of natural justice in some mandatory procedural requirement, or when such authority abuses of its power in that the act is done for an improper purpose or on the basis of irrelevant considerations, or where such act is otherwise contrary to law. In spite of this abbreviated and concise version and form, most of the grounds mentioned in the White Paper draft law can be comprised in most of the grounds of review in article 469A. However, it would be naive to insist that the current grounds of review are not more limited.

[23] This provision,which was not included in the draft law in the White Paper, has raised its own fair share of juridical problems as shall be seen. (see *infra* 116).

Naturally there are some terms such as *'rules of natural justice*', or '*the abuse of power'*, where, in spite of the fact that today there is no longer a *lacuna* or hiatus in this aspect of Maltese public law and therefore the principles of English common law can no longer be availed of, yet in order to fill such loophole, the norms of English common law will continue to be used in order to clarify, amplify and interpret the current statutory provisions. What perhaps is no longer permitted is to create *new* grounds of review drawn from English common law which are not expressly or implicitly included in article 469A. Jurisprudence has shown that even **after** the 1995 amendments, English common law is still a source for regulating areas not covered by article 469A in virtue of the judicial doctrine invariably applied by our courts of referring to English common law whenever a *lacuna* exists in Maltese public law. [24]

Differences between White Paper and Article 469A (Cap 12)

The new 469A is based on the grounds of review under French Administrative law with a strong added element of English common law practice and vocabulary.[25] Any direct link with Australian Administrative law was severed in the Bill; even though the Justice Minister, piloting the Bill, inadvertently reaffirmed Australian law as a source of the Bill.[26] A reason

[24] 100 et *seq* .

[25] Interview on 9 December 2016 with Dr Peter Grech, the current Attorney General, who in 1995 was Senior Counsel in the Attorney General's office. "I had examined the French model which is based on four clear and concise principles: incompetence, vitiated form, abuse of power and breach of law. I had also examined instances under French law (which is also the basis of EU Administrative law) where Government may be held liable in damages for *acts ultra vires*, and I based the provision on such model. See also Brown and Bell *French Administrative Law* (Fifth Edition)(Oxford University Press): 239: "The principle of legality prescribes a line of conduct for the administration from which it cannot depart without committing an *exces de pouvoir*….proceedings are based on one of four grounds namely *incompetence, vice de forme, violation de la loi and detournement de pouvoir.* These traditional grounds are by no means mutually exclusive, and it is not always easy to see why a particular case is considered under one head rather than another. "

[26] Minister Joseph Fenech: *We increased the jurisdiction of the courts to review and granted them the right to scrutinize acts of Government. This before did not exist in virtue of a written law but by referring to the English system acts of government were subject to judicial review because we had no ad hoc legislation. Now we have adopted part of Australian law, on the subject of judicial review of administrative actioin, and actions of government departments, and we also granted to the courts jurisdiction along with that of courts outside Malta*." (Debates HOR Seventh Legislature: Sitting No 378: 11 January 1995 p.786)

given by the drafters at the Attorney General's Office for the departure from the original draft was that the draft law expanded the grounds of review to the point of possibly bringing government action to a standstill, and that the provisions relating to the granting of damages were too stringent for the public administration.[27]

Besides, a provision in the original White Paper draft law, required that the Administration, at the request of any aggrieved party, be forced to inform him in writing of an administrative act of '*the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the action.*' Moreover, a decision made simply on grounds of public policy or of public interest was to be deemed "insufficiently based in law and in fact".

These provisions were omitted in the Bill, presumably because it was felt that it was granting too much power to the Courts and that the administrative shock on public authorities, accustomed to semi-immunity from court proceedings under Act No. VIII of 1981 and previously protected under the *iure imperii* shield , would be deleterious.

.The draft Bill in the White Paper laid down a definition of administrative act defining it as 'an action or decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether exercised in virtue of discretionary powers or not) in terms of law, other than an action taken by the President of Malta in the exercise of the

[27]Article 469D(2) of the draft bill in the White Paper had provided that: "The court may also, without prejudice to such other remedies as may be available to the applicant under the law, where it deems it so appropriate, declare the defendant liable in damage to the applicant in satisfaction of the injury suffered by him." In an interview with author on 9 December 2016, Dr Peter Grech stated: "the article derived from Australian law was going to lead to a situation where there would be too many opportunities to annul each and every administrative act and besides there was a clause which granted the right to sue Government for damages for *ultra vires* over and above any other action for damages under any other law.

functions of his office, and includes any order, licence, permit, warrant, decision, but excludes delegated legislation.'

In the Bill presented to Parliament resulting in Act No. XXIV of 1995, the reference to the President of Malta was omitted, presumably on the basis of the fact that according to article 7(2) of Chapter 1 of the Laws of Malta and article 742A of the Code of Organization and Civil Procedure no proceedings can be taken in court against the Head of State in the exercise of his official functions. Similarly, the express exclusion of delegated legislation is omitted, again presumably because it is evident that passing such legislation is a *legislative* rather than an *administrative* act. The courts in fact have refused to entertain an action under section 469A when subsidiary legislation was challenged as being *ultra vires*[28]. This exclusion has, as shall be seen,[29] created certain legal difficulties as to under which provision of law, case law or practice, one can institute an action for the invalidity of delegated legislation.

The definition under the new section 469A, of *administrative act* is expressed in definitive mandatory exhaustive terms: *att amministrattiv ifisser* (*an administrative act means*) while in the English text the definition is *indicative* and not exhaustive, stating that an administrative act '**includes**' the issuing by a public authority of any order, license, permit, warrant, decision or refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority. However, it is the Maltese text which prevails in such conflict regarding post-independence statutes.[30] Again 'public authority' is defined, this time exhaustively in both Maltese and English texts, as: '*the*

[28] *Carmelo Borg v. Ministry responsible for Justice and Home Affairs (CA) (8 November 2005) (839/05);* see also *Vanna Arrigo et v. Malta Environment and Planning Authority (*FH)17 October 2016) (99/07) (Mme Justice J. Padovani Grima);*Vodafone Malta Ltd v. Malta Communications Authority* (FH) (18June2013) (710/07) (Mme Justice A. Felice) and *Joseph Borg et v. Prime Minister et* (FH) (5 May 2016) (1118/09) (Mme Justice J. Padovani Grima).Similarly the Court has declined to exercise its constitutional jurisdiction where subsidiary legislation could have been challenged as *ultra vires* under ordinary law (*Vodafone Malta Ltd v. Malta Communications Authority*) (FH) (17 January 2006) (28/04) (Mr Justice G. Caruana Demajo).
[29] P 114 *et seq*.
[30] *Republic of Malta v. Joseph Gauci* (CC) (19 September 1975).

Government of Malta including its Ministries and departments, local authorities, and any body corporate established by law'.

As in the White Paper, therefore one can seek action under article 469A as regards any action of the public service by public officers or authorities, as well as public corporations established by law. Article 469A does not, however, apply to companies or entities in which the government has merely a controlling interest or a majority of shares.[31] The new provisions also provided that an action under article 469A was one of last resort and if a remedy was available under any law, that remedy had to be resorted to first. Besides, any action under the new subtitle is to be instituted within a period of six months.

Since the enactment of the sub-title on *Judicial Review of Administrative Action* in the Code of Organization and Civil Procedure in 1995, there has been one amendment namely Act No. IV of 1996 which was a relatively minor but significant amendment regarding the time limit to institute action which shall be explained later.[32]

Administrative Justice Act (Ch. 490)

The most significant statutory provision relating to judicial review following the introduction of article 469A in the Code of Organization and Civil Procedure was the enactment of the Administrative Justice Act 2007 (Chapter 490).[33] The Act had been preceded in January 2005 by a White Paper entitled "*Towards a Better and Speedier Justice – Lejn Ġustizzja Aħjar u Eħfef"*, which proposed for the first time the establishment of an Administrative Court. This was the first attempt by the legislator to move away from common law notions, and base

[31] In spite of the clear provisions of the law however, in some cases government-controlled commercial companies have been included under the term *body corporate established by law*; see below p143 *et seq.*
[32] See *infra* p 151.
[33] See Kevin Aquilina : *Empowering the Citizen under the Law: the Administrative Justice Bill* Published in *Law and Practice*, Issue 11, December 2005, pp. 29-41.

judicial review of a particular kind on continental notions of special administrative courts, while retaining the ordinary courts' jurisdiction as regards judicial review of administrative action .It was stated that:

> Fortunately for us throughout these last few years, the necessity of the creation of a Code which would comprise principles of administrative law and create an Administrative Court has gained ground. One cannot state that we have no administrative law and that we are creating it now.

This statement is in stark contrast with what we were used to in jurisprudence on the subject, such as the pronouncements in *Cassar Desain v. Forbes*[34] that:

> Inquiries which rightly occupy French jurist such for example as what are the boundaries between the jurisdiction of the ordinary courts (*tribunaux judiciaries*) and jurisdiction of the Administrative courts *(tribunaux administratifs*) have under English law no meaning.

or in *Lowell v. Caruana*[35] where it was stated that:

> In the absence of special tribunals such as the *Conseil d'Etat* in France and other countries, our system is the Anglo-American one, which treasures the constitutional notion of ordinary independent courts which ensure the due observance of the law not only by private persons, but also, within the limits of powers of judicial review, by the organs of the State.[36]

The rules laid down in the Act, applicable to all administrative tribunals go beyond the traditional norms of natural justice such as *nemo iudex in causa propria* and *audi alteram partem* or that a decision must contain reasons justifying it. It includes also such principles as the taking of decisions within a reasonable time, transparency, disclosure of documents during proceedings which have to be adversarial, and that as a rule the proceedings have to be in public. These norms are made applicable to a long list of administrative tribunals which are the forum of important litigation such as eviction from homes and urban property or disputes

[34] (n 4).
[35] (n.1).

relating to financial services, or the granting of compensation to the owners of expropriated property.

The Administrative Justice Act (Ch. 490) also established a new Tribunal, stryled the Administrative Review Tribunal, with a dual jurisdiction namely to review *administrative acts* of the public administration on both points of law and fact as well as to gradually absorb the powers of several administrative tribunals which are listed as a Schedule to the Act. The importance of this dual jurisdiction needs to be emphasized for the courts have on occasions erroneously mixed the two functions.

The reviewing function of the Tribunal is confirmed also by the fact that the Act defines the words *administrative act* and in so doing practically adopts the definition found in article 469A of Chapter 12, namely an act which:

> includes the issuing by the public administration of any order, licence, permit, warrant, authorisation, concession, decision or a refusal to any demand of a member of the public, but does not include any measure intended for internal organisation or administration within the said public administration.

In its second function it also retroactively assumed and absorbed proceedings which were pending before certain administrative tribunals which had been set up by statute under different Acts of Parliament[37]. The Tribunal has the power, therefore, to review administrative action and to annul decisions of the public administration. An appeal lies from decisions of the Tribunal before the Court of Appeal. The Tribunal itself has to comply with the principles of good administrative behaviour.

[37] See for instance Legal Notice 245 of 2009 *The Extension of Jurisdiction of the Administrative Review Tribunal (Fiscal Matters) Regulations* 2009, wherein all fiscal litigation relating to the Duty on Documents and Transfers Act, (Ch 364) were retroactively and prospectively, assigned to the Tribunal.

This Act gave rise to some criticism owing to the *duplication* of proceedings regarding judicial review, for some areas overlap with the jurisdiction arising from article 469A of Chapter 12.[38]

In *S&R (Handaq) Limited (C-5790) v. Malta Enterprise Corporation* [39] the Tribunal stated that:

> Therefore today there exist two proceedings – the procedure of judicial review of administrative action under article 469A of Chapter 12 of the Laws of Malta before the First Hall of the Civil Court and the procedure of judicial review of administrative acts according to Chapter 490 of the Laws of Malta before this Tribunal – proceedings which **are parallel to each other, but altogether distinct from one another.** (emphasis added) **.**

The terms "point of law" and "point of fact "introduced by the Act gave rise also to some legal perplexities. As to the first term "point of law" there was nothing in the statute, prior to 2016, to prevent applicant from reviewing the actions of a public authority under any ground of review under article 469A which contains points of law on which any such act could be challenged such as unreasonableness or excess of authority. What is even stranger, however, is the introduction for the first time of a revision on a *point of fact*. Review of administrative action on a point of fact, unless it affects jurisdiction, is unheard of in judicial review; indeed it is one of the distinguishing features of *review* as opposed to *appeal,* that a court does not review actions on mere fact; a matter which is however usually common when there is an *appeal* to a higher court or tribunal. Nor is such revision limited only to those tribunals or authorities which are listed in the Schedule to the Act. In fact, in article 7 the Tribunal is

[38] In the original Bill, all the grounds of review under article 469A of Ch. 12 were reproduced word for word in clause 7(3) relating to the reviewing powers of the Tribunal. This provision was deleted in the Act as approved by Parliament; however a revision on points of law and fact remained in clause 7(1): See Caroline Farrugia: *The Implications of the Administrative Justice Act Ch. 490 of the Laws of Malta* (UOM) (LL.D. Thesis) (2008), 28.

[39] (ART) (24 September 2012) (234/11); see also *Robert Hughes et v. Permanent Secretary Ministry of Finance* (ART) (17 November 2014) (7/09) where plaintiff alleged without success that his legitimate expectation relating to a change in car registration rules had been infringed. Although plaintiff lost the case, the Tribunal accepted the power to review the decision of a public authority under article 469A.

deemed competent to review administrative acts of the "public administration". "Public administration" is then defined in article 2 in the same terms as the definition of a "public authority" in article 469A namely "the Government of Malta including its Ministries and departments, local authorities and any body corporate established by law".

The purpose of listing public authorities in the Third Schedule is that found in article 25 namely that pending proceedings before such tribunals or authorities were *ex lege* transferred before the newly established ART in order to start a process of centralisation of such administrative tribunals and authorities into one general administrative review tribunal. This matter has been overlooked in certain cases by the courts. For instance in *Eros Trading Limited v. Comptroller of Customs*[40] the Court stated that:

> It may be true that both this court as empowered to conduct the said review, and the Administrative Review Tribunal exercise powers which are similar. But it is a fact that the said Tribunal is competent regarding those public authorities or those bodies only which are expressly mentioned by the constitutive act; and does not have power to review actions of other authorities which fall under the exclusive competence of this Court.

Similarly in *Clentec Limited (C4808) v. Director General (Contracts)*[41] the Tribunal refused to exercise jurisdiction to review an administrative act, namely the exclusion of plaintiffs from bidding for government contracts, wrongly interpreting the Administrative Justice Act (Ch. 490) as applying only to the tribunals listed in the Schedule to the Act. It quoted with approval the case of *Raymond Abela v. Malta Transport Authority*[42] where the Court ruled that:

> However it is a fact that the said Tribunal is only competent as regards those public authorities or corporations whose constitutive Acts are listed in the Third Schedule to the Act (article

[40] (FH) (22 June 2016) (603/15)(Mr Justice JR Micallef) confirmed on appeal (16 March 2018) (CA Inf.) (Mr Justice A. Ellul); see also *Antonella Grixti v. Minister for Family* (FH) (11 April 2018) (70/17) (Mme Justice J. Padovani Grima).
[41] (ART) (24 November 2015) (68/14).
[42] (FH) (23 February 2012) (295/11) (Mr Justice JR Micallef).

25(2) Ch. 490 Laws of Malta) and does not have the power to review administrative acts of other authorities which fall under the exclusive jurisdiction of the civil court.

Again in *Diomede Cassar v. Prof Juanito Camilleri ne* [43] the Court ruled that the proper forum for the revision of the operations of a disciplinary board of a public corporation namely the University of Malta was the Administrative Review Tribunal rather than the Civil Court. Equating an internal disciplinary board with an administrative tribunal, the court ruled that article 469A did not apply; it remarked that the Examinations Disciplinary Board was listed in Part B of Schedule I to the Administrative Justice Act. The error committed in this regard is that the First Schedule does not grant jurisdiction to the ART over such tribunals but merely confirms that the principles of Good Administrative Behaviour laid down in article 3 of the Act applied to such entities! Only those entities listed in Schedule III fall under the jurisdiction of the Tribunal in the sense that their powers were taken over by it.

However in *Melita PLC v. Malta Communications Authority* [44] a decision by a public authority was declared null by the ART in virtue of its reviewing powers. The Tribunal also stated that it could refer to the jurisprudence of the civil courts in the interpretation of article 469A in order to review administrative acts:

> There is no doubt that the relative jurisprudence regarding proceedings relating to judicial review of administrative action and the principles therein established, should not be ignored; indeed it should form a solid basis on which this Tribunal should operate and continue evolving.[45]

[43] (FH) (5 April 2016) (386/10) (Mr Justice JR Micallef).
[44] (ART) (13 June 2013) (202/12) (Magte G. Vella) confirmed on appeal (CA Inf.) (30 September 2015).
[45] See however *Mark Cassar ne v. Malta Transport Authority* (ART) (24 April 2015) (76/14) (Magte. C. Galea): "This Tribunal has no power at law to declare the Port Notice in question as irregular and consequently order its repeal, revocation or amendment for the reasons put forward by applicant nomine. Nor may this Tribunal declare any public authority liable for damages suffered since this goes beyond the powers belonging to it." See also *Clentec Ltd v. Director General Contracts* (ART) (24 November 2015) (68/14) (Magte. C. Galea) and *Michael Borg v. Director General Veterinary and Phyto Sanitary Departmen*t (ART) (2 February 2016) (51/14) (Magte. C. Galea).

An additional argument confirming the erroneous application of Chapter 490 by the Courts is that the Third Schedule mostly comprises *administrative tribunals* which according to jurisprudence do not fall under review of an administrative act; consequently the purpose of the Schedule was to absorb the powers of the listed entities into the jurisdiction of the ART, *not to limit judicial review to the entities listed in the Third Schedule*. The logical conclusion of this is that as regards government departments, authorities and public corporations , the Act, as originally formulated, wanted to grant jurisdiction to the ART to review their acts, provided they fell within the definition of an administrative act, on points of law and fact.

In 2016 Parliament intervened to avoid such duplication. A new provision was introduced substituting article 5(2) of the Act whereby:

> The Administrative Review Tribunal shall not have a general jurisdiction to review administrative acts which are reviewable under article 469A of the Code of Organization and Civil Procedure but it shall have jurisdiction to review those administrative acts as may be prescribed in or under this Act or any other law granting jurisdiction to the Administrative Review Tribunal over any class of administrative acts.

However, the general review power of the Tribunal in article 7 was maintained; the only amendment introduced was to impose a six month limit for the filing of any action under that article; incidentally the same period required to file an action under article 469A.

Position after 2016 amendments

So while avoiding duplication between the Administrative Justice Act and article 469A, the 2016 amendments which came into force on 15 February 2016 confused the issue even further by maintaining review of administrative acts on both points of law and fact, *provided no issue covered by article 469A could be raised*, rendering the Administrative Review

Tribunal as the final arbiter and court of appeal over all acts of the administration which could still be challenged on grounds and reasons of a factual basis.[46]

As regard points of law, since such points of law cannot include any ground mentioned in article 469A it is very difficult to find a point of law on which to challenge an administrative act by a public authority which is not included in article 469A; the question therefore arises is the term *point of law* in article 7 of Chapter 490 superfluous? or is it a general term to encompass every legal possibility of challenging legally administrative acts on grounds other than article 469A? The matter has not yet been decided upon by the courts since all post-2016 actions for judicial review on points of law have been filed under article 469A. However, as regards points of *fact*, since these do not form part of article 469A unless they affect jurisdiction, judicial review by ART is possible *even after* the 2016 amendments.

As regards review on point of fact the question arises however: does this mean that any administrative act can be appealed from on points of *fact*, in the same way as an appeal ordinarily does, covering points of law and/or fact? Or is it limited in the traditional sense of judicial review, rather than appeal, namely that only when the error of fact touches on a point of jurisdiction is such an act reviewable? It is too early to quote any sources or judgments in this regard; but the wide sense implied by this provision, maintained in the 2016 amendment, seems to allow a claimant to challenge an act of the government as wrong on fact by seeking recourse to the Administrative Review Tribunal, making the proceedings partaking more of the nature of an appeal than a review.[47]

In one case, the First Hall of the Civil Court examined the difference between the two proceedings but only in the contest of a special transport law which expressly and statutorily

[47] At the same time the Courts have decided that the ART is not empowered to grant damages although it may review administrative acts(see *David Anthony Pollina ne v. Authority for Transport Malta* (CA Inf.) (16 March 2016) (1/2009AE) .

allowed a limited form of appeal to the Administrative Review Tribunal. In *Dr John Vassallo v. Public Transport Authority*[48] plaintiff objected to the reversal of a decision by the Public Transport Authority to classify a narrow street as a pedestrian area. He argued that the administrative act of the Authority was unlawful on a number of grounds based on article 469A. The Authority for Transport Act (Ch. 499) in article 40 allowed the challenging of decisions of the Authority on certain matters with direct appeal to the Tribunal established by Ch. 490.[49] The Court refused to decline to exercise its jurisdiction in favour of the Tribunal for the provisions of article 40 did not apply to a decision relating to the establishment of a pedestrian area. The Court in this case, which arose *prior* to the 2016 amendments, did not enter into the matter whether under Chapter 490 *itself* such a decision could be reviewed by the Tribunal as an administrative act whose definition was much wider than the limited grounds of appeal under the Authority for Transport Act. Did the Court deliberately apply the "special law" namely Chapter 499 as prevailing over the more general law; or did it simply deliberately or inadvertently ignore the reviewing powers of the Tribunal under article 7? The matter is not clear although again this judgment reveals the reluctance of the courts to relinquish their power of judicial review in favor of any other person or authority.

Time for Reform

This ambivalence as to the aims and purposes of the Administrative Review Tribunal needs to be removed. The Tribunal has the function of *assuming the duties* of those administrative

[48] (FH) (7 January 2015) (288/14) (Mme Justice A. Felice). However, where the matter fell within the limited ground of appeal to the Administrative Review Tribunal as defined in Ch. 499, the Court decided that it could not exercise its jurisdiction under article 469A, since a remedy was available under a special law, namely article 40 of Ch.499. (*Garden of Eden Garage Limited v. Authority for Transport in Malta)* (CA) (26 June 2015) (167/10).

[49] ***40.*** *(1) The Administrative Review Tribunal established by article 5 of the Administrative Justice Act shall be competent to hear and determine:*
(a) appeals made by any person aggrieved by any decision of the Authority not to grant or renew, or to suspend or to revoke an authorisation, or a licence or a permit, or to impose conditions, limitations or exclusions therein or therefore; and
(b) appeals made by any person aggrieved by an administrative or any other penalty imposed on that person by the Authority

tribunals scattered in local legislation in different statutes, as Government may decide and determine. But the reviewing powers of the Tribunal have been affirmed as regards questions of point of law and fact, retaining a legal confusion and lack of clarity, which were there since inception, as to the role of the Tribunal and that of the ordinary courts of law. The time has come perhaps to establish a proper Administrative Court presided over by a member of the judiciary and no one else, applying an Administrative Code; or else enact an Administrative Code irrespective of the legal forum which will apply it.[50] Enough time has passed since Dicey's incorrect analysis of continental administrative courts, to take a second look at the continental system. One could follow the continental trend of establishing special administrative courts, but retain English common law as the basis of substantive Maltese Administrative law. As in so many other areas of Maltese law, we would have retained an eclectic system of administrative law drawing from several sources.

Conclusion

Now that a birds' eye view has been given of the main legal stages in the development of judicial review of administrative action in Malta, including statutes and procedure, the time has come to examine the grounds of judicial review, the persons responsible for observing the rules therein contained, against whom such action can be presented, the limits to such review, and the state of affairs today relating to judicial review in Malta.

[50] In the Administrative Code Bill published for consultation on 7 March 2012 by the Parliamentary Committee for Consolidation of Laws, the setting up of a special administrative court was envisaged presided over by a judge.

CHAPTER III

The area of application of Judicial Review of Administrative Action

Definition of "Administrative Act"

The answer to the question of what is reviewable hinges mainly on the definition of *administrative act*. The definition includes certain administrative decisions and excludes others. The Code provides that an 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. The definition is indeed wide particularly the phrase" refusal of any demand of a claimant", consequently the most interesting and useful part of the definition is the part which *excludes* certain matters. The difficulty lies in the fact, however, that no definition of " measure intended for internal organization or administration "is found in the article itself, and therefore one has to rely on recent jurisprudence to get a glimpse of what the purport of these words is.

Like all definitions, it is not satisfactory and not at all enlightening: it is left up to jurisprudence and the Courts to define the limits and parameters of those acts of the Administration which are liable to review. In deference to the separation of powers doctrine, if each and every act of the Administration were to be subjected to all the grounds of review, government operations would halt to a standstill; and yet the courts have been increasingly audacious and intrusive in inquiring about the validity of any act of the Administration. For instance, in a number of countries there is the notion of *the act of state*, and exercise of sovereign power which is traditionally considered as no-go area for courts scrutiny[1] such as

[1] See *Hon Mabel Strickland et v. Salvatore Galea et* (CA) (22 June 1935) (Kollezz. Vol. XXIX.I.216): "There is no doubt that such an important act, so far reaching in its consequences as to bring the constitutional life of these

for instance the granting of citizenship. In one case,[2] however, the withdrawal of the constitutional right of freedom of movement in Malta – a status just short of nationality – awarded to the foreign spouse of a Maltese national was subjected to such review. It was ruled that once that administrative authority had the power to make a choice between alternative courses of action or inaction, judicial review applied. Consequently since no reasons had been given, the rules of natural justice had been breached. The Court also ruled that the actual reasons for withdrawal were weak and unsubstantiated, and consequently declared that such withdrawal was null and void. The full force of the law and the entire gamut of grounds of review were rendered applicable, even in the sphere of this holy of holies of sovereign State power.

The second difficulty which arises from this definition, apart from the fact that we are told more about what is *not* comprised in the definition, rather than what is contained therein, is that the law establishes *one definition for any administrative act* irrespective of the ground of review applicable. This objection applies even more assiduously in the case of the application of the rules of natural justice. A cursory examination of the grounds of review reveals an expansive application of all the grounds of review for *all* administrative acts. Do the rules of natural justice have a more defined and restrictive application to acts of the Administration which decide some important matter relating to an individual's right, or the exercise by Government of a judicial or quasi-judicial function? This ground of review shall be examined later in more detail[3] but the problem being discussed now is whether in attempting to codify in a few paragraphs the entire centuries-old *corpus* of common law norms on judicial review,

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islands to a standstill, as the declaration of the existence or continuance of a state of emergency, which may be based upon circumstance, information and provisions the nature of which does not allow of their being made public, constitutes an act of State which is not capable of judicial enquiry and cannot consequently be amenable to the jurisdiction of the Courts."

[2] *Kevin Brincat et v. Principal Immigration Officer et* (FH) (5 July 2016) (684/05) (Mr Justice JR Micallef).See also *Dr Alexander Schembri ne v. Identity Malta Agency* (FH) (12 December 2017) (834/16) (Mr Justice JR Micallef).

[3] 184 *et seq*.

the legislator has produced a too wide a definition of the acts subject to review. One may argue that when it comes to applying the rules of natural justice, guided by the principles and traditions of English common law, one must be cautious and circumspect before spreading the net of this elusive ground of review too wide. But the definition does not contain any restrictions; and as the time-honoured *dictum* goes: *ubi lex voluit dixit.*

The problem comes into light mostly regarding certain decisions taken by different Administrations which have till now in practice escaped any court scrutiny relating to natural justice; every year, Government in the past, now the Lands Authority, exercising its powers under the Land Acquisition (Public Purpose) Ordinance (Chapter 88) declares thousands of square metres of privately owned land as being required for a public purpose; such expropriation orders have faced the stiff test of proportionality in purpose and operation under *constitutional* review by the courts *ex post facto*; but to what extent may the courts of law challenge such orders as being, for instance in breach of the rules of natural justice *prior* to the issuing of such orders?[4] For it is well known that no expropriation order *prior* to its issuing is ever notified to the injured party for consultation of one's views as to its propriety; all actions are *ex post facto* means of redress, mostly on allegations of breaches of the Constitution or the European Convention on Human Rights. However, proof of the evolution of the sphere of application of the natural justice rules is that the courts have recently deemed an expropriation order to be one of the administrative acts which requires abidance by the procedural fairness norms:

> Even when Government acts as an administrative organ in the public interest, it must follow the principles of natural justice and in the context of the current case inform the owners of the envisaged project and give them an opportunity to air their views and express their opinions,

[4] In *Cooper v. The Board of Works For The Wandsworth District*; 21 Apr 1863 ([1863] Eng R 424, (1863) 14 CB NS 180, (1863) 143 ER 414) an English Court ruled with regard to an order of demolition of plaintiffs property that "a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds."

and after considering all the circumstances of the case, including the issue of public interest take a decision.[5]

This judgment was overturned on appeal[6] but only because the Court of Appeal decided that the expropriation in question was issued for the purpose of the construction of a street envisaged in the building scheme which did not allow any discretion to the Commissioner of Land whether to expropriate or not. Arguing *a contrario sensu* this may be interpreted as meaning that *had there been such discretion*, then the rules would have applied.

This question is not tackled at all in the definition of what amounts to an administrative act; a definition of paramount importance, since article 469A permits a court of law to enquire only "into the validity of any administrative act." If an act is not administrative according to this definition it falls beyond the pale of judicial review at least under article 469A. Besides, for an act to be administrative it must amount to a decision and not merely a consultative act[7]. Similarly, circulars *per se*[8] or preparatory acts [9] are not considered to be administrative acts;

[5] *Giovanni Fenech v. Commissioner of Land* (FH) (2 April 2004) (2341/00) (Mr Justice T. Mallia).
[6] *Giovanni Fenech v. Commissioner of Land* (CA) (30 November 2007) (2341/00):"Once the land in question was indicated in the Scheme as a road, the Commissioner did not have any choice but to expropriate the land as in fact he did to construct that road. Therefore in the considered opinion of the Court, the provisions of article 469A (b) (ii) which refer to the rules of natural justice were not applicable to the present case."
[7] *Joseph Galea et v. Commander Task Force et* (CA) (5 October 1998) (Kollezz. Vol. LXXXII.II. 541): "An administrative act may only be reviewed by the Courts if it relates to an act which constitutes a decision, in this case, the issuing or refusal to issue the requested licence."
[8] *Global Capital Fund Advisors Ltd v. Malta Financial Services Authority et* (FH) (15 April 2015) (409/07) (Mme Justice A. Felice); see also *Global Capital Fund Advisers Ltd v. Malta Financial Services Authority* (CA Inf.) (2 October 2009) (8/09) "When circulars do not constitute acts which are norms or decisions and are not reproduced in the form of a provision or administrative order, these are not to be considered as acts which are capable of affecting the juridical position of interested persons."
[9] *John Grech et v. Commissioner for Tax* (FH) (2 March 2016) (1126/15) (Mr Justice M. Chetcuti): "The opening of an investigation cannot constitute an administrative act in the sense that no decisions determining the issue has been taken" See also *Christine Borda v. Director Inland Revenue* (FH) (26 November 2015) (21/14) (Mr Justice JR Micallef): "Not every writing which emanates from a public authority amounts to a decision; in order to possess such qualities such document must have settled the issue or complaint by stating that this is the final opinion of the public authority in question to such complaint or request made to it," Similarly in *Victor Borg pr et ne v. Malta Environment and Planning Authority et* (FH) (13 October 2017) (1048/06) (Mr Justice T. Abela) a letter issued by MEPA interpreting a local plan in a particular way was not deemed to be an administrative act until the planning authorities decided on the issue of the development permit itself.

nor can a public authority plead that it exercised a power under a special law and therefore article 469A does not apply.[10]

The meaning of *Administrative Act*

In English common law the parameters of judicial review are marked by the test of whether a body is '*performing a public function*' and is hence amenable to such review. Indeed, this may not depend upon the s*ource* of its power so that an ostensibly *private* body exercising such function is still amenable to review. The 'but for' test is applied, in other words, whether, but for the existence of a non-statutory body, the functions exercised by such body would have been inevitably regulated by statute.

In *Council of Civil Service Unions v. Minister for the Civil Service* [11] Lord Diplock remarked that 'for a decision to be susceptible to judicial review the decision-maker must be empowered by public law...to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers.' He said:

> The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision. To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him [or her] too. It must affect such other person either by altering rights or obligations of that person which are enforceable by or against him in private law; or by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.'

[10] *Carmel Massa et v. Director Social Accomodation* (FH) (17 September 2013) (799/05) (Mr Justice J. Zammit McKeon):"This Court rejects as unfounded at law plaintiff's argument that Chapter 125 is a *lex specialis* as regards article 469A of Chapter 12. Once the action of the Director constituted an administrative act then Chapter 125 is no *lex specialis* and the merits all came under article 469A."
[11] (1985) AC 374 HL 409.

However, where there is some other branch of law which more appropriately governs a dispute between the parties or where there is a contract between litigants, then the express or implied terms of such agreement govern such issue rather than the common law rules on judicial review.[12]

In one case, regarding disciplinary action by a jockey club against one of its members,[13] an English court referred to "non-reviewable decisions of a body whose sole source of power is a consensual submission to its jurisdiction." The court remarked that the judiciary had always been reluctant to interfere with the control of sporting bodies over their own sports and did not detect in that case any grounds for supposing that, if the Jockey Club were dissolved, any governmental body would assume control of racing. Neither in its framework nor its rules nor its function did the Jockey Club fulfil a governmental role.

Application to Maltese law

Applying these principles to Maltese administrative law, it is evident that any such action relating to a private association would have been barred under article 469A since a private club is neither part of the civil or public service nor a body corporate established by law even if in part it could have exercised a public function. But the two limitations of (a) a special branch of law and (b) a contractual relationship which supersedes judicial review, may still

[12] See De Smith, Woolf and Jowell *Principles of Judicial Review* (London) (Sweet and Maxwell) (1999): 73.
[13] *R. v. Jockey Club, ex p. R.A,.M. Racecourses Ltd*. (1993) AC 682. See also *R v. Panel on Takeovers and Mergers ex p Datafin PLC and others* (1987) QB 815 where a private body exercising a public law function is liable to judicial review "'Lord Lloyd LJ: If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, …be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we were referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public on the other ; however a question of public interest does not by itself give cause to such review . See in this respect *R v. Chief Rabbi of the United Hebrew Congregation of Great Britain and of the Commonwealth ex p Wachmann* (1992) 1 WLR 1036 . In that case regarding a dispute within a religious community, the Court held that: "this court is hardly in a position to regulate what is essentially a religious function – the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. "

be applied in Maltese law to determine whether an action of government is amenable to judicial review.

As to the first exception, any matter which is regulated by a specific law is subject to review under that law rather than under article 469A. This is borne out by article 469A (4) of Chapter 12 which states that:

> 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.[14]

Consequently in one case[15] where a candidate for a local election had his nomination declared invalid by the Electoral Commission, plaintiff had to avail himself of the remedies contained in the Local Councils Act[16] rather than instituting action under article 469A for mistake, arbitrariness and unlawfulness.

It is also submitted that when a *contractual* relationship under civil law regulates a relationship between Government and John Citizen, it is civil law which regulates such relationship rather than judicial review.[17] This follows also the distinction already referred to

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[14] Such a provision restricting judicial review should, however, be given, like all ouster clauses, a restrictive interpretation: See *Bunker Fuel Oil et v. Paul Gauci et* (CA) (6 May 1998) and *John Bonnici et v. Malta Transport Authority* (FH) 2 December 2009) (299/06) (Mr Justice C. Farrugia Sacco); *Joseph Muscat et v. Chairman Housing Authority et* (FH) (28h January 2004) (1447/96) (Mr Justice Ph. Sciberras) confirmed on appeal (CA) (24 June 2011) and *Fish & Fish Ltd. and Malta Fishfarming Ltd. v. Malta Environment and Planning Authority* et (FH) (30 April 2007) 439/06) (Mr Justice C. Farrugia Sacco) confirmed on appeal (CA) (26 June 2009).

[15] *Joseph Galea v. Chief Electoral Commissioner* (CA) (26 February 1998).

[16] Regulation 22 of the Third Schedule to the Local Councils Act (Ch. 363).

[17] See *Emmanuel Gatt v. Malta Maritime Authority* (FH) (7 July 2004) (125/02) where an issue regarding the length of a period relating to berthing rights was deemed to be a purely contractual matter rather than an administrative act. See also *Joseph Debono v. Executive Director Yachting Centres* (FH) (29 April 2005) (1408/00) (Mr Justice G. Valenzia) and *Justin Caruana v. Commissioner of Land* (FH) (16 October 2006) (2439/00) (Mr Justice J. Azzopardi) where a refusal to recognize plaintiff as tenant under civil law (rent laws) was deemed to be outside the purview of art 469A. See also in this regard *Carmel Cauchi v. Director of Land et (*CMSJ) (27 June 2007) (45/06) (Magte P. Coppini) and *Malta Development Corporation v. Mediterranean Film Studios Ltd* (FH) (25 April 2007) (770/04) (Mr Justice J. Azzopardi) where the Court ruled that the filing of a writ of summons was a purely civil and not administrative act. In *HSBC Bank Malta PLC v. Tabone Computer Centre Ltd et* (FH) (19 April 2010) (210/09) (Mr Justice J. Azzopardi), a request to revoke a patent for an invention was deemed not to fall under art 469A. Similarly where customs legislation offered a specific remedy

between governmental liability and judicial review. Where an action of government possibly falls under some kind of contractual relationship it is private law which regulates the matter just as if any private citizen was party to that relationship rather that the State.[18] Consequently an action for reimbursement of customs duty paid in excess did not amount to a challenge of the validity of an administrative act.[19] Similarly a withdrawal of a concession by Malta Transport Authority arising from a contract between the parties was governed by the terms of such contract and did not fall under article 469A.[20]

In another case[21] the Court decided that the issuing of a Local Plan delineating the building areas in a particular zone issued by the Planning authorities was not an administrative act. It cited as reasons justifying this conclusion the fact that a local plan was applicable to anyone

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to contest decisions by the Comptroller of Customs, art 469A did not apply. (*Priscilla Cassar et v. Comptroller of Customs) (*CA) (29 January 2010) (167/07). See also *Housing Authority v. Emmanuel Calleja et* (FH) (12 October 2007) (2461/97) (Mr Justice G. Caruana Demajo); *Benmar Co Ltd v. Sty Pauls Bay Local Council et* (FH) (28 October 2008) (628/04) (Mr Justice G. Caruana Demajo) confirmed on appeal (CA) (25 February 2011) (628/04); *Maria Caruana Demajo v. Director Social Security* (CA Inf.) (17 October 2008) (75/05); *John Bajada et v. Mario Camilleri et*(CMSJ) (21 October 2009) (13/04) (Magte P. Coppini); *Mark Micallef v. Comptroller of Customs* (FH) (8 October 2009) (557/06) (Mr Justice C. Farrugia Sacco); *Josette Attard v. Rector University of Malta* (FH) (24 January 2012) (432/11) (Mr Justice M. Chetcuti) *Ines Calleja v. Malta Transport Authority* (FH) (14 December 2011) (299/10) (Mr Justice J. Azzopardi); *Ines Calleja v. Malta Transport Authority* (CA) (30 November 2012) (499/10); *Consiglio D'Amato v. Malta Transport Authority* (FH) (30 April 2012) (916/10) (Mr Justice J. Azzopardi); *Philip Attard v. Floriana Local Council* (CA) (15 November 2012) (242/11);*Michael Mangion et v. Comptroller of Customs* (FH) (12 March 2013) (1338/10) (Mr Justice M. Chetcuti);*Carmelo Abela et v. Chief Government Medical Officer* (FH) (3 February 2015) (740/12) (Mr Justice M. Chetcuti); *Pierre Debono v. Malta Transport Authority* (FH) (14 October 2015) (139/15) (Mr Justice L. Mintoff) and *Mario Bondin et v. Prime Minister et* (FH) (29 February 2016) 723/08) (Mr Justice J. Zammit McKeon); see, however *, A B et v. Social Policy Minister* (FC) (21 April 2010) (362/08) (Mr Justice N. Cuschieri) where a request by grandparents to have access to a child under a care order issued by a Minister was thrown out by the Family Court since the available remedy was one of judicial review under art 469A. Similarly in *Karina Fenech v. Housing Authority* (FH) (12 December 2011) (877/08) (Mr Justice J. Zammit McKeon) an issue relating to whether according to rent laws applicant was to be recognised as tenant in government owned property was considered to fall within art 469A.

[18]"Actions and decisions involving the exercise of what might be characterized as private law rights, such as decisions regarding commercial contracts or decisions regarding the employment of staff, are generally not amenable to judicial review, unless there is some further public element to the decision, even where the decision is made in the exercise of a statutory power" (Auburn. Moffett and Sharland: *Judicial Review: Principles and Procedure* (Oxford University Press (2013): 18-19.

[19] *Practical Trading Co Ltd v. Comptroller of Customs* (CA) (29 February 2008) (1693/99).

[20] *Supreme Travel Ltd v. Malta Transport Authority* (FH) (18 October 2011) (Mr Justice JR Micallef): "The decision taken by Transport Malta to terminate the concession given to Supreme Travel (STL) was altogether a line of action originating from a contract entered into between the two parties in their private capacity; and in particular by the behaviour alleged by the other party namely STL when considered in the light of the obligations which it assumed under the said contract. For the Court, this is one of the circumstances where the remedy given to a citizen for judicial review of administrative action is not applicable."

[21] *Giulia Briffa v. Commissioner of Land* (FH) (21 June 2013) (41/11) (Mr Justice A. Ellul).

and not a single person and that the local plan did not allow any discretion to the Authority.[22] Besides, where a special law regulates a particular action such as in actions regarding equal treatment to disabled persons, article 469A does not apply.[23]

It has also been decided that where an act such as the issuing of a decontrol certificate is considered null at law, it cannot ever be considered as an administrative act for purposes of article 469A.[24]

Government-Civil Servants – a special relationship

A reagrds special laws, this is further illustrated by a special provision in article 469A which states that:

> 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.

This is a vestige, one of the few, of the infamous Act No.VIII of 1981 which tried to significantly limit judicial review. Article 469A did away with all the restrictive provisions of that Act giving new life to judicial review in Malta, except for the retention of this sub-

[22] "An administrative act normally affects a particular person. The same cannot be said for a local plan. By law the defendant Authority is obliged to apply local plans in the processing of an application. (Art 69 of Ch 504) This is not a matter of discretion. If a plan were to be classified as an administrative act this would mean that the court is entitled to review a local plan to see whether it is reasonable or not. See also *Gozowide Properties Ltd v. Prime Minister* (FH) (31 May 2011) (38/07) (Mr Justice R. Pace) where a revision of the Structure Plan was not deemed to constitute an administrative act: "The revision of the Structure Plan was approved and decided by the House of Representatives and therefore was done through a legislative and not administrative act. See also *Falcon Investments Ltd v. Malta Environment and Planning Authority* (FH) (17 June 2013) (1198/11) (Mr Justice A. Ellul) where a local plan was considered as a legislative act which could be challenged as *ultra vires* in the appropriate cases under art 116 of the Constitution; *Mario Cuomo v. Chairman Planning Authority* (FH) (8 January 2015) (937/06) (Mme Justice A. Felice)and *Vanna Arrigo et v. Malta Environment and Planning Authority et* (FH) (17 October 2 016) (99/07) (Mme Justice J. Padovani Grima); See however *Malcolm Mallia et v. Malta Environment and Planning Authority*(FH) (6 July 2012) (562/10) (Mr Justice A. Ellul) where a proposed change to a local plan by the planning authorities was deemed to be reviewable.

[23] *Mario Camilleri v. Commander Armed Forces* (CA) (3 October 2008) (270/05): "It is clear that plaintiff is putting forward his complaint on the basis of an article of a special law, and therefore once the mode of contestation is regulated by an *ad hoc* law, article 469A of Chapter 12 is not applicable.

24: *Agnes Gera de Petri v. Director Social Accomodation* (CA)(24 September 2004)(1001/96)

section. What used to be article 743(5) of the Code of Organization and Civil Procedure introduced by Act No.VIII of 1981, has been transferred lock stock and barrel into sub article (6) of article 469A. However the courts have definitely clipped the wings of any restrictive interpretation by government of such a provision.

In one case,[25] plaintiffs who were teachers employed with the Education Department, raised an issue as to whether any period prior to their resignation from the civil service owing to marriage – a policy prevailing at that time – could be taken into account after their re-employment in the public service. The Court of first instance, accepting a plea by government, ruled that the law excluded from the purview of the courts matters touching the conditions of employment of civil servants.The Court of Appeal reversed this judgment and in a lengthy explanation of the true meaning of article 469A(6) ruled that:

> The theory of English Administrative law on the non-legal nature of the Civil Service today has been severely dented and is no longer the absolute principle it used to be. It is no longer accepted that employment with the public administration was almost precarious to the extent that the sovereign had the absolute right to hire and fire and that therefore all employees were considered in employment "at Her Majesty's Service and pleasure" even though in theory Her Majesty was considered as the quintessence of justice, objectivity and reasonableness, even as regards her subjects who were in her employment and in her service. In this regard the Constitution itself correctly created a mechanism, to regulate the relationship between the Executive and the public service in Chapter X, in particular with the establishment of the Public Service Commission."[26]

The Court, while ruling that the employment relationship between government and public employees was expressly excluded from the application of any other law such as the Civil

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[25] *Helen Borg et v. Prime Minister et (CA*) (9 February 2001) (781/96 GV).see however *Eric Abdilla et v. Director General Office of Human Resources)* (CA) (29 April 2016) where the Court of Appeal ruled that government employment is still regulated by special laws.

[26] See also *Aaron Haroun v. Prime Minister et* (FH) (15 March 2011) (772/00) (Mr Justice JR Micallef): " It must indeed be said that today the idea of that public service ties are "non-legal" in the sense that the power of the State as successor to the Crown to recruit and terminate any engagement cannot be reviewed by any one and is not a source of civil rights – has been curtailed if not eliminated altogether." See also *Albert Calleja v. Director General Law Courts* (CA Inf.) (6 April 2005) (116/03): see however, *Arthur Briffa v. Prime Minister* (FH) (15 June 2006) (48/04) (Mr Justice T. Mallia) where the Court ruled that this sub-article meant that if disciplinary proceedings leading to dismissal were regularly held under the relative Disciplinary Regulations of the PSC, then applicant, a dismissed government employee, could not be considered to have a civil right under the meaning of the term "possessions" in Article 1 of Protocol I to the European Conv ention on Human Rights.

Code or Chapter 12 itself, declared that same provision subjected public service to special provisions regulating recruitment, conduct and dismissal in the Service. These special provisions were also binding on the Administration, being provisions intended to protect the rights and interests of public employees.[27] Consequently the law does not rest solely on the concept of Government as the good and model employer but also binds it to act according to a determined way and procedure, particularly as regards discipline. In another case,[28] in fact, an action by a suspended police officer, who was acquitted of all criminal charges, to recover half his salary during his period of suspension was deemed admissible and subject to court review in spite of article 469A(6).

Therefore article 469A (6), in spite of being originally inserted in a law whose public and obvious aim was to *limit* judicial review, was interpreted to be a special provision which was neutral in its application protecting even the rights of those in public employment and not in any way obstructing scrutiny by the courts of public service employment relationship and matters.

These cases may be cited as further examples of resistance by the judiciary to circumscribe or circumvent judicial scrutiny or review of any act of the Administration.

Employment Relationships

Attitudes to employment relationships in the United Kingdom are different from the point of judicial review. In one case[29] where a district nursing officer had been dismissed for misconduct, the Court declared that a claim for judicial review cannot be used to enforce

[27] See also *George Hili v. Attorney General et* (FH) (30 January 2008) (214/05) (Mr Justice G. Caruana Demajo).

[28] *Carmelo sive Charles Magri v. Commissioner of Police et* (CA) (5 October 1998) (Kollezz.Vol. LXXXII.II.751). " See also *Anthony Gauci v. Malta Maritime Authority* (FH) (30 October 2014) (Mme Justice L. Schembri Orland) which confirmed this line of thinking.

[29] *Regina v. East Berkshire Health Authority, ex Parte Walsh*; CA 14 May 1984.

merely private law rights against a public body. An applicant for judicial review has to show that *a public law right* enjoyed by him had been infringed and that where the terms of employment by a public body were controlled by statute its employees might have rights both in public and private law to enforce those rights, but that a distinction had to be made between an infringement of statutory provisions giving rise to public law rights, and those that arose solely from a breach of the contract of employment.

Moreover, entering into a contract by a public authority by itself will not be amenable to judicial review unless the decision has a public element in the form of a *nexus* between the contractual matter and the allegedly unlawful exercise of a public function.[30] Furthermore, it has been decided that decisions to terminate a contract will only be amenable to judicial review if there is fraud, corruption, or bad faith.[31]

Judicial Review of Administrative Tribunals and Administrative Acts

The problem has arisen whether an action challenging the lawfulness of a decision of an administrative tribunal falls under the definition of an *administrative* act and therefore subject to article 469A or else a different set of rules applies. The court has refused to consider acts or decisions of administrative tribunals as amounting to an administrative act as defined in article 469A.[32]

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[30] *Supportways Community services Ltd v. Hampshire County Council* (2006) EWCA Civ. 1035, (2006) LGR 836 para 38 per Neuberger J. "The mere fact that the party alleged to have been in breach of contract is a public body cannot on its own transform what would otherwise be a private law claim into a public law claim."

[31] *Mercury Energy Ltd v. Electricity Corp of New Zealand* [1994] 1 WLR 521, PC, 529; In this case a claim was brought against a state electricity provider, alleging that the provider had no power to terminate electricity supply arrangements. The judicial review claim was struck out. The case was referred to the Privy Council where it was stated that it was not likely that: "a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith." See also *T R (Broadway Care Centre Ltd) v. Caerphilly County* BC [2012] EWHC 37, (2012) 15 CCL Rep 82, paras 66-78 per HHJ Seys-Llewellyn QC.

[32] *Xermus Trading Limited v. Director General (Value Added Tax)* (FH) (22 November 2012) (Mr Justice JR Micallef) (1168/11): "In this respect the Court believes that the meaning given to the words "administrative act" in article 469A (2) of Chapter 12 was not intended by the legislator to include also decisions by a statutory board or tribunal." See however *Commissioner of Police v. Edgar Borg* (FH) (28 October 2005) (1209/03) (Mr Justice N. Cuschieri) where a decision of the Tribunal for the Investigation of Injustices was considered to be an

In one case[33] the court referred to common law and stated that since there is a *lacuna* on this aspect of the subject which was not regulated by article 469A, therefore it was legitimate to apply English administrative law. In that case the Malta Public Transport Authority challenged the decision of the Fair Competition Commission, established by law to decide complaints, as being wrong at law. The Court did not make any reference to article 469A to the extent that, though it accepted the plea that the action was time-barred, it did not base its decision on article 469A and the six month prescription therein contained, but applied English public law, including the Rules of Court where a *certiorari* action is time barred by the lapse of six months, a rather controversial statement in view of the fact that the court, after Independence, applied an English rule which emanated from *statute* rather than common law.

The *locus classicus* in this respect was a case[34] where plaintiff challenged before the civil court the decision of the Electoral Revising Officer on a point of law in the absence of an ordinary appeal from such decision. The Court of Appeal ruled that such decision could not be considered as an administrative act; indeed, the officer was independent from the Administration.

However, the Electoral Commission itself was considered to be an *administrative* rather than a *judicial* organ and therefore its acts were administrative in nature falling within the legal

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administrative act which could be challenged under art 469A (1) (b) (iv) as being "contrary to law"; see also *Boris Arcidiacono et v. Salvu Schembri et* (FH) (14 October 2014) (1825/01); but see *Joseph Vella et v. General Services Board* (CMSJ) (6 February 2015) (39/13) (Magte J. Demicoli) where an action under 469A to challenge a decision of a Board on whose decision an administrative tribunal based its decision, was accepted.

[33] *Malta Transport Authority v. Attorney General et* (FH) (12 May 2011) (592/09) (Madam Justice A. Lofaro); see also *Smash Communications Ltd v. Broadcasting Authority* (FH) (7 February 2012) (481/04) (Mr Justice R. Pace): "As regards the principles of judicial review and those of natural justice, it is generally accepted that Maltese administrative law is based on the English one (see *Cassar Desain v. Forbes n*e (CA) 7 January 1935 and *Lowell v. Caruana* (FH) (14 August 1972) The Maltese Courts always affirmed that when *a lacuna* existed in Maltese Public Law (and administrative law is a branch of public law) the principles of English law are applied."

[34] *Dr A. P. Farrugia v. Electoral Commission et* (CA) (18 October 1996).

orbit of article 469A.[35] Applying English common law, even after the introduction of article 469A, the Court affirmed its right to review the proceedings of any administrative tribunal, firstly to ensure that the principles of natural justice have been observed, and secondly to see that there be no wrong or incomplete statement of the law.

In another case,[36] the court asserted judicial review of decisions of the Broadcasting Authority, acting as a quasi-judicial authority, but made no reference to article 469A, and based its reviewing power on article 40(6) of the Broadcasting Act (Ch. 350). ; it cited judgments delivered prior to 1995 based on English common law.[37] It is therefore presumed that this judgment confirmed that where review cannot be pigeonholed under article 469A it is legitimate to base it legally under English common law even *after* the enactment of article 469A and even when applying a Maltese statutory provision. [38] However, in another case[39]

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[35] *Dr George Abela ne v. Carmel J. Portelli ne*) (FH) (24 October 1996) (Mr Justice G Valenzia) and *Dr. A. P. Farrugia v. Electoral Commission* (CA) (18 October 1996).

[36] *Smash Communications Ltd v. Broadcasting Authority* (FH) (7 February 2012) (Mr Justice R. Pace). Article 40(6) of Ch. 350 provides that: *(6) The Authority may make regulations to give better effect tothe provisions of this article and may, without prejudice to the generality of the foregoing, make regulations in respect of the determination of disputes between the network operator and the general interest objective service, the regulation of the general interest objective network in order to ensure that the network operator abides by the provisions of this article and any regulations made thereunder and, generally to ensure that an uninterruptedservice is provided by the network operator:Provided that in the case of a dispute between the network operator and a general interest objective service licensee, such disputes shall be referred to a standing arbitral tribunal to be composed of one person appointed by the Broadcasting Authority who shall preside, one person appointed by the Malta Communications Authority and one person appointed in agreement between the Broadcasting Authority and the Malta Communications Authority. The said tribunal shall decide the complaint as expeditiously as possible and its decision shall befinal.*

[37] "In *Anthony Farrugia v. Electoral Commission* (CA) (18 October 1996) it was held that the Electoral Commission is a quasi-judicial body and therefore not subject to the rules relating to review of administrative acts according to article 469A. **However, in spite of this, the decisions of the Commission are still reviewed in virtue of the power conferred on ordinary courts to review decisions of any judicial or quasi-judicial authority** (emphasis added)". See also "*Anthony Cassar pro et noe v. Accountant General*" (FH 29 May 1998) where although the judgment was delivered after 1995, it was held that "one must state that it is today established in our case law that the civil court may review the actions of any administrative tribunal, first of all to ensure that there is no incorrect or incomplete enunciation of the law – and this without trying to substitute its discretion to that of the Board; and this is done since once the law entrusted the quasi-judicial function to the Board, it is the Board and no one else who has to decide."

[38] " "An administrative act of a public authority in the widest sense of the word which affects the rights of third parties, and every decision of any Court, Board or Tribunal which affects the rights of third parties, of a judicial or quasi-judicial nature are effectively reviewable by the ordinary courts of this country in the light of the principles of natural justice and in order for the Courts to ensure that there be no wrong or incomplete enunciation of the law."

where the Broadcasting Authority ordered the public broadcaster to broadcast spots related to the EU referendum campaign, the Court considered such decision as an administrative act and stated that even if one were to accept, for one moment, that the decision was quasi-judicial in nature it would still be considered as an administrative act.

Similarly in another case[40] where a decision of the Fair Competition Commission was being challenged, even though its decision according to law was final, the Court did not refer to article 469A but to a long list of cases decided in Maltese administrative law based on English common law and concluded that:

> In this case the request is not to revise the decision but a challenge of its validity on the basis of the allegations contained in the writ of summons. It is these allegations as formulated, namely breach of the law, acting outside jurisdiction and the infringement of the rules of natural justice which grant **the residual power** of the ordinary courts to review the actions of the Commission and consequently invest this court with jurisdiction on the matter. (Emphasis added).

The Court did not specify *the legal basis* of this residual power of review; it is true that at the time of the commencement of the action a residual power of competence was encapsulated in the old article 32 of the Code of Organization and Civil Procedure but such article established a residual *jurisdiction;* as regards *substance* i.e. which law to apply, the actual norms and rules regulating judicial review were derived from English common law; after the enactment of article 469A, those areas which are not covered by such article are still regulated by English common law so long as there is no Maltese legal provision regulating the matter.

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[39] *Chairman PBS Ltd v. Broadcasting Authority* (FH) (5 September 2002) (711/02) (Mr Justice JR Micallef) "Without prolonging too much on this pioint, it is sufficient to state that the fact that the challenged act was an adjudication does not mean that it is not 'administrative'; on the contrary, the law itself includes such act when it refers to the words 'decision'. Apart from this, it is well established that article 469A grants to the courts of civil jurisdiction the power, which does not amount to an appeal, to review the regularity of quasi-judicial decisions within the parameters therein explained."

[40] *Simonds Farsons Cisk Ltd v. Acting Director Office for Fair Competition* (FH) (27 October 2004)(2770/96) (Mr Justice Ph. Sciberras).

In confirmation of this trend of thought the Court of Appeal in another case[41] rejected the lower court's assertion that administrative tribunals fell under article 469A and referred to pre-1995 judgments[42] which affirmed the right of a court of law to scrutinize decisions of administrative tribunals; all these judgments were based on the application of English common law to Maltese law. In another case[43] the Court stated that:

> The decision of the Tribunal for the Investigation of Injustices does not qualify as an administrative act. Nor is it consonant with the definition found in article 469A...Certainly the decision of the Tribunal is not an order, a license a permit or the issuing of a warrant, nor a decision or refusal regarding a request by a person by a public authority.

This judgment jars with another one where the Electoral Commission was classified as an administrative authority and therefore amenable to judicial review under article 469A. It appears that where the Broadcasting Authority and the Electoral Commission exercise administrative acts their actions may be challenged under article 469A but when they exercise a quasi-judicial role, the review is legally based on their own special laws viz. article 40(6) of the Broadcasting Act, and article 44 (1)(c) of the Financing of Political Parties

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[41] *Prime Minister v. Victor Vella Muskat* (CA) (25 September 2006) (81/03): "The ordinary courts have the power to review the legality of decisions of the Tribunal for the Investigation of Injustices under article 32(2) of Chapter 12. The premises and requests of the writ of summons are not based on judicial review of the tribunal's decision under article 469A of Chapter 12 but on generic allegations of illegality of such decision and therefore there is nothing to prevent the ordinary courts from taking cognizance of the grievances of appellant. See also *Jane Borg et v. Kenneth Cefai pr et ne* (CA) (31 January 2014) (53/06) and *John Cutajar v. Alfred Falzon Sant Manduca* (FH) (27 November 2014) (517/12) (Mr Justice A. Ellul); however a board which takes a decision regarding selection process is not deemed to be an administrative tribunal and therefore its actions amount to reviewable administrative acts under art 469A. (*Dr Tanya Sciberras Camilleri ne v. Dr Emmanuele Mallia ne et* (FH) (14 April 2015) (1038/13) (Mr Justice JR Micallef). See also *Director General Law Courts v. Pinu Axiaq (FH*) (7 January 2003) (2633/00) (Mr Justice A. Magri) confirmed on appeal (CA) 3 March 2006. where in spite of amendments in 2002 inadvertently removing the residual power of the civil courts from article 32, the Court still referred to this section as the basis of judicial review beyond the pale of article 469A. "The changes in the wording of article 32(2) as a result of the amendments introduced by article 16 of Act No. XXXI of 2002, in the opinion of the Court, did not change the substance relating to this principle (of judicial review)."

[42] *Joseph Farruga v. Emanuel Cilia Debono* (FH) (10 June 1987) *Montalto v. Chircop* (FH) (10 June 1987) *Norman Rossignaud noe v. Gontram Borg noe* (FH) (19 April 1990) *Anthony Borg Cardona v. Joseph Busuttil et noe* (FH) (5 October 1994).

[43] *Prime Minister v. Joseph Bonello* (FH) (27 November 2006) (807/05) (Mr Justice C. Farrugia Sacco). See also and *General Workers' Union v. Bank of Valletta plc* (FH) (11 March 2009) (870/08) (Mr Justice R. Pace) confirmed on appeal (CA) (19 January 2010) and *Malta Maritime Authority v. Philip Abdilla* (FH) (27 June 2013) (395/05) (Mme Justice L. Schembri Orland).

Act in the case of the Electoral Commssion, though English common law has been used to explain such reviewing power of the Courts . These distinctions as to judicial review under article 469A and that under common law principles may appear as a byzantine splitting of hairs but they assume practical importance for the legal practitioner when one considers that an action under article 469A is barred by the lapse of six months while no such time limitation applies to judicial review under the *lacuna* principle of applying English common law. Nor are actions of administrative tribunals reviewable under the Administrative Justice Act (Ch. 490). The Act, in spite of its title, does not create a right of judicial review in favour of persons aggrieved by a decision of such Tribunals for the Act applies only to administrative acts [44]and these are defined, and excluded, exactly as in article 469A.

The bizarre conclusion therefore is that an Act intended to regulate administrative justice does not apply to administrative tribunals which mete out justice to individuals. The Act does codify the main procedural rules of the adversarial system, and applies them to a number of administrative tribunals. Besides, through the Administrative Review Tribunal it has also absorbed a number of administrative tribunals, stream lining procedure and reducing costs. But there is no right of redress before the Tribunal *for challenging decisions of organs of administrative justice*. This shortcoming, whether created deliberately or inadvertently should be redressed as soon as possible.

The exclusion of internal measures

Article 4689A uses express words to exclude any measure intended for internal organization or administration within a public authority. The source of this provision is clearly that of French Administrative law where the *mesures d'ordre interieur adminstratifs* are not

[44]See art 7 (1) Ch. 490 : (1) *The Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points of fact.*

amenable to review. An example would be a circular giving advice within a department on the interpretation of a statute. But even then, above a certain point, the administrative measure may become, because of its gravity, an *acte administratif* within the cognizance of the administrative judge such as the expulsion of a pupil from a state school.

In one case[45] the Court of Appeal ruled that:

> although it is true that the definition of *administrative act* excludes anything done for the purpose of internal organization or internal administration in the said authority, this exclusion does not apply to a decision about which plaintiff is complaining, namely whether he is entitled to a pension according to the grade he occupied in the civil service at the moment of retirement, or else the grade equivalent to the task he was effectively undertaking – but refers only, as the word "internal" indicates, to organizational and administrative issues within the authority such as the allocation of duties, time schedules, and working methods within the said authority.

In at least two cases the courts have tried to distinguish ordinary acts amenable to review from such internal measures. The cases related to the dismissal of police officers in the public interest, a power given to the Prime Minister under the Police Act,(Ch 164) **[46]** whereby a member of the police is forced to retire with full pension rights without any disciplinary proceedings , except endorsement by the Public Service Commission. The Court of Appeal**[47]** refused to classify such forced retirement as an internal measure of organization and administration of the Police Force. The winning argument was the following:

> It is clear that in France the dismissal of a public officer is not considered as a measure intended for internal administration and organization, and its lawfulness may be reviewed by the *Conseil d`Eta*t. In the opinion of this Court it could really be not otherwise, for the forced termination of the employment of a public officer – irrespectively from the form such forced termination may take – is an issue which affects that person and does not concern the internal

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[45] *Edward Paul Tanti v. Administrative Secretary in the Office of the Prime Minister* (CA) (7 October 2005) (1773/01).

[46] Article 16 of the Police Act (Ch. 164): " It shall be lawful for the Prime Minister on the recommendation of the Public Service Commission to remove from his office at any time a police officer who -(*a*) has not given any indication of being or has ceased to be an efficient police officer; or(*b*) is incapable by reason of some infirmity of mind or body of discharging the duties of his office when such infirmity is likely to be permanent; or (*c*)it is considered, having regard to the conditions of the Force, the usefulness of the officer thereto, and all the circumstances of the case, that he should in the public interest no longer serve as a member of the Force."

[47] *David Gatt v. Prime Minister et* (CA) (6 September 2010) (1548/01).

administration itself…and this apart from the consideration that if such measure were not amenable to judicial review, this would give rise to serious abuse and injustice.

However, a promotion exercise within the Police Force was, in one case,[48] strangely classified as a merely organisational internal measure. The Court ruled that:

> The discretion exercised by defendant regarding plaintiff is not reviewable by this Court in the first place because it does not fall under the definition of what constitutes an administrative act according to article 469A and secondly the right of defendant to grant a promotion in particular circumstances amounts to an act intended for internal organization and administration and in the exercise of his right to decide he must take into consideration the relevant factors in the interests of the public service and the country in general.

Similarly, a rule that a Drydocks Council member could not apply for a promotion within the Malta Drydocks Corporation was considered to be an internal measure of organization[49]; but reorganization within the Malta Development Corporation whereby some employees were not absorbed within new structures was deemed to be.[50]

In contrast, a promotion exercise within another disciplined force, namely the Armed Forces of Malta, was considered to be a reviewable administrative act.[51] The Court in another case[52]

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[48] *Edward Falzon v. Commissioner of Police* (FH) (22 October 2002) (2459/99) (Mr Justice A. Magri); see also *David Crisp v. TeleMalta Corporation* (FH) (28 February 2007(1562/97) (Mr Justice R. Pace).

[49] *Anthony Gafa` v. Malta Drydocks* (FH) (26 November 2009) (1512/01) (Mr Justice R. Pace).

[50] *Anthony Cachia et v. Malta Development Corporation et* (FH) (2 October 2012) (357/04) (Mr Justice R. Pace).

[51] *Ivan Consiglio v. Prime Minister et* (FH) (18 February 2010) (446/08) (Mr Justice JR Micallef) " it would be wise for the Court to consider not only the administrative act as it appears superficially but also the nature of the complaint about such act. This is being said for if the complaint relates to the unreasonable exercise of discretion, or breach of one of the rules of natural justice, or indeed abusive behaviour, or acts which are beyond the power granted by law (that is to say an act *ultra vires*) it rests upon the Court to review such case for the matter does not remain one of 'simple organization or internal management' but one which strikes at the core of an action for judicial review of any administrative act." See also *Maj. Claudio Terribile v. Prime Minister* (CMSJ) (4 November 2009) (44/08) (Magte P. Coppini).

[52] *Raymond Camilleri v. Commander Armed Forces et* (FH) (26 October 2010) (1087/09) (Mr Justice JR Micallef).

ruled that the fact that the Armed Forces of Malta were not considered by the Constitution as forming part of the public service did not mean that they were not deemed to be a *public authority* for the purposes of article 469A. An action whereby an assimilation exercise for enrolled nurses was revoked retroactively was considered to be an administrative act subject to review.[53]

Indeed, French law excludes from judicial review any such internal measures but the courts are reluctant to surrender judicial review if such acts, owing to their gravity, qualify as an *acte administratif*. It is accepted in France, however, that in the armed forces, prisons and schools those in charge need to exercise discretionary disciplinary powers. So in one case[54] the issuing of a circular by a State school headmistress prohibiting the wearing of skin trousers was considered to be an unreviewable administrative act. But in more recent cases relating to a blanket provision to wear insignia badges on school uniforms or attire denoting religious conviction at school, the *Conseil d'Etat* gave an advisory opinion to the effect that such wearing of distinctive clothes or signs was, within certain limitations, admissible.[55] The *Tribunal Administratif* of Paris upheld such prohibitive circular, but the *Conseil d`Etat* again affirmed the right of pupils to wear such attire unless the school could show that the wearing of the scarf led to disturbances or other unlawful behaviours in the school.[56]

The question in Malta has arisen as to whether a promotion in the Police Force was reviewable or to be considered as an internal act of administration.[57] The court stated that it

[53] *Bernardette Agius et v. Prime Minister et (*FH) (9 January 2014) (526/02) (Mr Justice J.Azzopardi): "In the opinion of the Court the present case falls under the definition of article 469A (1) (iii) and possibly under subparagraph (iv); for plaintiffs are alleging that defendant did not have any right to take the action he took and therefore this means that there was either an abuse of power by taking into account irrelevant considerations or the administrative act was contrary to law."
[54] Case *Chapou* CE 20 October 1954.
[55] See: Brown and Bell: *French Administrative Law*: (Fifth Edition) (Oxford Clarendon Press) (1998) p: 159-60.
[56] *Kherouaa* CE 2 November 1991.
[57] *Edward Falzon v. Commissioner of Police* (FH) (22 October 2002 (2459/99) (Mr Justice A. Magri).

was an internal organizational matter. In another case,[58] regarding a transfer of an employee within a state-owned senior citizens' home, the Court replied in the negative; however a tautological problem arose when the Court asserted that, where the allegations put forward by plaintiff were based on serious grounds such as unreasonableness or *ultra vires*, such considerations had to be taken into account to decide whether an act was one of purely administrative nature or not.[59] This judgment can be rightly criticized on the basis that an administrative act, recognized as such, is liable to be reviewed under the grounds of review mentioned in article 469A; but this does not mean that if a plaintiff bases his action on any of the grounds of review, then automatically the act complained of becomes an administrative act and therefore subject to review. In another case, regarding the non-renewal of a definite contract of employment by a public authority, the Court skirted the issue by deciding that only after it would examine all the evidence and facts of the case, could it decide whether the measure was an administrative act subject to review or simply a non-reviewable act of internal organisation.[60]

The withdrawal of a tag to a transport worker by the Authority concerned was considered to be an administrative act; the Transport Authority had alleged that it was bound by law to withdraw such tag, without any discretion being given to it. The Court ruled that the fact that the Authority had not taken a similar action against others who were in a similar position, made its actions discretionary and therefore amenable to review.[61]

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[58] *Rita Vella v. Chief Government Medical Officer et* (FH) (31 October 2012) (140/12) (Mr Justice JR Micallef).
[59] See also *Dr Louis Buhagiar v. Prime Minister et* (FH) (24 February 2012) (463/05) (Mme Justice A. Lofaro) confirmed on appeal (CA) (27 May 2016).
[60] *Aaron Haroun v.Prime Minister* et (FH) (15 March 2001) (722/00) (Mr Justice JR Micallef) "As regard the second submission of defendants in the sense that in the present case the decision taken regarding plaintiff of not renewing his contract was one to be considered as an internal and organizational measure within the said authority, this Court considers that in order to examine whether this is true or not, the Court must necessarily conduct an investigation.
[61] *Paul Borg v. Public Transport Authority* (FH) (21 May 2009) (821/08) (Mr Justice JR Micallef) confirmed on appeal (CA) (28 September 2012) ` The Court is of the opinion that, by its decision to withdraw the tag and to refuse to accede to a request by plaintiff's counsel to reconsider the case, the respondent authority performed an

Challenging the process whereby following a public call for applications, plaintiff was not chosen by a selection board of the University of Malta, the court ruled that such an exercise could not be considered as a mere internal organizational measure, the more so when even persons not in employment with University could apply.[62] It would have been a different matter if the exercise applied only to members of staff.[63] Similarly, a decision of a Disciplinary Board of the University of Malta was not deemed to be an administrative act by a public authority; besides, since the Board was an administrative tribunal listed in the Administrative Justice Act, any challenging of its decisions had to be made to the Administrative Review Tribunal set up by that Act.[64] The non-renewal of a definite contract of employment with the Prison authorities was not deemed to be a simple internal organisation and management measure.[65] Nor was a request that a public officer be recognized in a particular grade in the Civil Service.[66]

A transfer of a nursing officer from one health establishment to another was deemed to be an administrative act and not only an internal organizational measure, the more so when it was alleged that the act was discriminatory.[67] A request for the granting of citizenship by

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administrative act as defined by law. This is being said both because such a decision falls within the definition of administrative act but also because such refusal constitutes a shortcoming which these courts may be requested to review. Not only that, but the evidence showed that the measure taken by the authority was so factually discretionary, that it did not take similar action against another person who was in the same position as plaintiff. See also *Paul Zammit v. Chairman Planning Authority* (FH) (8 October 2004) (1474/96) (Mr Justice N. Cuschieri).

[62] *Emmanuel Borda v. Prof. Roger Ellul Micallef noe* (FH) (30 January 2003) (Mr Justice JR Micallef) (1908/01) "It does not appear that the call for applications was an internal one or open only for whoever was already lecturing at University; or that persons who were not members of the academic staff were excluded from applying.. The court holds that the plea of respondents could have been upheld if it were shown that the call for applications was only internal, or the result of a re-organization of the department concerned… If it were otherwise, then no public examination or call for applications open even to outsiders launched by a public authority, would ever be capable of being reviewed by a court of law."

[63] See *Dr Louis Buhagiar v. Prime Minister et* (n.59) where an internal appointment within the hospital structure was not deemed to be an administrative act.

[64] *Diomede Cassar v. Profs J. Camilleri ne et (FH*) (5 April 2016) (386/10) (Mr Justice JR Micallef).

[65] *Aaron Haroun v. Prime Minister et* (FH) (15 March 2001) (772/00) (Mr Justice JR Micallef); see also *Dr Sylvann Aquilina Zahra v. Marcel Pizzuto ne* (FH) (13 October 2017) (663/15) (Mr Justice M. Chetcuti).

[66] *Nikol Borg v. Permanent Secretary in Office of Prime Minister* (FH) (17 October 2002) (1829/00) (Mr Justice JR Micallef) and (CA) (27 January 2006) (1829/00).

[67] *Rita Vella v. Chief Government Medical Officer et (n. 58)* " An act made for the purpose of internal organization and management within a public authority refers and is limited to measures taken by the said

applicant who was married to a Maltese citizen was considered to be an administrative act.[68] Disciplinary proceedings against a Drydocks employee were deemed to be covered by article 469A.[69] Similarly the way an enforcement order was executed by a public authority was deemed to be such an act.[70] An order by a Department to eliminate a flock of sheep was deemed to be a reviewable administrative act.[71] In another case[72] the decision by the Attorney General, after consulting a judge of the Superior Courts in private, as to whether a bill of indictment should be issued, even after a Court of Magistrates of Criminal Inquiry had cleared the accused, was deemed to be an administrative decision subject to review under article 469A. However a decision by the Police to prosecute for a criminal offence was not.[73] Strangely enough an action to challenge a decision by a public authority that positions within a corporation could not be filled by employees who were part of the Management Council of such corporation, was deemed to be an internal organizational matter not subject to review.[74]

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authority for it to maintain certain amount of order in day to day running; so however that where such measure reaches a certain level of affecting the rights of persons, then that measure enters into the realm of an administrative act over which the courts have a power to review."

[68] *Chen Yanmei et v. Director Department of Citizenship and Expatriates et* (FH) (4 March 2014) (668/13) (Mr Justice JR Micallef): "Consequently even though the Department was always stating that the application was being processed the legal provision (art 469A(2)providing that after two months from a request, a refusal is to be presumed if no decision is taken by a public authority, is applicable."

[69] *Stephen Galea v. Frans Farrugia* et (FH) (31 May 2001).

[70] *Albert Satariano v. Planning Authority* (FH) (3 May 2004) (1721.01) (Mr Justice J. Azzopardi).

[71] *Ganni Attard v. Director General Veterinary Department* (CMSJ) (11 July 20-14) (114/12) (Magte J. Demicoli) confirmed on appeal (CA) (29 January 2016) (114/12).

[72] *Police v. Joseph Lebrun* (FH) (27 June 2006) (16/06) (Mr Justice Tonio Mallia): "This however is only a decision whereby criminal proceedings are continued against the accused but has no influence on the question of the guilt or otherwise of the person charged. The decision is an administrative one or quasi-judicial and therefore the provisions of art 6 of the European Convention or art 39 of the Constitution of Malta do not apply to it...the decision remains an administrative one which cannot be considered as having any bearing on the right to a fair hearing of the accused before an independent tribunal. The decision of the Attorney General may, in the appropriate cases be subject to review under article 469A of Chapter 12." In *Joseph Lebrun v. Attorney General* (CC) (16 September 2014) (84/13) this provision of the Criminal Code was deemed to be in violation of art 6 of the European Convention on Human Rights.

[73] *Mario Saliba v. Comptroller of Customs* (FH) (25 April 2014) (487/11) (Mr Justice A. Ellul) "If this provision (469A) were to be applied to cases where the Police decide to arraign a person in Court, a situation would be created where a civil court would review a decision whether criminal action should be taken, causing even more delays in criminal proceedings."

[74] *Anthony Gafa' v. Malta Drydocks* (n.49).

However, in earlier cases, the Courts were more cautious in this regard. In one case,[75] the Court of Appeal went so far as to say that a transfer of a public officer from one establishment to another within the public service could fall under the phrase an internal measure of organization.[76] However, since applicant had presented evidence that his transfer was effected immediately after he took legal action against the Department concerned, the Court had the right to review such action to see whether there was any justification for it, or *nexus* between the transfer and the legal proceedings. The Court therefore seems to have adopted the view that the moment abusive behaviour is alleged, the act does not remain an internal organizational measure.[77]

An act of omission may also amount to an administrative act. In one case[78] where the transport authority declined to decide a request for the issuing of licence for double-deck buses, the court held that such *inertia* or lack of decision amounted to an act which was

[75] *Denis Tanti v. Prime Minister* et (CA) (16 November 2004) (1164/95). "The ordinary courts enjoy jurisdiction to investigate whether a transfer like the one given to applicant was truly an organizational or internal management matter and if it factually results that it was so, they stop there, since they are prevented from reviewing its merits. If however, on the other hand, it results that in fact the transfer does not constitute such a measure but was only a cover up, they will exercise their functions according to article 469A of Chapter 12."

[76] In *Carmen Grech v. Prime Minister et* (FH) (6 July 2017) (1040/16) (Mr Justice JR Micallef) however the revocation of detailing of a public officer with a public corporation by the Office of the Prime Minister was deemed to be an administrative act.

[77] See *Carmen Grech v. Prime Minister et* (n.76) regarding revocation of detailing of a public officer: "If the complaint is one relating to an unreasonable exercise of a discretion or an infringement of one of the principles of natural justice or indeed an abuse of power or an exercise beyond the power laid down by law, (*ultra vires*) it becomes the duty of the Court to review such case for the matter is not simply one of internal management or organization but lies at the core of judicial review of whatever the administrative action"; see also *Dr Anthony Degaetano v. Planning Authority* (FH) (30 March 2005) (1356/01) (Mr Justice G. Valenzia) where a warning issued by the Planning Authority to one of its employees which turned out to be based on a false premise was not considered to be merely an internal measure: "No illegality or abuse of power can ever be considered as an act of internal administration" This judgment was confirmed on appeal (CA) (28 April 2008) (1356/01). See also *Dr Sylvann Aquilina Zahra v. Marcel Pizzuto ne* (FH) (18 October 2017) (663/15).

[78] *Garden of Eden Garage Ltd v. Malta Transport Authority* (CA) (28 June 2012) (474/09) "The act of decision could be one where a request is acceded to, as well as when it is refused. A refusal of a request occurs not only when the request is expressly rejected, but also when no decision is taken within two months (or within such other period as may be fixed by any particular law) from receipt by the public authority of a written request by the person requesting such a decision."

amenable to judicial review. However an act must have definitely decided the matter before the public authority.[79]

An administrative investigation board regarding behaviour by members of the Police Force, even when set up by law, was deemed to be subject to review even though the Board did not take any executive decision; but such Board could not stand as defendant in any action though the Commissioner of Police and Home Affairs Minister who were responsible for the Board's actions could.[80] The Court also decided that matters relating to the legal validity of the composition of the Board by the Minister regulated by the Police Act and actions of such Board were reviewable even though the Board could not be sued as defendant.[81] However, in another case a mere request by the Commissioner of Inland Revenue regarding a taxpayer's means and income in order then to take an executive decision regarding tax was not deemed

[79] See *Christine Borda v. Director Inland Revenue* (FH) (26 November 2015) (21/14) (Mr Justice JR Micallef): "Not every writing issued by a public authority constitutes a decision; for it to have such attributes, that writing must have definitely closed the issue and complaint by stating that that was the final opinion of the public authority regarding the complaint or request it received. See, however. *Dr T. Degaetano v. Planning Authority et* (FH) (26 February 2004) (2219/00) (Mr Justice JR Micallef): "So long as a person is given enough indications as to what the position of a public authority regarding an administrative act will be, it is not necessary that such position be formally notified to the interested party before a special action for judicial review is presented on the basis of such indications." See also *Christopher Grixti v. Mario Salerno ne* (FH) (6 December 2013) (821/10) (Mr Justice A. Ellul) where an objection by a local council to the granting of a kiosk permit by Transport Malta was not deemed to be an administrative act. See also *Falzon Service Station Ltd et pr et ne v. Enemalta Corporation et* (FH) (8 October 2015) (14231/15) (Mr Justice A. Ellul). Similarly in *Carmelo Sammut pr et ne v. Malta Transport Authority* (FH) (24 May 2017) (641/15) (Mme Justice Anna Felice) the decision by a public authority not to transfer the registration of a vehicle as, according to its interpretation of a court order. It considered this to be in breach of such order, was not considered to be an administrative act.

[80] *Elton Taliana v. Minister for Home Affairs* et (FH) (16 March 2015) (177/14) (Mr Justice JR Micallef). In its final decision on the merits (FH) (7 November 2017) the Court affirmed its right to review decisions of the Police Board on whose conclusions disciplinary proceedings against a police officer had been issued: "The review which may be requested from this court applies to an administrative decision that in any way affects the citizen, whether it takes the form of a binding decision or else that of a report on which a public authority then bases its final decision, even if that report contains the motivation on which the public authority then bases its decisions. The law does not define the word 'decision' for the purposes of defining what is covered by the term 'administrative act'. It appears that so long as the decision is not merely a communication of information, the courts may review such decision limitedly to its validity without impinging on the merits."

[81] " Both under the rules relating to judicial review in general as well as under the norms contained in article 469A of Chapter 12 of the Laws of Malta in particular, the review by this Court applies to any administrative decision which in any way affects the citizen whether it takes the form of a binding decision or one which is in the form of a report on which the authorities base their ultimate decision.

not to be an administrative act but merely a preparatory step which was not reviewable.[82] Nor is a request for payment for services considered to be an action under 469A unless it results from the challenging of an administrative act.[83]

Delegated Legislation and Judicial Review

The problem has already been mooted as regards the legal basis for review of delegated legislation. In the original draft law, delegated legislation was expressly excluded in the definition itself. Such exclusion is not, however, found in article 469A. However, the courts of law have decided that the making of regulations, orders etc. under authority of a parent act does not amount to an administrative act, and does therefore not fall under article 469A.

The Courts have decided that such actions have to be instituted under article 116 of the Constitution which provides that:

> 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.

In *Carmelo Borg v. Ministry responsible for Justice and Home Affairs*[84] the Court of Appeal dismissed the idea that the review of delegated legislation could be covered by the definition of administrative act.

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[82] *John Grech et v. Tax Commissioner* (FH) (2 March 2016) (1126/15) (Mr Justice M. Chetcuti): "The request of the Commissioner for information was made to assist him to reach a conclusion as to whether there had to be a revision of the income tax returns of defendants. This request does not in any way prejudice defendants for they are free to refuse cooperation with the Commissioner."

[83] *Marika Caruana v. Director General Law Courts* (SCT) (19 December 2002) (643/01). See also *Practical Trading Co Ltd v. Comptroller of Customs* (FH) (29 October 2002) (1693/99) (Mr Justice A. Magri) where an action for restitution of undue payment made to Government was not considered as a challenge of the validity of an administrative act, but an action under the *solutio indebito* in terms of art. 1021 and 1022 of the Civil Code.

[84] (CA) (8 November 2005) (839/05). This judgment was confirmed also in *Louis Bartolo v. Prime Minister* (FH) (30 October 2012) (74/10) (Mr Justice J.R. Pace). See also *Adrian Galea v. Minister of Finance et (*ART) (9 April 2015) (40/14) (Magte G. Vella) *Global Capital Funds Advisors Ltd v. Malta Financial Services Authority et* (FH) (15 April 2015) (409/07) (Mme Justice A. Felice), *Fish and Fish Co Ltd v. Minister Sustainable Development et* (FH) (29 March 2017) (334/16) (Mr Justice M. Chetcuti) *Mff Ltd v. Minister for Sustainable Development et (FH) (12 February 2018(329/16) (Mr Justice M Chetcuti)* and *Liquigas Malta Limited (C44954) v. Regulator for Energy and Water Services e*t (FH) (28 February 2018) (1158/16) (Mr Justice JR Micallef).

> The right of any person to request a Court to review such laws is today guaranteed by article 116 of the Constitution read in conjunction with the definition of *law* found in article 124(2) of the said Constitution (with a right of appeal as outlined in article 95(2) (e) of the said Constitution, to the Constitutional Court and not to this Court.

The Court gave two reasons why such review must be founded in the *grundnorm* of Maltese constitutional law. It mentioned the historical instance of the enactment of Act No. VIII of 1981 which excluded judicial review in certain cases. In a rather original argument it stated that had judicial review of delegated legislation been included under the common law rules for review of administrative action, the obnoxious provisions of Act No. VIII of 1981 would have excluded the scrutinizing power of the courts. Instead, the nefarious and far-reaching law did not cover the review of subsidiary legislation for the latter was based on article 116 of the Constitution. The second argument was that if review of delegated legislation was covered by article 469A, then the six month period within which action for review had to be instituted would apply and this would run counter to article 116 of the Constitution which had no such limitation of time. It also applied the *eiusdem generis* canon of interpretation to rule that when article 469A refers to the word 'order' in the definition, it is not referring to the act of issuing Orders under subsidiary legislation, but such term was related to the other words used in the definition, namely, licences, permits warrants, decisions and refusal of a claim. The word 'order' was here being used as an administrative one, not the name of a subsidiary piece of legislation.[85]

Serious objections can be raised against this interpretation of the Constitution. The Court seems to have ignored the third possibility namely that judicial review of delegated

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[85] " The word 'law' in the Interpretation Act Ch. 249 includes any document having the force of law. In other words, the word 'order' may be used as the name of legislation as for instance to substitute the word 'regulations', or it may be used in the sense of 'an administrative order' which qualifies as an 'administrative act' for the purposes of the said article 469A."

legislation falls neither under article 469A of Chapter 12 nor under article 116 of the Constitution, but under the original jurisdiction of civil courts to examine whether a power given to the Administration by the legislator has been exercised according to the letter of the law; a power which Maltese jurisprudence always founded on article 32 of the Code of Organziation and Civil Procedure (Ch. 12) which gave a residual jurisdictional power to the civil courts. Such jurisdiction stems from the separation of powers and rule of law doctrine, and the role of the judiciary in a democratic society. Prior to the promulgation of the Constitution, there had been instances where the Court affirmed its right to review delegated legislation in virtue of its innate power of judicial review.[86] Even after independence there were instances[87] of such judicial review of subsidiary legislation *without any reference to article 116 of the Constitution*.[88] Another difficulty in accepting this judgment is that if judicial review of delegated legislation is classified under article 116 of the Constitution then an appeal lies to the Constitutional Court. Why should an appeal from a judgment relating to the validity of secondary legislation on *ordinary* law grounds rather than review under the Constitution, lie to the Constitutional Court? When the Constitution allows an *actio popularis* under article 116 to challenge a law or any instrument having the force of law including subsidiary legislation on grounds *other* than human rights namely article 33 to 45 of the Constitution, it is probably referring to cases where validity is challenged on articles *in the*

[86] *Edgar Baldacchino et v. Dr T. Caruana Demajo nomine et* (CA) (26 February 1954) (Kollezz. Vol. XXXVIII.I.61) ` The exercise of an absolute discretion may be challenged before a Court if it is *ultra vires* that is to say is not exercised within the limitations of the statutory power conferring such discretion, or if such act of discretion is not exercised according to due form or by the authority competent according to law. ` In that case the Court of Appeal struck down delegated legislation which gave retroactive effect to the Comptroller of Customs to seize released goods, when the parent act did not allow such retroactivity.

[87] *Louis F. Cassar v. Prime Minister* (FH) (20 July 1988) (Mr Justice V. Borg Costanzi).

[88] See, however, Vanni Bruno: *The Ultra Vires Doctrine in the context of Maltese delegated legislation* (UOM) (LL.D Thesis) (1975): 75) wherein it is stated: "since the coming into force of the 1964 Constitution, the right to challenge the validity or otherwise of laws (which term is used in a general sense, embracing under it also subordinate legislation) is akin to the *actio popularis* in Roman law wherein no specific interest was required to be shown by the plaintiff." The author then quotes art. 116 (then 119) of the Constitution to prove his point. The author refers to the case of *Benedict Dingli LP v. G. Borg Olivier ne* (CA) (5 April 1963) wherein it was stated that the *actio popularis* is not admitted except where the law specifically allows it.

Constitution apart from Chapter IV; which explains why in such cases the appeal lies to the Constitutional Court.[89]

A Third Way?

In support of a third way is the fact that between the coming into force of the Independence Constitution in 1964, and consequently of article 116, and the entry into force of article 469A of Chapter 12 in 1995, no court ever based its review of delegated legislation on article 116 of the Constitution. Why not may one ask? Instead the courts relied on their fundamental innate power to review subsidiary legislation which is not within the parameters of the parent act. If the legislature delegates legislative power to the executive branch, the latter must abide by such delegation and not act beyond its remit. Nor was common law ever quoted as the source of the power to strike down *ultra vires* subsidiary legislation. Such a solution, by avoiding reference to article 116, would solve two issues: (a) that the Constitutional Court is not seized of a purely non-constitutional matter: (b) and that, as is the case with any action for judicial review(even human rights review under the Constitution), juridical interest in cases under ordinary law, must be proven by plaintiff. It does not make sense that all public law actions need juridical interest on the part of plaintiff except the challenging of subsidiary legislation. If anything, as will be submitted later,[90] the notion of juridical interest should be expunged from public law all together or at least given a far more liberal interpretation than today.

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[89] See *Dom Mintoff v.George Borg Olivier* noe (CC) (22 January 1971) where an amendment to an un-entrenched provision of the Constitution relating to general elections was challenged as being passed in breach of the Standing Orders of the House of Representatives; *Griffiths v. Prime Minister* (CC) (31 July 1978) and *Vassallo v. Prime Minister* (CC) (27 February 1978) where subsidiary legislation issued by the Public Service *Commission* was challenged as being in breach of its powers and functions under article 115 of the Constitution; and *Depasquale v. Prime Minister* (CC) (4 September 2000) (Kollezz. Vol. LXXXIV.I.308) where an un-entrenched provision of the Constitution setting out the powers and functions of the Commission for the Administration of Justice was challenged as going against the entrenched provisions relating to discipline of the judiciary contained in Chapter VIII of the Constitution.

[90] 132 *et seq*.

Conclusion

To put it mildly, the legal sources for different actions under judicial review are confusing and baffle the mind of practitioners and scholars. There are three separate sources: article 469A of the Code of Organization and Civil Procedure (Ch. 12) for judicial review of administrative acts, article 116 of the Constitution for, *inter alia*, judicial review of delegated legislation, and article 32 of Ch. 12 along with English common law rules of judicial review for revision of decisions of administrative tribunals. This mosaic-like texture of legal sources is not justified: nor is it justified that fifty years after Independence, English common law remains a direct source (rather than merely a source of interpretation) of Maltese administrative law.

To further illustrate the bizarre consequences of this triple classification of judicial review under different headings and with separate norms regulating each sector, one must also consider the different time limits applicable for each action, depending on the type of review. If the judicial review relates to *an administrative act* under article 469A, the law is clear: the action has to be submitted within 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.[91] If the judicial review is directly based on English common law, such as judicial review of decisions of *administrative tribunals* or pre-1995 administrative acts then the six month period does *not* apply and the traditional thirty years period enshrined in article 2143 of the Civil Code comes into play.[92]

If the judicial review is of *delegated legislation*, then since case law has determined that such action falls under article 116 of the Constitution, not only is there no need to prove juridical

[91] Art. 469A (3) Ch.12.

[92] See *Malcolm Pace v. Dr. Carmelo Mifsud Bonnici pr et ne (*FH) (15 July 2015) (1146/13) (Mr Justice A. Ellul) and article 2143 of the Civil Code*:* ***Limitation of real, personal or mixed actions***.
2143. All actions, whether real, personal, or mixed, are barred by the lapse of thirty years, and no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith.

interest, but there is no time limit at all. Applying by analogy the jurisprudence of the Constitutional Court that since the enforcement section of the human rights provisions in the Constitution namely article 46, does not refer to any time limit then there is no prescription applicable in human rights cases,[93] one can argue that the *actio popularis* envisaged in article 116 is similarly not circumscribed by any time limit and therefore no prescription can block its exercise.

Stating that this is an unhappy state of affairs is too much of an understatement. The time has indeed come for the legislature to codify, as it has done with article 469A and the rules of review of administrative acts, all rules of judicial review under one legal roof: namely the sub title of *Judicial Review of Administrative Action* in Chapter 12 or the enactment of a new Administrative Code. Difficulties, unchartered waters, conflicting judgments, fragmentation of actions against the Administration have marked the subject of the application of judicial review in Malta. The strongest obstacle, however, to a full adoption of the English common law norms for judicial review was, *the iure imperii/ iure gestionis* doctrine which for decades, until 1972, prevented the courts from reviewing certain sovereign actions of the Administration or award damages to an injured party, which shall be examined in the next Chapter.

[93] See *Architect Joseph Barbara v. Prime Minister* (CC) (7 October 1997) (Kollezz. Vol. LXXXI.I.39). "In the absence of a statutory provision which regulates the matter, an action stemming from an infringement of a fundamental right is not subject to any norm of extinctive prescription"; see also *Dr L. Gonzi noe v. Electoral Commission* (FH) (5 February 2015) (26/13) (Mme Justice J. Padovani Grima).

CHAPTER IV

Obstacles to Review
The *Iure Imperii – Iure Gestionis* Doctrine in Malta – 100 years of Ambivalence

Development of Doctrine*: Busuttil v. La Primaudaye*

It all started with a raid by the Police at a silversmith shop and its closure pending criminal proceedings against the owner.[1] The owner, Busuttil, claimed that during the search and the time that the premises were under the custody of Police, some objects , including cash and gold dust, had gone missing to his detriment. He claimed damages against the Police represented by Commissioner of Police, La Primaudaye. The court of first instance decided to import and apply the so-called continental doctrine of *iure imperii* which it described as follows:

> "One must consider the State under two capacities; namely, a government exercising sovereign power, entrusted with the passing of laws, and the taking all necessary measures so that such laws be applied, empowered to distribute justice, maintain order and security between citizens, protecting their moral intellectual and material interests; and the State as a government which is a legal, or moral and civil person, having its own assets, property, interests, credits and debits which should not be confused with the assets, property, interests, credit and debits of the individual who compose the State, which may buy, sell, enter obligations, stand in judgement, in brief, do all those acts of civil life which are compatible with its nature of juridical person, from which are created such relationships of rights and obligations which are regulated by the Civil Code.".[2]

Once an act of the administration was classified as an act *iure imperii,* government could not be sued for damages for any harm caused as a consequence of such act, but one had to sue *personally* the individuals, agents or employees of the State who had caused such injury. So,

[1] *P. Busuttil v. C. La Primaudaye noe* (FH) (15 February 1894) (Kollezz. Vol. XIV 94) (Mr Justice A. Chapelle) confirmed on appeal by the Court of Appeal on 28 May 1894(Kollezz. Vol. XIV.301).
[2] This distinction is usually referred to *iure imperii* when the State acts in virtue of its sovereign power, and *iure gestionis* in other cases.

in spite of the fact that the Civil Code recognized vicarious responsibility by the State for acts of its employees, if it was proven that the employer was negligent in recruiting and selecting employees (*culpa in eligendo),* a blanket immunity from damages was granted to the State in the exercise of its sovereign powers. This immunity from damages was in most cases extended to cover immunity from court scrutiny.

In *Farrugia v. Borg Olivier noe*[3] the Civil Court First Hall was adamant in its view that acts done iure *imperii* were exempt from court scrutiny and therefore government could not be sued for damages resulting in this case relating to the determination of street level by the Public Works Department. At the same time the Court proclaimed that the courts had the right to examine whether the act, even if issued *iure imperii,* was within the competence of the authority which issued it and whether it was issued in a correct procedural form.[4] In *Attard Montalto v. Cuschieri noe*[5] an expropriation order having been issued *iure imperii,* was not reviewable by a court of law including its execution; except for the usual *caveat* as regards competence and procedural regularity. In that case plaintiff complained that the actual Order had not been notified to him, while Government had taken possession of the land without commencing any proceedings relating to its expropriation except the publication in the Government Gazette of the relative Order. Plaintiff complained of the execution of the Order or the lack of it rather than the Order itself. The Court's reply was:

> Undoubtedly this execution is part and parcel of this right and if this right, *in its exercise is not subject to review,* it is beyond explanation how one can argue that the method and timing of how the relative acts are executed are. These form an accessory part which according to the rule should follow the principal one. (Emphasis added)

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[3] *Walter Farrugia v. Dr G. Borg Olivier noe* (FH) (.13 March 1953) (Mr Justice A. Magr) (Kollezz. Vol. XXXVII.II.861).

[4] *Guza Formosa v. Joseph Ellul Mercer ne* (FH) (28 June 1957) (Mr Justice Alberto Magri) (Kollezz. Vol. XLI.I.1068) "the courts have always the power to review whether the act was performed by the competent authority and in the form required by law."

[5] *Gioacchino dei Baroni Attard Montalto v. Edgar Cuschieri nomine* (FH) (27 June 1953) (Mr Justice A. Magri) (Kollezz. Vol. XXXVII.I.749).

Lowell v. Caruana

The doctrine was given some blows such as in the *Cassar Desain* case ,[6] but it always re-emerged. In that case the Court of Appeal, while admitting that the Courts had the power and discretion to apply English common law, ruled that where there was an express provision of law , such provision, in this case the *culpa in eligendo* principle found in the Civil Code applied, shunning the *iure imperii* doctrine. The latter doctrine met its fatal destiny and final interment in the *Lowell v. Caruana noe*[7] case. In that case the Civil Court First Hall while refusing to apply the doctrine describing it as '*antikwata*' commented that:

> Though the issue has been raised by Crown counsel, the Court shall not apply it whatever the consequences and blindly accept past precedent, which after all is not set in the same context, without seriously scrutinizing such doctrine in the light of more liberal thought of the present times and the criticisms which the said doctrine was subjected to in those countries which may offer the best example and model, as distinct from others whose system, thoughts and values are not consonant with ours….

Ouster Clauses

One of the main differences between constitutional and administrative review is that while the court's right to scrutinize the constitutional validity of acts by the Executive is entrenched and enshrined in the Constitution and cannot be changed except by a qualified majority in the House, the same cannot be said of administrative law review which is based on ordinary law which may be altered at will by Parliament.

The tradition at least in the Anglo Saxon world, particularly in the United Kingdom where administrative review is the only kind of proper judicial review, is that the judiciary will

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[6] See *Francesco Camilleri v. Lorenzo Gatt nomine* (FH) (17 May 1902) (Kollezz. Vol. XVII.II.171) and Marquis James *Cassar Desain v. James Louis Forbes* nomine(CA) (7 January 1935) (Kollezz. Vol. XXIX.I.43).

[7] *John Lowell ne et v. Dr Carmelo Caruana nomine et* (FH) (14 August 1972) (Mr Justice M. Caruana Curran).See also Kevin Aquilina "*Rationalising Administrative Law on the Revocation of Development Permissions*" BOV Review No 34 August 2006; Natasha Buontempo: *Governmental Liability in Tort and in cases of Judicial Review* (2004)(UM MA in Law Thesis) and John M. Vassallo *Lowell vs Caruana and Governmental Liability in Malta* Id Dritt Law Journal (Ghaqda Studenti Ligi) (GHSL) Volume VIII pp 80-93)

resist by all means such exclusion of review; usually through interpretation and construction of statutes; sometimes as happened in Malta by deliberately or accidentally ignoring such ouster provisions.[8]

In the United Kingdom the *Anisminic* case[9] was a clear example of the courts' resistance to such exclusion. The usual phrases presaging such exclusion are worded in the following manner: '*as the Minister in his absolute discretion may deem fit*' or '*the decision shall not be enquired into in a court of law;* '*or no court shall have jurisdiction to enquire*'. In the *Anisminic* case the statute provided that the decisions of the Foreign Compensation Commission, regarding the awarding of compensation to companies which had suffered financial and material losses during the 1956 Suez crisis, were not to be 'called in question in any court of law.'[10] In spite of such an ouster clause, the House of Lords decided that such an immunity from review covered *only errors within jurisdiction*; so that if the error of law was such that it touched on jurisdiction, or was manifestly unreasonable or in breach of the rules of natural justice, then such clause did not prevent judicial review, for it would be unlawfully exceeding jurisdiction. Similarly where a statute provided that the decision of a body be "final and conclusive" such clause did not exclude review when the error of law was such that went to its jurisdiction;[11] even though Lord Denning in that same case rejected this distinction between jurisdictional and non-jurisdictional error of law asserting judicial review whenever the error of law was the basis 'on which the decision of the case depended'.[12] The

[8] *Mary Grech v. Minister for Development of Infrastructure (CA*) (29 January 1993). See also Anna Elliason et *Ousting the Ouster Clause* in Judicial Review Journal (2017) (Routledge) (Hart Publishing Oxford) Vol. 22 No. 3: 263-76) as regards more subtle means by which Parliament has ousted jurisdiction e.g. narrow time limits.
[9] *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, [1969] 2 WLR 163.
[10] S. 4(4) Foreign Compensation Act 1950.
[11] *Pearlman v. Keepers and Governors of Harrow School* (1979) Q.B. 56.
[12] "I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have the power to put them right...The way to get things right is to hold thus: **No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends."** (emphasis added).

position today appears to be that at least as regards review of decisions of tribunals (but not of courts of law) such distinction in the United Kingdom has been abolished.[13]

Act No. VIII of 1981

The most blatant example of exclusion of judicial review by statute in Malta occurred with the enactment of Act No.VIII of 1981 where review was limited by statute only to breaches of express provisions of a law; in spite of such general exclusion as shall be seen, the courts still affirmed their right to scrutinize and review; in some cases by merely ignoring such provision; in other cases by giving a construction of legal provisions in such a way as to resuscitate judicial review on the basis of such interpretation. In the *Ellul Sullivan* case,**[14]** in spite of the fact that there was no legal provision requiring the Shipping Registrar to give reasons for the cancellation of Maltese registered ships, the Court interpreted statute which required that the owner be allowed to make representations against such cancellation, as necessarily meaning that reasons had to be given to base one's representations on. Again in another case,**[15]** the Court of Appeal went to great lengths to interpret a particular provision as not allowing any discretion to a public officer, and therefore, linking Act No. VIII to 1981 to the exercise of discretion dismissed the respondent's plea on the grounds that Act No. VIII applied only to where discretion was granted by law; although in that case the fact that the plea was raised by respondent only at the appeal stage probably militated in favour of such dismissal.

[13] In *Re Racial Communications Ltd* (1981) A.C. 374; see *also O` Reilly v. Mackman* (1983) 2 A.C. 237 wherein Lord Diplock stated that "if a tribunal...mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine."
[14] *Anthony Ellul Sullivan v. Lino C. Vassallo et* (CA) (26 June 1987) (Kollezz. Vol. LXXI.II.356).
[15] *Dr Austin Sammut nomine v. Comptroller of Custom* (CA) (30 November 1993 (Kolezz.Vol. LXXVII.II.376).

Judicial Review of Actions by Constitutional Commissions and Authorities

The Constitution establishes certain Commissions and Authorities for particular purposes; most of them are declared by the Constitution itself to be independent and not subject to any direction or control of any person or authority. In some cases, the Constitution also provides that any matter decided by such institutions may *not* be challenged in any court of law.

In spite of such apparently wide and absolute exclusion of judicial review, the courts have circumscribed and curtailed such provision. In one case[16] where political discrimination was alleged, the courts affirmed their right to investigate such claim against the Public Service Commission in spite of such ouster clause contained in article 115 of the Constitution.[17] What is more pertinent to our study is that on at least three occasions, the Courts have stated that such exclusion does not prevent a court of law from enquiring whether the Commission observed its own rules of procedure.[18]

Again the fact that the Constitution proclaims that the Broadcasting Authority is not subject to any direction or control from any outside entity, body or person does not mean that such

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[16] *Vincent Galea v. Chairman PSC et* (CC) (20 February 1987) (Kollezz. Vol. LXXI.I.1).

[17] *Article* 115of the Constitution:
The question whether -
(a) the Public Service Commission has validly performed any function vested in it by or under this Constitution;
omissis
shall not be enquired into in any court.

[18] *Dr F. Cassar v. Chairman Public Service Commission* (FH) (12 October 1976) (Mr Justice G. Schembri); *John Bundy et v. Broadcasting Authority* (CA) (31 May 2002) (2850/96); *John Bundy v. Broadcasting Authority* (CC) (28 June 2002 (2850/96) ; *D Gatt v. Prime Minister et, I Portelli v. Prime Minister et and Michael Buttigieg v. Prime Minister* et all decided by the Court of Appeal on 6 September 2010 (154/01, 1626/01 and 1713/01) respectively); *Chairman Public Broadcasting Services Ltd v. Broadcasting Authority* (CA) (15 January 2003) (738/02); *Kevin Falzon v. Prime Minister et* CA) (6 July 2007) (276/00); *Alan Fiott v. Public Service Commission* (FH) (27 June 2014) (Warrant No 803/14) (Mr Justice J. Zammit McKeon) and *Dr Joseph Cachia Fearne v. Permanent Secretary Ministry Resources and Infrastructure* (FH) (20 October 2005) 106/03) (Mr Justice T. Mallia).See, however, *Dr Martin Balzan v. Prime Minister et (FH) (5 September 2000) (3088/00)* (Mr Justice JR Micallef) where the Court rejected a request to issue a prohibitory injunction against the Prime Minister since the issue whether he had acted in accordance with the recommendation of the PSC in a particular promotion exercise could not be inquired in a court of law.

authority is excluded from the orbit of judicial review. In one case[19] the Court of Appeal ruled that

> The Court cannot agree with such submission... first of all, in its opinion, article 118(1) (of the Constitution) is intended to strengthen the autonomy of the Authority in the exercise of its duties given by the Constitution and the law; in other words, this Court understands that the provision of the supreme law of the land, is intended to allow the Authority to perform its duties and functions without any interference. However, this should certainly not mean that the Authority can do what it pleases beyond any control putting the Authority in a position above the supreme law of the land.

Indeed, article 124 (10) of the Constitution provides that

> No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding any court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution or any other law.

This point was completely overlooked in one case[20] where an attempt by a political party to challenge the drawing of electoral boundaries by the Electoral Commission as being an exercise in gerrymandering was rejected by the Court on the ground that the Electoral Commission was not subject to the control of any authority, not even the courts of law. Subsequent cases however, have affirmed the power of the courts of law to review any decision of the Commission both under the Constitution and the General Elections Act.[21]

In view of the fact that the Broadcasting Authority although established by the Constitution is under the Broadcasting Act (Ch.350) a body corporate established by law and therefore

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[19] *Chairman PBS Ltd et v. Broadcasting Authority et* (CA) (15 January 2003) (711/02).

[20] *Michael Vella noe v. Emmanuel Farrugia noe* (FH) (13 April, 1987) (Kollezz. Vol. LXXI.III.639) (173/87): "In the application of the law, the Electoral Commission is not subject to the direction or control of any person or authority, this latter phrase "any person or authority" certainly including the courts." The Court did affirm its right to scrutinize such Commission if it broke the law, but went on to add that reviewing the boundaries delineation exercise would be beyond its jurisdiction, for it would be then substituting its discretion for that of the Commission. See, however, *Environmental Landscapes Consortium Ltd v Data and Information Commissioner et* (FH) (24 May 2018) (764/160(Mr Justice JR Micallef) where similar wording in the Data Protection Act (Ch. 440) was not considered to oust judicial review of the actions of the Data and Information Commissioner.

[21] *Dr L. Gonzi noe v. Electoral Commission* (CC) (25 November 2016); *Ancel Farrugia Migneco v. Electoral Commission* (CC) (22 September 1998) (Kollezz. Vol. LXXXII.I 225); *Nazzareno sive Reno Calleja v. Electoral Commission* (CC) (22 October 1998) (Kollezz. Vol. LXXXII.I, 238).

automatically considered a public authority under article 469A (Ch.12) and that the Electoral Commission is similarly considered as a public authority, these cases illustrate the court's resilience and their resistance to any ouster of even administrative law review, let alone constitutional.

"Decision is final"

Even where administrative tribunals are given the exclusive power to decide a case and their decisions are statutorily described as final, this does not prevent the courts of law from, inquiring into the legal validity of the tribunal's decisions.[22]

Prerogative

Prerogative has sometimes been used to preclude judicial review. Prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law makes no provision, such as the war prerogative of requisitioning property for the defence of the realm, or the treaty prerogative of making treaties with foreign powers.

Therefore in one case[23] in the United Kingdom relating to whether the keeping of the peace was an exclusive prerogative of the Government, or else reduced by a statute setting up the Police Force and in particular the Police Act 1964, the Court of Appeal held that

> a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest and, particular statutory provision apart, that it has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces.

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[22] See *Paul Washimba v. Refugees Appeals Board et* (CA) (28 September 2012) (65/08): "It is a principle of law however that the intrinsic jurisdiction of the courts relating to judicial review cannot be erased by any law, for it is not acceptable that the legislator could ever permit that a decision be taken in breach of the rules of natural justice or contrary to law. (See as well *Saed Salem Saed v. Refugees Appeals Board et* (CA) (5 April 2013) (1/08) and *Abrehet Beyene Gebremariam pro et noe v. Refugees Appeals Board et* (FH) (12 January 2016) (133/12) (Mme Justice A. Felice).

[23] *Regina v. Secretary of State for the Home Department, ex Parte Northumbria Police Authority*; CA 18 Nov 1987. (1989) 1 QB 26.

The issue of revision of government prerogative powers came up in a case[24] relating to a granting of a license for Laker Airways to start a cheap service from London to New York. Such license had to be issued by the independent Civil Aviation Authority. At that time, under the Bermuda Agreement of 1946 between the UK and the USA, the UK Government had also to designate the carrier. Both licence and designation were granted. Following a change in government and a revision of aviation policy, Government withdrew its designation under the Bermuda Agreement rendering the plaintiff's license useless and giving a monopoly to the state owned British Airways. The Secretary of State for Aviation argued that he acted by virtue of his prerogative which was not reviewable by a court of law. The argument ran as follows: the government has a prerogative power to conclude treaties; the UK government had signed such a treaty with the United States, namely the Bermuda agreement, as a consequence of which it could block such project by withdrawing the designation for transcontinental flights to the U.S. Lord Denning remarked that

> The Attorney General contended that the power of the Secretary of State 'to withdraw' the designation was a prerogative power which could not be examined in the courts. It was a power arising under a treaty which, he said, was outside the cognizance of the courts. The law does not interfere with the proper exercise by the Executive in those situations; *but it can set limits by defining the boundaries of the activity; and it can intervene if the discretion is exercised improperly or mistakenly...* (Emphasis added)

The Court of Appeal found the government's direction to be *ultra vires*: under the relevant legislation, the government was empowered to offer advice – 'guidance' – but not to direct. Unlike Lord Denning, the Court preferred to base its decision on review of power under legislation rather than under prerogative.[25]

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[24] *Laker Airways v. Department of Trade* (1977) QB 643.
[25] *See* De Smith: Judicial Review of Administrative Action (1980) (Fourth Ed) (Sweet and Maxwell) : 287.

In another case,[26] a scheme for compensating victims of crimes of violence was promulgated under prerogative powers. The Home Secretary appointed the Criminal Injuries Compensation Board, which was to award *ex gratia* payments and their decision was not subject to judicial or ministerial review. The High Court through Lord Parker CJ stated

> I can see no reason either in principles or in authority why a board set up as this board was set up, is not a body of persons amenable to the jurisdiction of this court. True it is not set up by statute but the fact that it is set up by the executive government i.e. under the prerogative, does not render its acts any less lawful.

Application to Maltese Law

Applying such principles to Maltese law, one may ask: are there matters not excluded by the *caveat* in favour on internal measures of administration and organization, which are *not* mentioned in the definition of administrative act, but which would still be covered by such definition? Or excluded by interpretation? The power of any Government in Malta to conclude treaties, establish structures for defense, security or any other purpose or establish diplomatic [27] or economic ties with any country or organization, are not covered by legislation, except in certain situations where such treaty necessarily implies change in legislation and such prerogative is limited by statute. Such powers stem from an innate power granted by the Constitution for the Executive to govern.[28]

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[26] *R. v. Criminal Injuries Compensation Board ex p. Lain* (1967) 2 QB 864; 3 W.L.R. 348.

[27] See *Council of Civil Service Unions v. Minister for the Civil Service* (the GCHQ case) [1985] 1 AC 374 (1985) – "many of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts." (per Lord Fraser, at p. 398); In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt* (116 ILR 607 (1999); The applicant had sought an order that the Foreign and Commonwealth Office (FCO) should make representations to the President of the Yemen relating to a criminal trial in progress in the Yemen. Lightman J said: "The general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly where such interference is likely to have foreign policy repercussions." See also *R. (on the application of Campaign for Nuclear Disarmament) v. Prime Minister*, [2002] EWHC 2777 (QBD) where the Committee for Nuclear Disarmament requested an advisory opinion on a Security Council Resolution regarding the UK Government decision to go to war in the Second Gulf War. Simon Brown LJ: "There was no foothold in domestic law for any ruling to be given on international law."

[28] Art 79(2) of the Constitution: "The Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to Parliament."

So long as Maltese norms of judicial review were based on English common law, such prerogatives could be pleaded to exclude review; but once these norms have been weaned from English common law and encapsulated in a written law, one may argue that statute, namely article 469A of Chapter 12 has supervened over any residual prerogatives, and that article 469A and its definition of administrative act by a public authority should form the sole basis and criterion to decide what is reviewable and what is not.

The question therefore remains open whether, after 1995, any Maltese court of law would dare to review such power relating to maintenance of peace or order or the execution of foreign policy which under English law are covered by prerogative. Would it argue that such review would be against the separation of powers doctrine and interfere with the sphere of jurisdiction and decision of the Executive? or that once article 469A contains no exception in favour of government prerogatives, such areas of review are covered by the new statutory grounds of judicial review?

The matter has arisen once[29] since 1995, in a case instituted by the Ombudsman against the Minister responsible for the Armed Forces where the respondent Government alleged the existence of prerogative precluding any court review of matters related to the Armed Forces. However, since the law, namely the Ombudsman Act (Ch. 385) made it clear that the Ombudsman had jurisdiction to inquire into promotions in the Armed Forces, there was no point in enquiring more into the matter because statute always prevails over prerogative. The Court of Appeal remarked

> If the State by means of a statute invests the Ombudsman with powers regarding appointments, promotions, salaries and pension rights of officers and members of the Armed Forces, then the matter whether these are acts *iure imperii* or acts of State does not make any difference to the legal position.

[29] *Chief Justice Emeritus J. Said Pullicino v. Minister Justice and Home Affairs et* (CA) (31 October 2016) (164/15); see also *Dr Alexander Schembri ne v. Identity Malta Agency* (FH) (12 December 2017) (834/16) (Mr Justice JR Micallef).

However, if the matter were to arise in any appropriate case, a probable compromise to the quandary would be that while the acts of the Administration as such cannot be put into question, if the decision has, to quote Lord Diplock's statement: '*consequences which affect some person (or body of persons) other than the decision-maker, either by altering rights or obligations of that person which are enforceable by or against him in private law; or by depriving him of some benefit or advantage'*[30] then such act would be reviewable.

[30] *CCSU v. Minister for Civil Service* (12985)AC 374); see also *Regina v. Foreign Secretary ex parte Everett* CA ([1989] 1 QB 811, Bailii, [1988] EWCA Civ 7, [1989] QB 811, [1989] 2 WLR 224) a decision taken under the royal prerogative whether or not to issue a passport was subject to judicial review, although relief was refused on the facts of the particular case.

CHAPTER V
Procedural issues in Judicial review Actions

Juridical Interest

In private law the notion of juridical interest is a pre-requisite for the filing of any action under civil law. In civil matters only the parties who have a direct, actual and immediate interest of a juridical nature can propose an action. This interest has been described by the Maltese courts as follows

> For several years our Courts have defined the elements constituting the interest of plaintiff in a cause as being three: that is to say, the interest must be juridical, it must be direct and personal, and also actual...[1]

To what extent, however, is this notion extended to public law? The Constitution requires that human rights actions have to be instituted by a person against whom the breach has been directed since article 46 of the Constitution speaks of a contravention *in relation to him*. Non-human rights actions which do not fall under the *actio popularis* provision of article 116 of the Constitution also require juridical interest.[2]

The courts in Malta have not departed from a blind application of this notion also in public law actions.[3] As has been pointed out,[4] in constitutional proceedings this can well render certain constitutional provisions futile and useless. The same application has occurred in

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[1] *Emilio Persiano v. Commissioner of Police* (FH) (18 January 2001) (1790/00) (Mr Justice JR Micallef).

[2] See *Darryl Grima v. Prime Minister* (FH) (17 June 1988) (Warr.926/880(Mr Justice J. Filletti) *Saviour Balzan v. Prime Minister* (FH) (23 June 1988) and *Fr Dionysius Mintoff v. Prime Minister* (FH) (24 June 1988) (Warr.961/88) (Mr Justice V. Borg Costanzi).

[3] See *Socjeta' Filarmonika La Stella v. Commissioner of Police* (CA) (19 July 1997) (136/97) (Kollezz. Vol. LXXXI.II.625) where the Court of Appeal ruled that, in a judicial review action under art.469A, the plaintiff band club had no juridical interest in the letting of o fireworks during the feast of St George in Gozo, since the applicant for the permit with the police had been the fireworks manufacturer and not the band club which organized the outdoor festivities." and *Dr Alfred Grech ne et v. Malta Environment and Planning Authority* (CMSJ) (7 December 2011) (105/06) (Magte J. Demicoli); *Dr Alfred Grech ne v. Alex Cassaer et* (CMSJ) (17 January 2012) (54/06) (Magte J. Demicoli); *Amadeo Barletta v. Malta Financial Services Authority* (FH) (23 April 2013) (276/12) (Mr Justice JR Micallef);*George Felice et v. Keith Attard Portughes e*t (CA) (30 September 2016) (502/14); *Zeynep Buhagiar v. Director Departmnet of Citizenship and Expatriates* (FH) (11 May 2017) (1143/15) (Mr Justice M. Chetcuti) and *Joseph Gheiti v Authority for Transport in Malta* (FH) (24 May 2018) (923/12) (Mr Justice JR Micallef).

[4] See Tonio Borg *Juridical Interest in Constitutional proceedings (*GH.S. L Journal Online) (17 February 2017).

judicial review cases. Consequently in one case[5] where an environmental non-Governmental Organisation (NGO) brought an action in the Civil Court First Hall against the Planning Authority and the owners of a development for a declaration that the permit granted had lapsed and that there was an illegal development on site which justified a revocation of such permit, the court of first instance ruled that the NGO, in this case the *Ramblers Association*, had no juridical interest to propose the action. It stated that:

> From the statute of the association it results to this Court, from the nature of the association, that is to say, an apolitical voluntary non-governmental organization and also the aims for which it was constituted, that these aims and objectives, laudable in general though they are in their purpose, cannot be considered as constituting a right for the purposes of juridical interest. For the plaintiff association to have been able to propose the current action, it had as a pre-requisite to prove that it was acting to protect itself against a breach of its own rights.

The Court reiterated that:

> With the exception of the *actio popularis,* any action without distinction has to be gauged by the requirement of juridical interest. Even in actions of a constitutional nature or under the Convention, such interest is the core basis of the action.[6]

This assertion is highly debatable.

The applicant association rightly pointed out that under planning legislation it was allowed to object to a development permit and if it registered its interest it could even make submissions and file an appeal to a special administrative board. If this was allowed under planning legislation, it did not make sense that it could not also propose an action under article 469A

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[5] *The Ramblers Association of Malta v. Malta Environment and Planning Authority* (FH) (6 March 2012) (228/10) (Mr Justice J. Zammit McKeon).

[6] The court was following the line set by the case of *Benedict Dingli PL v. G. Borg Olivier ne* (CA) (5 April 1963) wherein it was stated that: "In the modern legal system, the popular action is no longer admissible except in the cases expressly specified by law." For a detailed study of Third Part Appeals in development permit applications see Kevin Aquilina : *Development Planning Legislation :The Maltese Experience* (1999) (Mireva Publications Chapter 11 pp 351-386, and in particular *Architect Austin Attard Montaldo v.Chairman Planning Authority* (CA)(20 August 1996)(Appeal No 433/94) wherein it was decided that third parties could appeal from a grant of development permission .

for "lack of juridical interest." The Court while admitting that according to law the plaintiff association could *intervene* in proceedings before the planning institutions; this did not exonerate it from proving juridical interest if it *proposed* an action under article 469A.[7]The Court rightly pointed out that even in human rights actions, juridical interest is required. This is true but only because the Constitution and the European Convention Act expressly require it.

This judgment was reversed on appeal,[8] but not because the Court of Appeal jettisoned the juridical interest doctrine, but because EU legislation namely Directive 2003/35, applicable to Malta, in matters relating to environment-related permits, granted a *locus standi* to non-governmental organizations. Consequently, the reversal was due to an application of an EU norm, rather than an abandonment of the general rule, applicable also to public law actions, of the juridical interest requirement.[9] Indeed, the Court of Appeal seems to have reaffirmed the notion of juridical interest, but exempted the association from such requirement because a legislative provision emanating from EU law, allowed similar associations from proposing such an action; an exception which therefore reaffirmed and proved the rule that, were it not for the EU specific directive in this special area of law, the notion of juridical interest, as strictly applied in private law, would have prevailed.

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[7] "Therefore this Court states that there should be no special rules in this case or a dispensation from the juridical interest as traditionally conceived in legal doctrine (here the Court is quoting from what was submitted by plaintiff association). This Court considered in depth the references which the plaintiff association made and states that it found no legal foundation in the plaintiffs' claims that in the kind of action proposed by it, the requirement of juridical interest must assume a more liberal trend which reflects the exigencies of protection which the action itself intends to pursue." See also *Dr Michele Martone pr et ne v. Raymond Gatt ne et* (FH) (15 June 2010) (1099/06) (Mr Justice JR Micallef).

[8] (CA) (27 May 2016). The case was sent back to the First Hall which decided on the merits against plaintiffs (*The Ramblers Association of Malta v. Malta Environment and Planning Authority*) (14 December 2017) (228/10) (Mr Justice J. Zammit McKeon).

[9] See also *Flimkien Ambjent Aħjar et v. Malta Environment and Development Authority* (FH) (22 July 2016) (Warrant No. 935/16) where although the plaintiffs were declared to enjoy juridical interest for the same reasons, they could not request the prohibition of the holding of a meeting of the organs of MEPA to decide a planning permit case but could only challenge the validity of an executive decision after it is taken by the competent authorities.

Interpretation of Juridical Interest by the European Court

However, one should note that the European Court of Human Rights has been much more liberal than the Maltese courts in interpreting such juridical interest, that is to say, that one has to be *a victim.* For instance, in one case[10] it decided that applicant had the right to seek recourse before the European Court to challenge the mere existence of secret measures, or of legislation which allowed such measures, without the need of proving that such measures had been applied in his regard. Other decided cases require a reasonable likelihood that one becomes a victim. Consequently when in Ireland an injunction by the Supreme Court prohibiting information to pregnant women about abortion services outside Ireland was challenged, the European Court allowed an association of women of child bearing age to institute an action as victims.[11] Similarly in another case the European Court decided that legislation prohibiting adult homosexual acts in private could be challenged by applicant even though he had not been subject to any measure of implementation of such laws.[12] Again, in another case applicants were allowed to challenge interception of communications and surveillance in Bulgaria based on legislation which gave wide powers to public authorities, even though there was no evidence that such surveillance measures applied to plaintiff association.[13]

A Matter of Constitutional Significance

The question is not without its constitutional significance. Blocking access to a court of law by limiting public law actions to persons who have direct, actual, juridical interest is

[10] *Klass v. Germany* (A 28(1978) 2 EHRR 214 para 34 PC.
[11] *Open Door and Dublin Well Women v. Ireland* (A246 (1992) 15 EHRR 44 para 41 PC.
[12] *Dudgeon v. United Kingdom (EcrtHR) (23 September 1981)*A 45 (1981) para 4.
[13] See *Association of European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (EcrtHR 28 June 2007) (62540/00). The Court accepted that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting them, without having to allege that such measures were in fact applied to him or her. See also Karen Reid *A Practitioner's Guide to the European Convention on Human Rights* (5th Ed.) (2015) (Sweet and Maxwell) 46.

indirectly allowing the Executive to act with impunity; besides the courts would be abdicating their role of maintaining the rule of law limiting themselves only to the redress of individual grievances.[14] The question also raises human rights issues for if, in any particular case, it can be shown that there is no access to a court by any one, owing to the strict application to the case of the juridical interest notion, one can argue that such lack of access amounts to a breach of article 39 of the Maltese Constitution and 6 of the European Convention on Human Rights.

It is being submitted therefore, that if the courts are to apply the notion of juridical interest at all to judicial review in public law, they should do so in a more liberal fashion than when they apply it in private law. If the courts continue to blindly follow the strict dictates of juridical interest as in private law, the consequences from a legal point of view can be that the public administration is not held to account. Consider, for instance, the provision under article 469A which prohibits a public authority from doing anything against the law. Applying strictly this notion of juridical interest, this means that a proposer of an action under article 469A must prove that the prejudice arising from such contravention must be in *relation to him*. This is rarely the case. A planning institution may wrongly issue a development permit; a medicines authority may approve a medicinal product in violation of the law.[15] It is very difficult in such cases to consider who the proposer of an action might be if one strictly applies the private law notion of public interest. It is imperative that the courts

[14] See Woolf and Jowell "*de Smith's Judicial Review* (2013) (Sweet and Maxwell): 66: "To deprive a person of access to the courts because of legal standing can raise issues of constitutional significance. At its heart is the question whether it can ever be right as a matter of principle, for a person with an otherwise meritorious challenge to the validity of a public authority's action to be turned away by the court on the ground that his rights and interests are not sufficiently affected by the impugned decision." See also *Golder v. United Kingdom* (21 February 1975)(4451/70) where the European Court of Human Rights ruled that access to a court was a fundamental principle sanctioned by article 6 of the European Convention of Human Rights.

[15] In a pending case before the First Hall of the Civil Court, (*Dr. Miriam Sciberras ne et v. Superintendent for Public Health* (494/17 JRM), a group of non-governmental organizations set up to protect life from conception (*Life Network*) is challenging the placing on the market in Malta of the morning after pill, alleging that it is a medicinal product which aborts life and therefore runs counter to the Criminal Code which criminalizes abortion in Malta. Respondent Government has pleaded *inter alia*, that plaintiffs have no juridical interest in the case.

of law re-visit the application of this doctrine in *public* law; if one is to keep the Administration accountable to law under the Constitution and under the norms of judicial review contained in article 469A.[16]

Legal Standing in English Common law

An argument which can be put forward for a more liberal interpretation of *locus standi* in judicial review actions is the development of such notion in English common law. Prior to the amendments to the Rules of the Supreme Court (RSC) in 1978 and subsequent enactment of a statutory provision requiring "sufficient interest" for judicial review actions by the Senior Court Act 1981, the English courts had already expanded, in common law, the notion to cover non-governmental organizations and even individuals who are not mere busy bodies but have a genuine interest in the litigation matter, even if not purely juridical[17]. Lord Diplock in fact stated that:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group … or even a single public-spirited taxpayer … were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[18]

In the *Pergau Dam* case,[19] the World Development Movement, a non-governmental organization, was allowed legal standing to challenge an overseas aid which was subsequently declared unlawful by the courts of law; and Greenpeace was allowed, in view of

[16] See also: Giovanni Bonello: *When Civil Law trumps the Constitutional Court* Għ.S.L. Journal Online *Id-Dritt* (2018).
[17] See: Stephen Sedley: *Not in the Public Interest* (London Review of Books) (Vol. 36 No.5 · 6 March 2014): "Where, as also happens, an NGO or a concerned individual calls attention to what appears to be a real and serious abuse of government power, albeit one that does not directly affect them, the courts may call on the executive to explain itself and may intervene if the explanation does not stand up."
[18] *R* v. *Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617. See also John Stanton and Craig Prescott *Public Law* (Oxford University Press) (2018):387.
[19] *R v. Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement Ltd* (1995) 1 WKR 386, 395F.

its environmental credentials, to object to nuclear regulations.[20] Mr Justice Sedley in one case[21] ruled that:

> Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.

Although one can argue that these judgments were delivered *after* the statutory provision requiring sufficient interest came into force, the previous case law based exclusively on common law had already liberalized the notion of interest.

In the famous *Makgill* case[22] in 1916 applicant a Scottish baronet of extreme right-wing views, brought judicial review proceedings to remove from the Privy Council two wealthy German naturalized Jewish philanthropists As a preliminary issue the Attorney-General submitted that the claim should fail because Makgill lacked standing to bring it: only the attorney-general himself, as guardian of the public interest could bring such a question before a court of law.

The Chief Justice disagreed. Makgill, he said

> appears to have brought this matter before the court on purely public grounds without any private interest to serve and it is to the public advantage that the law should be declared by judicial authority. I think the court ought to incline to the assistance, and not to the hindrance, of the applicant in such a case.

Again in *Gouriet v. Union of Post Office Workers*[23] before the introduction of the Rules of the Supreme Court Order 53[24] in 1978 and the Senior Court Act of 1981[25] a member of the

[20] *R v. Her Majesty's Inspectorate of Pollution, ex p. Greenpeace Ltd* (1994) (4 ALL ER 329).
[21] *R v. Somerset County Council ex p Dixon* (1998) (Env L R 111, 121).
[22] *R v. Speyer and Cassel ex p. Makgill* (1916) (1 KB 596 (DC) upheld on appeal (1916) 2 KB 858.
[23] 1978 AC 435 *HL 26 Jul 1977.*

general public was allowed to request a declaration that an industrial action by a postal workers' union was unlawful and could amount to a criminal offence

> it was open to a member of the public who might be inconvenienced or suffer material loss by reason of the breaches to bring proceedings in his own name or a declaratory judgment that the threatened actions would in fact constitute breaches of the criminal law.[26]

The evident conclusion and comment is: why are the Maltese courts applying the doctrine of juridical interest as developed on the continent in private law litigation, even though there is no Maltese statutory provision on the matter, when the time-honoured rule has always been to refer to English common law whenever Maltese public law contains a *lacuna*. In this matter it is respectfully submitted that if the courts in Malta are to apply the doctrine at all, they should apply the liberalised version of the notion as developed in English common law.[27]

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[24] Rule 3(5) "The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates."

[25] Section 31(3) of the Senior Court Act 1981: "no application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[26] See also Lord Denning *The Discipline of Law* (Butterworths) (1979): 144: "The ordinary citizen who comes to Court...is usually the vigilant one. Sometimes he is a mere busybody interfering with things which do not concern him. Then let him be turned down. But when he has a point *which affects the rights and liberties of all the citizens,* then I would hope that he would be heard; for there is no other person or body to whom he can appeal.." (emphasis added). See also *R v. Paddington Valuation Officer ex parte Peachey Property Corpn Ltd* (1966) 1 QB 380 at 400-01): Similarly in *Blackburn v. Attorney General* (1971) 1 WLR 1037, a member of the general public was considered to have *locus standi* to challenge the ratification of the Treaty of Rome by the British Government; the same person namely Mr Raymond Blackburn was allowed to contest the lethargy of Police in applying the law relating to gaming clubs in London (*R v. Commissioner of Police of the Metropolis ex parte Blackburn* (1968) (2 QB 118) and the law relating to obscene publications (*R v. Police Commissioner ex parte Blackburn* (1973) (QB 241).

[27] "If pre-1978 authorities indicate that an appellant would have standing, this is almost certainly still the position...some of the old cases are of interest in so far as they indicate that prior to 1978 a very generous approach to standing was already being adopted. Thus proceedings could be brought even by strangers for an order of prohibition. " (De Smith Woolf and Jowell *Principles of Judicial Review* (1999) (Sweet and Maxwell):33; see also *Blackburn v. Attorney General* (1971) 1 WLR 1037 where although an action by plaintiff to prevent the UK Government from signing the Treaty of Rome in the future was refused on the merits, Lord Denning remarked on the question of *locus standi* " I would not myself rule him out on the ground that he has no standing ". Forty-six years later in *R (Miller) v. Secretary of State for Exiting the European Union* (27 January 2017) (2017 UKSC 5) the Supreme Court allowed Mr Deir Dos Santos, a hairdresser to challenge with success the UK Government's position of triggering off article 50 of the Treaty of the European Union to withdraw from the European Union without the need of passing legislation. A ray of hope may be found in Maltese case law in the public law action relating to the request by a local council to intervene in a planning permit appeal before the courts in the case of *Martin Debrincat v. Malta Environmental and Planning Authority* (CA Inf.) (12 January2005) (13/03) (Mr Justice Ph.Sciberras) : "Perhaps the time is ripe for our laws and

The parties to an action on judicial review of administrative action

Article 469A is absolutely clear as to who may be a respondent to such an action, that is to say, which part of the public sector is considered to be bound by the rules of judicial review. A 'public authority' – the only possible respondent in such an action – according to sub-article (2) means the Government of Malta, including its Ministries and departments, local authorities, and any body corporate established by law.

The public sector in Maltese administrative law and practice may be divided into three categories or sections:

The Civil Service

The first to be mentioned in article 469A is the Government of Malta, including its ministries and departments. This would cover the political masters of the public service composed of public officers such as ministers and parliamentary secretaries, but also constitutional offices such as that of the Auditor General or the Attorney General.

The *public service* is made up of public officers who are accountable to a Minister, or any other public officer or authority according to law. This is what is commonly known as the *civil service*: it has been described as anonymous in the sense that it loyally serves successive administrations, and as a rule the political master is usually a minister who is responsible for its actions, omission, operations and workings to Parliament.

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jurisprudence to progressively update themselves with new socio-juridical phenomena in matters relating to juridical interest."See also Final Report of the Commission for the Holistic Refom of the Justice System (30 November 2013) Parliamentary Secretariat for Jusrtice Office of the Prime Minister , Valletta :92 wherein it is stated that " For the purpose of clarity, the doctrine of judicial interest should be codified in the Code of Organisation and Civil Procedure. This code should be updated to also recognise, the judicial interest, the collective interest and the diffused interest. The collective interest is that which belongs to an entity that is an identified or identifiable social structure organised to work in favour of the protection of collective rights, whereas the diffused interest is correlated with those entities that have a collective interest but they are not organised."

A distinctive feature of the Civil Service is that as a rule its members, according to article 110 of the Constitution [28] can only be recruited by the Prime Minister on the binding recommendation of the Public Service Commission (PSC) or any person or authority delegated by it. This is the litmus test to distinguish a civil servant form any other employee in the public sector.

Casual employees, provided they are employed for a two month period, do not require PSC approval. The fact that an express provision of the Constitution exempts them from the PSC process proves that they are still considered, by arguing *a contrario sensu,* to be public officers.

A *public officer* is defined by the Constitution as 'the holder of any public office or of a person appointed to act in such office.'[29] *Public office* in its turn is defined as 'an office of emolument in the public service'. *Public service* is defined as 'the service of the Government of Malta in a civil capacity.

The practice has also evolved of appointing persons to positions of trust, paid fully from the public purse, bypassing the entire PSC procedure. There are serious and genuine doubts as to how much such procedure, applied in various degrees by different Administrations, is consonant with the strict recruitment provisions of the Constitution. For if even a temporary employment for two months with Government needs to be mentioned as an exception to the rule of PSC recruitment and vetting, this means that any office of emolument in the service of the Government of Malta in a civil capacity falls within the remit of the Commission, and any

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[28] *Appointment, etc.*
of public officers.

110. *(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission.*

[29] Art 124 (1) of the Constitution.

holder of such office is considered as a public officer.[30] It is submitted that the actions of such *persons of trust* are reviewable under article 469A for even such persons, irregular though their recruitment might be, are public officers according to the Constitution and therefore their acts are reviewable under article 469A.

Body Corporate Established by law

The *second* category of the public sector consists of the *body corporates established by law*, commonly called *public corporations or statutory bodies* which have mushroomed to a large extent in the past forty years.[31] Statutory authorities are bodies created by Parliament under specific legislation, unlike departments which can be created by the Government without any direct parliamentary involvement. Statutory authorities cannot be altered or abolished except by a further Act of Parliament.

While traditionally such bodies were created by a separate Act of Parliament, recent trends, following the enactment of the Public Administration Act (Ch. 497) allow the Prime Minister to establish and create such corporations having a distinct legal personality from the Civil Service, through an order or regulations. These regulations then regulate their powers and functions or procedures. Creation of such corporations is therefore never debated in the House, and knowledge by the public of their creation implies examining Legal Notices issued every day by Government and laid on the Table of the House.

Government Companies, partnerships, foundations etc.

The third category in the public sector comprises **any partnership or body** in which the Government of Malta or any body corporate established by law has a controlling interest or

[30] See Kevin Aquilina: *Positions of Trust: A Constitutional Quagmire* (*Malta Today* 22 June 2016): "The Constitution makes no provision for the engagement of staff in positions of trust, so the legality of this practice could be questionable even where ministerial secretariats are concerned."
[31] See Kevin Aquilina "*Notes on Public Corporations*" (University of Malta) (Faculty of Laws) (October 2012).

over which they have effective control. Although in view of a wide privatisation process which started in the late eighties, such bodies or partnerships are rare to come by, some still stubbornly survive. These bodies are not considered to be a 'public authority' for the purposes of article 469A.[32] This legal position in Malta therefore contrasts sharply with that obtaining in England where any body performing a public function, even if private, let alone a partnership in which government has a majority of share, is considered liable to judicial review.

Under the Ombudsman Act (Ch. 385), the Commissioner for Administrative Investigations in accordance with section 12 of the Act, can receive a complaint *against*

> The Government including any government department or other authority of the Government, any Minister or Parliamentary Secretary, any public officer and any member or servant of a public authority; to any statutory body and any partnership or other body in which the Government has a controlling interest or over which it has effective control including any director, member, manager or other officer of such body or partnership or of its controlling body; and to local councils including Mayors, Councillors and members of staff of all local councils.

Consequently government companies which are neither part of the civil service or established by law as a body corporate, fall under the jurisdiction of the Ombudsman including public-private partnerships so long as public funds are involved, *but they are not subject to the review envisaged in article 469A.*

Not just Solitary Swallows

In the *Cerviola* case[33] the Court ruled that a commercial company in which Government had a majority shareholding was a public authority for purposes of article 469A. It said:

[32] For other purposes e.g. the provisions on discrimination in art 45 of the Constitution, they have been considered as a public authority. See as regards Air Malta, *Joseph Debono Grech v. Albert Mizzi noe* (CC) (11 February 1991) (Kollezz. Vol. LXXV.I.68).
[33] *Hotel Cerviola Ltd v. Malta Shipyards Ltd* (FH) (31 May 2007) (359/06) (Mr Justice R. Pace).

> Regarding this definition, the Court considers that the defendant company qualifies as a public authority on the basis of the provisions abovementioned and this because it results that the company is constituted and registered under the laws of Malta...[34]

The Court of Appeal[35] compounded the error committed by the lower court by stating that:

> Although a private commercial company was constituted, in effect the proper control remained in the hands of Government with the intention to negotiate the sale of the Drydocks. As has been decided in other cases relating to fundamental human rights, the Court is of the view that even as regards judicial review actions, it must look at the substance of things and of what is being sought to be protected; and not rest simply on appearances and formal definitions or classifications.

The flaw in the argument is evident. The moment one considers a commercial company duly established under the Companies Act 1995 (Ch. 386) as a body corporate established by law, then *any* commercial company, not necessarily those in which Government holds a majority shareholding or control, will be considered a public authority and therefore subject to article 469A; for the definition of public authority merely states 'a body corporate established by law.' If one were to erroneously extend this definition to commercial companies, there is no qualification in the definition limiting it only to government owned companies and all companies of whatever nature, provided they have a distinct legal personality, will come under the definition of 'public authority'. This is evidently not the case, for only public corporations set up expressly by law are to be logically considered as 'public authorities'.

In another case,[36] two years later, the Court, without even citing the *Cerviola* case, reached an identical conclusion and ruled that a government company, the Malta Industrial Parks Limited (MIP) in which government controlled practically all the shareholding, was a *public authority* for the purposes of article 469A. In that case the court remarked that:

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[34] See also *Paul Licari v. Malta Industrial Parks Ltd* (FH) (10 July 2017) (25/10) (Mme Justice Miriam Hayman).
[35] (CA) (23 September 2009).
[36] *Euro Chemie Products Ltd v. Malta Industrial Parks Limited) (*FH) (29 September 2009) (1006/06) (Mr Justice JR Micallef).

> MIP is in fact a public authority which alone has the power to decide whether to issue an eviction order and give advice to the Commissioner of Land to order the issuing of such an Order. The fact that such authority has the form of a commercial company does not eliminate its classification as a body corporate established by law, as mentioned in article 469A (2). Apart from that a study of the relative provisions of Chapter 169 of the Laws of Malta make it clear that MIP was given power by delegation which characterizes any authority with a public function. The same provisions show as well that MIP enjoys powers of a regularity function, which are public and administrative. The Court also notes that it was MIP itself which declared so, when it said that it was the successor of the Malta Development Corporation.

A more reasoned approach was made by the court in another case[37] where Malta Industrial Parks Limited was considered to be a public authority but only because it had succeeded to all the rights and obligations of the Malta Development Corporation which was a public corporation.

In another case[38] the Court assumed upon itself the definition of *public authority* by stating that:

> The fact that Government chose to operate through a company and not a body corporate established by law does not mean that consequently such company which is exercising a public function cannot be subject to review under article 469A of Chapter 12 when it performs an administrative act. It is a known fact that ***"the actions of public corporations are judicially reviewable in the same way as those of other bodies, where they have powers of a public law character.*** *(Administrative Law* Wade 10th Ed. (2009)

It is submitted that this reasoning is not correct. The court equates the phrase "body corporate established by law" with any commercial company which has a majority government shareholding, the more so if it has a regulatory function. That the two concepts, *body corporate established by law* and *a government commercial company* are two distinct legal notions is borne out by the Constitution itself which in article 110 (6), regarding recruitment in the public sector, makes the distinction between the two quite clear. It distinguishes between "any body established by the Constitution or by or under any other law" and a "partnership or other body in which the Government of Malta, or any such body as aforesaid,

[37] *H.P. Cole Ltd v. Malta Industrial Parks Ltd* (FH) (28 March 2012) (547/08) (Mr Justice A. Ellul).
[38] *Captain Mario Grech et v. Gozo Channel Co Ltd* (CMSJ) (27 April 2010) (2/09) (Magte A. Ellul).

have a controlling interest or over which they have effective control." To lump the two notions together, and treat them equally was certainly not the legislator's intention in drafting article 469A. A government commercial company is not a body corporate established *by* law. That term is reserved for public corporations or bodies established specifically by the Constitution or by an Act of Parliament and not for a commercial partnership set up, like all other partnerships, with a memorandum of association under a general law regulating commercial partnerships.[39] Finally one must observe that though government commercial companies are body corporate established *under* law, they are not set up *by* law as article 469A requires. [40]

Interesting Developments Regarding Private Companies

Although private companies do not fall within the ambit of article 469A, the Court of Appeal has on one occasion decided that where such company executes a power given to it by law, then the norms of judicial review, including the principles of natural justice apply. In *Armando Tramontano v. Dragonara Casino Limited* [41] the Court of Appeal applied these principles to a private company managing the Dragonara Casino which was empowered by the Gaming Act (Chapter 400)[42] to take decisions regarding entry of persons into the kursaal.

[39] One must however note that in *Paul Licari v. Malta Industrial Parks Limited* (CA) (25 November 2016) (25/10) the Court of Appeal hinted *obiter* that it approved this line of reasoning at least as regards Malta Industrial Parks Ltd: "It is true that the defendant company (MIP) is exercising a public function, in so far as its task is to administer the industrial zones property of the Government **and may also qualify as a public authority for the purposes of article 469A of Chapter 12 of the Laws of Malta." (**emphasis added) The First Hall of the Civil Court in a decision on the merits in the same case allowed judicial review of actions by the Malta Industrial Parks Limited even though the latter was not a public corporation. (FH) (10 July 2017) (Mme M. Hayman).

[40] An interesting development is the one relating to the Ombudsman Act where such legislation covers all agencies funded by the public purse; In several Reports the Ombudsman has requested that even private entities providing a public service should fall under his remit. (See Ombudsman Report 2010 p 15).

[41] (CA) (25 May 2007) (1765/01).

[42] ***25.*** (3) Without prejudice to the other provisions of this Act, admission to a casino shall be at the discretion of the licensee who shall ensure that persons who may have a problem of pathological gambling are not given access to the gaming area: Provided that no person shall be refused admission to a casino by reason of his race, place of origin, political opinion, colour, creed, sex or physical infirmity.

In this case the same appellant company referred to the powers granted to it by the Gaming Act (Ch.400) to control who enters the Casino and therefore such power could not be exercised "without first hearing the person who is going to suffer".

This judgment can be lauded in its attempt to spread the net of judicial review as far as possible, but at law it is flawed, particularly in view of the fact that even if the act of controlling entry into a casino can be considered as administrative, the private company was certainly not a public authority as defined by article 469A.[43]

Respondents in cases of Judicial Review of delegated legislation and of Administrative Tribunals

In the case of judicial review of delegated legislation since all parent acts vest legal responsibility for the passing of subsidiary legislation in an enabling section to a minister, body or person the obvious respondent would be such government minister, body or person. In cases of judicial review under English common law rules of decisions made by administrative tribunals which, as we have seen, are not considered to be an administrative act under article 469A, the practice has been for the Chairman of such authority or tribunal to be summoned as defendant.[44] In the case of commissions or authorities which exercise

[43] See also *Dr David Camilleri noe v. Players Coaches Complaints Board* (FH) (23 November 2001) (1378/98) (Mr Justice A. Magri) where the Court decided that the Board had not infringed the principles of natural justice, assuming therefore that these applied even *vis-a-vis* an entity of a private organization, namely the Malta Football Association.

[44] ***181.*** *(1) When a written pleading is to be filed by the Prime Minister or other Minister, by a head of department or other public administrator, it shall be sufficient if there is designated in such pleading the office of the person filing it and it shall not be necessary to name the person for the time being holding such office.*
- omissis -
(4) The provisions of sub-articles (1), (omissis) shall apply also in respect of the party against whom the pleading is to be directed where such party is the holder of an office referred to in the said sub-article (1).

judicial actions under the Constitution e.g. the Employment Commission, it is possible to sue the Commission as such under article 181 (4) of Chapter 12.[45]

[45] e.g. *Public Broadcasting Services Ltd v. Broadcasting Authority* (FH) (29 April 2005).

PART II

Chapter VI
First Ground of Review: Administrative acts contrary to the Constitution

General

The first ground of review raises its own fair share of problematic legal issues. This ground of review did not appear neither in the Bill attached to the White Paper; nor does it make any appearance in the Australian laws relating to judicial review or in the grounds of review emanating from French Administrative Law. It just appeared, as if parachuted anonymously from nowhere, in the Bill which led to the enactment of Act No. XXIV of 1995.

Its insertion in article 469A has raised several issues: for instance was this an attempt by the legislator at avoiding duplication of actions, one constitutional the other administrative, so that it would be possible at one go to challenge both the constitutional validity of an act, and its lawfulness under judicial review in administrative law? and if this was the intention of the legislator, is this consonant with the rule in article 46 of the Constitution, that a constitutional action is one of last resort, which can be instituted only after one has exhausted all adequate legal remedies?

The objections to treating this sub-article as establishing a two-in-one judicial action are that:

(a) the jurisdiction of the organs of a constitutional nature constitutes a *special* jurisdiction enshrined in the Constitution; reducing such jurisdiction to an ordinary law level does not make constitutional sense;

(b) such an interpretation could run counter to the Constitution for while an action under article 469A to challenge the constitutional validity of an administrative act, say on human rights is subject to a six month time limit, the Constitution does not establish any prescription

for human rights actions. In fact through Act No. IV of 1986, article 469A was amended to remove the applicability of the six month period when judicial review under article 469A is based on a breach of the Constitution.

No Integration between Two Actions

The Constitutional Court has ruled that this provision cannot be applied to integrate a human rights action for infringement of articles 33 to 45 in an administrative law action under article 469A. In one case [1] the Constitutional Court remarked that article 469A (1) (a) applied to infringements of the Constitution by administrative acts *on grounds other than human rights*. As regards human rights infringements, this sub-paragraph did not apply, and one had to apply to the First Hall Civil Court under article 46 of the Constitution: for there is a clear distinction between the constitutional and civil jurisdiction and competences of the court. [2]

Again in another case[3] the Court interpreted the words "contrary to the Constitution "as meaning contrary to any provision*, other than articles 33 to 45 (human rights sections)* of Chapter IV and even excluded the provisions of the European Convention Act (Ch. 319)

[1] *Emmanuel Ciantar v.Commissioner of Police* (CC) (2 November 2001) (701/99): "The principle should always be that there is a clear and distinct separation between the constitutional and civil jurisdictions even because applications under the di fferent jurisdictions are regulated by special procedure with their aims as regards remedies being not necessarily identical." See also *Anthony Gauci v. Malta Maritime Authority* (FH) (30 October 2014) (Madam Justice L. Schembri Orland) (52/09).

[2] However, an application which contains reference both to the administrative law action under article 469A and the fundamental human rights under article 46 of the Constitution is not considered to be null: see *Charles Cini v. Prime Minister et* (FH) (16 January 2018) (188/17) (Mr Justice JR Micallef).

[3] *Christopher Hall v. Director Social Accommodation* (CC) (18 September 2009) (1/03): "In other words – and the Court hopes that this question is resolved once and for all – appellants could not have initiated ordinary law proceedings for judicial review under sub-article 1(a) of article 469A of Chapter 12, and allege a breach of their fundamental rights protected by the Constitution, for that sub-article, refers to breaches of the Constitution by an administrative act that (i) does not amount to a violation or alleged violation of the fundamental rights as protected by articles 33 to 45 of the said Constitution and that (ii) according to the same Constitution may be reviewed by the ordinary courts; and in virtue of the same argument – that is to say that one must keep the constitutional and civil competences separate and distinct – the words '*is in any other way contrary to law'* in sub-article (1) (b) (iv)of article 469A refers to any law other than the provisions of the Convention as incorporated in Chapter 319. " See also *Martin Baron pr et ne v. Commissioner of Land et* (FH) (28 May 2015) (1168/12) (Mme Justice L. Schembri Orland) *Wakil Mohammed Samir v. Prime Minister et* (CC) (14 February 2011) (45/08), *Emanuel Ciantar v. Commissioner of Police* (CC) (2 November 2001) (701/99) ; *Dr Karmenu Mifsud Bonnici et v. Anthony Tabone ne* (FH)(12 July 2002) (296/02) (Mr Justice JR Micallef) and *Giovanni Fenech v. Commissioner of Land* (FH) (7 February 2002) (2341/00) (Mr Justice JR Micallef). See also *Public Broadcasting Services Ltd v. Broadcasting Authority (*FH) (21 November 2002) (1692/00) (Mr Justice JR Micallef) and *Nazzareno Scerri et v. Malta Environment and Planning Authority* (FH) (30 January 2015) (470/06) (Mr Justice A. Ellul).

under '*the otherwise contrary to any law'* ground of review; and in a moment of frustration remarked that it hoped that this question would be solved once and for all by its judgment.

It is doubtful whether such interpretation solves the issue, at least in a logical way. Serious questions may be raised challenging this interpretation: why is Chapter IV 'more equal' than other entrenched provisions of the Constitution, to the extent that it is not covered by article 469A (1) (a) while other provisions of the Constitution are? the maxim *ubi lex voluit dixit* is thrown overboard. The Court, on request, could have declared the provision *itself* to be unconstitutional, but it had no right to spontaneously create exceptions where the legislator mentioned none: for with what authority based on sound legal foundations, does one interpret the words "contrary to the Constitution" as excluding, in *a la carte* fashion, articles 33 to 45 of the Constitution but not the other provisions of the constitutional document? One can argue that article 46 of the Constitution grants a special jurisdiction with special powers to the Civil Court First Hall and the Constitutional Court: but the other provisions of the Constitution also form part of a *special* jurisdiction of a *special* Court: the Constitutional Court.

The main problem is that the inclusion of article 469A (1) (a), (i) is unnecessary; (ii) it confuses issues and jurisdictions; and (iii) in its original form was probably in breach of the Constitution. In fact in 1996 a year after its enactment, through an amendment,[4] the six month rule under article 469A (3) was made applicable only to the grounds of review listed in sub-article (1) *other than sub-paragraph (a).*

Legislator's Intention: Fusion of two Actions

However, there is no doubt that the legislator intended to join the constitutional with the administrative law action; the fact that through Act No. IV of 1996, government tried to salvage the provision from a constitutional point of view, by removing the six month limit is

[4] Act No. XIV.1996. 8.

ample proof of this;[5] yet the courts of law have, as has been seen, re-dimensioned this sub-article but in the process have not always adopted a logical thinking. Besides, the fact that the legislator in 1995 included as a ground of review, the phrase 'contrary to any law', a phrase culled from the Australian law on judicial review, means that he probably intended to include challenges of administrative acts on grounds of alleged breaches of an ordinary law such as the European Convention Act. Yet the courts have decided that this provision applies to all instruments having the force of law, *except the European Convention Act*. [6]

Is sub-article (1) (a) the wrong provision in the wrong place?

For those who believe in a strict separation of constitutional and administrative action, it is. For those, however, who take a more pragmatic approach and believe that substance should never be sacrificed on the altar of procedural norms, it is not; they argue that such a combined procedure (a) is less costly for the individual, and makes life easier for everyone for an administrative act to be challenged on two parallel lines which may or may not converge; (b) that since the First Hall of the Civil Court is the same Court for both actions, this would simplify matters and would not create any legal procedural difficulties;[7] and finally that even though there is a difference at the appeal stage since normally an administrative law action is appealed to the Court of Appeal, we already have in our system hybrid actions in human rights cases where the Constitutional Court has been given additional jurisdiction by statute

[5] See *Primrose Poultry Products Ltd v. Prime Minister* (FH) (8 November 2001) (1945/00) (Mr Justice JR Micallef).
[6] See *supra* 150.
[7] See Ian Refalo :*Administrative Law : Case Law Summary and Comments* (2016) (Faculty of Laws: University of Malta):283 "The First Hall of the Civil Court has indeed a dual jurisdiction, civil and constitutional; but they live side by side and the Court is not differently constituted depending on the jurisdiction; it is therefore one and the same jurisdiction. The situation becomes different in appeal where clearly the ordinary and the constitutional jurisdictions are separate. One wonders whether with the present composition of the Constitutional Court, seeing that it is very often composed of the same judges sitting on appeal, it makes any sense maintaining this distinction. It is also difficult to understand how section 469A (1) (b) (iv) can be understood as a reference to all laws with the exception of fundamental human rights provisions. Certainly the legislator would have wanted to declare administrative acts in violation of such laws to be also void. This distinction though made by the Court, does not emerge from the words of the law."

(e.g. Act No. XIV of 1987) to hear appeals from decisions under the European Convention Act along with Chapter IV of the Constitution, and the Constitution in article 95(2) (f) already admits of '*appeals from any question by a court of original jurisdiction in Malta together with any of the questions referred to in the foregoing paragraphs of this sub-article*[8] *on which an appeal has been made to the Constitutional Court.'*

It is fair to say, however, that the fusion of the administrative law and constitution law action flouts the constitutional norm that a constitutional action on human rights can only be submitted after exhausting all other ordinary remedies. If plaintiff challenges an administrative act under article 469A he ex *admissis* accepts that an ordinary remedy already exists: and that therefore recourse to the constitutional action is unnecessary; for the strongest argument against fusion of the two actions remains the exhaustion of adequate ordinary remedies rule. It is true that this norm contained in the proviso to article 46(2)[9] confers only a *discretionary* power to the courts to decline jurisdiction; but it is a power which is usually applied with vigour to prevent the confusion between civil or administrative and constitutional issues. The fear that this would be aggravated by means of such fusion is too strong to uphold and endorse the two-in-one approach implied by article 469A and probably intended by the legislator.

[8] These include appeals in human rights cases.

[9] *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.*

Chapter VII

Second Ground of Review: Acts emanating from authority not authorised to perform it

General

Second Ground of Review: 'When the act emanates from a public authority that is not authorised to perform it.'

One may call this ground of review as substantial *ultra vires,* that is to say, when the public authority acts in breach of an express provision of the law as regards substance. This is *ultra vires* par excellence. In this ground of review the construction of the words contained in a statute are of paramount importance; courts of law have been known to read between the lines and give an ample interpretation of a legal provision declaring an administrative act as *ultra vires*. The act is the result of an exercise of a discretionary power that is to say the power to make a choice between alternative course s of action or inaction.[1]

In *Boselli v. Roupell* [2] (1912) regarding the dismissal of an Italian Literature Professor at the University of Malta for health reasons, the Court of Appeal ruled that:

"The courts of justice are competent to examine the lawfulness of an administrative act when it is alleged that a right of others has been breached, in the sense that they may inquire into whether such a measure is within the powers of the authority which took such decision, and whether it is regular in form, but they may not question whether such act was appropriate or just if the authority concerned was competent to take such challenged action and observed the due procedure.".[3]

The Court is here affirming a limited jurisdiction in the sense that it would examine substantial and procedural *ultra vires*, but would not inquire into any further act, such as the reasonableness of such decisions and certainly would not substitute its discretion for that of

[1] De Smith Woolf and Jowell: *Judicial Review of Administrative Action* (1999) Sweet and Maxwell: 151.
[2] *Prof. Antonio Boselli v. Onor Ernest P. Roupell* (CA) (28 February 1912) *and Emmanuele Amato v. Edward Merewether ne* (CA) (11 March 1903) (Kollezz. Vol. XVIII.I.87).*Giuseppe Mallia Tabone v. Frank. Stivala ne (*CA) (11 January 1926)(Kollezz. Vol. XXVI.I.374).
[3] This was confirmed in *Giuseppe Mallia Tabone v. Frank. Stivala ne* (n 2).

the court. Reasonableness as a factor of review and the rules of natural justice were to come at a later stage.

Internees' case in World War II

One of the first successful cases of judicial review on *ultra vires* was the *Internees* case.[4] In World War II a number of Maltese nationals were interned, without trial, by the British authorities allegedly because of their pro-Italian sympathies. These included the Chief Justice, the Leader of the party in Opposition, the Dean of the Cathedral Chapter, and members of the Maltese intelligentsia. They were kept in detention without trial. In May 1942 the British authorities decided to deport them to Uganda. No person interned commenced legal proceedings in 1940 when they were first detained.[5] After all, regulation 18(1) (c) of the Malta Defence Regulations 1939 was clear that the authorities could intern any person who was considered to be a security risk. According to Regulation 18(1) (c) of the Malta Defence Regulations 1939:

> The Governor, if he deems it proper so to do, regarding any particular person, in order to prevent such person from causing harm to public security, or defence, make an Order for such person to be detained: and so long as such Order remains in force regarding such person, he shall remain detained in such place and under such conditions as the Governor may from time to time, determine, and while such person remains in such detention, be considered to be under his legal custody.

Naturally, deportation was another matter. Government rested its case on the wording of Regulation 18 which allowed the Governor of Malta to detain such person 'in any place as

[4] *Guido Abela et v. Walter Bonello noe* (FH) (7 February 1942) (Mr Justice A. Montanaro Gauci) (Kollezz. Vol. XXXI.II.54).

[5] In *Liversidge v. Anderson* (1942) AC 206, the House of Lords refused to scrutinize whether a detention order issued under Regulation 18B of the Defence (General) Regulations.1939 was reasonable or not. This brought about a strong dissenting opinion of Lord Atkin who stated: "In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

the Governor may determine'. That meant, according to the authorities, that persons could be interned even outside Malta.[6]

The internees filed a court action for such Order to be declared *ultra vires* and therefore without effect. The Civil Court, First Hall, declared such deportation order to be *ultra vires*. Deportation was much more serious and injurious to one's rights than mere detention. An exceptional measure such as deportation could not be construed as being covered by the words 'in such place as the Governor may determine', as if the Governor had the right, under his powers of detention, to send a person in detention in any country outside Malta. It stated:

> The jurisdiction of the Governor is limited to these Islands; consequently the right to keep detained British subjects cannot be extended to cover places outside Malta; this is what would happen, however, if the aforementioned regulation 18 were to be interpreted as applying to places outside Malta. Apart from this, the Malta Defence Regulations were made in virtue of the Emergency Powers (Defence) Act 1939 and applicable to Malta by Order in Council of 25 August 1939. That Act does not seem to give the power to deport British subjects outside their country, because that Act in section 1(1) (a) grants the right to the King, and therefore the Governor, the right not to deport but 'to make provision for the apprehension, trial, and punishment of persons offending against the Regulations, and for the detention of persons whose detention appears to the Secretary of State – and in our case the Governor – to be expedient in the interests of public safety or the defence of the realm." If the Act wanted to grant such power to deport, it would have stated so clearly, and not limit itself to the power to preventive detention; and once the parent act did not allow such power, such deportation is not allowed.'

This judgment has remained registered in the annals of history as an audacious one, protecting rights of the ordinary citizen even in time of war and tension. It refers to common law in the sense that according to the Common law of England no British subject could be

[6] According to Dr Herbert Ganado, one of the internees, `The camp in Uganda, according to government's position, would become part of Malta under the Governor of Malta. Malta according to the Colonial Government, had become as an elastic piece which could be stretched at will`. (Herbert Ganado : *Rajt Malta Tinbidel* (1977) (Malta) Vol. II. 333. See also Max Farrugia *L-Internament u l-Ezilju Matul l-ahhar Gwerra (Internment and Deportation in the last war)* (Pubblikazzjonijiet Indipendenza) (PIN) Pieta' 2007;505-527. Counsel for Plaintiffs , Dr Alberto Magri, argued that" If an internee were to be transferred to another colony he might lose certain rights such as the right to appeal to the Consultative Board in Malta or his rights under Common law"*"Jekk internat jigi trasferit f' kolonja ohra huwa kien jista' jitlef certi drittijiet , bhad-dritt li jappella lill-Bord Konsultattiv f Malta jew id-dritt tal-Ligi Komuni tieghu;*"(*ibid* 516)

deported from his own country except by the authority of Parliament, not even a criminal out of the land against his will, let alone untried persons detained on mere suspicion.[7]

It did not, however, refer to common law to legally justify its jurisdiction to examine whether an administrative act was *ultra vires* or not. It just assumed, correctly one must add, that it had the function to interpret the law and constrain Government, even during wartime, to abide by it. It is true that this was a case of simple substantial *ultra vires*. As shall be seen, when it comes to grounds of review which were not expressly laid down in the law prior to 1995, the courts had to resort to English common law to justify their review of acts of the Administration or decisions of administrative judicial organs on such matters as reasonableness or rules of natural justice. However, when the *iure imperii* doctrine was in full swing, the court always affirmed their right to review whether an administrative act was within its substantive and procedural *vires*.[8]

Ultra Vires and the Housing Act 1949 (Ch.125)

Most of the cases relating to substantial *ultra vires* have hovered over the power of the Housing Secretary to issue requisition orders under the Housing Act 1949.[9] This power, now defunct, allowed the Housing Secretary to take possession of premises either to provide

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[7] A few days after this judgment, the Emergency Powers (Removal of Detained Persons) Ordinance (Ordinance I of 1942) was enacted by the Council of Government, the legislature under the 1939 Constitution, empowering the Governor `to make an order directing that any person as therein specified and subject to the conditions therein set forth to be removed from Malta in pursuance of arrangement as therein recited. ` New deportation orders were issued ordering that 47 internees be removed to Uganda. The internees again challenged this law passed by the Colonial Legislature. In the case *Guido Abela et v. Major Walter Bonello noe*, the court of first instance delivered judgment on 11 February 1942 rejecting plaintiffs` claims that the Order was unlawful. Plaintiffs appealed but were deported just the same on 13th February 1942. The Court of Appeal in a judgment delivered on 4 May 1942 (Kollezz. Vol. XXXII.I.164) (50/42) upheld plaintiffs` requests and declared that the Ordinance had been enacted *ultra vires* since only the Westminster Parliament and not a colonial legislature could authorise the deportation of British subjects from their country. The internees, in spite of winning their case, remained in Uganda until 1945. Deporationof Maltese nationals is today constitutionally prohibited under article 43 of the Constitution.

[8] *Giorgio Busuttil v. Carlo Mallia nomine* (CA) (1 June 1925) (Kollezz. Vol. XXVI.I.164); see also *Edgar Baldacchino v. Tommaso Caruana Demajo nomine:* (CA) (26 February 1954) (Kollezz. Vol. XXXVIII.I.61).

[9] See Patrick Holland: *The Housing Act 1949 and its relation to the Theory of Iure Imperii* (RUM) (LL.D Thesis) (1958) and Alfred Grech: *Judicial Review of Administrative Action with particular reference to the Housing Act 1949* (UM) (LL.D. Thesis) (1975).

accommodation to homeless persons or to provide better living accommodation. However, the law also allowed the Housing Secretary to issue requisition orders 'in the public interest'. Such a general and vague phrase, if not properly checked, could lead to rampant abuse. The effect of the Order was to impose a lease, against the owner's will, on the requisitioned premises, subject to stringent rent restrictions, in favour of the person to whom such premises were allocated. The courts of law sometimes rose to the occasion and put a stop to abuse of power; on other occasions they failed miserably and subserviently succumbed to political arrogance; even when the requisitioned premises were the *hom*e, rather than just the *house*, of the requisitionee.

Case law on this subject is varied, but all judgments proclaim the legal fiction that when a requisition order was issued, then *ex lege* the Housing Secretary assumed possession of the premises; so no constitutional challenge could be successful since the Secretary, in executing a requisition order, would only be entering premises possessed by him.[10] Consequently, the only means of challenging a requisition order was to dispute, in appropriate cases, the public interest requirement expressly mentioned in article 3(1) of the Housing Act.

Public Interest: Notion and Application

One of the first cases where the courts audaciously treaded on this feared ground of examining the public interest was in *Giuseppe Sciberras v. Housing Secretary*[11] where a requisition order had been issued following the eviction of a tenant after legal proceedings by the landlord since the latter was homeless. The court ruled that:

> A requisition order issued in the public interest is not really issued and applied for that aim when, as happened in the present case, it serves as a direct interference between the right of an individual to regain possession of his property for he has no home where to stay, and the duty of another individual to vacate such property for that reason – a right sanctioned and recognized by a judgment which is *res iudicata* between the parties.

[10] *Edward Ferro v. Housing Secretary* (CC) (19 June 1973) (17/73).
[11] (FH) (21 July 1973) (Mr Justice V. Sammut).

Another case challenging public interest in requisition orders was *Albert Galea et v. Patrick Holland no*e.[12] A requisition order was issued on premises owned by plaintiffs, and allocated to the party in government to be used as an extension of a club in the main square of the town. Plaintiffs argued that there was no public interest involved in assigning private property to a political party. The Court of Appeal begged to differ. It ruled that political parties had an important role in a democratic society and sanctioned the allocation of private property for the benefit of a political party, even though it was only one political party which ever benefited from the benevolence and largesse of the Housing Secretary. It stated:

> The words 'public interest' in so far as they necessarily comprise all aspects of the social life of the country, have a very extensive meaning…and there can be, and never was, any doubt that in the same way that premises may in the public interest be requisitioned for cultural, religious and sports, purposes, they may be requisitioned in the predominantly public interest of preparing political activity in the country.

A successful attempt, however, was made in another case regarding the allocation of requisitioned premises to private clubs. In *Carmelo Vella et v. Housing Secretary*[13]plaintiffs questioned the validity of an Order requisitioning their premises to be assigned to a village band club as an extension. To make matters worse, the original premises occupied by same band cub, also owned by plaintiffs, had already been requisitioned in 1955 at plaintiffs' expense. Thirty years down the line in 1986, the extension of the club was being done at the expense of plaintiffs once more.

The court of first instance rejected plaintiffs' demands stating that the allocation of private property to a band club owned by a private organization was in the public interest, and the

[12] (CA) (29 January 1980)(144/74).
[13] (CA) (30 November 1993) (Kollezz. Vol. LXXVII.I.390).

fact that an extension was being granted at the expense of the Vella family for a second time did not mean that the order was not issued in the public interest.

The Court of Appeal forcefully rejected the arguments accepted by the court of first instance criticizing the pronouncement that the words 'public interest' have a very wide meaning.

> The public interest in whose name these decisions are taken and acts performed by a public authority – the holder of the *res publica*, the universality of the *res* which comprises the common good of all citizens, and towards which all laws are directed – can never refer to any private interest. The possibility of access to the public for such activity does not by itself transform an essentially private activity in one inherently public.

The Court went on to give the example of premises being requisitioned for the opening of a public school and a private one. One could not refer to the latter as being done in the public interest like the former. Applying any different interpretation,

> the courts would authorise interference by the State in any conceivable activity, in so far as today all activities are of interest to the modern State, and therefore instead of the concept being used to serve the democratic system, it would serve a totalitarian one.

In view of the ratification by Malta of Article 1 Protocol I to the European Convention of Human Rights in April 1987, and the subsequent incorporation of the Convention in Maltese law through Chapter 319 in August 1987, the meaning of *public interest* assumed new importance for any compulsory taking possession of a right over property by the State can only be made, according to art.1 Protocol I, in the public interest.[14]

It was therefore a veritable bolt in a blue sky when the Constitutional Court decided to revisit the *Vella* case in 2012. It did so in a case brought again by the Vella family, in order to challenge the constitutional validity under the European Convention of the *first* requisition

[14] *1(1) "Every natural and legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions* ***except in the public interest*** *and subject to the conditions provided for by law and by the general principles of international law*." (emphasis added).

order issued in 1955.[15] Rather than instituting an administrative law action, they filed a human rights action under Chapter 319 probably because the thirty year prescription period for the filing of any action before a civil court applicable in ordinary law actions did not apply to actions under human rights law under Chapter 319.

The Constitutional Court decided that several judgments after *Vella* in 1993 of the European Court of Human Rights had expressly allowed expropriations and compulsory taking possession of private property to be used by *private* persons or authorities. It therefore rejected plaintiffs' demands to annul, as being in violation of Article 1 of Protocol I, the 1955 first requisition order, overturning the judgment of the court of first instance which had made express reference to the first *Vella* case to annul it. The latter court[16] had stated that:

> Respondents on their part...emphasized the social and cultural worth of band clubs. This Court does not want in any way to lessen such value at all. However, it is of the opinion, as already said, that this is not covered by public interest as required by the Convention and interpreted by the Courts.

The Constitutional Court[17] revoked this judgment observing that:

> This Court examined the judgment of the Court of Appeal in *Dr. Carmelo Vella v. Housing Secretary* on which the court of first instance based its judgment, and states that today, in the light of the jurisprudence of this Court and that of Strasbourg, although what was stated in that judgment is still partly valid.. what matters is that the public interest is aimed at the public in general and linked to the final aim for which the property is being used, independently of whether that activity is being performed by a public authority or not.

The Constitutional Court decided that the Order had been issued in the public interest since such interest include every aspect of social life and using premises for a cultural purpose was

[15] *Josephine Vella et v. Director Social Accommodation* (CC) (25 May 2012) (15/07).
[16] *Josephine Vella et v. Director Social Accommodation et* (FH) (11 October 2011) (15/07) (Mme Justice A. Felice).
[17] (CC) (25 May 2012). This judgment was overturned by the European Court of Human Rights in *Josephine Vella v. Malta* (EcrtHR) (27 February 2018) (73182/12) on the ground that an excessive burden had been imposed on applicant in breach of articloe 1 Protocol 1 to the European Convention on Human Rights. No pronouncement, however, was made on the question of public interest.

in such interest. It quoted the European Court of Human Rights which in one case[18] had decided that it would "respect the legislature's judgement as to what is in the 'public' or 'general' interest unless that judgment is manifestly without reasonable foundation." It added:

> In this case it cannot be said that the interest was only private since it applied to citizens in general. A social or cultural scope affects different layers of people, even if there are persons who are disinterested in activities of this nature. In the Court's view, the requisition order was issued in the public interest since the ultimate aim of the Club was a social one reinforcing the general identity of the locality and developing musical talents there, and this independently of whether the service was being given by a private organization rather than Government.

This judgment is to say the least controversial; not only because it reversed a judgment which had been cited with approval in several judgments for at least twenty years, but also because it has opened a Pandora's box. Which band clubs, cultural associations, sports clubs will be eligible for requisitioning of private property under a law enacted during wartime and conveniently extended to cover peace time, originally intended to provide social housing to those in need of it?

An examination of the judgments, local and foreign, quoted by the Court in justifying its departure from the *Vella* case reveals that these were usually projects of certain economic significance such as the Freeport, or a private hospital.[19] In one case, the taking of private property for allocation as a lotto office run by the State through private operators[20] was deemed not to be in the public interest; but the courts upheld interference with private property for purposes of a post office, even when postal services were privatized.[21] Or the

[18] *Ghigo v. Malta* (EcrtHR) (26 September 2006) (31122/05).
[19] *Mario Cutajar v. Commissioner of Land* (CC) (30 November 2001) (467/94).
[20] *John Mousu` v. Director Public Lotto* (FH) (22 January 1999) (595/97) (Mr Justice G. Caruana Demajo).
[21] *Victor Gatt et v. Attorney General* (CC) (5 July 2011) (55/09): "The test to determine whether public interest exists in the case of control and use of property is also that of looking at the ultimate aim for which such property will be used."

opening of a public road included in a town planning scheme, even if that served the interests of third parties.[22]

However, the allocation of requisitioned premises in 1973 to the party in government at Santa Venera was deemed in 2010, 37 years later, not to have been in the public interest in a constitutional case.[23] The Constitutional Court accepted the reason why plaintiffs had not pursued an administrative law action for *ultra vires* in view of the *Galea v. Holland* 1980 case. The incorporation of the European Convention of Human Rights in Maltese law enabled them to challenge the Order under Article 1 Protocol I with success. It subsequently transpired in 2012, as has been seen in the second *Vella* case, that band clubs would fare better than political parties. In the case of the Santa Venera political party club, the Court ruled, in contrast with *Galea v. Holland noe*, that:

> It is true that in a democratic country, plurality of political parties is necessary for the democratic development of a country, but the interests of any political party is necessarily partisan, since its aim is to attract as much as possible members to its political and social views. It cannot be said that the interest of a section of the public is equal to the general interest, particularly in the political field where persons of opposing political opinions contradict each other.

It is extremely doubtful how much such a distinction can be maintained at law. It is true that projects can be in the public interest even if managed by the private sector; but they must have a strong public interest element in themselves such as hospitals, schools, roads, camping sites etc. The problem with the *Josephine Vella* case is: where does one draw the line, where do the boundaries of public interest reach if one were to adopt such a liberal interpretation as that of including the cultural life of a village? In most of the cases justifying compulsory taking possession of private property to be allocated to another private party, the case of

[22] *Paul Farrugia et v. Attorney General* (CC) (30 July 2010) (696/99). Similarly terminating an agricultural lease over public land for the purposes of developing a camp site to be run by the private sector was deemed to be in the public interest (*Emmanuela Vella et v. Commissioner of Land* (CC) (27 March 2003 (32/01).
[23] *Philip Grech v. Director Social Accommodation* (CC) (7 December 2010) (60/06).

James v. United Kingdom[24] delivered by the European Court of Human Rights is quoted with approval. The latter case related to the acquisition by lessees, against financial compensation, of title over their own homes as a matter of social justice.[25] Most Maltese case law in this regard relates to private hospitals, the private management of a state-owned Freeport etc. Even though today the issue has become an academic one in administrative law, owing to the prospective post-1995 abolition of the requisition powers, these powers are still valid as regards orders issued *prior* to that year, and therefore the matter can still arise under constitutional or administrative review.

Evictions

In one case[26] an eviction order from premises occupied under a valid title by plaintiff was deemed to be *ultra vires* the Housing Act since such eviction order could only be issued by the Housing Secretary *vis a' vis* requisitioned premises and then only if he felt that the premises were not being used for a commercial purpose.

Expropriations

Up to 1987, when the European Convention Act came into force, no expropriation ordered could be challenged constitutionally owing to the immunity granted by article 49(9) of the Constitution to pre-1962 laws from the provisions relating to the right to property; this, apart from the fact that article 37 of the Constitution does not guarantee the right to property, but only a number of *ex post facto* rights including a fair procedure to determine just compensation. All this changed with the incorporation *inter alia* of Article 1 Protocol 1 as part of the European Convention Act which guaranteed that no property be taken by the State

[24] EcrtHR (21 February 1986) (8793/79).
[25] *James v. United Kingdom (*EcrtHR) (21 February 1986) (8793/79*)* "The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest.'"
[26] *Emanuel Zammit et v. Commissioner of Land* (FH) (22 October 2004) (708/00) (Mr Justice N. Cuschieri).

except in the public interest. Since the local law, the Land Acquisition (Public Purpose) Ordinance (Ch. 88) did not provide for a procedure to challenge such public interest element in any expropriation order, the law was amended granting the right to any owner of property which was declared to be needed for a public purpose, to challenge before the Land Arbitration Board, within twenty-one days, the issue of whether such expropriation was needed in the public interest or not.[27] This has given rise to some interesting cases, as in the case of the Housing Act 1949, regarding the interpretation of this elusive concept of 'public interest'.

In one case, the taking possession of by Government of a quarry in Gozo for use as a waste site for building material by several building contractors was declared to be not in the public interest by the lower court.[28] However, this judgment was overturned by the Court of Appeal[29] since the fact that private contractors who were competitors of plaintiff would benefit from such a waste site did not taint the public interest element in the order. [30]

In another case,[31] property at Valletta had been taken possession of under title of public tenure for it to be used by the Manoel Theatre Management Committee. The Court found that this Committee acted as if it were distinct form Government, even leasing part of the property to third parties. This according to law necessitated acquisition by absolute purchase rather

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[27] *"Art 6(2) (Ch. 88): (2) Any person who has an interest in land, in respect of which a declaration of the President as is referred to in subarticle (1) is made, may contest the public purpose of the said declaration before the Land Arbitration Board by means of an application to be filed in the registry of the said Board within twenty-one days from the publication of the said declaration..*

[28] *Gioacchino sive Jack Bugeja v. Commissioner of Land* (CMSJ) (13 June 2012) (134/95) (Magte P. Coppini) "This Court agrees that there was no public purpose in this expropriation. If there was a problem of waste storage caused by the building industry in Gozo, the solution was not that of taking compulsory possession of the quarry owned by the person who had tried his best in a legal way and completely at his expense, to find his own waste site for his own use. There was nothing to stop the other building contractors to do as plaintiff had done and search for sites fit for storage of their waste."

[29] (CA) (30 September 2016) (134/95).

[30] "It is erroneous to state that in this case the expropriation took place for merely private purposes; for the evidence shows that it occurred for the general interests of the residents of that island, forming part of an initiative to reduce the haphazard and abusive dumping of building waste to the detriment of the environment and public health."

[31] *Agnes Gera de Petri Testaferrata Ghaxaq v. Attorney General* (FH) (18 June 2009) (392/07) (Mr Justice R. Pace).

than public tenure.[32] The Court therefore ruled that this was *ultra vires* the power of the Commissioner of Land under Ch. 88.[33] However in another case[34] an eviction order issued by the Commissioner of Land following a non-renewal of a lease was deemed to be *intra vires* since the law empowered Government to evict an occupier of government land who was occupying it without a valid title.

Selection Processes

The courts have established jurisdiction to enquire whether a selection process was conducted according to law, particularly as regards the qualifications required to fill a post with a public authority. In case of breaches of a condition in the call for applications the Court will order that the selection process is conducted again rather than order that any particular candidate fill the post.[35]

Admission to University

Interesting cases regarding admission to the *Alma Mater* and the application of University Regulations have arisen. The courts have affirmed their right to take into account what happens in the educational domain.[36] In one case[37] a prospective law student was not

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[32] Article 5 Ch. 88: "*Provided further that where the land is to be acquired on behalf and for the use of a third party for a purpose connected with or ancillary to the public interest or utility, the acquisition shall, in every case, be by the absolute purchase of the land."*

[33] "The said Manoel Theatre Management Committee did not keep the expropriated premises under their management and a large part was leased to third parties including that part where there is a cafeteria, a restaurant on ground floor as well as offices leased to other entities … This means that effectively the said property is being used by third parties even for commercial purposes ."

[34] *Albert Fenech v. Commissioner of Land* (FH) (21 January 2015) (1058/06) (Mme Justice A. Felice).

[35] *Adriana Gatt Terribile v. Ghajnsielem Local Council et* (CMSJ) (15 April 2008) (75/04) (Magte A. Ellul).

[36] See Ugo Mifsud Bonnici *An Introduction to the Law of Education* (2013) (Malta University Press) 375: "The Education law in force (Act No.XXIV of 1988) as amended Chapter 327, does not exclude explicitly the jurisdiction of the ordinary courts of law on any specific academic matter, indeed as previously explained, certain provisions are intended to recognize rights which can be actionable in the Courts." See also *P.L. Giuseppe Borg v. Prof. Temistocle Zammit nomine* (CA) (7 May 1923) and *Anne Cremona Barbaro v. Prof Edwin Borg Costanzi noe* (CA) (27 September 1975). In the latter case, the Court of Appeal rejected the respondent's plea that the regularity of the conduct of examinations was a domestic matter between the University and its students.

[37] *David Harding v. Lawrence Farrugia nomine* (CA) (9 February 1987) (Kollezz.Vol. LXXI. II.115).

admitted as a student worker by the Selection Board, owing to an age limitation imposed by the Board. Plaintiff alleged that the imposition of an age condition was *ultra vires* the power of the Board since such limitation could only be imposed by the employer sponsoring a student worker to University.[38] The fact that respondents argued that a retrospective legal instrument would validate the imposition of such a condition was ignored by the Court of Appeal which declared such condition *ultra vires* the powers of the Board. Indeed, the fact that respondents argued that the law was going to be amended was an admission that what they did was in breach of the law as it stood at the moment of the relative decision.

Admission to University both as a student and to follow any particular course is governed by law and no changes to the requirements with regard to admission criteria can be made unless contained in an instrument having the force of law such as subsidiary legislation. In *Attard v. Ellul Micallef nomine*[39] the Court of Appeal ruled that:

> The legislator wanted that such a serious matter as entry into University should not be within the exclusive discretion of its Administration, but required that such rules relating to admission be incorporated in regulations, which would be known to any person interested and subject to review by the House of Representatives. This was done in order to ensure that the selection method is not only just but seen to be just, since it would be subject to verification by any involved or interested person. It is therefore not conceivable that the law would allow that a provision of such importance and basic for adjudication in the university education system, be bypassed and neutralized by a simple expedient that an important directive in the selection process be called criteria or such other nomenclature instead of a regulation proper; an expedient which would effectively mean that the directive be not subject to scrutiny by the legislator….

In *Fenech v. Zarb nomine*[40] the Court of Appeal again affirmed its jurisdiction to enquire into the validity of decisions by any University institution;[41] however in that case it decided that

[38] Art 39(1) Education Act: "Student workers shall be nominated by their employer after considering the needs, including age and grades as he may determine."
[39] *Nicholas Attard v. Professor Roger Ellul Micallef nomine* (CA) (4 March 1998) (Kollezz. Vol. LXXXII. II.40).
[40] *Joseph Fenech et. v. Professor Serafino Zarb noe et* (CA) (10 October 1952) (Kollezz. Vol. XXXVI.I.236).

the fact that the University, in breach of its own statute, had not published the University calendar within a week from the commencement of the Academic year, did not mean that all acts done by the University prior to such publication were null, for this could not be the intention of the legislator.

In another case,[42] the fact that a student was verbally informed which subjects and study units were obligatory did not exonerate the University authorities from indicating such fact in writing in the course catalogue as required by University Regulations.[43]

Appointment of 'Independent Persons'

A strange application of the *ultra vires* doctrine occurred in one case[44] where a trade union alleged that the Minister had not appointed 'independent' persons, as the law required, on the Labour Board which made recommendations to the Minister regarding Wage Orders under the Conditions of Employment Act 1952. The court ruled that since the law did not provide a definition of the term 'independent' it could not review the quality of independence of the members appointed by the Minister. The danger in this line of thinking lies in the fact that the right of a court of law to review an administrative act becomes dependent on whether the legislator defines a particular term in the statute concerned. The Court in fact applied the infamous article 742 of the Code of Civil Procedure (Ch. 12), as it then was, so literally that it refused to inquire into what the term "independent" meant once the term was not *expressly* defined in the statute itself.

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[41] "The question whether certain amendments made to the University statute are valid or not because they have infringed a provision of the Ordinance, falls within the jurisdiction of the ordinary courts."

[42] *Denise Buttigieg v. Rector University of Malta* (FH) (22 December 2003) (1435/02) (Mr Justice N. Cuschieri); see also *Stephanie Dalli v. Dr Valerie Sollars ne et* (FH) (20 October 2009) 824/08) (Mr Justice R. Pace) where the Court annulled a decision of a Disciplinary Board taken in breach of the University Regulations and the principles of natural justice.

[43] 'The *ratio legis* in this regard is clear that is to say that those study units which are compulsory and therefore on which university life for the student depends in their respective courses, be indicated clearly and their compulsory nature should unequivocally result in writing; in that way they would be notified to, and may be verified by, whoever is interested or involved. Consequently there would be no situation of uncertainty which may be of prejudice to the student.'

[44] *Anglu Fenech nomine v. Prime Minister et* (FH) (3 September 1989) (Mr Justice A. Depasquale).

Review of Legal Issues Decided by Tribunals Beyond Art. 469A

The courts have made it abundantly clear that they will not interfere with decisions of authorities or tribunals made within the *vires* allowed by law. Review is not appeal. Consequently attempts at appealing from decisions of the Industrial Tribunal on the meaning of the term 'redundancy' under the guise of review have been firmly rejected. [45]Similarly requesting review of decisions by such Tribunal on the basis of assessment of evidence by the Tribunal, which had exclusive jurisdiction on unfair dismissal, has not been allowed.[46]

The problem, however, remains: where does one draw the line? Can an administrative tribunal commit an error of law within its jurisdiction, or does an error of law necessarily allow judicial review? In *Dr. Vincent Falzon nomine v. Isabelle Grima*[47] the Court of Appeal refused to review a final decision of the Industrial Tribunal, from which there lied no appeal, even though plaintiff alleged a wrong application of the law. The argument of the plaintiff was that the Estacode – a code of conduct applicable only to pubic officers – was applied to a private company which was not bound by it. The court of first instance decided that the dismissal had been declared unfair but not on the basis of the Estacode, and that therefore there was no room for review and since no appeal lied from the Tribunal's decisions, the matter could not be reopened through judicial review. Plaintiffs appealed maintaining that the

[45] *See John Holland nomine v. Julian Schembri* (CA) (20 May 1991) and *Mediterranean Film Studios Ltd v. Albert Galea* (FH) (26 October 2001) (502/00) (Mr Justice G. Caruana Demajo); see also *Commissioner of Police v. John Mary Camilleri* (FH) (6 February 2004) (493/02) (Mr Justice J. Azzopardi) and *Mediterranean Film Studios Ltd v. Albert Galea et* (FH) (5 May 2004) (9502/00) (Mr Justice G. Caruana Demajo): "This Court does not enter into the question whether the decision of the Tribunal when it found that there was no resignation or abandonment of the place of work, was a right decision or not for the jurisdiction of this court is one of reviewing legality and not one of appeal."

[46] *Reno Alamango v. Mary Rose Ciantar* (CA) (29 May 1991); see also *Power Projects v. Stephen Agius et* (FH) (16 June 2003) (279/98) (Mr Justice Ph. Sciberras) "It is firmly established that the principles of natural justice have to be considered in the contest of the proceedings as a whole. Not any pretext is valid to annul decisions which on the contrary must and ought to stand."

[47] (CA) (17 May 1993) (Kollezz. Vol. LXXII.I.92).

decision had been based on the Estacode contrary to what had been asserted by the court of first instance. The Court of Appeal ruled that:

> The challenging of the validity of a decision of the Industrial Tribunal is limited to three categories of shortcomings: (a) excess of jurisdiction (b) non-observance of the law constituting it (Ch. 266) and finally (c) non-observance of one of the fundamental principles of justice.[48]

The Court summarily refused to review such decision. Implied in the judgment is that a review on matters of law could only be accepted if the Tribunal was in breach of *the law which constituted it, and not any other law*. The Tribunal, it seems, had the right to make errors of law, so long as they did not touch on the law constituting the Tribunal so much so that the Court remarked that:

> The appeal of the company not only cannot be sustained but the action, in the first place could not have been proposed before the ordinary courts.

So while the court of first instance at least decided that the Tribunal had not ruled in favor of respondent in this action by infringing the law and applying the Estacode, and therefore there could be no review because there was no error of law, the Court of Appeal seems to have decided that once there was no error of law in the Tribunal's decision *regarding the statute constituting it,* an error of law based on other statutes, was within the exclusive jurisdiction of the Tribunal and was non-reviewable.

The reference in the judgment to *the fundamental principle of justice* rather than the traditional term "rules of natural justice" may raise some eyebrows, but it does not appear that the Court was referring to some norms other than those traditionally accepted by the Maltese courts and English common law.

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[48] This statement is in direct conflict with recent English case law particularly *Pearlman v. Keepers and Governors of Harrow School* (1979) Q.B. 56 where the tendency is that any error of law does touch on the jurisdiction of a tribunal if the latter's decision was based on it. See *supra* 123.

This line of thinking was not followed in subsequent judgments of the Court of Appeal which affirmed its right to review awards by the Industrial Tribunal *inter alia* on matters of *any* error of law.[49]

Reading been the Lines

While case law interpreting the vague and nebulous concept of 'public interest' is extremely interesting because it allows a certain latitude to the courts to allow community-oriented projects even if run by the private sector, while at the same time preventing a flippant and abusive use of this concept, other cases deal with the proper interpretation of a statutory provision; so that what is apparently and *prima facie* not prohibited, becomes in breach of the law according to the interpretation of a particular legal provision given by the courts.

[49] In *Eden Leisure Group Limited v. Salvino Borg Anastasi* (CA) (27 June 2003) the Court of Appeal affirmed its jurisdiction to see whether an award was vitiated by error of law or by having taken irrelevant matters into account in its decision. Quoting its own case of *Dr A. Farrugia v. Electoral Commission* (CA) (18 October 1996) it stated that "Today it is clear that the Civil Court can review the acts of any administrative tribunal first of all to ensure that the principles of natural justice have been observed and secondly to ensure that there was no wrong or incomplete enunciation of the law." See also *SM Cables Ltd v. Carmelo Monaco* (FH) (14 February 2002) (2661/00) (Mr Justice JR Micallef)*, Director General of L aw Courts v. Carmelo Sciortino et (*FH) (4 October 2004) (789/02) (Mr Justice J. Azzopardi) and *Director General Law Courts v. Carmelo Axiaq* (FH) (13 June 2005) (788/02) (Mr Justice J. Azzopardi) where in the latter case the Court reviewed whether the Tribunal for Investigation of Injustices had acted *intra vires.* In *Anthony Cauchi v. Malta Environment and Planning Authority* (CMSJ) (18 October 2005) (5/04) (Mgte P. Coppini) the Court stated that: "our Courts have followed English doctrine even in this aspect of Administrative law and recognized that in spite of the fact that a particular statute allows an appeal on a point of law decided by an administrative tribunal, the ordinary courts may nonetheless review the actions of that tribunal to investigate whether it overstepped its lawful powers or observed the principles of natural justice in reaching that decision. See also *Perit Joseph Mallia v. Attorney General et (*FH) (11 July 2011) (Mr Justice J. Azzopardi): "There is no doubt that this Court enjoys the jurisdiction to review the workings of any administrative tribunal first of all to ensure that the principles of natural justice have been observed and secondly **to ensure that there was no wrong or incomplete enunciation of a legal hypothesis**"(emphasis added) (*Cassar v. Attorney General*) (FH) (29 May 1998); see also *George Sultana v. Malta Environment and Planning Authority* (CA Inf.) (26 June 2012) (50/11) *Police v. George Galea* (CA) (25 May 2012) (695/99) and *Malta International Airport PLC v. Deborah Bonello* (CA) (26 January 2018) (200/04) where a wrong enunciation of the law on Probation (Ch.152) was deemed to be sufficient ground of review of a decision of the Industrial Tribunal. See also *EneMalta Corporation v. Malta Resources Authority* (FH) (9 February 2009) (642/07) (Mr Justice C. Farrugia Sacco); *Power Projects v. Stephen Agius et* (FH) (16 June 2003) (279/98) (Mr Justice P. Sciberras). However, the Court of Appeal in the same case (CA) (13 April 2007) overturned the judgment of the lower court in so far as the lower Court had stated that the Planning Appeal Board could not examine questions relating to *ultra vires* as listed in article 469A.

One of the landmark judgments in this regard is *Anthony Ellul Sullivan noe v. Lino Vassallo noe et.*[50] At the time of the judgment of the Civil Court, First Hall,[51] later confirmed on appeal, the provisions of Act No. VIII of 1981 were still in force so that only simple substantial or procedural *ultra vires* was admitted as a ground of review, that is to say, a breach of an *express* provision of a written law either in substance or in procedure. In that case, two ships owned by plaintiff which were registered in Malta with the Registrar for Shipping were cancelled from the Register in 1982. Prior to cancellation plaintiff received a notice from the Registrar that such cancellation would be affected 'in the interests of Maltese shipping' and was given four days' notice to make representations. No reasons were given for such cancellation. Article 80 of the Merchant Shipping Act 1973, at that time, empowered the Minister responsible for shipping to cancel the registration of any ship in the national interest or that of Maltese shipping. Before doing so he had to give the owners *'adequate opportunity*' to make their representations. The Court ruled that by not giving the owners reasons for the cancellation, this adequate opportunity had not been given by respondents:

> The Minister gave plaintiff an opportunity, but it was not an *adequate* one as required by law because he did not give a single clue as to what he was supposed to respond to and make representations... Whatever the reasons were which the Minister had in mind, he did not express them openly and they remained hidden in his thoughts and, thereby he breached the will of Parliament expressed unequivocally in the words of the law.

Absence of Discretion

Similarly in *Dr. Austin Sammut nomine v. Comptroller of Customs*,[52] the Courts interpreted a statutory provision to the effect that there was no discretion given to the respondent public officer; and therefore the provisions of Act No. VIII of 1981 which introduced article 743 precluding court review did not apply. The case related to the right of a returned emigrant to be exempted from paying customs duty on his car if he imported such car within three

[50] *Anthony Ellul Sullivan v. Lino C. Vassallo et* (CA) (26 June 1987) (Kollezz:Vol. LXXI.II.356).
[51] (FH) (2 June 1983) (Mr Justice M. Caruana Curran).
[52] (CA) (30 November 1993) (Kollezz. LXXVII.II.376).

months from arrival to take up residence in Malta. The respondent Comptroller of Customs was alleging that such time had elapsed and therefore duty was payable.

Having lost the case before the First Hall of the Civil Court, on appeal the respondent raised, for the first time, the issue of lack of jurisdiction to review under article 743 of Ch.12 The response of the Court of Appeal was as follows:

> This latter category of pleas regarding lack of jurisdiction of its very nature requires the strictest and most restrictive interpretation for it constitutes an exceptional situation in a State governed by the rule of law... the expression "satisfies the Comptroller of Customs" interpreted in a natural way, as these words normally mean, indicates a duty of the emigrant to provide proof of three factual elements which the legal provision refers to, to the satisfaction of the Comptroller. These words do not indicate any discretion on the part of the Comptroller; for discretion implies the exercise leading to a decision which takes into consideration an assessment of factors which it is not practically possible for them to be subjected to the review by who cannot be vested with all these factors.

This tortuous reasoning linking article 743 only to discretion exercised by a public officer and then denying that such discretion existed in this case, is yet another proof of the reluctance of the courts to blindly apply ouster clauses. Indeed, they will go to great lengths and legally bend backwards to affirm, rather than deny, judicial review.

Ultra Vires and Interpretation of Laws

The Courts in England have developed certain guidelines, indicators and presumptions regarding interpretation of statutory provisions to determine whether a public authority exceeded its powers as interpreted by the Courts; such as a presumption against legislation ousting the jurisdiction of the courts, or in favour of a strict construction in penal and taxation matters and one in favour of interpreting statutes in consonance with international law as well as constitutional or Convention rights;[53] but these remain rebuttable presumptions, and if the wording of the law is clear, the courts in England have decided that they cannot arbitrarily change their construction. In Malta such laws, however, may be challenged as infringing the

[53] Auburn, Moffett, Sharland: *Judicial Review: Principles and Procedure* (Oxford University Press (2013) 282.

written Constitution, and in both England and Malta as being in breach of the European Convention on Human Rights.

Similarly cases regarding construction of words have arisen as regards requisition orders issued by the Housing Secretary which in some way or another were considered as restricting the powers of a public authority either by a promise of some kind by the public authority or else in the wording of the order itself. Consequently in *Giovanni Aquilina v. Joseph Ellul Mercer noe*[54] the Court of Appeal decided that following a promise in writing made by the Minister responsible for housing that the order was temporary until a third party would be accommodated in other commercial premises pending the demolition and reconstruction of a slum area, government could not renege on that promise. The order, coupled with the letter, had limited the duration and the nature of such requisition order, even though the law itself did not contain any restrictions of time for such orders.[55] Similarly in *Masini v. Podesta*`[56] an order issued `in the public interest for providing living accommodation to persons and for ensuring a fair distribution of living accommodation', did not allow the Housing Secretary to allocate the premises for industrial purposes. Had the order been issued only in the public interest such order would have been valid.

As stated in *Denaro v. Tabone*[57]

> There is nothing to prevent any citizen or group of citizens from exercising their normal right to challenge in Court all executive acts which are discretionary. If it were not so, any government official would be above the law in the exercise of every function of his, and this is not the position of the Executive in this country.

[54] (CA) (28 March 1958) (Kollezz. Vol. XLII.I165).
[55] "Respondent nomine cannot arbitrarily avoid the legal consequences of the commitments of the department for which he is responsible, and must respect the limitations made by the said letter to the requisition order, by executing in good faith the assumed commitments *iure gestionis* and return the shop to plaintiff."
[56] (FH) (27 April 1962) (Mr Justice JH Xuereb). This judgement was reversed by the Court of Appeal on 29 April 1965 (Kollezz. Vol. XLVII.I.250).
[57] *Victor F.Denaro v.Tabone Emmanuel noe* et (CA) (25 January 1957) (Kollezz. Vol. XLI.I.34).

Declaring Existence of Trade Dispute

In one case,[58] a trade union wrote to the Minister for Labour for him to declare that a trade dispute existed following the dismissal of two of its members from the Malta Drydocks; the Minister for Labour refused to give such a declaration arguing that when the employees were dismissed the Union had not yet been constituted and in any case such a declaration was entirely within the Minister's discretion and was not reviewable by the Courts. The court affirmed its jurisdiction to enquire into the legality of administrative acts and decided that the reason given by the Minister was not according to law.

Police Board

In a landmark judgment relating to the conclusions of the Police Board set up by the Police Act, the Court declared null its conclusions on which disciplinary proceedings had been instituted against a police officer owing to the fact that the new members of the Board, appointed after the general elections of 2013, had held meetings when the old Board was still duly constituted and the new Board had not yet been constituted according to a law.[59]

Refusal of Licences/Permits

In *Pace v. De Gray*[60] the Court of Appeal ruled that a legal provision giving an enabling power to a government official had to be analyzed in the whole context of the law in question. Consequently a power given to the Commissioner of Police to refuse the granting or renewal of a licence if he considered the licensee not to be of good character, did not extend to suspending such licence when it had not yet expired.

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[58] *Victor Henry Debono v. Dr Vincent Tabone nomine* (FH) (24 June 1970) (Mr Justice M. Caruana Curran).
[59] *Elton Taliana v. Minister Home Affairs et* (FH) (7 November 2017) (177/14)
[60] *Grazio Pace v. Vivian De Gray noe* (CA) (25 April 1969).

Similarly in *Lowell v. Caruana*[61] the Court ruled that the Planning Area Permits Board (PAPB) was entitled not to grant a permit, or in granting it to impose conditions, but had no right to revoke it while it was still in force.

Tax Matters

A demand notice issued by the Value Added Tax Commissioner to a company only, could not then serve as a notice to the director to be held personally responsible for the payment of tax if no demand notice had been issued against such director personally. This ran counter to article 469A since such decision was as a result *ultra vires.*[62]

Tendering Process

The Court of Appeal has intervened on a number of occasions regarding points of law in the tendering process, in some cases annulling refusal of bids; in one such case the Court annulled a refusal of a bid that did not breach any express condition of the public call for bids in the tendering process.[63]

Customs Matters

In a more recent case[64] the Court annulled a confiscation order of released goods by the customs authorities regarding a harmless energy drink which however was styled *Cocaine* in breach of government policy; since there was no breach of the law, and the policy was not legally binding, the administrative act was quashed since the public authority had no legal authority to emanate it. The Courts have affirmed their right to review decisions by customs authorities and refused in one case the argument that under the Interpretation Act 1975

[61] *John Lowell ne et nomine v. Dr Carmelo Caruana nomine* (FH) (14 August 1972).
[62] *Christopher Gauci v. Value Added Tax Commissioner* (FH) (7 November 2017) (826/05) (Mr Justice S. Meli).
[63] *Avv. Peter Fenech nomine v. Department of Contracts* (CA) (27 June 2008) (972/05).
[64] *All For Property Limited v. Director General Customs* (FH) (30 September 2014) (741/08) (Madam Justice L. Schembri Orland). See also *Malta Police Association et v. Commissioner of Police et* (FH) (29 May 2017) (633/15) (Mme Justice M. Hayman) where the prohibition against police officers to bid in auctions of seized firearms was deemed to be *ultra vires* for there was no law allowing it.

(Ch.249) the discretion of the customs authorities was so wide that no review was possible.[65] In another case,[66] the refusal to release food stuffs because they were allegedly in breach of the *Codex Alimentarius,* when such Code at that time was not applicable in Malta, was deemed to be not only contrary to law, but also unreasonable.

Decisions of Policy by the Medical Council

In a recent case[67] a policy adopted by an administrative body, namely the Medical Council which endorses warrant for medical doctors to exercise their profession in Malta, was challenged. The Court, while declaring that public authorities had authority to draft policies to guide them in the exercise of their public functions, retained the right to examine and monitor such policies to guarantee that they are reasonable:

> The fact that an administrative body – and the Medical Council amply qualifies as such, given the enabling powers conferred upon it by the law – adopts a policy in regard to some standard or quality which must result in an application brought before it does not render such policy void on the basis alone that there is no express legal provision to buttress it. The invocation of 'policy' by such an administrative body, however, raises the question of the reasonableness of such policy and other kindred issues like the legitimate expectations of those who are aware of the policy's existence.

In that case plaintiff argued that the Council's decision that applicants in plaintiff's situation would only be enrolled in the Register once they submit to and pass a special oral examination in various medical disciplines was an implementation of a 'standard policy' and not the result of an express legislative instrument laying down this requisite. Not only that, but this 'standard policy' did not appear to have been at least minuted in the records of

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[65] *Pacifico Fenech v. Comptroller Customs* (FH) (21 January 1991) (Kollezz. Vol. LXXV.III.660). It resulted that the importation of dead birds could be prohibited by the Customs authorities to prevent such imported goods from being embalmed but no proof had been produced in this regard and therefore the Court ordered the release of such goods. The mere *possibility* of such embalming was not enough.

[66] *Carmelo Dingli v. Comptroller of Customs* (CA) (27 March 2009) (66/92). "It is the opinion of the Court that the administrative decision taken by defendants does not satisfy the test of reasonableness for it was based on criteria which were not known to everyone including plaintiffs and which render that decision not objective and the same for everyone."

[67] *Isabella Zanian Desira v. Medical Council* (FH) (14 February 2017) (740/11) (Mr Justice JR Micallef).

proceedings before the same Council at any time but was resorted to as a matter of general practice. The Court stated that:

> In order that such discretion is correctly acquitted, it must be shown to the Court's satisfaction that the vested authority has indeed considered all the relevant issues brought before it and that it has done this without any interference by any third party or by not having rendered itself incapable or unable to exercise such discretion.

The plaintiff criticized also the incoherent application of this policy and brought evidence which showed an adopted practice of engaging third country nationals as practicing medical doctors at the behest of Government under a temporary registration, *without having to submit the chosen candidates to the qualifying exam*. It was then possible to convert that temporary registration into a permanent one within a short time without observing the 'standard policy' which the Council said it had devised in regard to all such candidates.

In the light of these findings the Court ruled that the Council had acted unreasonably (a) because it had ignored applicant's academic qualifications which had been considered adequate by the competent authorities. (b) secondly, a proper reading of the *proviso* to article 11(1) (c) of the Health Care Professions Act (Ch. 464)[68] would show that plaintiff's situation was not one to which that *proviso* applied. That *proviso* applied to third-country nationals whose qualifications had not been recognized in a Member State, which was certainly not the case with plaintiff, whose qualifications had been recognized by the competent Maltese authorities and thereby recognized by a Member State. (c) insofar as the Committee's decision to reject the appeal was expressly based on the said provisions, it followed that the decision was founded on a wrong application of the correct law and thus could not stand (d) once the plaintiff's application did not fall within the category covered by the provisions of

[68] 11 (1) (c) Chapter 464 Laws of Malta: "*Provided that in respect of applicants coming from third countries, whose qualifications have not been recognized in a Member State, the Medical Council may, in respect of such qualifications, require the applicant to sit for and pass a professional and linguistic proficiency test, and may also require that he serves as house physician and, or surgeon in a hospital recognized for the purpose by the Medical Council, for such period, being not longer than two years, as the Minister may prescribe…"*

article 11(1) (c) of the Act, it did not seem reasonable for the Council to impose upon plaintiff a condition which the enabling law did not give it the discretion to impose (e) despite the laudable intentions of the Council to assure that practicing medical or health care professionals in Malta be duly qualified and capable of securing the best health care available, the Court did not consider the condition imposed on plaintiff in order to accept her name to be registered to be reasonable in the particular circumstances of the case. It resulted that plaintiff had, for a considerable span of time and as requested by the same Council, performed 'adaptation work' in a State hospital for many months after the Maltese authorities had recognized her academic qualifications and very close to the time when she resubmitted her application to have her name enrolled in the Register.

Once the Court has found sufficient reason to uphold the plaintiff's grievances on the above-mentioned grounds, it was neither necessary nor useful to inquire into the other grounds flagged by her, as the identification of one valid ground was sufficient to bring about the effects which might lie with the other grievances, had they been likewise proven.

Plaintiff in her third claim had requested that the Court order the respondent Council to register her particulars and qualifications in the Register for Medical Practitioners in Malta and to do this within the short and peremptory time which the Court would prescribe. As regards this request**,** the Court felt it pertinent to point out that the powers of a reviewing Court were limited by virtue of the nature of the action brought before it. In particular, it was settled law that a reviewing Court could not substitute the administrative body whose action or omission it was called to review nor exercise the discretion and powers with which such body was vested by its enabling law. When a Court of review found that an act fell foul of the law, all it could do was to annul such act and remit the matter to the administrative body for reconsideration, without venturing to pronounce itself also on the merits or re-deciding the matter which was the preserve of the administrative body reviewed. That administrative body

had to take note of the Court's decision in its reconsideration, but the role of re-examining the case still vested in the administrative body.

Parking Matters

In one case a Local Council had launched and executed a residents' parking scheme without legal authority. Although it had the right to issue bye-laws in order to execute its functions and prevent inconvenience in its locality, the Council had taken a decision to launch such scheme rather than issue a bye law.[69]

Pharmacy distances

In another case[70] the court delved into the question of the proper meaning of *shortest walking distance*, regarding pharmacy licences. It decided that the measurement had to abide by the provisions the Highway Code. Even though such Code did not have the force of law, it was used to assist the Court in interpreting the term walking distance. This the Court was permitted and entitled to do in the absence of any definition of the term. Consequently the decision of defendant ignoring the Code was considered to render such decision unlawful.

Review of Delegated Legislation

Even though the courts have decided that the executive power delegated by Parliament to legislate does not constitute an administrative act and therefore falls outside the parameters of article 469A, a brief review of cases relating to the challenging of delegated legislation as being *ultra vires* illustrates the power of the courts to affirm their jurisdiction in reviewing

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[69] *Maria Victoria Borg v. Mayor Pieta Local Council* (CA) (19 May 2009) (949/04). Article 34(1) of Chapter 63 provides that: "1 (l) The Local Council may make, amend or revoke bye laws in order to execute its functions and reduce and protect the locality from inconveniences. " It can never therefore be that the resident reserved parking scheme was made in virtue of this article for there is no doubt that this scheme was not launched in virtue of a bye-law but of a decision of the appellant Local Council taken at one of its meetings."

[70] *Joanne Cini v. Superintendent for Public Health* (CMSJ) (14 April 2011) (17/11): "Walking had to be effected on the pavement and a pedestrian should never cross a road diagonally." See also *Michael Scicluna v. Superintendent for Public Health* (FH) (28 July 2011) (668/10) (Mr Justice JR Micallef).

such legislation on ground similar to those contained in article 469A. Up to recent times no mention was ever made of article 116 of the Constitution as forming the legal basis for such review. The courts merely affirmed their jurisdiction in virtue of their judiciary role as established in the separation of powers doctrine.[71]

Refusal or release of Russian Films and Customs Regulations

One of the earliest judgments in this regard was that of *Baldacchino v. Caruana Demajo* noe.[72] A film distribution company at the height of the Cold War had imported for screening purposes two Russian films. Their release was refused by the Customs authorities in virtue of the Cinematograph Films (Prohibition of Importation) Regulations 1954. These films, which were produced in the United Kingdom but were considered to be Russian films since they were an exact copy of films produced in the Union of Soviet Socialist Republic (USSR) had already been regularly imported and were deposited in the Customs Stores awaiting release when a Legal Notice was passed (LN 67 of 1954) prohibiting the importation of films produced in the USSR. The Court of Appeal accepted plaintiffs' argument that even though the government's refusal could be classified as being *iure imperii*, it still had to be according to law in substance and procedure

> When a government officer exercises an absolute discretion, he is acting *iure imperii*, according to the phraseology of the continental doctrine which is followed by our courts. No appeal can be made to these courts of justice in the exercise of such discretion. However, the exercise of such discretion may be challenged in court if it is *ultra vires*, that is to say if it is not exercised within the parameters of the statutory power conferring such discretion, or if such act of discretion was not exercised according to procedural formalities, or by the competent authority at law.[73]

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[71] *Director General Law Courts v. Pinu Axiaq (FH*) (7 January 2003) (2633/00).In that case specific reference was made to article 32(1) of Ch. 12 and that such artcicle applied to judicial review even after the amendments introduced in 2002. See *supra* 104. See also *Norman Rossignaud vs. Gontran Borg noe*,(FH) 19 April 1990.
[72] (CA) (26 February 1954) (Kollezz. Vol. XXXVIII.I.61).
[73] *Ibid.*

Government argued that its right to refuse importation emanated from its political authority to govern. The Court refused this argument stating that once importation regulations had been passed, Government has to abide by them and base it actions on such regulations.

It did, however disagree with the position taken by the court of first instance that the films had not yet been imported in Malta. It ruled that the moment they entered Maltese territory they had been imported. It also decided that Government had no power to pass regulations with retrospective effect not even when it considered the matter as one of public order. Once the goods had been imported, subsidiary legislation could only have retrospective effect if expressly authorised by the parent Act. Since no such provision existed in so far as the Regulations purported to retroactively prohibit the release of films regularly imported, such regulation was *ultra vires.*[74]

Other Cases

Similarly in *Calleja v. Grech,*[75] the Court of Appeal ruled that a regulation prohibiting a motor bus from embarking or alighting passengers in a particular stretch of its route was *ultra vires* since no such enabling power existed in favour of the respondent Commissioner of Police. In another case,[76] the reduction through subsidiary legislation of the closed season, thus extending the hunting season was held to be *ultra vires* when the parent act itself established the period in which hunting was allowed. Extending such period without amending the principal law was exceeding the powers given to the Executive in issuing

[74] "It is a universally recognized principle that so long as the law does not expressly say so, new laws, except those which relate to procedural matters, do not have retroactive effect."
[75] *Joseph Calleja v. Herbert Grech ne* (CA) (31 January 1955) (Kollezz. Vol. XXXIX.I.83).
[76] *Louis F. Cassar v. Prime Minister* (FH) (20 July 1988) (Mr Justice V. Borg Costanzi).

delegated legislation which could never run counter to the parent Act, in this case the Code of Police Laws.[77]

[77] For further cases of judicial review of delegated legislation see also *Police v. George Pace P.L.* (FH) (15 May 1937 (Kollezz. Vol. XXIX.IV.697); *Police v. John Lyons* (FH) (18 October 1948 (Kollezz. Vol. XXXIII.IV.741); *Police v. George Vigo* (FH) (14 December 1951) (Kollez. Vol. XXXV.IV. 772); *Police v. Ganni Vassallo* (FH) (28 June 1952) (Kollezz. Vol. XXXVI.IV.787), *Police v. Domenico Savatta* (FH) (7 June 1952 (Kollezz. Vol. XXVI.IV.772) *Police v. Ganni Camilleri et* (CC) (23 April 1965).

Chapter VIII

Third Ground of Review: Procedural Fairness – The Rules of Natural Justice

General

The law expressly mentions procedural *ultra vires* as the third ground of review. Article 469A (b) (ii) provides that an administrative act may be challenged as being *ultra vires* "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."

Even this apparently straightforward ground of review raises some interesting issues and gives rise to some questions of construction and substance. Is any procedural requirement mandatory? How is one to distinguish between procedural requirements which are mandatory or simply directory?

The second question which is more complex is that this ground of review seems to imply that *any* decision of the Administration which amounts to an administrative act has to abide by the rules of natural justice.[1] Shorn from any interpretation based on English common law, this ground of review would challenge decisions of the Administration which for decades have been taken, and are still being taken, without observing the rules of natural justice. The law does not seem to refer to any limitations of application. Are we to interpret this provision in the light of English case law regarding the subject, or has this ground of review been extended to cover all administrative acts, as a positivist interpretation of this provision seems to imply?

[1] "*CCD Ltd v. Malta Transport Authority et* (CA) (18 July 2017) (355/.05): "It is well known that the principles of natural justice are those minimum principles which have to be observed during any proceedings even before an administrative entity which has the power to take decisions which affect the rights of a person."

Definition of Rules of Natural Justice

Nowhere in article 469A is there a definition of what constitutes the rules of natural justice.[2] Presumably the legislator assumed that the common law norms defining natural justice in legal terms, which had been applied for decades ever since the landmark judgment of *Sammut v. Mc Cance*,[3] and now codified in article 469A Ch.12 of the Laws of Malta, were to be applied. One can therefore argue that the sphere of application of such rules is also subject to English common law norms. This second point is not so clear. On the definition of "rules of natural justice" the law is silent, and therefore one may apply the rule that wherever there is a lacuna it is permissible to refer to English common law in public law matters. On the second point one can argue that statute has intervened providing that such rules have to be applied to any action of the Executive which fits into the definition of an *administrative act* contained in article 469A. Applying the Latin maxims *ubi lex voluit dixit,* and *ubi lex non distinguit nec nos distinguere debemus*, no application of English common law can change or thwart the clear provision of the law.

But one may ask is there truly a *lacuna*? The Administrative Justice Act (Ch. 490) in article 3 (1) under the title '*Administrative Tribunals*' provides that such tribunals have to respect and apply the principles of *good administrative behaviour*, which are then listed in detail in sub-article (2), amongst which it is provided that any administrative tribunal shall respect the

[2] The fact that it is not defined does not mean that it has no meaning. Lord Reid in *Ridge v. Baldwin* (1964) AC 49 commented that: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these ideas tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". See also *Lloyd v. McMahon* [1987] AC 625 (12 March 1987) cited with approval by the Court of Appeal of Malta in *CCD Limited (C-29169) v. Malta Transport Authority* (CA) (18 July 2017) (355/05) "the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.*"*

[3] (FH) (29 May 1946) (Kollezz. Vol. XXXII.II.350) (Mr Justice W. Harding): "The ordinary courts have limited review over the decisions of the Emergency Compensation Board, in the sense that they may examine whether there is anything *ultra vires* in the Board's decisions, or whether there has occurred any violation of the rules of natural justice." See also *Emmanuel Said et v. Malta Planning Authority* (FH) (23 May 2008) (99/07) (Mr Justice A. Ellul).

parties right to a fair hearing including the principles of natural justice, namely (1) *nemo iudex in causa propria* and (ii) *audi alteram partem;* so here there is a definition of what the natural justice principles are. One may object that these principles in Chapter 490 apply only to tribunals and not to public authorities as defined in article 469A, and secondly that the principles of natural justice go beyond the two Latin precepts mentioned in the law; in fact later on in the sub-article, with obvious reference to tribunals, there is also stated that 'reasons shall be given for the judgment'.

It is submitted, however, that in spite of applying to organs and persons other that public authorities, the rules of good administrative behaviour contained in Chapter 490, assist in the definition and interpretation of natural justice under article 469A – though they are of no assistance as to their *sphere of application*. Such principles as that documents have to be made available to the parties or the requirement of procedural equality between the parties may, by analogy, be applied to review of discretion under article 469A; but other principles such as that the proceedings have to be held in public, or that decisions have to be taken within a reasonable time or that proceedings have to be adversarial in nature obviously refer to proceedings before a judicial or quasi-judicial organ, rather than a public officer or authority as defined in article 469A. However, even though these latter principles are not described as constituting the rules of natural justice under paragraph (a) of sub-article (2) of article 3 of Chapter 490, they still indicate what the legislator considered to be the tenets of procedural fairness and propriety.

Mandatory or Directory

The courts have admitted that the distinction between what is directory and mandatory is not always clear. In *Mintoff v. Borg Olivier nomine*,[4] where it was alleged that an Act of Parliament had been approved in breach of the Standing Orders of the House of Representatives, the Constitutional Court remarked that:

> The court holds the opinion that the rule must be that the question of invalidity of an Act of Parliament, present and future, such as in the present action based on irregularities of form and procedure in the legislative process before the House of Representatives, must rest on grave reasons which really, considering all the circumstances, affect the constitutional requirements. In the present case, in spite of certain irregularities which have been mentioned the Court did not find that such gravity existed.

It also stated that:

> A distinction has to be made between rules which are directory and those which are mandatory; in the first case the non-observance does not affect the validity of laws, while in the second case such validity is affected since there is a breach of the requirements imposed by the Constitution.

In *Mercieca v. Commissioner of Inland Revenue*[5] the Court decided that the rule whereby the Commissioner of Inland Revenue was obliged to consider 'such further returns, books or evidence, if any, as may be produced before, or obtained by him,' prior to issuing an *ex officio* assessment was a mandatory and not directory one.

Criteria to be adopted to decide whether a norm is mandatory or not, include examining the consequences provided for non-compliance by the statute itself, the language of a statute, whether it is in affirmative language or negative language and the results of the compliance or non-compliance of a statutory provision. The use of the words 'shall' and the 'negative' or

[4] (CC) (22 January 1971).
[5] *Paul Mercieca nomine v. Commissioner of Inland Revenue* (FH) (17 October 1986).

'prohibitive' language of the provision is generally seen as a strong, not ultimate, indicator of the fact that the intention of the legislature was to make the rule mandatory.[6]

Mandatory Procedural Requirements

In one case[7] where the residence home of plaintiffs was classified as being in an urban conservation area, and consequently subject to severe restrictions regarding development, the issue arose whether the proper procedure had been followed. A local plan had been changed after a consultation exercise. In the original draft submitted for consultation, the property of plaintiffs was not included in the Urban Conservation Area (UCA). After the exercise it was. The Court first of all stated that the exercise did not indicate any suggestion that the house in question would be classified as an UCA. It however found that the Planning Authority had been planning to extend the UCA's *prior* to the publication of the first draft plan. In this respect therefore the Court concluded that:

> The Authority therefore failed in its statutory obligation to inform the public exactly what its intentions were in this regard and thereby denied the public the opportunity to put forward its opinion as the legislator willed.[8]

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[6] Considering similarities with the common law tradition in India regarding judicial review, one may refer to the case decided by the Indian Supreme Court in *BDA Private Limited v. Paul P. John & Others 2008 (37) PTC 41 (Del.)*, the court held that to judge the true character of the legislation, the true object of the provision of law and its design and context had to be ascertained. If the object of the law is to be defeated by non-compliance with it, it has to be regarded as mandatory. See also judgment by the said Court in *Pratap Singh v. Shri Krishna Gupta AIR 1956 SC 140,* wherein it is stated that `some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues." See also G.C. Thorton *Legislative Drafting* (London) Butterworths (1987) Third Edition: "Where a statute prescribes the time or manner of performance of a power or duty, the question arises as to the validity of the act if the prescribed procedure is not followed. If the validity depends on obedience to what is prescribed the provisions are said to be mandatory if validity does not so depend the provisions are said to be directory."

[7] *Joseph Sciriha et v. Malta Environment and Planning Authority* (FH) (28 January 2016) (127/07) (Mr Justice JR Micallef).

[8] See also *Falcon Investments Ltd v. Malta Environment and Planning Authority* (FH) (17 June 2013) (1198/11) (Mr Justice A. Ellul): "The courts certainly enjoy jurisdiction to review whether in the preparation of a local plan, the Authority followed the procedure envisaged by law. This can be done irrespectively of whether this exercise is made under article 469A (b) (ii) of Chapter 12 or on the basis of other principles of law; see also *Ricky Alan Reeves v. Commissioner of Inland Revenue* (FH) (6 June 2016) (Mr Justice L. Mintoff) (870/15) where an application for the recognition of a debt owed to a foreign fiscal authority was not notified to the

Similarly in another case [9] the Broadcasting Authority, an institution established by the Constitution, was deemed to have breached a mandatory procedural requirement when it heard a case relating to an administrative offence without observing the basic rules of a fair hearing.

In a disciplinary case before the Medical Council, the Court ruled that the period of two years established by law for the Council to conduct its investigation on any complaint was not merely directory but also mandatory.[10] It stated:

> The Court is of the opinion that term is mandatory and is not there to serve only as a guide. Had it been otherwise, there would have been no need to establish (i) a definitive period of two years (ii) that the Council had to terminate the inquiry within two years and (iii) and that the two year period does not apply when the delay is not the fault of the Medical Council.

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alleged debtor who received only the decree recognizing such debt. The proceedings were declared procedurally *ultra vires*.

[9] *Public Broadcasting Services Ltd v Broadcasting Authority (*FH)(11 May 2009)(1692/000(Mr Justice C.Farrugia Sacco): " The fact is absolutely clear that the decision given by the Authority at the moment it was given was not in conformity with the provisions of article 41(3) Chapter 350 for it did not observe the guarantee of a fair hearing in public. Nor was the plaintiff company informed that it was being investigated and charged according to article 41(8) . It also failed to inform the plaintioffc ompany that it had the right to produce witnesses to defend its case as well to be assisted by a lawyer. Nor was there any cross examination of the person who made declarations . See also Kevin Aqulina: *The right to a fair and public trial in Administrative Broadcasting Proceedings* (IRIS Legal Observations of the European Audiovisual Observator IRIS 2009-8:16/24).

[9] *Dr Frank Portelli v. Dr Josella Farrugia ne et* (FH) (25 April 2014) (1110/09) (Mr Justice A. Ellul). See also *Ronald Apap v. Commissioner of Police* (ART) (14 April 2016) (31/14) (Magte. G. Vella) where the Court annulled a decision of the Commissioner of Police regarding a private guard licence for it was not decided within the statutory four weeks.

Again in another case[11] the conclusions of the Police Board against a police officer were declared null owing to the fact that the evidence collected had not been given on oath as required by law. The Court observed:

> From the wording of the law the requirement that evidence is given under oath is a mandatory one when a person is called to give evidence before the Board. In other words, the Board enjoys discretion (as submitted by defendants) whether to hear witness in the course of its investigation; but once it decided to hear witnesses the evidence must be given under oath.

Even authorities who are protected by ouster clauses must observe mandatory procedural requirements. This is illustrated in two important judgments delivered by the Court of Appeal in 2010. Under the Police Act (Ch. 164) – as is the case with the Armed Forces Act (Ch. 220) – the Prime Minister on the recommendation of the Commissioner of Police, can force the retirement of a member of the Force "in the public interest" with full pension rights.[12] Since such a retirement was not considered as a formal dismissal, it was customary for such decision to be made without hearing the officer concerned. However, the Public Service Commission could not ignore *its own procedural rules* which required that such forced retirement in the public interest had to follow a certain procedure, including that of hearing submissions by the aggrieved person as required by the disciplinary regulations approved by the Commission itself. [13]

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[11] *Elton Taliana v. Minister Home Affairs et* (FH)(7 November 2017)(177/14)(Mr Justice JR Micallef).

[12](Ch. 164) *"18. It shall be lawful for the Prime Minister on the recommendation of the Public Service Commission to remove from his office at any time a police officer who –*
(a) has not given any indication of being or has ceased to be an efficient police officer; or
(b) is incapable by reason of some infirmity of mind or body of discharging the duties of his office when such infirmity is likely to be permanent; or
(c) it is considered, having regard to the conditions of the Force, the usefulness of the officer thereto, and all the circumstances of the case, should in the public interest no longer serve as a member of the Force."

[13] Reg. 35 L.N. 186 of 1999. See *D. Gatt v. Prime Minister* (CA) (6 September 2010) (1548/01) and *I. Portelli v. Prime Minister* (CA) (6 September 2010) (168/01). In *Dr J. Cachia Fearne v. Permanent Secretary Ministry Resources and Infrastructure* (FH) (20 October 2005) (106/03) (Mr Justice T. Mallia) (confirmed by CA on 14 July 2008) it was stated that: "the principles of natural justice must be always and scrupulously observed by any court, tribunal, board or Commission empowered to decide any matter regarding an individual and no authority so empowered can ignore such principles with impunity."

Natural Justice: Sphere of Application

The application of the rules of natural justice in English common law has been varied. The flow and ebb of their application in practice ranges from a strict application to judicial and quasi-judicial bodies, particularly those entrusted with deciding a *lis inter partes*, and the opening in the beginning of the twentieth century to a more liberal application, climaxing in the *Ridge v. Baldwin* judgment of the House of Lords in 1964.[14]

It was only with the extension after the war of the welfare state and the proliferation of bodies and offices determining questions relating to social rights that the courts of law started extending the application of the rules to bodies other than judicial ones.

In *Board of Education v. Rice,* [15] Lord Loreburn ruled that when an officer in any governmental department decides cases, then he "*must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything*". However, the courts still stuck to the opinion that the rules applied only when any body or person performed a judicial or quasi-judicial function, as distinct from an administrative decision. *Board of Education v. Rice* dealt with a *lis inter partes* reviewing a Board decision ascertaining questions of law and fact.[16] Indeed in the *Arlidge* case[17] the House of Lords ruled that there was no obligation for a department to divulge a Report submitted by an inspector[18], regarding a housing appeal made by a citizen affected by a housing decision. Only when a government department made decisions in situations resembling a legal action between two parties or when a person was dismissed from office when such office was not held at pleasure

[14] (1964)AC 49.
[15] (1911) A.C. 179.
[16] See De Smith *Judicial Review* (Seventh Edition) (2008) (Sweet and Maxwell) 353:`It does not follow that everyone who decides anything is subject to a similar duty, or that persons involved in a controversy must always be given the opportunity of rebutting statements prejudicial to them.`
[17] (1915) A. C 120.
[18] *R. v. Leman Street Police Station Inspector ex parte Venicoff* (1920) 3 K.B. 72.

and decisions seriously affecting property rights. Indeed in *Venicoff*[19] a deportation order signed by the Home Secretary which he deemed to be "conducive to the public good" was considered to be an executive or administrative decision in spite of the consequences of such decision on a person's liberty.

In *Ridge v. Baldwin*,[20] this definition was extended to apply also to *administrative* decisions If a decision seriously affects individual interests, natural justice or fairness must be observed irrespective of the label applicable to that decision. Prior to *Ridge v. Baldwin*, even such important decisions as revoking a trader's licence[21] were held to be non-judicial and not subject to these rules. *Ridge v. Baldwin* changed all that and the list contained in such case where natural justice applies included:

(a) where there is a *lis inter partes;*

(b) where a person's livelihood is at stake;

(c) where the decision will deprive a person of an office or status as distinguished from ordinary employment;

(d) where property interests are at stake;

The rules did not apply:

where a decision was *legislative* in character and

where a decision was said to be *administrative* in character, for example because it is not a final determination of rights, or because it is not an essentially discretionary decision rather than a determination of a question of law or fact; or because there is no *lis inter partes*. In such cases a *limited* application of the rules may be made.

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[20] n.14.
[21] *Nakkuda Ali v. Jayaratne* (1951) (A.C. 66).

In *Ridge v. Baldwin* the idea that the rules of natural justice applied only to the exercise of those functions that were analytically judicial was thrown overboard. The application of the rules was to be inferred from the nature of the power and its effect on the individual. Lord Reid admitted that in view of an undeveloped system of administrative law in England, the courts "had to grope for solutions". When any body or person is entrusted with deciding what the rights of an individual should be, then the rules applied.

Duty to act fairly

Following *Ridge v. Baldwin,* the notion of 'acting fairly' developed. In *Re H.K. (An Infant)*,[22] a minor, the son of a Commonwealth citizen, was refused entry in the United Kingdom following suspicion that he was not under sixteen years of age. The law allowed a dependant of a Commonwealth citizen under the age of sixteen to enter the UK. Plaintiffs argued that in deciding whether the person concerned was 16 years old or more, an immigration officer exercised a judicial or quasi-judicial function. While not accepting such an argument, Lord Parker C.J. accepted that:

> even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know that his immediate impression is, so that the immigrant can disabuse him. That is not as I see it a question of acting or being required to act judicially, *but of being required to act fairly (emphasis added).*

Application of Principles to Maltese Law

Applying these common law principles to the Maltese scenario, there is no doubt that the lack of definition of the rules of natural justice in article 469A allows reference to English

[22] (1967) 2 Q.B. 617.

common law as developed and as will develop in the future, to interpret such a phrase in Maltese legislation.

As to the sphere of application one awaits to see whether the Maltese court will adopt an approach more liberal that the one established in common law. A review of Maltese case law on the matter does not seem to endorse such a view.

Maltese Case Law

The first case where the principles of natural justice were mentioned was in *Sammut* v. *Mc Cance* [23] in 1946. In that case, a decision of an administrative tribunal styled the Emergency Compensation Board was quashed in view of the fact that not both parties to a case before it were informed of an inspection on site which took place by one of the technical members of the Board. The Court ruled that:

> The ordinary courts have limited right to review decisions of the Emergency Compensation Board that is to say, that there is nothing in such decision which is *ultra vires* and that there has been no violation of the principles of natural justice…the rule of *audi alteram partem* has to be scrupulously applied and the parties have a right to be present in any investigation made by a member of the Board, in order to be able to control any information given to such member for the purposes of such investigation.

A purview of the natural justice cases reveals that up to the late eighties, these principles were mostly applied to administrative tribunals and the court's assertion of its right to rein them in so that, even though justice was being administered by organs other than the courts of law, certain basic principles of procedural fairness had to be observed. Thus in another case,[24]

[23] *Antonio Sammut v. John Bell Mc Cance et* (FH) (20 May 1946) (Kollezz. Vol. XXXII. II.350) Mr Justice W. Harding); see also *Anthony Busuttil et v. Louis Zammit* (CMSJ) (20 November 2008) (131/03) (Mgte P. Coppini) where the fact that proceedings before the Small Claims Tribunal had been notified through the posting procedure at the wrong address and not the proper address of defendant nullified the proceedings as being in breach of the *audi alteram* principle.

[24] *Josephine Caruana v. Walter Attard* (FH) (22 November 1951) (Mr Justice Tancred Gouder).

practically identical to *Sammut v. Mc Cance*, a decision by the Rent Regulation Board based on information gathered during an inspection on site which had not been notified to the plaintiff was declared null since it violated the principle of *audi alteram partem*; and when the same Board decided a case on the merits when it had been postponed for further submission, its decision was quashed since it was in breach of such rules.[25] Even when Parliament had given a tribunal exclusive jurisdiction on a subject matter, and no appeal lay from its decisions, the courts retained their right to review whether procedural fairness, had been observed in the proceedings before such tribunal.[26]

Again in another case,[27] in spite of the fact that according to law the Industrial Tribunal enjoyed exclusive jurisdiction to decide unfair dismissal cases, this did not prevent the courts from scrutinizing proceedings before tribunals which were inferior to the courts of ordinary jurisdiction.[28] In that case a refusal by the Industrial Tribunal to issue a counter warrant

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[25] *Architect Rene Buttigieg v. Carmelo Abela* (CA) (24 June 1985) (Kollezz. Vol. LXIX.II.259).

[26] See *Andre' Francis Grant noe v. Erik Gollcher nomine* (Kollezz. Vol. XXXVII.II.506*); Giuseppe Barbara v. Carmelo Mallia nomine) (*Kollezz. Vol. XL.I. 69); *Edgar Cuschieri nomine v.Carmelo Camilleri et* (Kollezz. Vol. XXXIII.II.61); *Josephine Caruana v.Walter Attard* (Kollezz. Vol. XXXV.II.514*) Erik Gollcher nomine v. Denis Higgins nomine* (Kollezz. Vol. XXXIII.I.648);*Joseph* D*ebono v. Irene Candachi* (Kollezz. Vol. XXXIX.II.675). *Maria Grech v. Raymond Mintoff et* (FH) (6 December 1985) (Mr Justice W.Ph. Gulia) *Commissioner of Land v. Maria Concetta Cassar et* (CA) (24 February 1986) (Kollezz. Vol. LXX.II 141).

[27] *Thomas Montalto v. Major Stanley Clews noe et* (FH) (26 May 1987) (Mr Justice J. Filletti).

[28] See also *Johanna Van't Verlaat v. Malta Medical Council* (CA) (28 April 2017) (948/09 RCP) ; *SM Cables Ltd v. Carmelo Monaco* (FH) (14 February 2002) (2661/00) (Mr Justice JR Micallef) and *Charles Mattocks v. Dr. Anthony Gruppetta noe et* (CA) (27 June 2008(1179/03)**;** *Alex Mangion v. Anthony Cilia Pisani noe",* (FH) (20 May 2004) (628/03)(*Mr Justice T. Mallia); Saed Salem Saed v. Refugees Appeal Board* et,(CA) (5 April 2013) (1/08); Nazzareno *Zammit et v. Josephine Falzon" (*CA Inf.) (10 March 2004) (54/00); *Gaetano Galea v. Ronald Bezzina et* (ART) (15 October 2015) (56/14);*Power Projects Limited v. Stephen Agius*, (FH) (16 June 2013) (279/98) *Jason Zammit v. Development Control Commission* (CA Inf. (28 October 2002) (9/01); *Malta International Airport v. Deborah Bonello* (FH) (15 October 2013) (200/04) (Mme Justice L. Schembri Orland); *SM Cable Ltd v. Carmelo Monaco* (FH) (14 February 2002) (2661/00) (Mr Justice JR Micallef); *Prime Minister v. Victor Vella Muskat (*CMSJ) (9 November 2004) (81/03) (Mgte. T. Micallef Trigona); *EneMalta Corporation v. Malta Resources Authority et* (FH) (9 February 2009) (642/07) (Mr Justice C. Farrugia Sacco).

[29] Up to 1995 it was possible for any creditor to request the Court to issue a precautionay warrant of impediment of departure of the debtor from the Maltese Islands; the warrant had to be followed by commencement of litigation against the debtor..The debtor could request a counter warrant by depositing in Court the amount requested to be delivered to the creditor only if the litigation was decided in the latter's favour.

[30] *Professor Edward Mallia v. University of Malta* (CA) (Inf.) (11 June 2010) (17/10) "It is superfluous to state that in any decision by any tribunal of any nature, the adjudicator, though he is empowered to regulate proceedings before him as he may deem fit, is obliged to observe not only his own minutes of sittings, but above all the fundamental canons which guarantee to the parties the extensive rights of defence in such a way that they

neutralizing a warrant of impediment of departure,[29] following a deposit in court by the debtor of the sum claimed by the person issuing the warrant, was deemed to be in breach of the law and of one's freedom of movement. Again the courts have decided[30] that the Industrial Tribunal, even though its decisions are "final" cannot ignore the records or the minutes of its own proceedings; consequently where from the minutes it resulted that a plea regarding jurisdiction was decided when the case had been postponed for judgment on another preliminary issue and no submissions had been made on the jurisdiction plea, the court annulled the decision of the Tribunal as being in breach of the principles of natural justice. Similarly cases where a postponement for submissions ended up with the Land Arbitration Board – from whose decisions no appeal lay at the time – delivering judgment on the merits was a clear breach of such rules.[31]

Decisions relating to civil matters such as the termination of an agricultural lease of government land have been considered to fall within the orbit of judicial review on the ground of the rules of natural justice.[32] The refusal of renewing a contract of employment for a definite period of time technically fell under such rules.[33]

In cases of disciplinary proceedings the rules have been applied scrupulously. In one case[34] the Court decided that the fact that the procedure followed was sanctioned by subsidiary legislation, or that the applicant was fully conversant with the procedures before an Authority, did not justify departing from the rules of natural justice. A reflection of the trend to extend the significance meaning and range of these rules of natural justice is found in one

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are informed of the result of the proceedings and submit their points on the merits of the case.". See also *Renato Vidal et v. UCIM Co Ltd* (CA) (Inf.) (11 June 2010 (1/10).

[31] *Commissioner of Lands v. Maria Concetta Cassar et* (CA) (24 February, 1986) (Kolezz. Vol. XX.II.141).
[32] *Jonah Caruana v. Commissioner of Land* (FH) (14 January 2016) (100/12) (Mr Justice JR Micallef).
[33] *Aaron Haroun v. Prime Minister* (Case no 2) (FH) (8 June 2017) (772/00) (Mr Justice JR Micallef)
[34] *Paul Cassar v. Malta Transport Authority* (CA) (25 January 2013) (1146/06)

case[35] where the fact that an administrative tribunal did not give adequate time to prepare one's case was deemed to be a breach of the rules as well.

The same rules, including the right to cross-examine witnesses, were applied to a disciplinary board of the Malta Transport Authority.[36] In another case[37] a decision of the Industrial Tribunal was declared null in view of the fact that in breach of the principle of *audi alteram partem,* the Tribunal had sought advice from lawyers in private practice without informing the parties. This judgment however was later overturned[38] since the Court of Appeal stated that the legal opinion of the private lawyer had been made available to the parties during the proceedings. However in one case,[39] the Court ruled that in a tendering process there is no need for a local council to hear submissions from any bidder.

Rules expanded

The courts have not limited themselves to the two-pronged core of natural justice rules namely the rule against bias, and *audi alteram partem* in reviewing decisions of tribunals. They have ruled that an adversarial procedure has to apply in proceedings before tribunals.[40] Besides an equilibrium or [41]balance had to be kept between celerity in summary proceedings

[35] *Liquigas Malta Ltd v. Office of Competition* (CCAT) (1/11) (Mr Justice M. Chetcuti): "It results that the Office received the complaint one hour and a half prior to the first meeting with the persons against whom the complaint referred, so that the latter could not have been prepared to reply to the complaint and this in breach to what was established in the *Trensocreen* case (European Court of Justice (ECJ) (23 October 1974) (17/74) (1974) ECR 1063 where the general principle was established by the Court that an enterprise had to be "clearly informed, in good time, of the essence of the conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission."

[36] *Angelo Debono v. Malta Transport Authority* (FH) (14 October 2009) (402/05) (Mr Justice C. Farrugia Sacco).

[37] *General Workers Union v. Bank of Valletta Plc* (FH) (11 July 2011) (870/08) (Mr Justice J. Azzopardi).

[38] (CA) (27 March 2015) (870/08); however, in *General Workers' Union v. Attorney General* (CC) (12 February 2016) (20/08) the practice of the Tribunal to seek advice from third parties was deemed to be in violation of article 6 of the European Convention on Human Rights.

[39] *Pius Attard et v. Munxar Local Council (*CMSJ) (29 February 2008) (113/01).

[40] *Janice Xerri v. Mrs Jones* (CA Inf.) (23 October 2009) (3/09).

[41] *Josephine Magro v. Mondial Holidays* (CA Inf.) (28 March 2007) (19/06).

before special tribunals and the rules of natural justice.[42] Excessive subservience to form over substance could nullify proceedings.[43] Besides each party had to be afforded a reasonable opportunity to present his case according to the principle of equality of arms[44] under such conditions that did not place him in a substantial disadvantage *vis a vis* his opponent;[45] and ultimately that a decision of a judicial organ can be defended rationally with reasons or some imprint of rationality.[46]

In *Eugene Cardona v. Transport Appeals Board,*[47] the Inferior Court of Appeal ruled that:

> Motivation must not only result from the judgment but also must be adequate. Motivation which must as a minimum satisfy the parties to the case on its factual and juridical correctness as to the reasons on which it is based. The rationality of the motivation had to include as a minimum a contrast between the reasons for the decision and the results deduced form the facts and the applicable principles of law.

Room For Improvement

A thorough examination of the rules of natural justice was made in the case *Joseph Farrugia v. Emmanuel Cilia Debono*[48] decided by Judge Wallace Ph. Gulia.[49] The Court affirmed its

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[42] *George Attard v. Mary Jane Portelli* (CA Inf.) (14 July 2004) (104/02).
[43] *Untours Insurance v. Maria Lourdes Gauci* (CA Inf.) (10 July 2003) (71/01).
[44] *Teshome Tensae Gebremariam v. Refugee Appeals Board* (FH) (30 November 2010) (65/10) (Mr Justice R. Pace) confirmed on appeal (CA) (30 September 2016) "The principle of equality of arms requires *inter alia* that each party in a cause has the opportunity to present its case, including the faculty of producing witnesses, under such conditions that no party is at a substantial disadvantage *vis a vis* the other party; that each party shall have the opportunity and reasonable time to prepare and organize the defence of its case in an appropriate manner and without restrictions; that each party shall have the opportunity to examine all documents including reports by referees appointed by the Court exhibited in the records of the case and examine the witnesses produced by the other party; and in a general way that restrictions imposed by domestic law do not result in a party suffering actual prejudice in such a way that its right to a fair hearing is impaired." See also *Edgar Bonnici Cachia v. Attorney General*(CC) (5 December 2014) (47/11).
[45] *Comptroller of Customs v. Anthony Debono* (CA Inf.) (6 June 2008) (212/07); see also *Angelo Mangion v. Agostino Mangion* (CA) (11 December 1967); *Anthony Cassar Desain v. Giovanni Pace nomine* (CA) (4 December 1964); *Emmanuel Fenech v. Victor Mansueto (*CA) (13 April 1970);and *Simon Chircop et v. Dr Rene Frendo Randon nomine* (CA) (12 October 1979).
[46] *Mary Zarb v. Emma Azzopardi* (CA Inf.) (28 March 2007) (13/06) This was explained and described as "the right that a decision be based on a logical and probative examination and a sober justification which indicated the reasons why the claim or the pleas are being accepted or rejected. In other words the proceedings have to lead to a decision which reflects the correct assessment of facts and the application of the law."
[47] (CA Inf.) (18 June 2010) (18/2010); see also *Support Services Limited v. Central Procurement and Supplies Unit Gozo General Hospital et (*CA) (15 December 2016) (302/16) .

[48] (FH) (10 June 1987) (Mr Justice W Gulia).

right to review whether an administrative tribunal namely the Port Workers Board had abided by the rules of natural justice in view of its judicial and quasi-judicial functions, and whether the decision contained a wrong or incomplete statement of the law. But the most interesting point of the judgment is that the court admitted the possibility of 'room for development' as far as rules of natural justice were concerned, rather than merely sticking to the two principles of *nemo iudex in causa propria* and *audi alteram partem*. At the same time the Court observed that tribunals are not necessarily bound by the norms arising from the Code of Organization and Civil Procedure (Ch. 12) and that a breach of a provision of such Code did not necessarily constitute a violation of the natural justice rules; in this case the fact that in proceedings before the Tribunal a copy of a Criminal Court judgment was not exhibited in court, even though the withdrawal of a port worker's licence was based on such criminal conviction, did not amount to such breach.

Again in another case[50] the Court added new norms to the traditional two Latin dicta of *nemo iudex in cause propria* and *audi alteram partem* to include also the principle of *equality of arms* which has already been accepted as a cardinal principle of the right to a fair hearing in constitutional cases, and those relating to article 6 of the European Convention.[51] In that case even the rule that a copy of the decision by the public authority should be given to the aggrieved person was '*obiter*' considered to be part of these principles. The court reached this conclusion by referring to a constitutional court judgment.[52]

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[49] Emeritus Professor of Administrative Law at the University of Malta.

[50] *Austin Gonzi v. Malta Drydocks Corporation* (FH) (27 October 2004) (1808/97) (Mr Justice Ph. Sciberras).

[51] "One should also mention the right to an opportunity for a full defence, even if this principle is not categorically and directly mentioned in the aforementioned jurisprudence, which incorporated the principle of equality of arms, a principle which today has been stratified as part of the jurisprudence in constitutional proceedings and those related to the Convention." (*Austin Gonz*i (n.50))

[52] *Constantino Consiglio et v. Cav. Joseph N. Tabone nomine* (CC) (11 August 2000). For a comprehensive list of judgments relating to natural justice up to 2006 see Kevin Aquilin:*Empowering the Citizen under the Law: The Administrative Justice Bill* : "Law and Practice ":the Malta Chamber of Advocates Valletta Issue 14 December 2006 :6-14.

Rules of Natural Justice and the Constitution

The point arises as to what extent the principles of natural justice can be enmeshed with the right to a fair hearing as protected in article 39 of the Constitution and article 6 of the European Convention. There is no doubt that the two concepts overlap. All the principles of natural justice are included in the right to a fair hearing but the same cannot be said *vice versa*. The natural justice rules evolved as part of the court's power to scrutinize inferior tribunals and later public authorities. Their evolution was cautious and gradual as regards content. The constitutional right to a fair hearing which extends over both criminal and civil cases is wider, it includes certain guarantees e.g. the right to access to a court established by law, or that the proceedings must be in public or decided within a reasonable time or the right to legal assistance, which are not necessarily covered by the natural justice rules. The tendency has been to pick and choose from the rules and evolving jurisprudence relating to right to a fair hearing and apply them to decisions of public authorities.[53]

Natural Justice and Human Rights

The issue of natural justice is therefore intimately connected with the constitutional provisions contained in article 39 (2) relating to a right to a fair hearing in the determination of the existence and extent of civil rights and obligations guaranteed also by Article 6(1) of the European Convention on Human Rights rendered applicable to Malta by means of the European Convention Act (Ch. 319). There is no doubt that the rules of natural justice form an integral part of the notion of a fair hearing; the constitutional action based on the Constitution and/or the European Convention, applies not only to administrative acts as

[53] The right to a copy of the decision is a case in point; this right is not even expressly mentioned in article 39 of the Constitution or article 6 of the Convention except in relation to criminal cases.

defined in article 469A but to any public body, authority or public officer determining any question relating to civil rights and obligations.

The difficulty which may sometimes arise is whether to apply one or the other. The Constitution in article 46 makes it clear that the constitutional action is a remedy of last resort[54] and a court of constitutional jurisdiction may decline to exercise its jurisdiction if it is satisfied that adequate remedies at law were available and not availed of. Consequently, it is legitimate in cases where an act of the Administration is covered by the rules of natural justice for such public officer or authority, to plead, in a constitutional case, that an ordinary action under article 469A or under English common law rules could have been presented, rather than a human rights action.

The difficulty or dilemma can also arise the other way round. In the *Smash* case,[55] a charge was issued by the Chief Executive of the Broadcasting Authority against a broadcaster alleging breaches of the Broadcasting Act. That Act allowed the imposition of administrative penalties on the basis of a charge issued by the Chief Executive to be then decided by the Authority itself.[56] The respondent broadcaster instituted action under article 469A, alleging that the rules of natural justice had not been observed, for the person issuing the charge was an employee of the Authority which would decide the matter. The Court of Appeal, rejecting these claims under article 469A and overruling the decision of the lower court, ruled that:

> When the act had been done according to law, where the law does not allow any discretion regarding such administrative act, the court cannot state that the law is not to have effect, for that can only be done by it in its *constitutional* jurisdiction; nor can it be allowed to interpret the law in conformity with the Constitution if such interpretation is not possible without in effect stating that the law is not valid.

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[54] Art 46(2): *"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*."

[55] *Smash Communications Limited v. Broadcasting Authority et (*CA) (24 June 2016) (481/04).

[56] Art 41 (4) Ch. 350).

This judgment raises several issues. First of all, is it correct to state that the law did not grant any leeway or discretion to the person performing the administrative act? The Broadcasting Act allows the Authority 'if it is satisfied that an offence has been committed' to initiate the special administrative proceedings. Once these begin, then it is true that the law prescribes a procedure which cannot be discarded and in this sense no discretion exists. The fact that the law allows the Authority to act as prosecutor and judge militates in favour of the Court's decision that this was a *constitutional* rather than an "administrative" matter since it related to the invalidity of legislation which, under no stretch of the imagination, could be considered to be an administrative act.[57]

What is, however, even more interesting is the fact that the Court of Appeal ruled that, had it been a question of an administrative act made following an exercise of a discretion – unlike the *Smash* case – then it would have been possible to apply the ground of review based on a breach of the Constitution based on article 469A (1) (a). The implication is clear. In the *Smash* case, the matter was one of procedural fairness and the Court said that it would have been possible *in an administrative law action of judicial review under article 469A* to allege a breach of article 39 of the Constitution and article 6 of the Convention. This is in direct and stark contrast with judgments by the Constitutional Court which have refused to accept that article 469A (1) (a) covers alleged breaches of human rights.[58]

However, the most significant development as regards the expansion of the rules took place in 1992 when a further rule that decisions had to be reasoned was introduced.

[57] See also Kevin Aquilina: *Wounded not Defeated* (TOM 22 February 2012) and *Not Wounded or Defeated* (TOM) (15 July 2016).
[58] *Emmanuel Ciantar v. Commissioner of Police* (CC) (2 November 2001) (701/99).

Reasons For Decision

In *Dr Alfred Sant nomine v. Commissioner of Inland Revenue,*[59] the Court of Appeal included within the ambit of the rules of natural justice the requirement that a decision on tax matters by the Inland Revenue Commissioner had to contain the reasons justifying such assessment. Perhaps this was one of the first judgments where the principles of natural justice were made applicable to public officers, rather than administrative tribunals only.[60] The principles of natural justice, as stated in the *Joseph Farrugia* case[61] could not be limited to the two dicta of *nemo iudex in causa propria* and *audi alteram partem*. In certain cases, a decision by a public officer on a matter which could be appealed from to an administrative tribunal such as in the *Dr Alfred Sant* case,[62] the Board of Special Commissioners for Income Tax, had to be based on reasons given to the aggrieved party. In this respect the judgment follows the general line of thinking of the *Ellul Sullivan* case, although in the latter case, the Court interpreted an express provision of the law as including the requirement of giving reasons, even though the latter requisite was not expressly written down in the law.[63]

Rules apply even to Administrative Decisions

Another application of the rules to entities which were not administrative tribunals occurred in the landmark judgment *of Mary Grech v. Minister responsible for the Development of Infrastructure.*[64] A permit had been issued by the Planning Areas Permits Board (PAPB) to plaintiff under the condition that such permit could be withdrawn at any time. Subsequently

[59] (CA) (4 March 1992); see also *AB Limited v. Commissioner of Inland Revenue* (CA) (28 January 2008)
[60] See also *Natalia Aquilina v. Director Social Services* (CA) (Inf.) (17 May 2011) (22/10) ;It is necessary that a decision contains reasons showing how the person who decides a case came to that conclusion; this is not a mere question of the Arbiter not replying in detail to every argument but that effectively the said decision is without any motivation for it failed to consider and decide that which was submitted to him by the parties." See also *Ronnie Gauci v. Director Social Security* (CA Inf.) (6 October 2010) (6/10); see however *Yitagesu Legesse Weldermariam et ne v. Chief Executive Officer of the Agency for the Welfare of Asylum Seeker*s (FH) (3 March 2015) (885/12) (Mr Justice S. Meli) where an age assessment team regarding immigrants was deemed to be bound by the rules of natural justice but not required to give reasons for its decisions.
[61] (n. 48).
[62] (n 59).
[63] See *supra* 124.
[64] (CA) (29 January 1993).

such permit was withdrawn, without any notice or opportunity given to plaintiff to make representations. Even though a right of appeal from such decision of withdrawal existed to the Minister, the Court ruled that the loose fashion in which proceedings took place in the absence of plaintiff and without any reasons registered in the records, made such appeal futile, and therefore applying the principles of natural justice, quashed such withdrawal. It then made the substantive ruling that:

> *in matters where the rights of the individual were materially and substantially affected*, as in cases where a building permit was withdrawn, it was a principle of justice that the Authority withdrawing the permit had first of all to hear the party concerned before the effecting of such withdrawal. (*emphasis added)*

Consequently the decision of withdrawal was quashed, but the court did not take any decision on the permit itself since the matter was referred to the Board for a final decision after observing the rules of natural justice.[65]

What is interesting is that for the first time the Court of Appeal announced the principle that the rules of natural justice apply each time a public officer or authority takes decisions in matters where the rights of the individual are materially and substantially affected. This pronouncement is important for in most cases dealing with natural justice, the issue had been that of reviewing decisions of administrative tribunals which patently had a judicial function. Here the principles were extended to cover any decision by a public officer or authority which deals with the rights of individuals in a material respect.[66] Is this the criterion to be

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[65] In *George Falzon v. Minister Rural Affairs and Environment et* (FH) (27 January 2010(1010/03) (Mr Justice R. Pace) the fact that several warnings had been issued, and site inspections held indicated that an opportunity was given for an animal breeder to air his views prior to the withdrawal of his abattoir licence; in *Agostino Bartolo et v. Director of Land et* (FH) (30 October 2015) (104/04) (Mr Justice A. Ellul)it was decided that the refusal to grant an encroachment permit on government land which had been so occupied under same title by father of applicant, was not covered by natural justice rules.

[66] See also *Paul Cassar ne v. Malta Transport Authority* (CA) (25 January 2013) (1146/06) regarding the revocation of a licence for a vehicle roadworthiness test (VRT) garage: "It has been proven in this case that there was a breach of the principle of natural justice for there was no fair hearing, no equality of arms, non-observance of the principle of *audi alteram partem* and also plaintiff was never informed that he was being charged with behaviour which if found that he was responsible for, would entail a penalty of Lm5000 which in fact was inflicted by the Authority's decision." See also *Francesco Fenech Services Ltd v. Director of Contracts*

adopted even after the enactment of article 469A which does not contain such a limitation to the application of the rules of natural justice to any administrative act? No formal decision has been delivered since 1995 on this question. It is submitted that no court of law would literally apply article 469A to cover all administrative acts, in spite of the statutory provision not containing any limitations; and then the probability is that in the same way as English common law will define the rules of natural justice, vaguely referred to in article 469A, the same common law norms will be used *to limit their sphere of application*, in pre-1995 fashion.

Cases Decided in spite of Act No. VIII of 1981

It is also interesting to point out that the Mary Grech case[67] was decided *in spite of* the provisions of Act No. VIII of 1981 which, as has been seen, blocked the jurisdiction of the courts to review acts as *ultra vires* unless there was a breach of an express provision of the law either procedurally or substantively.[68] In spite of such ouster clause, the court still applied the "unwritten" rules of natural justice, in virtue of English common law, rather than any express provision of the law, without, it seems, any eyebrow being raised. It is true that no specific or express plea of lack of jurisdiction under Act No. VIII of 1981 was raised; but such matter could have been raised *ex officio* by the court; but it did not. This again proves

(FH) (22 October 2014) (2302/00) Mr Justice S. Meli*)* where an order for resubmission of samples in a public works tendering process was deemed to be in violation of the rules of natural justice.

[67] (n 64).

[68] Art 743(2) of the Code of Organization and Civil Procedure used to provide that "no court in Malta shall have jurisdiction to enquire into the validity of any act or other thing done by the Government or by any authority established by the Constitution or by any person holding a public office in the exercise of their public functions, or declare any such act or thing null or invalid or without effect, except and unless, (a) such act or thing is *ultra vires* or (b) such act or thing is clearly in violation of an explicit provision of a written law or the due form and procedure has not been followed in a material respect and substantial prejudice has ensued from such non-observance; Provided that an act or thing which is within the general or special powers of a person or authority shall not be deemed to be *ultra vires* unless the act or thing is clearly and explicitly prohibited or excluded by a written law." This provision was repealed in 1995.

that courts of law are reluctant to apply ouster clauses whenever they can; and remain jealous of their power of review in spite of all odds.

After the 1995 amendments, the courts have continued applying the rules of natural justice whenever important decisions are made by a public authority or officer affecting an individual's rights. Consequently in one case[69] a decision by the Principal Immigration Officer revoking an exempt status and the right of freedom of movement[70] to the foreign spouse of a Maltese citizen was quashed because no reasons were given for such a decision. In this respect the decision was following the case of *Dr Alfred Sant nomine v. Commissioner of Inland Revenue*[71] where the giving of reasons was included as one of the principles of natural justice. The decision of revocation of exempt status and freedom of movement was considered sufficiently affecting the rights of the individual to warrant the application of the natural justice norms. The Courts have extended the application of these rules even to transfers of a public corporation employee on less favourable conditions than his previous position[72] or transfers of nursing officers within the same department.[73] In the latter case the Court stated that:

> Today it has been established that for an authority to be deemed to have exercised its functions correctly, it is expected that that authority informs the person concerned not only what the reasons were underlying the decision taken by the said authority, but also that such person be given the opportunity to express her views, and in cases where such person does not know the

[69] *Kevin Brincat et v. Principal Immigration Officer* (FH) (5 July 2016) (684/05) (Mr Justice JR Micallef).
[70] Under the Constitution (art 44) freedom of movement allows the foreign spouse of a Maltese citizen to enter and leave and reside in Malta at will and to work in Malta without the need of a permit.
[71] (n.59). See also Kevin Aquilina : *Development Planning Legislation* (1999)(Mireva Publications. Several decisions of the planning law institutions were annulled because not based on reasons e.g. *C. Mercieca v. Development Control Commission* (Planning Appeals Board)(30 January 1995)(163/94 RR) and *Jack Scerri v. Development Control Commission* (Planning Appeals Board (24 January 1997)(614/95 KA).
[72] *Carmel D'Amato v. Malta Tourism Authority* (FH) (29 November 2011) (875/06) (Mr Justice J. Zammit McKeon) "It is a principle of good administration that a person in whose regard a decision is to be taken particularly in the public administration sector, as well as when there is involved the employment of such person in the public sector, the more so when such decision is going to affect the rights of such person, that person has to be given not only the reason for any decision in his regard, but also be granted the opportunity to air his views particularly when his employment is involved as in the present case."
[73] *Rita Vella v. Chief Government Medical Officer et* (FH) (17 November 2016) (140/12) (Mr Justice JR Micallef).

reasons which led the authority to issue an order in her regard, the authority must give the person concerned the opportunity to state her case.[74]

The rules of natural justice however did not apply to an objector to a planning permit, who had appeared before the executive organ of first instance but did not register his interest on appeal from a refused application. By not exercising due diligence, he had lost any right to be informed of the appeal proceedings which he should have followed himself.[75]

Administrative and Judicial Functions

An attempt to distinguish between administrative and judicial functions was made in one case[76] regarding voting rights, where however the purpose of such distinction was to decide whether such functions were reviewable under article 469A as an administrative act or not. The question arose whether the Electoral Commission and the Revising Officer under the General Elections Act 1991 (Chapter 354), performed judicial or administrative functions. The Court of Appeal came to the conclusion that the Revising Officer exercised a judicial function and his decisions were not reviewable under article 469A, though presumably the rules of common law came into play, once his actions fell outside the purview of the norms of judicial review under that article. The Electoral Commission, on the other hand, was a public authority which exercised an administrative function and therefore its acts were administrative ones reviewable under article 469A.

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[74] See also *Mary Mifsud ne v. Superintendent Cultural Heritage et* (FH) (31 May 2012) (863/07) (Mr Justice R. Pace): "Although the natural justice principle of *nemo iudex in causa propria* was originally applied to the civil courts, consequent to the extension of administrative powers, it was extended to apply to the administrative sphere."

[75] *Boris Arcidiacono et v. Salvu Schembri et* (CA) (28 June 2013) (1825/01) "This Court does not agree *in generalibus* with submissions by plaintiffs that the principles of natural justice do not apply only and strictly to the parties to proceedings, but also to anyone who may be adversely affected by decisions of a public authority. This assertion is too wide and imposes an obligation on the authority to search and inquire who could be adversely affected by its decision."

[76] *Dr A. P. Farrugia v. Electoral Commissioner et* (CA) (18 October 1996).

The theory of legitimate expectation and procedural fairness

As a procedural norm, the doctrine of legitimate expectation is best explained in the English case of *Council of Civil Service Unions v. Minister for the Civil Service*[77] where Lord Diplock stated that for a legitimate expectation to arise:

> The decision must affect the other person…by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until either there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision –maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

In that case, were it not for the fact that the matter in issue was related to national security, there would have been a duty of the Minister to consult trade unions before their rights were taken away. Similarly a prisoner could not be deprived of remission without being given an opportunity of being heard;[78] gypsies have been considered as having a legitimate expectation not to be evicted without the council finding an alternative site for them,[79] and a contractor on a list of approved contractors prepared by a council had a "legitimate expectation "not to be removed from such list without a hearing.[80]

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[77] (1985) A.C. 374. The act must also constitute a definitive decision affecting one's rights; a mere suspension of a process of selection pending court litigation was not such a decision (*Dennis Tanti v. Employment and Training Corporation* (FH) (2 May 2017) (342/15) (Mr Justice L. Mintoff).
[78] *O'Reilly v. Mackman* (1983) 2 A.C. 237.
[79] *R v. Brent LBC ex p. MacDonagh* (1990) C.O.D. 3; 21 H.L.R. 494.
[80] *R v. Enfield LBC ex p T.F. Unwin (Roydon) Ltd (*1989 1 Admin. L.R. 51.

The first time reference was made to the doctrine was, however, in the *Schmidt* case[81] where Lord Denning stated that the application of the doctrine from a procedural point of view depended on "*whether he (plaintiff) has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."*

In that case, two U.S students had been admitted to the United Kingdom for a limited period. When that period expired the Secretary of State refused an extension of time. However, the Court of Appeal refused to apply the doctrine since *"in the case of aliens it is quite different: they have no right to be here except by license of the Crown.*"

Application to Maltese scenario

Would such rules relating to legitimate expectation apply to the Maltese scenario? [82]Nowhere is such a notion referred to in article 469A[83] though article 12 of the Interpreation Act (Ch.249) provides that the repeal of a legal provision does not affect any right, privilege or

[81] *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch 149.

[82] See Peter Grech: *Keeping One's Word: Legitimate Expectations in Administrative law*" – *Id-Dritt*, Law Students Association (Għ.S.L.) (Vol. XVIII)and Mark Soler:*A Maltese Perspective of Legitimate Expectation* (UM)(LL.D Thesis)(2017). See also Kevin Aquilina: *Development Planning Legislation The Maltese Experience.*(Malta) (Mireva Publications) (1999) and in particular the case therein referred to of *Victor Theuma v. Development Control Commission* (Planning Appeals Board)(17 March 1995)(282/94 KA) . In that case the applicant's file for a development permit opened in 1991 was lost; the Board ruled , when the file was reconstructed, that the applicable law had to be that of the date when application had been filed.See also *Peter sive Rino Muscat Scerri et v. Attorney General (*PA)(17 March 2014)(71/11) wherby the change of a berthing right from peprament to temporary wa sdecalred to be an acquired right and a "possession" under article 1 Protocol I of the Euroepan Convention on Human Rights 6 February 2015) . This judgment was reversed by the Constitutional Court (CC 6 February 2015)(71/11) but only because it was not convinced on the basis of the evidence that any permanent berthing right had been recognized by the public authority.See also *Commissioner of Inland Revenue v. Joseph Serge* (CA)(25 May 2001)(Warr. No 1343/93)where the Court of Appeal decided that an executive garnishee order issued by the fiscal authorities against plaintiff remained in force as an acquired right even after certain fiscal laws were amended citing *Anthony Cassar Torregiani noe v Dr. Vincenzo Gatt* (CA)(12 May 1950) (Kollezz. Vol. XXXIV.I.148) to the effect that according to *Gabba* fiscal laws as a rule are not retroactive and that acts done under the previous law remained valid and regulated by the law at the time the act occurred.

[83] See, however, article 12(1) (c) of the Interpretation Act (Ch .249) which states that: *Where any Act passed after the commencement of this Act repeals any other law, then, unless the contrary intention appears, the repeal shall not-. c) affect any right, privilege or liability acquired. accrued or incurred under any law so repealed.* `However this only applies where a right emerges from a repealed **legislative** enactment.

liability, acquired or accrued or incurred under any law so repealed. In judicial review such doctrine , even though not expressly mentioned in article 469A can be considered to be contained within the general rules of natural justice as its offshoot, whose interpretation and content are still governed by English common law, the immediate and obvious source of such a notion. For instance, in Australia the doctrine has been accepted as a ground of review from a *procedural* point of view, but there are still doubts as to whether the doctrine applies when it comes to **substantial** *ultra vires*.[84]

One of the few cases where express reference was made to such doctrine was in the context of procedural fairness, and in a case of constitutional rather than administrative law review. In *Commissioner of Land v. Frank Calleja*[85] the retrospective application of a law which would have changed the criteria of compensation for expropriated land to the prejudice of the owner, following the postponement of the case for judgment, was deemed to be in breach of a legitimate expectation and therefore in breach of the right to a fair hearing.

An express reference to legitimate expectation in the context of the procedural question of retroactivity of an administrative act, however, was made in one case [86] before the Administrative Review Tribunal. However, the case did not arise within the powers of judicial review of administrative action by the Tribunal, but was decided by the Tribunal which had, through the Administrative Justice Act (Chapter 490), absorbed the functions and powers of the VAT Appeals Board. In that case, an arrangement had been concluded in 2004, and was operative for some time, whereby applicant, as agent for NATO, US and British military vessels visiting Malta, was exempted through a credit /tax refund system, from payment of VAT on supplies made to such ships. This arrangement was unilaterally withdrawn by the VAT Commissioner in 2011. The Tribunal affirmed the right of the

[84] See Woolf and Jowell :*De Smith's Judicial Review* (Seventh Edition) (2013) (Sweet and Maxwell) 699.
[85] (CC) (6 September 2010) (6/07).
[86] *XXX v. Commissioner for V.A.T.* (ART) (28 May 2015) (236/12).

Commissioner to revoke any arrangement, but declared that the effects of such revocation could only be prospective and not retroactive. At first the Tribunal based its decision on the concept of acquired rights as interpreted by our Courts;[87] but then it moved on to base its decision on the doctrine of legitimate expectation. The Tribunal quoted judgments of the European Court of Justice interpreting a Council Directive on the common system of value added tax in the light of the Court's case law.[88] It then concluded that:

> Therefore what the European Court of Justice emphasizes is the retroactive effect of new legislation and not so much the impossibility of changing a future situation through new legislation; applied to the present case this means that the Director General (V.A.T.) has the right to change and even revoke a special arrangement in force till that time, provided that such change or revocation effects only future transactions and not also have retroactive effect on transactions which under that special arrangement were considered valid.

However, no reference is made to English common law or article 469A, even because as stated this was a case of an appeal rather than review. It based its decision on the European Court of Justice's case law regarding fiscal *legislation* and then applied it lock stock and barrel to an *administrative act*.

Legitimate expectation as shall be seen in the next Chapter has also been applied in some cases by the Maltese courts as a ground of review on *substance* rather than procedure.

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[87] " The principle of acquired right means that new norms must respect those rights that were created by an acquisitive and valid fact under the laws then applicable and which therefore form part of the estate of an individual. Essentially this principle finds its application in the context of the retroactivity question even more so in that of retroactivity of laws." See also *Antonio Cassar Torregiani v. Dr Vincent* Gatt (CA) (12 May 1950) (Kollezz. Vol. XXXIV.I.148) "Where there truly and properly exists an acquired and completed right under the previous law, such right will be intrinsically effective resisting any application of a subsequent law, even fiscal, in case of a change in the previous law."

[88] "*According to the Court's settled case-law, it is perfectly permissible and, as a general rule, consistent with the principle of the protection of legitimate expectations for new rules to apply to the future consequences of situations which arose under the earlier rules (Case C60/98 Butterfly Music [1999] ECR I3939)… the principle of the protection of legitimate expectations precludes a national legislative amendment which retroactively deprives a taxable person of a right enjoyed prior to that amendment to obtain default interest on a refund of excess VAT."*

Draft Administrative Code

An attempt to lay down rules regarding legitimate expectation, from a procedural point of view, was made in March 2012 in a draft Administrative Code[89] published for consultation, which however was never submitted to Parliament. The Code proposed an article on the matter which read as follows:

198. (1) the public administration shall follow its own established administrative practices, unless there are legitimate grounds from departing from those practices in an individual case.

(2) When the public administration intends to depart from its own established administrative practice in an individual case, it shall record in writing the grounds which merit such a departure and shall call the person concerned to a hearing to explain to the said person such reasons.

(3) The public administration shall communicate in writing such reasons to the person concerned in the case of a departure from its own established administrative practice. It shall do so not later than five working days from the meeting mentioned in sub article (2) above.

(4) The public administration shall respect the legitimate and reasonable expectations that persons have in the light of how the public administration has acted in the past.

It is evident that this proposed rule had a procedural and substantive content. From the *procedural* point of view, any departure from usual policy had to be recorded and explained to any person interested in, or aggrieved by such departure giving him the reasons why such a departure had to be made. It has a *substantive* content which is evident in sub-article (4) in that the administration has to respect *'the legitimate and reasonable expectations that persons have in the light of how the public administration has acted in the past.'*

Conclusion

The rules on natural justice are of a procedural nature, enmeshed with the universally recognized right to a fair hearing in any proceedings before a court of law or adjudicating

[89] The Code was prepared by Professor Kevin Aquilina and launched on 7 March 2012 by the Parliamentary Committee on the Consolidation of Laws.

authority, including access to justice. As in the case of the interpretation of the right to a fair hearing in constitutional law, the area covered by the rules of natural justice has developed and extended over the years. Just as in the case of constitutional review the right has now developed to the extent of covering events occurring prior to a hearing which may prejudice the fairness of the subsequent proceedings, so the rules of natural justice have developed radically from the original notion of just guaranteeing that judicial organs outside the organization of courts of law be reined in to guarantee a minimum of procedural fairness. They have extended to cover any judicial, quasi-judicial or administrative decision by any public authority or officer which affects the rights of others. Looking at the Maltese situation in the past thirty years, one is struck by the way these rules have been interpreted more radically; and as has been stated by our courts, their interpretation is liable to develop in the face of new realities, as the rules enshrined in the Administrative Justice Act, and more recent case law have shown.

Chapter IX
Fourth ground of review: Abuse of Power

Fourth Ground of Review "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."

General

The most interesting part of judicial review is by far the ground of review of abuse of power.[1] It is the ground which grants most lee way and discretion to the courts to review executive decisions.[2] It is the ground of review which is also most liable to misinterpretation, indeed to abuse. This is the slippery ground on which decisions can be taken by the judiciary which are in effect a *substitution* of administrative discretion; for a too wide an interpretation of such ground of review, results in the courts deciding the appropriateness rather than the lawfulness of an administrative act. Contrary to popular belief, this ground of review is based on law not on whim and fancy.[3] It has a legal foundation and has to be interpreted in a legal way;

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[1] Wade and Forsyth: *Administrative Law* (11th edition) (Oxford University Press) (2009) 286. "It is the attitude of the courts by finding limits to such seemingly unbounded powers which is perhaps the most revealing feature of a system of administrative law."

[2] See Lord Denning *What next in Law* (Butterworths) (1982) 311. "The only admissible remedy for any abuse of power in a civilised society is by recourse to law. In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of power from whatever quarter it may come."

[3] *See Reginald Fava pro et noe v. Superintendent for Public Health et* (FH) (7 April 2010) (278/10) (Mr Justice J. Zammit McKeon) "The interpretation of what is equitable and reasonable may be subjective. However, the difficulty is more apparent than real.The rights of the citizen are guaranteed by our Constitution. At the same time, justice, equity and reasonableness are principles which should inspire its interpretation. In normal circumstances, reasonableness should qualify the exercise of any executive discretion even when the law does not mention, or expressly so qualify, such discretion." See also *Reginald Fava pr et ne v. Medicines Authority* et (FH) (3 May 2011) (594/07) (Mr Justice C. Farrugia Sacco) where an administrative freeze regarding pharmacy licences was considered to amount to an abdication of duty by a public authority. What is interesting in this case is that the Court gave time to the defendant to exercise his discretion in the light of its judgment. In a further judgment of 10 July 2012, in view of the fact that no action was taken by him within such period, the Court ordered defendant to issue such pharmacy license. See *also Colette Schembri v. Chief Government Medical Officer* (FH) (9 March 2017) (893/07) (Mme Justice Anna Felice): "The decision of the Superintendent for Public Health could not be motivated by presumed or real fear of an action or reaction by third parties, which

definitions abound as to its real meaning, what it includes or excludes;[4] it is a safety-valve against tyranny and subtle and not so subtle usurpation of power. But ultimately, as shall be seen, this ground of review, particularly the test as to what is reasonable or not, depends on the general thrust, intentions and scope of the legislation under which a public authority misuses the discretion granted to it.

This ground of review also contains its own problems of construction and interpretation. Based as it is on French Administrative law – with a strong dose of English common law – the question immediately springs to mind as to whether all the forms of misuse of power under English common law have been included under the heading as contained in article 469A (b) (iii). A quick look at the Bill attached to the 1993 White Paper entitled *Justice within a Reasonable Time* reveals that this ground of review included notions, apart from the ones expressly contained in the present law, such as an exercise of a discretionary power in **bad faith**; or an exercise of a personal discretionary power **at the direction or behest** of another person or in accordance with a rule or policy **without regard to the merits of the particular case**; or that is so **unreasonable** that no reasonable person could have so exercised the power; or when the power was exercised in such a way that the result of the exercise of the power is **uncertain;** or in any other way constitutes abuse of the power.

Some of these more detailed grounds can fall under the general ground of abuse of power as defined by article 469A, namely taking into account irrelevant considerations and ignoring

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fear was the principal reason behind the administrative freeze which denied plaintiff of her rights for years on end."

[4] See *Dr Daniel Grixti Soler et v. Public Service Commission et* (FH) (10 April 2015) (736/14) (Mr Justice JR Micallef) confirmed on appeal (CA) (12 February 2016) :"The measure of reasonableness has to be an objective one linked with the circumstances of fact in which such decision is taken. In addition, for behaviour to be considered abusive, who makes such an allegation must prove that there was an intentional element to cause harm, which can be proven by evidence of external behaviour forming part of that discretionary exercise. "

the relevant ones; bad faith and fraud certainly would;[5] but it can be argued that producing an uncertain result is not.

The same applies to the doctrine of *legitimate expectation*, in so far as this doctrine has been accepted as a *substantive* ground of review and not only procedural; under which heading is it classified? In English common law such doctrine, eloquently described in *ex parte Coughlan*[6] is usually pigeon-holed under abuse of power; but a strict interpretation of article 469A(b)(iii) hardly encompasses such a ground of review; and yet in two cases[7] reference was made to this doctrine as a ground of review without actually quoting chapter and verse, or which heading, provision or paragraph, forms the legal basis of the application of such doctrine in Malta; nor should its application in Malta, desirable though it may be, be considered as a foregone conclusion. In Australia it has been accepted as a *procedural* guarantee regarding the form of exercise of power, but not as a *substantive* ground of review.[8]

The Test of Reasonableness[9]

The notion and test of reasonableness is part and parcel of common law tradition and has been adopted by most former British colonies whose public law system is based on common

[5] See *Carmel Tabone v. Agnes Gera de Petri et* (FH) (24 January 1997) (Mr Justice G. Caruana Demajo). where fraud was accepted as a ground of review even though not expressly mentioned in article 469A.
[6] *R. v. North and East Devon Health Authority, ex parte Coughlan* 16 July 1999 (2001) QB 213.
[7] *Bingo Ltd v. Commissoner of Police* (FH) (1361/09) and *Gaming Operations Ltd v. Gaming Authority* (FH) (1374./09) both decided on 20 August 2009 (Mr Justice T. Mallia). See also Mark Soler: *A Maltese Perspective of Legitimate Expectation* (UOM) (LL.D Thesis) (2017).
[8] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (12 February 2003) (Australia) [2003] HCA 6) the High Court of Australia said that the reasoning in *ex parte Coughlan* violated the separation of powers doctrine by overextending the reach of judicial power provided for in section 75(v) of the Constitution of Australia. In its opinion, the balancing act employed in *ex parte Coughlan* should be left to the executive and falls beyond the province of the courts.

[9] De Smith categorizes the different headings of unreasonableness as follows: (a) unreasonableness review i.e. whether the decision falls within the range of *reasonable responses* open to the decision maker (b) where *human or fundamental rights* are in issue (c) whether the public authority has struck a *fair balance* between competing considerations or between means and ends i.e. proportionality (d) the balance, necessity and suitability of the public authority's actions in the light of the jurisprudence of the European Court of Human Rights on *proportionality* as a test for the validity of a statutory derogation; and (e) abuse of power*; see* Woolf and Jowell: *De Smith's Judicial review* (2013) (Seventh Ed.) (Sweet and Maxwell):588. Michael Fordham QC in *Judicial Review Handbook* (Sixth Ed.) (2012) (Hart Publishing): 530 *et seq* categorises unreasonableness into the following sub categories: bad faith, improper motive, frustrating the legislative purpose, substantive unfairness, inconsistency, relevancy/irrelevancy, unreasonableness, proportionality, human rights violations.

law. In fact in most Constitutions given to countries whose Independence was granted by the United Kingdom in the late fifties and early sixties, the permissible statutory derogations to fundamental human rights are peppered with references to adjectives and adverbs derived from the noun "reason". A restriction to a fundamental human right under the Maltese Constitution e.g. freedom of expression, has to be "reasonably required" in some public interest[10] and then it must also satisfy the test of being "reasonably justifiable in a democratic society".[11] This is in contrast with the European Convention on Human Rights which allows restrictions only if they are '**necessary**' in a democratic society."

The most famous dictum regarding reasonableness and its meaning was that of Lord Diplock in the *Wednesbury* case[12] who stated that an unreasonable decision would be "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." This definition is tautological up to a certain extent[13] even though Lord Greene in his judgment cited examples of such unreasonable behaviour such as bad faith, dishonesty, disregard of public policy, ignoring relevant considerations, and attention given to extraneous circumstances.[14] But this judgment and *dictum* have been challenged on the ground that they seem to apply only to extreme

[10] See articles 33(2), 34(f) and (i), 38(2) (a) and (b), 40(3), 41(2) (a), 42(2) (a) of the Constitution.
[11] See provisos to articles 38, 40(2) and (3), to art 41(2), 42(2), art 45(11) of the Constitution.
[12] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) (1 KB 223. In that case an order prohibiting minors under 15 years of age to attend cinemas on Sundays whether accompanied by adults or not, was unsuccessfully challenged as being unreasonable.
[13] See Woolf, Jowell *De Smith's Judicial Review* (Seventh Edition) (2013) (Butterworths): 594: "One of the difficulties with the *Wednesbury* test is its tautological definition which fails to guide us with any degree of certitude."
[14] *Associated Provincial Picture Houses Ltd* (n.12) at 229 " A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."

behaviour as the adjective 'outrageous' suggests.[15] Still *Wednesbury* has become part of the legal jargon in most judgments which refer to whether an act is reasonable. [16]

The irony of it all is that in *Wednesbury* the courts ruled *against* plaintiff, and while attempting to describe and define the reasonableness test, decided, quite strangely, that a legal norm prohibiting minors under the age of fifteen from attending cinemas on Sundays even if accompanied by their parents was ... not unreasonable at all. Certainly observance of Sunday as holy day was strong in the immediate post-war era in Britain and showing films on Sunday to anyone at all, even adults had only become legally permissible some fifteen years before *Wednesbury*.[17] Lord Greene stated that:

> Nobody…could say that the well-being and the physical and moral health of children is not a matter which a Local Authority, in exercising their powers, can properly have in mind.[18]

Taking Irrelevant Considerations into account or Ignoring Relevant ones

The definition of abuse of power in article 469A (1) (b) (iii) consists of either taking irrelevant considerations into account or ignoring relevant considerations. It is evident that there are some considerations e.g. political motives, personal gain, discriminatory treatment, breach of rights, which are altogether impermissible; but there are others which the public authority is entitled to consider or not to consider; it is only when the public authority does

[15] In *Nottinghamshire County Council v. Secretary of State for the Environment* (1986) AC 240 the court described an unreasonable decision as one "so absurd that the public body must have taken leave of its senses."
[16] *Boddington v. British Transport police* (1999) 2 AC 143 HL 175 per Lord Steyn " If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully...."In Malta the *Wednesbury* standard was fully adopted in *Piju Attard v. Munxar Local Council* (CMSJ) (29 February 2008) (113/01) (Magte. A. Ellul).
[17] See Jennifer James: *Associated Provincial Picture Houses v. Wednesbury Corporation* in *Cases that Changed Our Lives*: General Editor Ian McDougall (LexisNexis) (2010): 21.
[18] Jennifer James (n. 17): 24 "Quite why the well being physical and moral health of children would have been at risk from attending a Sunday showing of *Miracle on 34 Street* the learned Lord Greene MR did not state."

the former, namely taking into account considerations which it was not entitled to consider, that the action is unlawful.[19]

The ground of review on abuse of power is the one mostly used in local jurisprudence to annul an act of the Administration followed by that of ignoring relevant considerations; which is why Maltese law, as shall be seen, bases its definition of abuse of power on these two grounds and reasons.

The famous *Poplar c*ase[20] immediately springs to mind in this respect. In that case a Borough Council fixed a minimum wage as it had every right by law, but ignoring the labor market. Lord Atkinson famously described the exercise of such a discretion in fixing excessive wages as based on "eccentric principles of socialist philanthropy"[21] declaring such exercise as an abuse of power. On the same lines a scheme by Birmingham Council granting free travel to old age pensioners was, in the absence of any statutory authority, struck down after a rate payer claimed that such exemption was *ultra vires*.[22] Similarly in another case,[23] a scheme for the purchase of council property in Westminster in marginal wards likely to vote for the party in government, and selected politically for such purpose, was deemed to be an abuse of power.[24]

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[19] See Auburn, Moffetet and Sharland: *Judicial Review: Principles and Procedure* (2013) (Oxfird University Press) 332

[20] *Roberts v. Hopwood* (1925) A.C. 578 Lord Wrenbury said in his judgment: "A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

[21] Other cases of improper political motive include *Magill v. Porter* (2001) (UKHL 67(2002) 2 AC 357; *R v. London Borough of Ealing ex p Times Newspapers Ltd* (1987) (IRLR 129; *R v. Secretary of State for the Home Department ex p Launder* (1997)1 WLR 839, 868-D and *R v. Local Commissioners for Administration in North and North East England ex p. Liverpool City Council* (2001) (1 All ER 462).

[22] *Prescott v. Birmingham Corporation* (1955) Ch 210.

[23] *Magill v. Porter* [2001] UKHL 67 (13 December 2001).

[24] Lord Scott of Foscote: "This is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be

Ignoring relevant considerations amounts also to abuse of power. In *Padfield v. Minister of Agriculture* [24A] a Minister refused to refer a complaint by milk-producers to a Committee of Investigation establishes under statute claiming that such action was within his absolute discretion. In the House of Lords, Lord Reid argued that:

> If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act.

The threshold of Reasonableness[25]

In reality the courts of law, have not always required a high threshold for unreasonableness to be determined. Subsequent attempts have been made to reformulate *Wednesbury*. In one case[26] the definition adopted was: "a decision so unreasonable that no person acting reasonably could have come to it": although this definition is perhaps more tautological that the *Wednesbury* one. In another case, the definition was colourfully presented as" one which elicits the exclamation '*my goodness that is certainly wrong.'* [27] Attempts have therefore been made to beef up the *Wednesbury* definition. These have included such phrases as *whether a decision is within the range of reasonable decisions open to a decision maker;*[28] or *"one which a reasonable authority could reach* [29] *"or beyond the range of reasonableness open to a reasonable decision maker."*[30]

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any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage.."

[24A]: (1968)A.C 997.

[25] See Jowell Jeffrey *Proportionality and Unreasonableness: Neither Merger nor Takeover* in Wilberg H and Elliott M (Editors): *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2017) (Hart Publishing): "It is generally assumed that there is a sliding scale of substantive review and that the more interference with human rights, the more the court would require by way of justification under the reasonableness test. Conversely the greater the policy element in the decision, the lower the degree of scrutiny the decision is required."

[26] *Champion v. Chief Constable of the Gwent Constabulary* (1990) 1 W.L.R.1.

[27] *Neale v. Hereford and Worcester County Council*: CA 1986[1986] ICR 471.

[28] *Boddington v. British Transport police* (1999) 2 AC 143 HL 175 per Lord Steyn.

[29] *R. v. Chief Constable of Sussex ex p International Trader's Ferry Ltd* (1999) 2 AC 418 HL 452 per Lord Cooke.

[30] *R v. Ministry of Defence ex p. Smith* (1996) (QB 517, CA 554 per Sir Thomas Mingham MER.

De Smith [31] under this heading includes decisions taken in bad faith, or based on considerations which have been accorded manifestly inappropriate weight or strictly irrational decisions namely decisions which are apparently illogical or arbitrary or supported by inadequate evidence or by inadequate or incomprehensible reasons.

Principles governing the exercise of official power in a constitutional democracy

One of the requirements for such an exercise of power is *legal certainty* and that a person's legitimate expectations should not be disappointed. The main principles contained in this doctrine from the substantive point of view are that (a) the expectation must be induced by the decision-maker either expressly by means of a promise or undertaking, or implicitly by means of a settled past conduct or practice. (b) such promise may be general or addressed to a specific category of persons, or to a specific person; (c) what is important is the assessment whether the representation may reasonably induce a person within the class to rely on it. (d) the representation must be made by a person or authority with the ostensible power to make it and (e) it must be clear, unambiguous and devoid of relevant qualification.

Another principle is *equality and equal treatment* which are guaranteed by the rule of non-discrimination enshrined in the European Convention on Human Rights and one of the unwritten general principles of European Community law.

Proportionality and Abuse of Power

This sub-heading is intimately linked to the concept of *proportionality* which is the litmus test adopted by the European Court of Human Rights in deciding whether a particular restriction of a right is permissible or not. An important factor is the impact which a decision

[31] De Smith Woolf and Jowell's *Principles of Judicial Review (*1999) (Sweet and Maxwell): 450.

has on any person, whether the burden imposed is excessive or its effects unfair; where fundamental rights have been breached the test will be even stiffer.[32]

The use of the term "abuse of power" was first applied in one case[33] where a legitimate expectation was ignored. The concept is intimately linked with the idea of fairness. Ignoring relevant considerations and taking into account irrelevant ones form the basis of this concept.

In French Administrative law, abuse of power falls generally under the heading of the notion of *detournement de pouvoir*, namely an analysis of the motives behind an administrative act, an investigation into *the legalite` interne*, rather than *legalite` externe* such as procedural flaws or incompetence.[34] It actually boils down to a very similar ground to abuse of power, namely an examination whether a power or discretion has been exercised for some object other than that for which it was conferred by statute. Reference can be made in this process to *the travaux preparatoires* or debates in the Legislature to determine the precise object and scope of the legislation. This may not always be an easy task and in some cases it is up to the *Conseil d`Etat* to "invent an object for the legislature."[35] If plaintiff proves unexplainable behaviour by the Administration, it is up to the public authority to rebut such suspicion of unlawful behaviour.

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[32] See Aharon Barak: *Proportionality:Constitutional Rights and Their Limitations* (Cambridge University Press) (2012): 131 "proportionality..is made up of four components: proper purpose, rational connection, necessary means, and a proper relation betweeen the benefit gained by realizing the proper purpose."

[33] *R v. Inland Revenue Commissioners ex parte Preston* (1985) AC 835: Lord Templeman "In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy."

[34] See Brown and Bell: *French Administrative Law* (Fifth Edition) (Oxford University Press) (1998) 245 *et seq;* see also Natasha Bountempo:*Governmental Liability in Tort and in the Cases of Judicial Review* (Thesis MA in Law)(UM)(2004) 55-6: "According to Long, Weil et Braibant, *Les grands arrêts de la jurisprudence administrative,(Sirey) (1978)(23 et seq* ,) *détournement de pouvoir* is applied in three categories of cases: (a) when the administrative act is taken without the public interest in mind (b) when the administrative act is taken on the basis of public interest but the discretion which the administration exercises in doing so was not conferred by law for that purpose (c) in cases of *détournement de procedure* where the administration, concealing the real content of the act under a false appearance , follows a procedure reserved by law for other purposes .

[35] *Ibid* p 246.

One of the classic examples of such *detournement* can be found in the *Rault* case, [36] where a decision by a mayor regulating dances was quashed since it was inspired by an interest for his own inn to be patronized by clients; or a regulation relating to dressing and undressing on beaches, formally passed in the public interest was motivated not by reasons of public decency but only to entice bathers to use the municipal bathing establishments.[37] In another case[38] the *Conseil d Etat* was more adventurous: It proclaimed that when a wartime statute prohibited the purchase of real estate without the endorsement of the local prefect, such endorsement could only be refused to avoid speculation and for no other purpose, declaring that this was the scope of the statute, though no documentary evidence supported such a view.

Application of Principles to Maltese law

There is no doubt that reasonableness, proportionality and abuse of power were not always considered as a ground of review. The earliest jurisprudence on judicial review mattered more with competence, jurisdiction and form, but not with the internal legality of an administrative act. *Scerri v. Grech,*[39] the first Maltese judicial review case made it clear, in the light of Italian doctrine obtaining at the time,[40] that it would only examine whether the law had been formally adhered to. It would not enter into the substance of the matter itself.

[36] CE 14 March 1934.
[37] Beauge CE(4 July 1924).
[38] *Tabouret et Larocje* (CE 9 July 1943).
[39] (FH) (28 April 1899) (Kollezz. Vol. XVII.II.58).
[40] See Mars Ann Farrugia: *The Development of Judicial Review of Administrative Action in Malta* (LL.D Thesis) (UM) (1993) 113 "There can be no doubt that the court referred to Italian jurisprudence on the subject. This is betrayed by the final phrase in the judgment namely "a meno che non consti che questa abbia recato una lesione del diritto altrui" which recalls immediately to mind the dichotomy in the Italian system between "diritti" which are protected by the ordinary courts, and "interessi" which are protected by the *Consiglio di Stato."*
[41] See *Victor Trapani ne v. Oscar Pace Feraud* (CA) (6 February 1950) (Kollezz. Vol. XXXIV.I.17):"The Housing Commissioner enjoys the right to requsition any premises…and his actions are not reviewable by the courts so long as the requisition order was issued in the form required by law; see also *Elisa Cesareo v. Victor Trapani* (FH) (26 June 1950) (Mr Justice Albert Camilleri) (Kollezz. Vol. XXXIV.II. 594); *Victor Denaro ne v. Emmanuel C. Tabone* (CA) (25 January 1957) (Kollezz. XLI. I.34) and *Guza Formosa v. Joseph Ellul Mercer ne* (FH) (28 June 1957) (Mr Justice Alberto Magri) (Kollezz. Vol. XLI.II. 1068).

This attitude rears its head every now and then, throughout decades of Maltese case law.[41] In 1926 in *Mallia Tabone v. Stivala*[42] the Court made it abundantly clear that it would not even dare to inquire into the substance, rationality, reasonableness of an administrative decision. No scrutiny of an appreciation of facts regarding the Commissioner of Police's decision not to renew the permit for a firearm would be made. Similarly in *Muscat Azzopardi v. Stivala*[43] the Court of Appeal did not venture into whether a refusal by the Commissioner of Police to issue a license to use a pontoon was reasonable or not.[44] Such reluctance is also evident in another case[45] regarding an expropriation order where the Court as late as 1953 declared that its jurisdiction was limited to examining whether an act complied with the requisites of the law.[46] The failure of the authorities to start the proceedings which would lead to the payment of compensation was not reviewable once the order had been issued according to the formalities of the law. In *Strickland v. Galea*,[47] the court again declined to inquire into the discretion given by law to the Secretary of State for the Colonies to suspend the Malta

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[42] *Giuseppe Mallia Tabone v. Frank Stivala noe* (CA) (11 January 1926) (Kollezz. Vol. XXVI.I.374): "When one is dealing with an administrative act issued by a government officer or entity in virtue of a law or regulation, the Courts of Justice are competent to examine the legality of such act, when it is claimed that the rights of others have been infringed; in the sense that they may examine whether such a decision falls within the competence of such Authority which issued it and whether it is regular in form; but they cannot discuss the appropriateness or justice of such act if the Authority was competent to take such decision and it was taken according to due form". See also *Giorgio Demarco et ne v. James Turner et* (FH)(12 October 1933)(Kollezz.Vol XXVIII.II.455)(Mr Justice G. Depasquale) :"The words expressly provided in the law namely "in the discretion of the Director Veterinary Services" clearly exclude any assessment by any authority other than the Director himself ."

[43] *Ugo Muscat Azzopardi nomine v. Frank Stivala nomine* (CA) (5 February 1926) (Kollezz. Vol. XXVI.I.420).

[44] The same applied to the revocation by the Police of a driving license: see *Giuseppe Mifsud v. Salvatore Galea* (FH) (31 January 1936 (Kollezz. Vol. XXIX.II.930).

[45] *Gioacchino Attard Montalto v. Edgar Cuschieri noe* (FH) (27 June 1953) (Kollezz. Vol. XXVII.I.749).

[46] "The expropriation of land for a public purpose consists in an act exercised *iure imperii*.; and in the same way as the right of the competent authority to expropriate land for a public purpose is not reviewable by the Courts, so long as it is exercised by the competent authority and in the form prescribed by law, similarly the execution of such right is not reviewable since it forms part and parcel of the same right. "see however *Elisa Cesareo v. Victor Trapani* (FH) (26 June 1950) (Vol. Kollezz. XXXIV.II 594) (Mr Justice T. Gouder) where it was stated that even if an act was *iure imperii*, " when the legitimate act is enforced not according to law, though the legitimate act is not nullified, nonetheless its exercise would be unlawful and therefore anti-juridical."

[47] *Mabel Strickland proprio et nomine v. Salvatore Galea* (CA) (22 June 1935) (Kollezz. Vol. XXIX.I.216).

Constitution if he "shall be satisfied that a grave emergency had arisen and continued to arise in Malta."[48]

The error committed in this and other cases is that the court confused the issue of *reviewing* discretion with *substituting* it with its own. A court has every right – even if one follows English case law at the time – to scrutinize administrative discretion and declare it unlawful and invalid if unreasonable or perverse, without however substituting such act with its own decision. This is the real reason why judicial review of abuse of power took so long to start and make a difference.

As late as 1972 in one case[49] the Court refused to inquire into a discretion derived from the words" reasonable cause to believe" given to the Commissioner of Inland Revenue to issue precautionary warrants in relation to *ex officio* assessments, citing a wartime controversial case in the United Kingdom of *Liversidge v. Anderson*[50] to decline to review.

It was only in *Pace v. Anastasi Pace*[51] that an opening was made referring to judicial review of administrative tribunals, in this case the War Damage Commission where the court of first instance declared that it had the right to review whether a decision was "*fair and honest*". Yet post-war jurisprudence accepted such review of fairness and honesty – which may be considered to be tantamount to reasonableness – only to an administrative judicial or quasi-judicial organs. No such review ever occurred regarding an administrative decision by a public officer or authority.

[48] " There is no doubt that such an important act, so far reaching in its consequences as to bring the constitutional life of these islands to a standstill, as the declaration of the existence or continuance of a state of emergency, which may be based upon circumstance, information and provisions the nature of which does not allow of their being made public, constitutes an act of State which is not capable of judicial enquiry and cannot consequently be amenable to the jurisdiction of the Courts."
[49] *Emanuel Cassar v. Albert Agius Ferrante nomine* (FH) (31 January 1972) (Mr Justice V. Sammut).
[50] (1942) (A.C. 206).
[51] *Ugo Pace et v. Joseph Anastasi Pace nomine* (FH) (1 May 1946) (Kollezz. Vol. XXXII.II.317).

One of the first decisions which attempted to define court scrutiny on the basis of reasonableness was that of *Toni Pellegrini noe v. Edward Arrigo nomine et*[52] where, regarding a decision taken by the Malta Broadcating Authority, the court, quoting from the English case of *Wednesbury*,[53] stated that:

> The words 'in its opinion' must be interpreted to mean that the Court will not annul a decision unless it is such that no group of reasonable people would have reached the said conclusion or if there is bad faith or corruption.

Another audacious decision relating to the ground of review of reasonableness, a ground which had been proclaimed for some years by English case law, but conveniently ignored by the local courts, was that of *Debono v. Tabone.*[54] In that case a valiant attempt at controlling executive discretion was made where a refusal by a Minister to declare a matter as being a trade dispute on spurious grounds was declared to be invalid as an abuse of power. The discretion by the Minister had been exercised wrongly and for the wrong reasons by taking irrelevant considerations into account; for the Minister had decided that since the trade union requesting such declaration had not yet been formed when the trade dispute first arose, it could not then request such a declaration.[55] Similarly arbitrary acts by constitutional commissions or authorities were reviewable by the courts[56] that cited the famous dictum in *Sharp v. Wakefield*[57]

> that something is to be done according to the rules of reason and justice not according to private opinion..according to law and not to humor, It is to be not arbitrary vague and fanciful but legal and regular.

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[52] *Toni Pellegrini v. Edward Arrigo noe et* (FH) (10 March 1964) (Kollezz. Vol. XXXXVIII.II.869) (Mr Justice M. Caruana Curran).
[53] *Associated Provincial Picture House Ltd v. Wednesbury Corporation (*1948)1 KB 223.
[54] *Victor Debono nomine v. Vincent Tabone nomine* (FH) (24 June 1970) (Mr Justice M. Caruana Curran).
[55] This case is similar, legally speaking, to *Padfield v. Minister of Agriculture* (1968) A.C. 997 where the refusal of a Minister to refer a complaint to the Milk Marketing Board, even though such reference could occur only "if the Minister in any case so directs", was held to be subject to review and declared unreasonable.
[56] *Dominic Mintoff noe v. Anthony Montanaro Gauci nomine et* (CA) (22 May 1971).The case related to the arbitrary distribution of air time in the 1971 electoral campaign by the Broadcasting Authority, treating parties represented in Parliament and those not so represented alike.
[57] (1891) (A.C. 173).

This meant that although the courts were not and could not be arbiters of expediency or political correctness of a policy, they were entitled to examine whether adherence to such a policy produced an unreasonable exercise of power or abuse of it.[58]

But even prior to this clear pronouncement the courts were gradually, even though at times ambivalently, moving towards a clear alignment with English common law. In one case[59] relating to a requisition order of property for accommodation purposes which was then changed to house government offices, it was emphasized that "in the exercise of executive discretion one supposes that the authority acts not only "*rite*" but also "*recte"*.[60] This does not mean that for a court to decide that an executive decision is lawful, it must agree with it or deem it correct. So even though a court of law might express doubts whether a decision was right, it can still declare that it was not unreasonable.[61]

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[58] In *Joseph Attard v. Enemalta Corporation*(FH) (5 October 2001(2282/97) (Mr Justice G. Valenzia) the Court, coming perilously close to pre-War Maltese jurisprudence, went so far as to declare that it had no jurisdiction to enter into *minutiae* of a promotion exercise if the criteria were established and applied to all equally: "In the current case, the Corporation conducted its exercise according to established criteria (at least no contrary proof was brought forward before this Court) for anyone sitting for the examination. The Court, under article 469A, as a court of review, does not enter into questions relating to how marks were awarded and the reason behind such award or whether a proper evaluation of plaintiff's capabilities occurred. These are matters to be left to the discretion of the examiner and this Court does not interfere in such matters as whether the examination was right or not, or not or whether plaintiff was competent in his work more than others who were selected."

[59] *Francesco Masini nomine v. Wilfred Podesta` nomine* (CA) (21 April 1961) (Kollezz. Vol. XLV.I.110).

[60] See also *Victor Denaro ne v. Hon Emmanuel Tabone ne et* (CA) (25 January1957) (Kollezz. XLI. I.34) where a requisition order on the Westminster Hotel in Kingsway issued to provide social accommodation, was then used to accommodate a government department and was declared to be *ultra vires.* In *Anthony Psaila v. Commissioner of Police* (FH) (28 January 2004) (1734/97) (Mr Justice Ph. Sciberras) the court observed that "The said article 469A introduced by Act No XXIV of 1995 and applicable to the current proceedings, empowers, in its first sub-article, the competent ordinary courts of civil jurisdiction to review the validity of an administrative act or to declare such act null, invalid and without effect; this attitude of the law towards the courts is strikingly different from that case law, today considered as devoid of all logic, which used to hold that the function of the Court was limited to an investigation as to whether the act fell within the powers of the authority but did not include examining the `opportunita`e la giustizia di esso." See judgment in *Marchese Giuseppe Mallia Tabone v. Major Frank Stivala nomine* (CA) (11 January 1926) (Kollezz. Vol. XXVI.I.374) which dealt with the lack of renewal to plaintiff of a license to carry a firearm for hunting purposes. Reading this judgment it is obvious that the concepts of reasonableness, as developed in the United Kingdom or that of *detournement de pouvoir* in French law, as a means of controlling an arbitrary exercise of discretion, were not yet recognized by the Court. See also *Joseph Muscat et v. Chairman Housing Authority* (FH) (16 January 2009) (1447/96) (Mr Justice Ph. Sciberras).

[61] *Dr John Vassallo v. Malta Transport Authority et* (FH) (27 June 2017) (288/14) (Mme Justice Anna Felice) "From the evidence produced, this Court does not conclude that the decision complained of by plaintiff is arbitrary and therefore *ultra vires*... **In spite of the fact that this Court harbours doubts about the measurements applied by the Authority in order to reach its decision that the road was wide enough to allow parking and passage of large vehicles such as ambulances** …this does not necessarily mean that the

Power exercised under Dictation and Abdication of Power

Not exercising discretion when a public officer should have is also an abuse of power for a public authority is denying a person his rights at law.[62]

The law in granting discretion to a public officer does not allow such power to be exercised by someone else, not even a Minister. In the landmark judgment of *Giuseppe Sciberras v. Housing Secretary*[63] it resulted that the Housing Secretary had issued a requisition order on orders from the Parliamentary Secretary responsible for Housing following a decision of the Rent Regulation Board ordering the eviction of a tenant.

There is no doubt that as a reaction to this judgment, a provision was included in the new Interpretation Act 1975 which in article 6(c) provided that the Minister could give directions to a public officer as regards the exercise of such discretion. The provision ran as follows:

> (c) where such Act confers a power on the holder of an office, and such power relates to any business of the Government, or is exercisable as part of the functions of a department of Government for which responsibility has been assigned to a Minister under the Constitution, such power even if expressed to be exercisable in the discretion (whether absolute or otherwise) of the holder of that office , shall be exercisable subject to the control, supervision and direction of the Minister responsible for that business or department of the Government except to the extent that the holder of that office is expressly declared by any law not to be subject to the direction or control of any other person or authority.

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decision taken by the Authority was arbitrary or amounted to an abuse of power. It was incumbent upon plaintiff to prove to the satisfaction of the Court that the decision was based on improper or extraneous considerations." (emphasis added). *See also Teknika Consult Marketing Limited v. Commissioner of Land* (FH) (7 December 2016) (34/16) (Mr Justice Mark Chetcuti) where the refusal by defendant to change a title of lease of a kiosk into a title of emphyteusis was considered a reasonable exercise of discretion since the policy approved by Parliament only applied to a kiosk held by encroachment and no other title."

[62] *Tabone Computer Ltd v. Director Wireless Telegraphy et* (CA) (31 January 2007) (519/97): "The failing of an authority authorized by law, to use its discretionary powers constitutes an abuse of such power (*De Smith: Judicial Review of Administrative Action:* Fourth Edition (Chap 6; 298-321) the more so when such authority fails to give a reason for not exercising its powers.... Such a shortcoming consequently amounts to an administrative abuse which requires a remedy as decided by this Court in a similar case of a refusal to exercise a discretion in *Whelpdale et ne v. Comptroller of Customs* decided on 31 May 2004) (556/95)".

[63] (FH) (21 July 1973) (Mr Justice V. Sammut). The same applies to administrative tribunals. In *Carmel Fenech v. Commissioner of Police et* (FH) (14 February 2007) (1622/00) (Mr Justice J. Azzopardi) the First Hall of the Civil Court ruled, with reference to a decision of the Police Licences Appeals Tribunal, that: "The Court agrees with plaintiffs that this decision was not motivated but dictated to by others. A Tribunal, whatever its nature, cannot decide a case simply because one of the parties, whoever that may be, was holding a particular position. Even as regards the advice given by UNESCO, the Tribunal accepted all that the Department said without even being shown any document in this regard."

In 1990 in virtue of Act No. XXXV of 1990 this provision was amended so that such directives were to be given in writing, and again in 2009 through Act No. I of 2009 to the effect that on employment, promotion or disciplinary matters in relation to individual employees, such direction could only be given by the Prime Minister and that the Public Service Commission had to be informed of such directive by a head of department

This legislative intervention, in the wake of the *Sciberras* judgment, therefore allowed public officers to be directed in the exercise of their discretion by political superiors.

In one case[64] the complete reliance of the Commissioner of Police on the Malta Planning Authority on matters relating to licenses for explosions in a stone quarry, amounted to an unlawful exercise of discretion dictated by an authority other than the one entrusted by law to take a decision. The Court ruled that:

> In the present case it results that the Commissioner of Police, did not simply consult the defendant Authority, something which he was entitled to do, but left everything in the hands of the defendant Authority such that it was the latter which really and effectively decided on the application of plaintiff company. At the very moment that the Authority did not issue a clearance, the Commissioner of Police stopped there, did not do any deliberation and did not even reply as he was obliged to do, to the application by plaintiff company.[65]

The Blue Sisters Case

The real ground breaking decision on abuse of power however was the *Blue Sisters*' case.[66] It is a landmark decision dealing with a heavily politically loaded case which raised different

[64] *Ballut Blocks Limited v. Commissioner of Police et* (FH*)* (15 December 2016) (710/04) (Mr Justice J. Zammit Mckeon)**.**

[66] *Prime Minister v. Sister Luigi Dunkin* (FH) (26 June 1980) (675/80) (Mr Justice J. Herrera). See Ian Refalo: *Administrative Law : Case Law Summary and Comments (2016) (Faculty of Laws)* : 71: "The main impact (of this judgment) is in the area of judicial review where it centres on the ability of the Courts to control the unreasonable exercise of discretion. The judgment in fact affirms the principle that where Maltese Administrative law has a lacuna then reference can legitimately be made to the English Common law position as source of Maltese law. "

issues relating to this particular ground of review. The facts have to be explained in detail for a full grasp of the legal issues involved.

In 1911 Mrs. Emilia Clapp had donated to the Government of Malta a hospital which she had built at her own expense: a condition was however attached to the donation deed to the effect that "the hospital shall be enjoyed exclusively and in perpetuity by the Nursing Sisters of the Institute called 'Little Company of Mary' who were obliged to use the premises as a hospital for patients "of every gender and nationality according to the rules of their Institute." According to the deed, in case the Sisters did no longer use the premises as a hospital or left Malta, then the hospital reverted to Government in full ownership. In 1977 Government included a new provision in the Medical and Kindred Professions Ordinance (Ch.51) introduced by Act No. XX of 1977 whereby "no premises could be used for hospital purposes without a permit issued by the Health Minister. The Minister according to article 84(5) of the Ordinance could:

> in granting or renewing any licence under sub-section 1 of this section impose **any such condition as he may deem fit** and may restrict the services and activities that may be provided or carried on in the licensed premises (emphasis added)

When the nuns applied for a permit, this was issued in 1980: however, a condition was imposed to the effect that the hospital had to make available to Government at least fifty per centum of the facilities at the Hospital for the care of patients under the National Health Scheme. The Blue Sisters refused to accept this condition, and consequently Government proceeded to evict them from the Hospital for being in breach of the donation deed which obliged them to enjoy the use of the premises only if they used them as a hospital, which they could not once no hospital licence had been issued following the refusal of the condition by the Sisters. The respondent Little Company of Mary pleaded that (a) that the law did not empower the Minister to issue such a condition (b) the condition was unreasonable and an

abuse of discretion[67] (c) the condition was in breach of the contractual obligations assumed by Government in 1911 which had accepted the donation on condition that it allowed the Little Company of Mary and no one else to run, manage and use the Hospital and (d) that such condition was in breach of article 37 of the Constitution (right against compulsory taking possession of property without compensation) and article 38 (protection of privacy of home and premises). Consequently the Blue Sisters could not be in breach of a condition which was null and void and therefore they were not in breach of their obligations under the donation deed.

The legal battle lines were set. This case would determine to what extent the full range of common law grounds of review would be applicable to ministerial discretion in Malta. In fact government rejected any form of review arguing that when a Minister enjoys an absolute discretion "as he may deem fit" no court may inquire into the exercise of such discretion unless the exercise was *ultra vires* in form or substance the law which granted such a discretion.

This case was ground -breaking for it affronted head on the issue of abuse of power and its legal interpretation. It opened the way for further audacious judgments on the control of executive discretion. The First Hall of the Civil Court while affirming once again that English common law was applicable whenever there was a *lacuna* in Maltese law on public law matters, ruled that the courts had the right to inquire the reasonableness of the exercise of the discretion, and quoting Wade, this had to be done "*having regard to the Act and its scope and*

[67] "It is also unreasonable and abusive of the administrative discretion granted to him (*the Minister*) under the said article (*art.84*) which does not authorise him to impose conditions which exceed the scope of the principal law and is also irrelevant to the aim of the law which expressly declares which are the conditions when a Minister refuses to issue a permit." (from plaintiff's writ of summons).

object in conferring a discretion upon the Minister rather than the use of adjectives".[68] This meant that the review of discretion on reasonableness had to be a legal matter, not based on general opinions or whim of the court, but having regard to the general scope, letter and spirit of the law; even though that still left a wide lee way to the Court to decide the matter.[69] The Court concluded that:

> In the opinion of the Court the main aim of this Act which granted discretionary powers to the Minister to issue licences under article 84(1) was so that the Minister in question does not issue licences or allow premises to be used for the purposes laid down in article 84(1) before he is ensured that the standard of medical care or service to be provided would be of good and high quality and this in order to safeguard the protection of public health in Malta… it therefore results from this, that the first condition imposed by the Hon. Minister in issuing the licence to defendant, namely that the latter had to provide not less than 50 % of the hospital facilities including 50% of the number of beds to Government, had no relation to the principal aim for which Act No. XX of 1977 was enacted.

The Court then went on to decide the issue of whether by imposing the condition Government was in breach of its *contractual* obligations under the 1911 donation deed, and whether such obligations could lawfully fetter its discretion. This point was equally important for in the past the courts had stated that government could not be shackled in its public duties by contractual obligations,[70] when exercising its power *iure imperii*. The Court in the *Blue Sisters* case dismissed this point on non-reviewability, considering that the *iure imperii*

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[68] Wade HWR *Administrative Law* (1974) (Third Ed) (Oxford University Press): 79 quoting Lord Upjohn in *Padfield v. Minister of Agriculture* (1968) (A.C. 997).

[69] "From all this there arises the principle that when an Act which confers discretionary powers on the Executive, such powers have to be exercised for, and within the ambit of, the scope for which the Act was promulgated; and moreover the Courts have the power and right to review the cases presented before it both directly, by an application on the part of the complainant , as well indirectly as a form of defence by such complainant, to examine whether the conferred discretionary powers were exercised according to law within the ambit of the scope of the Act conferring such powers, or else exercised abusively against the spirit of the said law or in an unreasonable way."

[70] *PL. Francesco Azzopardi v. Emilia Malfiggiani* et (Commercial Court) (5 January 1902) (Kollezz. Vol. XVII.III.69); at the height of the *iure imperii* doctrine, an order to close a theatre for reasons of public order was declared to be non-reviewable even though the defendant *impresario* of the Royal Opera House in Valletta was by contract signed by Government, entitled to manage the theatre. The theatre had been rented out to the Maltese Nationalist leader F. Azzopardi for the purpose of launching a new national anthem. The authorities ordered the *impresario* to close the theatre on that date in the interests of public order. See also *Antonio Buttigieg ne v. Captain Stephen H. Cross et* (CA) (8 November 1943) (Kollezz. Vol. XXXI.I.398) and *Anthony Darmenia et ne v. Dr G. Borg Olivier ne et* (CA) (18 February 1966) where the courts reiterated that no contractual obligation could impede the Government from acting in the public interest.

doctrine had been thrown overboard after *Lowell v. Caruana*.[71] It concluded that by imposing a condition that half the hospital facilities had to be made available to Government, the latter was in breach of the conditions of the donation deed which left the enjoyment of the property exclusively to the Little Congregation of Mary. It remarked:

> Government cannot revoke, or release itself from, its contractual obligations merely through an administrative act….Government is here imposing a condition which is in direct conflict with the obligation contained in the donation deed.

As has already been stated, as a knee jerk reaction to this judgment Parliament enacted Act No. VIII of 1981 which remained effective until the new article 469A was introduced in 1995 whereby a court had jurisdiction to review an administrative act only if there was a breach of an *express* provision of the law, even though as has been seen, Maltese courts of law found ingenious ways and means of circumventing such ouster clause.

Post-Blue Sisters Case Law

Post-Blue Sisters Case law in Malta on abuse of power may all be classified under the ground of review of taking irrelevant considerations into account. However, there have been some cases, where a decision was declared to be arbitrary, or made under dictation from another authority or the result of unlawful pressure or duress.

When examining some case law regarding taking irrelevant considerations into account one is inevitably drawn into the discussion whether in some cases, the courts of law have interfered too much, and substituted their own discretion to that of the Executive.

[71] *John Lowell nomine v. Dr Carmelo Caruana nomine et* (FH) (14 August 1972) (Mr Justice M. Caruana Curran).

The Threshold of Reasonableness

Drawing the fine line between review on abuse of power and interfering with a power belonging to the Executive remains the arduous task of the judiciary.

The issue therefore is what kind of threshold needs to be surpassed for abuse of power or unreasonableness to be ascertained? Is there for instance the need to prove an intention to harm? or is it enough if, from the facts of the case, an action appears to be without reason? The latter view makes more sense, but the intention to harm element has been referred to in some judgments.[72]Here Maltese case law offers different cases. There is no doubt that the *Blue Sisters* case, with its unreasonable conditions attached to a private hospital license, had certainly passed the red line. But in other cases the threshold was not high at all. For instance in one case[73] where the Customs authorities had blocked the release of merchandise basing themselves on the *Codex Alimentarius* of the Food and Agriculture Organization (FAO) which had not yet come into legal effect in Malta, such exercise of discretion was quashed.[74] Again in another case[75] relating to irregularities in a tendering process, the fact that the Director of Contracts did not disqualify bidders and start the tendering process all over again,

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[72] *See Abdalla Ahmed Abdalla Bashshar v. Minister for Foreign Affairs et* (FH) (26 February 2013) (273/09) (Mr Justice JR Micallef) "The test of reasonableness must be an objective one linked to the factual circumstances within which the said discretion is exercised. In addition, for behaviour to be considered abusive, the person alleging such abuse must prove there was an intentional element to do harm, a fact which may be proven through external behaviour forming part of the exercise of discretion. "The requirement introduced in this judgment that for there to be unreasonableness there must be an intentional element to create harm, is extremely doubtful. A person may act unreasonably without having any intention to cause harm."

[73] *Carmelo Dingli et v. Comptroller of Customs et* (CA) (27 March 2009) (66/92). See also *Lawrence Borg nomine v. Governor Central Bank* (FH) (1 March 2014) (2959/96) (Mr Justice JR Micallef) confirmed on appeal (CA) (9 March 2007) " It must result to the Court that the authority really considered the issue before it, and that this was done without any interference by a third party and without putting itself in a position that it could not exercise, or refuse to exercise such a discretion. It is useful that it be ascertained that the authority under review did not do anything which it was not authorised to do by law. Above all, the authority must have acted in good faith and considered all relevant factors. These are in brief a collection of the different categories in Administrative law regarding lack of exercise of discretion, or excess or abuse of its exercise."

[74] "It is the opinion of the Court that the administrative decision taken by defendants fails the test of reasonableness because it is based on criteria which were not publicly known to all, including plaintiffs, which renders such decision not objective and equal to everyone." See also *Said International Limited v. Central Bank of Malta* (CA) (29 January 2016) (1145/08).

[75] *Francesco Fenech Services Ltd v. Director Contracts* (FH) (22 October 2014) (2302/00) (Mr Justice S. Meli):

but requested a resubmission of new samples, was deemed to be unreasonable. The confusion between something being *ultra vires* and being unreasonable is evident with the two terms being used interchangeably.

In *Frank Pace v. Commissioner of Police*[76] a license for a public service garage was not renewed following the imposition of a new condition by the Commissioner of Police, namely, a bank guarantee of Lm600 which would be forfeited if in the opinion of the Commissioner any condition attached to the license was breached. This condition was deemed to be an exercise of abuse of power by the Commissioner in view of the fact that a punitive penalty was being imposed without any proceedings before a court or other judicial organ. The Court of Appeal ruled that:

> The use of discretion is clearly in conflict and contrast with at least one of the fundamental principles of the Maltese legal order, namely that the rights and obligations of every citizen have to be determined by a judicial organ, independent and impartial. It is manifest that the Commissioner therefore cannot in virtue of his discretionary powers as exercised with the introduction of the condition at issue, decide unilaterally the contravention of a condition and apply a penalty of forfeiture of Lm600.[77]

There is no doubt that in these cases the threshold was not raised high at all by the courts. One almost denotes a trait of interference in the duties of the Executive.

Matters of policy can lessen discretion but so long as they do not dominate its exercise do not lead to an unlawful use of discretion.[78] Consequently a policy to prohibit the importation of

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[76] (CA) (18 November 1994) (1311/78).

[77] However, imposing a condition in a disco license to acquire a permit from the planning authority before starting to operate was not deemed to be arbitrary or unreasonable (*Benny's Catering Ltd v. Commissioner of Police et* (FH) (28 November 2003) (2582/97) (Mr Justice G. Valenzia) confirmed by the Court of Appeal (CA) (28 September 2007).

[78] In *Reginald Fava pr et ne v. Superintendent for Public Health et* (FH) (7 April 2010)278/10) (Mr Justice J Zammit McKeon) regarding a pharmacy licensee whose premises were being taken over in view of a public project in Vallettta and who requested that other premises in Valletta be licensed so that his business operations would continue uninterruptedly, the Court ruled that the refusal of the health authorities to do so was influenced too much by opposition from the Pharmacists' Union. The Court ruled that such feared negative reaction did not justify the refusal since it was an extraneous consideration in the exercise of the discretion given by law.

candy in the form of cigarettes was not considered to be unreasonable.[79] Nor was a non-renewal of a trading license owing to the fact that licensee had no title over the premises any more.[80] Similarly a policy that fireworks, even light ones, could not be let off from historical sites such as the Gozo Citadel was considered to be reasonable and acceptable.[81] However a policy whereby Gozitan tax-drivers were prevented from carrying Gozitan passengers to Malta was deemed to be unreasonable[82] in so far as such decision and policy were based on the premise that unless there is agreement between the taxi owners of Gozo and Malta, the *status quo* was to be maintained. Similarly a refusal for a weapons permit owing to the criminal record of applicant was deemed to be reasonable.[83] In another case[84] the refusal by a health department committee for a patient to seek medical assistance abroad which could not be given locally, was deemed to be an abuse of power for, in spite of the obligations arising out of EU law, government for budgetary reasons had not provided such assistance, consequently taking into account irrelevant considerations. The fact that applicant had no access to make representations to a Committee which assessed his claim, made the exercise of discretion also arbitrary.

Again in another case[85] a requisition order was challenged as an exercise of abuse of power. Dilapidated premises were earmarked for demolition and a building permit was issued for a

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[79] *Sweetsource Ltd v. Superintendent for Public Health et* (FH) (30 May 2007) (1079/05) (Mr Justice G. Valenzia) "There is nothing unreasonable in the interpretation held by defendants that the candy sticks are in the form of cigarettes and are considered as sweets in the form of cigarettes. The candy sticks are packed in the same way as cigarettes, are all together in one box, and are not sold in a bag or by weight."

[80] *Josephine Le Provost v. Commissioner of Police* (FH) (6 October 2006) (1452/96) (Mr Justice D. Scicluna).

[81] S*aviour Farrugia nomine v. Commissioner of Police* (Court of Magistrates) (Gozo) 20 July 1997) (Magte M. Mallia).

[82] *Grezzju Debono v. Public Transport Authority* et (FH) (12 April 1999) (Mr Justice G. Caruana Demajo).

[83] *Anthony Psaila v. Commissioner of Police* (FH) (28 January 2004) (1734/97) (Mr Justice Ph. Sciberras) "The assessment of defendant in the circumstances was a correct one, even more so considering the fact that the permit requested was for a firearm which. though distinct, in the past was the object for which plaintiff was charged and convicted of a serious and grave offence."

[84] *Daniel James Cassar v. Director Institutional Health* (FH) (27 November 2008) (863/04) (Mr Justice R. Pace) confirmed on appeal (CA) (24 June 2011).

[85] *Joseph Portelli et v. Minister for Works et (*FH) (15 March 1993) (Kollezz. Vol. LXXVII.III.70) (Mr Justice G. Muscat Azzopardi).

block of flats to be built. A requisition order was issued even though the building was not fit for habitation. The Court in declaring the exercise of the discretion abusive remarked that:

> A discretion had to be exercised not only within the parameters of what the authority considers to be the public interest, but also, and with equal emphasis, within the parameters of that which is just and reasonable… the interpretation of what is just and reasonable are to be the same as those applied in the interpretation of our democratic Constitution.[86]

In spite of the restrictive provisions enacted by Act No. VIII of 1981 which were still operative in 1993, the Court completely ignored those provisions and applied the unwritten rules and norms of reasonableness, justice and equity to strike down an unnecessary and unjust requisition order.

Bad Faith

In one case[87] where a decision by a public corporation transferring an officer to another posting outside the said corporation at less favourable conditions, was based on contradictory statements, the Court concluded that the discretion had been exercised abusively and illegally. The Corporation had contradicted itself when it had tried to justify such decision on organization and at the same time stated that the officer was not up to standard.[88]

Discriminatory treatment

Where a discretion is exercised in a discriminatory way then an administrative act may be annulled as an abuse of power; however applicant has to prove that (a) there is a different treatment in his regard compared with others; (b) such other persons must be factually in the

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86 *ibid*

87 *Carmel D'Amato v. Malta Tourism Authority* (FH) (29 November 2011) (Mr Justice J Zammit Mckeon).

88 "The Malta Tourism Authority (MTA) is giving two versions for not keeping plaintiff in its employment. On the one hand it states that plaintiff was not capable in his work, and on the other hand it states that the office he was holding had become superfluous following restructuring. It is clear however that the Authority did not dismiss plaintiff but transferred him to Industrial Projects and Services Ltd (IPSL) to be assigned other work."

same position as applicant; (c) such treatment is not objectively or reasonably justifiable and (d) such difference in treatment lacks proportionality between the aim pursued and the means adopted.[89] This was amply pointed out in one Canadian case where a liquor licence was withdrawn simply because of the religious conviction of the proprietor who was in the habit of bailing out adherents of Jehovah Witness belief each time they were arrested.[90]

Rash Decisions

In one case[91] a refusal by government to recognize applicant as tenant in government owned premises – a purely civil matter – was considered to be an exercise of abuse of power since the authorities had rashly and abrasively refused to recognize the transfer of the lease from the deceased tenant to applicant without hearing the aggrieved party. Even though there was no obligation to observe the rules of natural justice, the authority was considered to have acted unreasonably when on such an important matter it did not properly examine the facts of the case. This case sticks out since in similar cases[92] the courts have decided that the matter is purely governed by civil law; in this case, giving a rather liberal interpretation of what amounts to abuse of power, the court declared as null the refusal to recognize the new tenant owing to inefficiency and procrastination in dealing with the matter. However, it is

[89] *Henry Calleja v. Commissioner of Land* (FH) (26 March 2009) (34/98() (Mr Justice JR Micallef) and *Agnes Gera de Petri Testaferrata Bonici Ghaxaq v. Attorney General et* (CA) (30 September 2011) (327/07): "This Court agrees with applicant that in the context of her request regarding judicial review under article 469A of Chapter 12, the Court may review the action of the competent authority to see whether apart from other reasons, it was discriminatory independently from issues regarding human rights." See, however, *Justin Caruana v. Commissioner of Land et* (FH) (16 October 2006) (2439/00) (Mr Justice J. Azzopardi) where the Court refused to apply article 469A to claims of discriminatory treatment in an eviction order of government-owned property, arguing that one should file a constitutional action, though in that case the only law which was invoked by plaintiff was the Re-Letting of Urban Property (Regulation) Ordinance) (Chapter 69).

[90] *Frank Roncarelli v. Hon Maurice Duplessis*, (Supreme Court of Canada) (27 January 1959) [1959] S.C.R. 121 Per Abbott J: "The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification."

[91] *Karina Fenech v. Housing Authority* (FH) (12 December 2011) (877/08) (Mr Justice J. Zammit McKeon).

[92] See s*upra* 95.

permissible for the Administration to correct a mistake and so in one case a condition erroneously attached to a licence could be revoked if it was evident that an error had been committed. Such revocation was not considered to be arbitrary.[93]

Exercise under Duress and Undue Interference

Where the discretion is exercised by a public authority under duress, moral or physical violence, amounting to unlawful pressure, the administrative act resting on such exercise is unlawful. In one case[94] a tender decision was revoked by a local council following aggressive protests made by the losing bidder, a Co-Operative, which included blocking parts of the town administered by the Council, protesting before the Council offices, and disallowing a competing bidder from executing his work of public cleansing under probation as requested by the Council. The revocation of the original decision was considered to be unlawful and an abuse of power.[95] The Court, quoting de Smith, remarked that:

> If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial.[96]

In another case[97] the fact that plaintiff alleged that the taking of criminal action against him could not proceed because the Police did not act against others who were in a similar

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[93] *Doris Darmanin v. Commissioner of Police* (FH) (7 July 2003) (972/96) (Mr Justice G. Caruana Demajo): "In the opinion of the Court the evidence clearly shows that defendant did not act arbitrarily or in an abusive manner or in breach of the rights of plaintiff; he only did what he had the power to do in order to correct an error."

[94] *Philip Seguna et v. Zebbug Local Council* (CA) (3 October 2008) (934/98); see also *Halida Kuduzovic v. Prof Juanito Camilleri ne et* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef).

[95] "The decision of Council to overturn its decision and not to insist on any evidence was taken hastily after the chaos created by workers of the Co-operative.; and the idea of taking a decision quickly and in the darkness of the night was also taken after disorder and threats on the part of members of the Co-Operative."

[96] De Smith's *Judicial Review* (6 Ed.) (Sweet and Maxwell) (2007):280.

[97] *Peter Paul Borg v. Planning Authority et* (CMSJ) (24 January 2006) (255/97) (Mgte T. Micallef Trigona): "If plaintiff broke the law, he cannot claim any immunity on the basis of a simple allegation of discrimination which will certainly be examined in the proper forum of the criminal action; but certainly in the Court's view, this does not and may not lead to the conclusion that the criminal proceedings are null or invalid."

position, was not deemed to be an abuse of power justifying the annulment of the police action. While expressing doubts that the initiation of police action could be considered as an administrative act, the Court ruled that the mere allegation of discrimination did not *per se* annul the police action.[98]

In another case[99] where Transport Malta obeyed a Ministerial order not to process licences for open double deck buses, in spite of the fact that regulations existed regulating such licences, the Court ruled that the exercise of such a discretion was unreasonable and arbitrary, the more so when both the Minister and the Transport Authority were considered public authorities under article 469A.[100]

Similarly in one case [101] where a Ministry official had unduly interfered in the proceedings before the Police Board against a police officer, such interference was considered to amount to abuse of power even though there was no evidence that such interference had influenced the Board in its decision which was annulled on other grounds of review.

Too Much Reliance on Policy

Nor can a public authority indirectly abdicate its duties by relying too much on policy. When a public authority rested its decision on a policy rather than a law, regarding the release and

[98] The onus of proof of unreasonableness always lies with the person alleging it. (*CCD Ltd v. Malta Transport Authority) (*CA) (18 July 2017) (355/05); changing an encroachment permit owing to an error *per se* does not amount to an abuse of power. (*Carmelo Bonnici et v. Commissioner of Land et* (FH) (4 October2017) (1105/14) (Mr Justice L. Mintoff).

[99] *Garden of Eden Garage Ltd v. Malta Transport Authority* (FH) (29 September 2011) (474/09) (Mr Justice JR Micallef).

[100] However the fact that a Minister creates through subsidiary legislation a scheme for the importation of second hand cars, executed by the transport authorities, which harms the business of car importers, does not *per se* give rise to an action under article 469A. (*Association of Car Importers Malta et v. Malta Transport Authority e*t (FH) (18 January 2012) (983/06) (Mme Justice A. Felice) confirmed on appeal (CA) (27 May 2016).

[101] *Elton Taliana v. Minister Home Affairs et* (FH) (7 November 2017) (177/14) (Mr Justice JR Micallef): "The very fact that certain zeal was shown in what was happening before the Board, on the part of a Ministry official who should not have intervened at all, casts a shadow on the proceedings even if the Board was unaware of such interference."

confiscation of imported goods, such decision was considered to be ultra *vires* and also amounted to an abuse of power since an irrelevant consideration, namely the policy rather than the law, was taken into account.[102] The case related to the importation of a drink which was harmless in itself but which was styled *Cocaine*. According to the National Drug Policy, trade in such objects was to be discouraged. Similarly in another case[103] basing one's decision on a *Codex Alimentarius* which had not yet legal effect in Malta was deemed also to be unreasonable apart from lacking legal authority.

While the judgment regarding the legal invalidity of such Customs confiscation is perfectly within the ambit of the courts power to strike down an administrative act which is done in breach of the law, it is doubtful whether such act constituted also an *unreasonable* exercise of discretion amounting to an abuse of power. The implication in the judgment is that each time a public authority deliberately or mistakenly bases its discretion on a policy rather than a law, then such discretion is in breach not only of article 469A (1) (b) (i) but also (iii).

In another case,[104] the fact that Cabinet had approved a policy against the holding of circuses did not legitimize the reasonableness or otherwise of such a policy.[105] Indeed in that case the Administrative Review Tribunal considered such policy to be unreasonable in view of the fact that the pressure of lobby groups had been given paramount importance.[106] This decision however was overturned on appeal. The Court of Appeal decided that taking into account the

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[102] *All for Property Ltd v Dir. Gen. Customs (*FH)(30 September 2014)(741/08)(Mme Justice L. Schembri Orland)"Since his action was not supported by law, but only by a policy, issued as a guideline, this Court concludes that respondent acted *ultra vires* and with abuse of power since his decision was based on irrelevant considerations in breach of article 469A(1) (b) (iii)."

[103] *Carmel Dingli v. Comptroller of Customs* (CA) (27 March 2009). "In the light of all this it is the opinion of the Court that the administrative act taken by defendants fails the test of reasonableness because it was based on criteria not known to everyone including plaintiffs; this renders that decision not objective and equal to everyone."

[104] *Johann Said v. Commissioner of Police* (ART) (10 December 2012) (325/12) (Magte G. Vella).

[105] "A Cabinet policy should not be used so that a legitimate request be rendered illegitimate as otherwise the most absolute abusive behaviour would be practiced."

[106] "The Tribunal observes that the public and government authorities should not adopt the function of protectors or tutors of the interests of lobby groups which represent personal interests of some to the d etriment and prejudice of someone else. This is certainly not good governance."

interests of the Valletta business community which was against plaintiff occupying an extensive parking space for the Circus, by itself, was not an irrelevant consideration.[107] Similarly in the case of a refusal of a licence by the Transport authorities on the basis of a policy which was not published anywhere, less still contained in subsidiary legislation, the exercise of discretion was deemed to be arbitrary and therefore null and void.[108]

In a case relating to a decision to eradicate a flock of sheep which was not registered with the authorities, in breach of domestic and EU law, the Court of Appeal stated that it found nothing unreasonable in such decision.[109]

However not all kind of pressure is necessarily unlawful**.** Exercising a right according to law, even if it amounts to a form of arm twisting was not considered to be an abuse of power. In one case[110] regarding an increase in the assessment of the proper value of donated property for document duty purposes where the Commissioner of Inland Revenue offered to the beneficiary of the donation of such property the concession to pay only 10 per centum of an additional penalty and settle the tax dispute, or contest the case before a special tribunal with the possibility of suffering the full additional penalty, the court did not find that such behaviour amounted to an abuse of power.

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[107] (CA) (12 December 2012).

[108] *Nazzareno Fenech v. Chairman Malta Transport Authority* (FH) (9 March 2001) (481/96) (Mr Justice G. Caruana Demajo): "That the Authority has the right to draft a policy necessary in order to achieve the aim of having a proper integrated public transport system, without danger, economic and efficient, emanates from the law which constituted it; however, in so far as the policy affects directly third party rights, such as for example the issuing of licenses, such policy must be implemented according to the means provided for in the said law (article 27) which grants to plaintiffs, with the consent of the Minister, the power to issue regulations. In so doing the criteria for the issuing of licences will not only be known to all, but form the basis for the taking of decisions objectively and applicable to all." See however *Nazzareno Scerri et v. Malta Environment and Planning Authority (*FH) (30 January 2015) (470/06) (Mr Justice A. Ellul) where the projection of a road according to policies and local plans of MEPA was deemed to be a reasonable exercise of power.

[109] *Ganni Attard v. Director General Veterinary Services (*CA) (29 January 2016) (114/12*).*

[110] *David Debono et v. Commissioner of Inland Revenue* (FH) (5 May 2009) (61/06) (Mr Justice C. Farrugia Sacco): "There is no evidence of any abuse by the Commissioner of Inland Revenue who acted according to law, even if the interpretation given of such law is a bit strained, since one is denied access to a Tribunal if one pays and avoids additional interests. But none of the headings under which an administrative action may be proposed is applicable to the present case."

Legitimate Expectation and Abuse of Power[111]

Attempts have been made in Malta to develop the doctrine of legitimate expectation as in the United Kingdom from a *substantive* point of view in the light of the *Coughlan*[112] decision by the English courts. In that case regarding a promise made to a woman with severe disability that she would remain accommodated in a particular institution following her transfer from a previous facility, the Court of Appeal was of the view that for the authorities to frustrate Coughlan's legitimate expectation was so unfair, that such action amounted to an abuse of power. Furthermore, there were no overriding public interest considerations to justify the authorities' decision. A court in the United Kingdom, in both procedural and substantive application of the doctrine, is empowered to examine whether there existed a legitimate expectation and whether there were sufficiently grave reasons to depart from one's expected obligations.

In Malta, a legitimate expectation has been considered to be a 'possession' in the context of Article 1 Protocol I and therefore subject to protection under that Article.[113]

But the doctrine of legitimate expectation has been applied also in judicial review cases though it is not clear under which statutory provision or heading such application was made. In one case,[114] a court employee whose rank was inferior to that of a Court marshal was promised by his superiors that if he performed the duties of the latter post, a promotion exercise would be held, and he would be considered for the post of Marshal. This promotion

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[111] See Peter Grech: *Keeping One's Word*: *The Protection of Legitimate Expectation in Administrative Law* (Id-Dritt (Għaqda Studenti Ligi (Għ.S.L.) (Vol. XVIII (2002) and Mark Soler :A *Maltese Perspective of Legitimate Expectations* (UOM) (LL.D Thesis) (2017).

[112] *R. v. North and East Devon Health Authority, ex parte Coughlan* 16 July 1999 (2001) QB 213.

[113] See *Bellizzi v. Malta* (EcrtHR 21 June 2011) (46575/09); see also *Lay Lay Company Limited v. Malta Environment and Planning Authority* (CC) (25 February 2011) (30/04).

[114] *Director General Law Courts v. Pinu Axiaq* (FH) (7 January 2003) (2633/00) (Mr Justice A. Magri).

exercise never occurred. This inaction was considered to be an act subject to review by an administrative tribunal established by law, and the Court confirmed the legal validity of a Tribunal's decision in favour of plaintiff.[115]

There has been reference to legitimate expectation in one case which was a case of an appeal rather than review. The case was decided by the Court of Appeal (Inferior Jurisdiction)[116] and related to an appeal from the decision of an administrative tribunal namely the Customs and Excise Duty Tribunal. Plaintiff company alleged that it had received written instructions or guidelines relating to the payment of the tax by IATA agents in Malta whereby it was indicated that such tax was not payable on packages including air transportation when such resources were supplied and enjoyed outside Malta. Later on, Government ruled that such services enjoyed outside Malta were still taxable on the difference between the price of the package and the price of those services availed of outside Malta. The Court of Appeal made express reference to British common law and, declaring that Maltese courts "apply English administrative law", quoted English case law to the effect that:

> The Court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise.[117]

Consequently the court decided that plaintiff company had received an interpretation of the law from a legitimate authority as to when and how the tax had to be collected,

> and therefore had a legitimate hope that he would not be faced later on with a conflicting or contradictory interoperation to the previous one.[118]

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[115] "However, it appears that at least from the moment that respondent on appeal was given court marshal duties, there seemed to be no problem for an eventual promotion exercise. Therefore by his action appellant created a legitimate expectation in favour of respondent on appeal that if he acquired the necessary experience, he would have the possibility to be promoted to the grade of marshal. This expectation was also confirmed by the minister responsible for justice who had promised respondent on appeal and his colleagues that he was going to appoint ten court marshals."

[116] *AB Ltd v. Director Customs and Excise Duty* (CA) (Inf.) (6 November 2002).

[117] *R. v. North and Esat Devon Health Authority ex parte Coughlan* 16 July 1999 (2001) QB 213.

[118] *ibid.*

Laudable as the reference to legitimate expectation might be, the Court failed to consider the fact that since 1995 a specific statute regulating judicial review had been enacted. The least the Court could have done was to pigeon hole the legitimate expectation doctrine under one of the statutory grounds of review, namely abuse of power by ignoring relevant considerations. To blindly apply English administrative law, when a Maltese statute already regulates judicial review, and add on to such grounds on the basis of the *lacuna* principle,[119] when there is no l*acuna*, is not legally correct or logical.

In one of the first cases of judicial review under the new article 469A,[120] the Court came very close to adopting the doctrine of legitimate expectation, though no specific reference to such doctrine was made in the judgment. The case referred to the decision by the Commissioner of Police to prohibit the letting off of light fireworks from the ramparts of the citadel of the sister island of Gozo. For decades permits had been regularly issued in this regard; suddenly a policy was adopted and adhered to by the Commissioner, not to allow the letting off of any fireworks from historical sites.

The court of first instance[121] in quashing the Commissioner's exercise of discretion ruled that:

> The rule of law requires and presupposes that an individual should know *a priori* his position regarding a state of facts through laws and regulations which are clear on the relative matter; and not be suddenly faced by all kinds of conditions which he could not have foreseen before, as happened in this case.[122]

[119] The principle created by the jurisprudence of the Maltese courts that whenever there is a lacuna in Maltese public law, the Maltese courts may refer to, and apply English rules of common law in public law. (*Lowell v. Caruana ne) (*FH) (14 August 1972) (Mr Justice M. Caruana Curran).
[120] *Socjeta' Filarmonika 'La Stella' v. Commissioner of Police* (CA) (19 July 1997); (136/97) (Kollezz. Vol. LXXXI.II.625).
[121] *Socjeta' Filarmonika 'La Stella' v. Commissioner of Police* (CMSJ Gozo) (17 July 1997) (Magte M. Mallia).

It ruled that adherence to such policy was taking an irrelevant consideration into account under the ground of review of abuse of power. The Court of Appeal reversed the judgment of the lower court on a technical point that the plaintiff association did not have any juridical interest in the case since the person who had applied for the fireworks permit was not the association but the fireworks manufacturer.

In one case,[123] this time before the Administrative Review Tribunal of Malta set up under the Administrative Justice Act, a claim was made that a change in the car registration tax rules amounted to a denial of legitimate expectation under the Registration Tax and Annual Circulation Licence Fees Guidelines published on the website of the Authority for Transport in Malta. Plaintiffs argued that the old and more benevolent rules were "sufficiently precise and clear as to create in them a legitimate expectation as safeguarded by article 469A of Chapter 12 of the Laws of Malta". Unfortunately, no reference was made as to under which specific provision of section 469A was the claim based, although applying the analogy with *Coughlan,* and from the facts of the case, the allegation was probably linked to abuse of power.[124] In any case, the claim was dismissed since the stringent procedural rules regarding the institution of a collective action had not been adhered to, and no decision on the merits was given. A similar substantive interpretation and acceptance of the legitimate expectation rule was made in two similar cases relating to the issuing of licences for gaming parlours without reference however to article 469A.[125] In these cases, plaintiff companies alleged that, after the issuing of temporary license for the running of bingo parlours, applicants were given the impression, in meetings with the Gaming Authority, that they would be allowed to

[123] *Robert Hughes et v. Permanent Secretary Ministry of Finance* (ART) (17 November 2014) (7/09).

[124] See Peter Grech *Keeping One's Word*: *The Protection of Legitimate Expectation in Administrative Law* (Id-Dritt (Għaqda Studenti Ligi (Għ.S.L.) Vol. XVIII (2002): "Given that the doctrine of legitimate expectation is about extending the protection of the principles of natural justice, about preventing the abuse of a public authority's power by ensuring that promises are treated as" relevant considerations ", and that any exercise of the power that is abusive is generally considered as an illegality, the article *(469A)* provides a sufficient legal basis for the application of the doctrine of legitimate expectation in Maltese law within our system of judicial review."

[125] *Bingo Limited v. Commissioner of Police Warrant No 1361/09* and *Gaming Operation Limited v. Gaming Authority et (*Warrant no 1374/09) both decided by the FH on 20 August 2009 (Mr Justice Tonio Mallia).

continue to operate until new Regulations would be issued. The Authority had withdrawn such licence at the end of its term of validity and had not issued any Regulations. Applicants alleged that this was unreasonable, disproportionate and unjustified. Again no reference was made to article 469A but since the abovementioned grounds of review emerge from such article, it is assumed that in applying for a warrant of prohibitory injunction to stop the Authority from closing down these establishments, applicant was referring to the norms of judicial review contained in article 469A. The court rejected the request of applicant company. It ruled that there was no acquired right or legitimate expectation which committed the Authority to issues such permits or allow the applicants to run their business until new Regulations are issued. It is true that a temporary license on a trial basis had been given to applicant and that a press release had been issued in October 2006 stating that "after such period the Authority is expected to issue regulations and specification standards to license, supervise and control this new form of gaming." The Court stated, however, that the press release issued in October 2006 and the subsequent negotiations with the company,

> did not give a commitment that the operators could continue operating without a license for an indefinite period of time, or else until new regulations are issued.[126]

The Court went on to state that when they started operating the operators knew that their position at law was not secure and that they were operating only on a trial basis which was clearly defined, and therefore they were conscious of the risk they were incurring in the investments which they were making. The Court also referred to a letter which the company had sent admitting that at the end of the concession, it would not be able to operate any further and that,

> this could essentially place my company in a very prejudicial position since we would be obliged to stop using the previously licensed gaming devices.

Although no reference was made to the ground of review under article 469A, a proper assessment of this Court decree reveals that the Court accepted legitimate expectation as a permissible ground of review in substance rather than procedure and that it considered such ground under the general one of abuse of power and unreasonableness for that was the request made by the applicant company.

Similarly in another case[127] the court accepted the doctrine of legitimate expectation, though it rejected applicant's demands without explaining the source from which such doctrine emerged under Maltese law.

Grey Areas

As is bound to happen there are certain cases where a decision by the Court on the reasonableness of an administrative act resembles more an intrusion on the executive power entrusted by law to a public authority. Incidents of this kind are bound to happen when one considers that the demarcation line between proper judicial review and judicial intrusion is indeed thin and in some cases precarious.[128]

[127] *Jack Galea v. Director General Works Department* (CMSJ) (24 May 2006) (72/93) (Magte. P. Coppini) In that case the fact that an employee at a government department informed plaintiff that a renewal of a development permit would be issued, when such matters were decided only and exclusively by the Planning Board, did not create a legitimate expectation. This judgment was confirmed on appeal (CA) (9 January 2009) (72/93). See also *Law. Quintano and Co Ltd v. Director of Public Health* (FH) (7 October 2010) (784/.00) (Mme Justice A. Lofaro) and *Philomena Ellul v. Charles Ellul* (CA) (31 January 2003) (558/00). In *Dr Carmel Chircop et v. Malta Environment and Planning Authority* (FH) (12 May 2011) (517/06) (Mr Justice G. Caruana Demajo) the Court ruled that the withdrawal of one stop notice on property owned by plaintiffs, did not create a legitimate expectation that other notices were to be withdrawn as well. In both cases the court did not dwell on the legal origin and basis of such a doctrine.

[128] See *CCD Ltd v. Malta Transport Authority* (FH) (17 June 2013) (355/05) (Mr Justice J. Zammit McKeon) where the Court cited with approval from HWR Wade: *Administrative Law*: "The court must therefore resist the temptation to draw the boundaries too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits".

In one case[129] the Principal Immigration Officer withdrew the right to freedom of movement of a foreign spouse of a Maltese citizen under the Immigration Act 1970. The revocation was deemed to be in breach of the rules of natural justice viz. the giving of reasons, and rightly so, for such revocation diminished plaintiff's legal rights including that of residing in Malta and working there without the need of a work permit. The Court, however, went one step further. It decided that the decision was also *unreasonable*. In that case the public authority had established that the foreign spouse never visited her husband when the latter was committed in custody at the Malta Prisons.[130] Moreover, random inspections had shown that the Maltese spouse was never found in the matrimonial home. That the Court considered these submissions and evidence to be "irrelevant" for the purpose of the reasonableness test appears to be an unnecessary intrusion in the discretion of a public authority to guarantee that foreigners do not unlawfully enjoy benefits restricted to spouses living effectively with their married partners. The fact that a long period of time had elapsed between the taking a decision to withdraw the freedom of movement and the actual notification of such decision to plaintiff's wife, may have played a part in the Court's conclusions of unreasonableness.[131]

Conclusion

Maltese jurisprudence on this subject has evolved substantially; from a time when courts were only interested in substance and form and not the contents of an administrative decision,

[129] *Kevin Brincat et v. Principal Immigration Officer et* (FH) (5 July 2016) (684/05) (Mr Justice JR Micallef).
[130] "The decision that the right to freedom of movement of plaintiff be withdrawn was taken on information to the effect that she had never visited her husband while serving time in prison If this was truly the case, respondents did not show how this circumstance meant that plaintiffs were not living together any longer."
[131] "The Court refers again to the long period of time which elapsed from the moment when the decision was taken to revoke the right to freedom of movement of plaintiff to when she was informed of such decision. This circumstance appears not only to infringe every expectation of proper behaviour but also the protection of the principle of natural justice that a person be notified of any decision in his regard and be given the reasons for such a decision."

to court scrutiny at full blast, scrutinizing areas which were previously considered to be the prerogative of the Executive.

Indeed this ground of review is a powerful weapon in the hands of a reviewing Court which should be cautiously but firmly applied. It is indeed a bulwark against arbitrariness and arrogance of the Executive; but as with all other grounds of review, a court of law has to be careful not to intrude in the domain of another organ of the State. Naturally, governments on the receiving end of this reviewing power, habitually accuse the judiciary of over stepping the parameters of its jurisdiction. However, this reviewing power, and this ground of review in particular, form the corner stone of modern administrative law, and constitute a solid guarantee against Government's abuse of discretion.

Chapter X

Fifth Ground of Review

'when the administrative act is otherwise contrary to law'

General

The final ground of review is a residual one. If the act does not fall under any other ground of review and is contrary to law, then it is unlawful.

By law, one refers not only to criminal law, but any law. One however, assumes that the law is statute law. The most obvious example would be if the act is in breach of a provision of the Criminal Code.[1]

This ground of review should not be confused with the one regarding legal authority. Where an administrative act relating to a requisition order or an expropriation order is not issued in the public interest, as the law requires, such act can be reviewed under article 469A (b) (i). 'Contrary to law' has an element of transgression. In any case it is possible that in such cases the review of such act falls both under article 469A (b) (i) and (iv).

The Courts have already stated[2] that the word 'law' in this sub-paragraph does not include the European Convention Act (Chapter 319) since the jurisdiction relating to human rights under article 46 of the Constitution and article 3 of the European Convention Act are special and

[1] On 15 January 2017 *Life Network* a pro-life non-governmental organization filed a judicial letter against the Medicines Authority, a public corporation, which had previously authorized the sale in Malta of the Morning-After Pill. The pro-life lobbyists argued that in so far as the wilful termination of a pregnancy at whatever time and by whatever means constituted a criminal offence (art 241 of the Criminal Code (Ch .9) , the Authority could not authorize something which was evidently 'contrary to law'. A similar protest was filed against the Superintendent for Public Health on 11 May 2017.Subsequently a case was filed by the Network which is still pending before the Courts in *Dr. Miriam Sciberras ne et v. Superintendent Public Health et* (4934/17JRM). Article 16 of the Embryo Protection Act (Ch. 524) also provides that **"***Whosoever willfully destroys any embryo shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding twelve thousand euro (€12,000) or to imprisonment not exceeding two years or to both such fine and imprisonment*."

[2] *Christopher Hall v. Director Social Accomodation (*CC) (18 September 2009) (1/03).

therefore there can be no fusion or confusion between the administrative and the constitutional human rights cases.

In *Agnes Gera de Petri v. Commissioner of Land* [3] in view of the fact that an order for acquisition by public tenure issued under the Land Acquisition (Public Purpose) Ordinance (Ch. 88) was in breach of the provisions of the said Ordinance,[4] the Court ruled that such act was *ultra vires* in virtue of sub-paragraph (iv) rather than an authority which did not have the legal authority to do that administrative act.[5]

This ground of review was culled directly from Australian law and appeared in the draft law attached to the White Paper: *Justice within a Reasonable Time.*

It has been retained possibly to cover any situation were an administrative act runs counter to any law. Such possible situations might cover those where an administrative act is in breach of law of a criminal nature or is done by an authority which assumes a function which is not authorised by law or relates to an act which is in the exclusive jurisdiction of another body.

Since most of the *ultra vires* cases, do not specify under which sub-paragraph of article 469A (b) i.e. whether sub-paragraph (i) or (iv) is based their allegation of *ultra vires*, it is difficult to determine how many times recourse has been had to this sub-paragraph.

[3] (FH) (11 November 2008) (327/07) (Mr Justice C. Farrugia Sacco). This judgment was reversed on appeal (CA) (30 September 2011) since it was not proven that the acquisition order had been issued for the benefit of third parties.

[4] "Provided further that where the land is to be acquired on behalf and for the use of a third party for a purpose connected with or ancillary to the public interest or utility, the acquisition shall, in every case, be by the absolute purchase of the land."

[5] "As a consequence of all this it results that the third proviso to article 5 of Chapter 88 had to be observed, so that in the light of above, this Court feels that the expropriation as affected was not according to the provisions of Ch. 88 of the Laws of Malta and was *ultra vires* the said Act and therefore in breach of article 469A(1) (b) (iv) of Ch. 12, and consequently null and without effect."

PART III

Chapter XI

Procedural Issues

Exhaustion of Other Remedies

Article 469A(4) is clear:

> (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.

This provision, which incidentally does not allow any discretion to the Court, [1] has formed the basis of a stock reply by public authorities to practically any action for judicial review of an administrative act. Its peremptory wording attracts even more such stock replies.[2] The

[1] In constitutional human rights cases it remains within discretion of the Court whether to exercise its jurisdiction (art 46(2) of the Constitution) even if other remedies were available. In *Katerina Cachia v. Director General Health Department* (FH) (11 August 2000) (748/00) (Mr Justice V. Degaetano) the Court refused to decline its jurisdiction regarding an allegation of a breach to the right to life even though it implicitly admitted that plaintiff could have initiated judicial review action under art 469A.

[2] See *Richard Zammit v. Chairman Planning Authority* (CA) (21 May 2002); *Victor Attard v. Chairman Planning Authority* (CA) (7 April 2003); *Jack Galea et v. Planning Authority* (CMSJ) (30 May 2003) (200/97) (Magte P Coppini); *Peter Paul Borg et v. Planning Authority* (CA) 8 May 2003; *Trimeg Ltd v. Planning Authority* (FH) (28 January 2004) (519/97) (Mr Justice Ph. Sciberras) confirmed on appeal (CA) (26 January 2007); *Alfred Cini v. Malta Environment and Planning Authority et*: (CA) (2 July 2010); *Jane Gatt v. Malta Environment and Planning Authority* et" (FH) (24 April 2013) (Mr Justice JR Micallef);*Architect Anthony Fenech Vella v. Planning Authority* (FH) (19 May 2002) (780/97) (Mr Justice G. Caruana Demajo) *John Cauchi v. Chairman Planning Authority* (CA) (5 October 2001) (Kollezz. Vol. LXXXV.II.943)*; James Calleja et v. Planning Authority* (FH) (7 March 2002) (1328/00) (Mr Justice JR Micallef)*;* see also *John Azzopardi Vella v. Sliema Local Council* (CM) (14 July 2005) (6/13) (Magistrate Marsann Farrugia) where the fact that an appeal from a decision of a local council existed before the Licences Appeals Board led the Court to decide that it had no jurisdiction *ratione materiae.* Similarly in *Michael Cohen ne et v. Malta Environment and Planning Authority* (FH) (29 October 2012) (770/02) (Mr Justice J. Azzopardi) the fact that a local council could appeal from a decision regarding a local plan to the Planning Appeals Board precluded the court from examining the question under art 469A.

provision must be given a restrictive interpretation since it forms an exception to the reviewing power of the Courts.[3]

However, where, as in the case of development permit applications, an appeal is available under a special law relating to planning, it was incumbent upon the aggrieved party to first seek recourse to such appeal before filing a case under article 469A.[4] However, where the outcome of the appeal would have been certainly against the applicant or where such Board of Appeal was not constituted, article 469A applied.[5]

In Maltese public law there are several instances where an exhaustion of an alternative remedy is required. Under the proviso to article 46(2) of the Constitution[6] an aggrieved person can only commence a human rights action if alternative ordinary remedies have been exhausted. Reference has been made to the jurisprudence relating to article 46(2) in order to

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[3] *Silpau Operators Ltd v. Chairman Planning Authority* (FH) (27 February 2003) (2486/00) (Mr Justice R. Pace).

[4] *Jupiter Co Ltd v. Malta Environment and Planning Authority* (FH) (30 November 2006) (112/04) (Mr Justice R. Pace) confirmed on appeal (CA) (3 April 2009). See also *Sunny Homes Ltd v. Chairman Planning Authority* (FH) (28 February 1997) (Mr Justice N. Arrigo); *Richard Zammit v. Chairman Planning Authority* (CA) (31 May 2002); *Peter Paul Borg v, Planning Authority et* (CA) (8 May 2003);*George Catania et v. Malta Environment and Planning Authority* (FH) (27 June 2007) (451/04) confirmed on appeal (CA) (27 November 2009); *Kevin Alamango v. Carmel Portelli et* (CMSJ) (25 October 2007) (20/06) (Magte. P. Coppini); *Francis Attard v. Prime Minister et* (CMSJ) (1 April 2008) (82/07) (Magte. A. Ellul). See also *Melita Cable et v. Carmelo Balzan* (FH) (28 January 2009) (885/06) (Mme Justice A. Felice); *Joseph Bugeja v. Victoria Local Council* (CMSJ) (24 July 2009) (81/08) (Magte A. Ellul); *Carmelo Farrugia et v. Malta Environment and Planning Authority* (FH) (2 July 2009) (1203/08) (Mr Justice J. Zammit McKeon) confirmed on appeal (CA) (27 November 2009); *Mario Grima et v. Joseph Saliba et* (CMSJ) (27 April 2010) (2/09) (Magte A. Ellul); *Anghelenici Viorica v. Principal Immigration Officer* (FH) (14 October 2010) (791/99) (Mr Justice JR Micallef); *Buxom Poultry Ltd v. Commissioner of Land et* (CC) (25 November 20011) (44/10); *Raymond Pace v. Malta Transport Authority* (CA) (11 November 2011) 800/08);*Charles Aquilina v. Transport Malta* (FH) (3 November 2011) (1211/10) (Mr Justice JR Micallef); *Trafalgar Company Ltd et v. Planning* Authority et (FH) (27 May 2016) (694/16) (Mr Justice L. Mintoff); *Michael Borg v. Prime Minister* (FH) (15 November 2016) (22/16) (Mme Justice L. Schembri Orland); *John Falzon et v. John Camilleri et* (FH) (11 October 2016) (1059/06) (Mme Justice A. Felice)and *Diane Holdings Ltd v. Comptroller of Customs* (FH) (15 March 2017) (117/08) (Mr Justice L. Mintoff); see however *R.J.C. Caterers Ltd v. General Workers Union* (FH) (9 October 2007) (1022/06) (Mme Justice A. Felice) where a limited right of appeal on a point of law from a decision of the Industrial Tribunal was not considered to be an adequate alternative remedy under ordinary law: " The Court is of the opinion that the limited right of appeal provided for in the Industrial Relations Act does not preclude in any way the right of this Court to review the workings of that Tribunal on matters related to natural justice."

[5] *Paul Borg v. Public Transport Authority* (FH) (2 October 2008) (1/08) (Mr Justice JR Micallef).

[6] "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."

apply the provision on exhaustion of other remedies under article 469A (4).[7] The Courts have, however, stated that where an administrative act is issued *intra vires* but is in breach of human rights, then article 469A does not constitute an alternative remedy.[8]

In a string of constitutional cases the plea has been raised that applicant should have first sought to challenge an administrative act under article 469A, though the court enjoys a discretion to affirm its constitutional jurisdiction even if a remedy under 469A exists. [9] The

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[7] See *Carmel Cini v. Minister for Education et (*FH) (3 October 2017) (348/10) (Mr Justice M. Chetcuti) "Article 469A also gives the courts the discretion to decline to exercise its powers and hear the case where it is proven that plaintiff had an adequate ordinary and effective remedy at his disposal. The parameters used in the case of a constitutional action apply in the same way to a case of judicial review of administrative action."

[8] *Carmel Massa et v. Director Social Accomodation* (FH) (27 October 2011) (33/08) (Mr Justice R. Pace):"In fact it may happen that the issuing of such an order is done according to law but this does not mean that it was issued in consonance with the said fundamental human rights and therefore in this sense there was no other alternative remedy to plaintiffs except the present action."

[9] See *Caterina Cachia v. Director General Health Department* (CC) (8 January 2007) (748/00) and *Emanuel Farrugia v. Director Joint Office et* (FH) (24 October 2017) (30/16) (Mme Justice J. Padovani Grima) However, in most cases where a human rights action relates to an administrative act, it is still common for the plea to be raised by defendant that recourse should have been had to article 469A. (see *Raymond Farrugia v. Commissioner of Police* (CC) (12 November 2001) (5/2001/1): *Maria Debono v. Commissioner of Police et* (FH) (29 May 2002) (584/97) (Mr Justice G. Valenzia); *Emanuel Bezzina et v. Chairman Planning Authority* (CC) (10 June 2003) (749/00/1; *Visual and Sound Communications Ltd v. Commissioner of Police* (CC) (12 December 2002) (34/01); *Angela Busuttil v. Attorney General* (FH) (3 October 2003) (33/01) (Mr Justice N. Cuschieri); *Adel Mokhtar Al Sakalli v. Prime Minister* (Kollezz. Vol. LXXXIV.1.486); *Raymond Farrugia v. Commissioner of Police* (CC) (9 June 2004) (5/01); *Joseph Gheiti v. Malta Maritime Authority* (FH) (29 April 2005) (27/04) (Mr Justice G. Caruana Demajo); *Nardu Balzan Imqareb v. Registrar Courts of Justice* (FH) (18 May 2006) (7/06) (Mr Justice T. Mallia); *Sonia Zammit et v. Minister for Family and Social Solidarity et* (FH) (27 February 2006) (11/05) (Mr Justice C. Farrugia Sacco); *Nardu Balzan Imqareb v, Commissioner of Police* (FH) (4 July 2006) (27/06) (Mr Justice T. Mallia); *Angelo Xuereb et v. Director of Works et* (FH) (21 December 2007) (13/06) (Mr Justice JR Micallef) confirmed on appeal (CA) (27 March 2009); *Valletta Estate Agents Ltd v. Planning Authority et* (FH) (29 May 2008) (26/02) (Mr Justice R. Pace); *Tereza Camilleri v. Marriage Registrar* (FH) (16 December 2008) (35/07) (Mme Justice A. Lofaro) confirmed on appeal (CC) (6 April 2009); *Raymond Pace v. Malta Transport Authority* (FH) (27 February 2009) (27/08) (Mr Justice R. Pace);*Borg Properties Ltd v. Director of Land* (FH) (26 November 2010) (58/09) (Mr Justice G. Caruana Demajo); *William Vella pr et ne v. Commissioner of Land et* (FH) (12 October 2012) (19/12) (Mr Justice T. Mallia); *Charmaine Farrugia et v. Minister for Family and Social Solidarity* (FH) (8 August 2013) (36/13) (Mr Justice T. Mallia); *Dr Michael Shields et v. Attorney General et* (FH) (15 April 2015) (63/14) (Mr Justice A. Ellul); *Rezk Khalil Gadalla v. Prime Minister e*t (FH) (24 June 2015) (3/11) (Mr Justice J. Azzopardi) and *Charles Vassallo et v. Commissioner of Land et* (FH) (22 October 2015) (12/12) (Mr Justice S. Meli). However in *Emmanuela Vella pr et ne v. Commissioner of Land et* (FH) (2 October 2002) (32/01) (Mr Justice A. Magri) the Court summarily dismissed the plea of lack of exhaustion of ordinary administrative remedies to a human rights action stating strangely that "article 469A can only be invoked in proceedings against an administrative decision and not in actions of alleged breach of fundamental human rights protected by the Constitution and the European Convention," ignoring the fact that both these human rights instruments grant the right to a court to decline its constitutional jurisdiction where remedies, even under administrative law, exist under ordinary law. Also in *Gasan Enterprises Ltd v. Planning Authority* (FH) (3 October 2002) (29/01) (Mr. Justice T. Mallia) where the Court ruled that the delay in processing a development application was not covered by art 469A and therefore the court would not decline to exercise its constitutional jurisdiction in a human rights case. It should be noted that the Court deliberately or inadvertently omitted to refer to proviso to art 469A(2) which states that" 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", a provision which clearly

Constitutional Court has also made it abundantly clear that an alternative remedy under article 469A(1) (a) regarding administrative acts which are in breach of the Constitution does not exist, since infringements of fundamental human rights can never form the subject of a judicial review action.[10] A strange application of this article is found in one constitutional case[11] where, the Court ruled that article 469A was not an effective alternative remedy because its provisions did not grant jurisdiction to the Court where other remedies before any court *including the courts of constitutional jurisdiction*, are available. At the same time, the latter can decline to exercise their jurisdiction if alternative remedies under ordinary law such as article 469A were available. A veritable perpetual *renvoi* of fora and jurisdictions!

In one case the argument was put forward with success that while in judicial review cases the court cannot order any remedial action except to declare that an act is null, in human rights cases orders may be made forcing government to take action.[12] The question of the

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solves the difficulty raised by the Court in not applying art 469A. Also in *Bernard Gauci v. Commissioner of Land et* (FH) (3 June 2009) (28/04) (Mr Justice JR Micallef) the Court ruled that the President's Declaration declaring land as required for a public purpose was not an administrative act and therefore recourse under art. 469A was not an alternative remedy to a constitutional action. Nor is applicant required, prior to instituting a constitutional action, to start legal action against the Commissioner of Land to send a notice to treat which the law obliges him to do (*Inez Calleja et v. Commissioner of Land* (CC) (14 February 2011) (28/07) and *Rosaria Schembri et v. Attorney General* (CC) (6 April 2006). However see *Andrew Vella et v. Commissioner of Land* (CC) (30 September 2011) (40/08): "The process leading to the taking possession of land is an administrative act though like all administrative acts it is subject to judicial review and is a procedure recognized by article 37 of the Constitution and article 1 of the First Protocol." Besides in *ITC Ltd v. Attorney General et*, (FH) (15 April 2004) (8/04) (Mr Justice JR Micallef) the Court ruled that the existence of an alternative remedy must be considered in the light of remedies available at the time when the alleged breach of a fundamental right occurred and not when the action under the Constitution or Convention is presented. Moreover, in *Joseph Camilleri v. Commissioner of Land (*FH) (1 July 2004) (25/01) (Mr. Justice JR Micallef) the Court ruled that pre-1995 administrative acts were not covered by art 469A and that in any case the remedy offered by a constitutional action was wider than that available under art 469A. In contrast see *Dennis Tanti v. Minister for Home Affairs and Social Development* (FH) (21 March 2005) (1506/93) (Mr. Justice D. Scicluna) where a pre-1995 administrative act was considered as being covered by article 469A.

[10] *Samir Wakil Mohammed v. Prime Minister et* (CC) (14 February 2011) (45/08).

[11] *Federation of Estate Agents v. Director General (Competition*) (FH) (21 April 2015) (87/13) (Mme Justice J. Padovani Grima): "This Court can neither accept the plea of non-exhaustion of ordinary remedies since article 469A (4) of Chapter 12 provides that article 469A cannot be availed of when an administrative act may be challenged or remedied before a court or tribunal under any other law."

[12] *Ivan Vella v. Attorney General* (FH) (23 June 2005) (39/04) (Mr Justice JR Micallef): "an action for judicial review gives power to the Court (in its civil jurisdiction) to declare such act as "null, invalid and without effect" but does not empower it to order how such administrative act had to be performed or direct the public authority as to what it should do to grant a remedy". See also *Laura Peregin v. Prime Minister et* (FH) (27 February 2009) (27/08) (Mr Justice G. Valenzia) "The remedy under article 469A is under certain aspects limited while the constitutional remedy has no limit regarding the adequate remedy which the Court may give." see also

distinction between an administrative remedy and a constitutional one for human rights violations was emphasized in one case.[13] Besides where the constitutional action alleges a number of human rights infringements, it is more difficult for the plea that alternative remedies through application of article 469A to be upheld. [14] The same applies to a human rights action under the European Convention Act.[15]

If a human rights action then is filed before the European Court of Human Rights, article 35 (1) of the Convention[16] makes it clear that one can only proceed with one's action if all adequate domestic remedies have been exhausted.

In constitutional and Convention human rights actions before the Maltese courts of constitutional jurisdiction, the question is a matter of discretion. For even if the Court is satisfied that alternative ordinary remedies were available it may still continue hearing the case 'if it feels it desirable so to do'. In the case of recourse to the European Court of Human

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Olusegum Ogunyemi Kehinde et v. Director of Public Registry et (FH) (24 May 2010) 54/08) (Mr Justice J. Zammit McKeon) and *Residual Ltd v. Commissioner of Land* (FH) (19 October 2011) (69/06) (Mr Justice C. Farrugia Sacco); *Mary Fatima Vassallo et v. Daniel Spiteri et* (FH) (10 April 2014) (73/12) (Mr Justice J. Zammit McKeon) and *Madeleine Ellul et v. Housing Authority et* (FH) (14 December 2017) (69/16) (Mr Justice J. Zammit Mckeon). See also *Antonella Grixti v. Minister for Family* (FH) (11 April 2018) (70/17) (Mme Justice J. Padovani Grima) where the Court argued that no alternative remedy under art 469A was available since under that article one had to exhaust other remedies first, such as appealing from a child care order,a remedy which plaintiff had availed herself of. This apparently allowed applicant not to avail herself of art. 469A first prior to instituting a constitutional action.

[13] *Joseph Caruana v.et v. Prime Minister et* (CC) (31 October 2007) (44/.06) "The Court...feels that where the ordinary alternative remedy which is mentioned, is that of judicial review of administrative action, one must be extremely careful before accepting such action as an alternative remedy to one under the Constitution or the Convention; the reason being that remedies under article 469A are rather limited. "See also *Adrian Buckle et v. Teresa Friggieri ne et* (FH) (28 June 2010) (12/09) (Mr Justice J. Zammit McKeon);*Carmen Zammit et v. Commissioner of Land* (FH) (26 June 2012) (20/10) (Mr Justice R. Pace); *Joseph Vassallo v. Prime Minister et (*FH) (2 May 2013) (50/12) (Mr Justice JR Micallef); and *Malta Playing Fields Association v. Commissioner of Land et* (FH) (15 July 2014) (8/09) (Mr Justice J. Zammit Mckeon): "In an action for judicial review the Court cannot substitute its discretion for that of the authority responsible for the administrative act. It is only in this forum, that a complete and effective remedy such as *the restitutio in integrum* of the victim of a breach of a fundamental right may be granted if a breach is found to have occurred; see also *Peter Muscat Scerri et v. Attorney General* (FH) (17 March 2014) (71/11) *Michael D' Amato v. Housing Authority et* (CC) (28 April 2017) (194/14); and *Joseph Falzon et v. Attorney General et* (CC) (28 April 2017) (10/11); see however, *Paul Magri et v. Prime Minister et (FH) (30 September 2014) (11/12)* (Mr Justice J. Zammit McKeon) confirmed on appeal (CC) (30 October 2015) where the Court stated that the remedy under 469A in spite of limitations was an alternative remedy.

[14] *Paul Farrugia et v. Attorney General et* (FH) (7 October 2009) (696/99) (Mr Justice G. Valenzia).

[15] The proviso to article 4(2) of Ch. 319 is identical to the proviso to article 46(2) of the Constitution.

[16] ECHR Article 35 (1): "*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."*

Rights there is no such discretion but this is understandable in view of the fact that the jurisdiction of an international court must necessarily be based on actions of last resort.

The burden of proving that a remedy under any other law was available to plaintiffs lies on the defendant who raises such plea.[17] Besides if applicant did not raise an issue regarding the jurisdiction of an administrative tribunal, he cannot then raise the issue for the first time in an *ultra vires* action under article 469A.[18]

Where a constitutional action is brought challenging the constitutional validity of an instrument having the force of law, it is not possible to raise the plea of exhaustion of the alternative remedy under article 469A.[19]

The plea of exhaustion of alternative remedies under article 469A applies only to actions brought under that article. When it comes to judicial review of decisions of administrative tribunals, the Courts have said that as a rule their power of review does not statutorily fall under the provisions of such sub-article. However, if applicant had at his disposal a satisfactory and wide right to appeal, particularly on the legality of a decision, then the Courts may refuse to exercise their right to review:

> If the remedy of appeal from a decision of a statutory tribunal is wide enough to encompass questions relating to the legality of the appealed decision by the court empowered to hear such

[17] See *Dr Tony Degaetano et v. Planning Authority* (FH) (24 September 2001) (2219/00) (Mr Justice JR Micallef): "It is true to state that if there is a remedy under any law, plaintiffs are presumed to have known about it, according to the maxim *ignoratia iuris neminem excusat*; however, in this case such a remedy is mentioned by the defendant Authority through a plea, and therefore it is incumbent upon it to explain what this remedy is according to the basic principle that one must prove any allegation of fact."

[18] *Prime Minister et v. Anthony Brincat* (CA) (9 October 2009) (268/04): "Evidently plaintiffs had every possibility to challenge the jurisdiction of the Tribunal had they raised the issue before it, and therefore had every means to challenge the claims of Anthony Brincat before the said Tribunal. Therefore even from this aspect appellant is right in raising the plea that the present action could not be proposed at law."

[19] *Victor Spiteri v. Attorney General* (FH) (25 September 2008) (1/08) (Mr Justice JR Micallef) confirmed on appeal (CC) (1 October 2009): "If the Regulations are the source and reason why applicant is alleging a breach of one or more of his fundamental human rights, the action for judicial review on its own would offer no full remedy for his position." See also *Dr Frederick Zammit Maempel et v. Commissioner of Police et* (FH) (26 March 2009) (23/05) (Mr Justice R. Pace); *Vodafone Malta Ltd v. Malta Communications Authority* (CC) (29 May 2009) (4/05) and *Republic of Malta v. Mohammed Said Nasser Khaled et* (FH) (19 May 2015) (54/13).

appeal, then in that case, the remedy of appeal can eliminate the remedy of judicial review by the courts of general jurisdiction.[20]

In reaching this conclusion, which is not supported by any statute, the Court made reference to English textbooks on common law, affirming therefore once again that the judicial review of administrative tribunals is still based on English common law applicable to Malta through the judge made *lacuna* doctrine.[21]

Administrative Review Tribunal and The Courts of Law

The possibility of seeking recourse before the Administrative Review Tribunal (ART) set up under the Administrative Justice Act rather than a court of law, remains the main issue and problem encountered in several cases instituted under article 469A at least prior to 2016. After the 2016 amendments no conflict should technically arise since the ART has no jurisdiction over cases where the ground of review is contained in article 469A. So a certain overlapping did exist *prior* to the 2016 changes.[22]

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[20] *Jane Gatt v. Malta Environment and Planning Authority* (FH) (24 April 2013) (1048/11) (Mr Justice JR Micallef); see also *John Cutajar v. Alfred Falzon Sant Manduca* (FH) (27 November 2014) (517/12) (Mr Justice M. Chetcuti).

[21] *Jane Gatt* (n.20):" In this regard the authors teach that: " For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. It is important that the process should not be clogged with unnecessary cases which are perfectly capable of being dealt with in another tribunal." (DeSmith, Woolf & Jowell:*Principles of Judicial Review* (1999) (Sweet and Maxwell): 565 – 7.

[22]See *Mohan M. Barwani v. Commissioner for VAT* (FH) (25 January 2016) (67/15) (Mr Justice L. Mintoff) where the Court prior to the 2016 amendments of Act No. IV of 2016 stated that: "the same Tribunal, when established, was given powers very similar to those enjoyed by the courts under article 469A of Chap 12 so that in several instances the powers and jurisdictions overlap. This occurred since during the debates in the House of Representatives, though the original intention of Government was to transfer all powers ex-article 469A from the Courts to the Administrative Review Tribunal, the Opposition objected to this since it felt that the Courts were being divested of their basic power to review the actions of the Executive and therefore as a compromise there was established, up to a certain point, an overlap between the two jurisdictions, or at least two parallel ones were created, distinct form each other (see in particular Sitting No 489 Tenth Parliament held on 31 January 2007 pp 338 *et seq*. See also the judgment in the case (*S & R Handaq Ltd v. Malta Enterprise Corporation (ART) (24 September 2012):*This Court is therefore also competent to review the validity of an

Prior to the 2016 amendments, the extensive power of the Tribunal was demonstrated in certain important cases which were decided against public authorities; such as the order that changes to tax rules be operative prospectively and not retroactively,[23] or decisions relating to the reasonableness of an administrative act.[24] Prior to 2016, there is no doubt that the court of civil jurisdiction had to decline its jurisdiction of judicial review where a remedy was available before the ART. In practice the courts devised ingenious methods to avoid such relinquishment, either because they decided erroneously that the public authorities who may be sued in the Tribunal are different from those who may be so sued before the ordinary courts of law;[25] or that the definition of administrative act is not exactly identical to that contained in the Administrative Justice Act. The fact remains that so long as the Administrative Review Tribunal (ART) retained its power to review administrative acts on points of law and fact, without limitation, it was difficult to overcome this problem.

After the 2016 amendments the possibility of overlapping is slight since no review can be made by the ART on any ground contained in article 469A. It is true that it can still revise administrative acts on points of law and fact; but any point of law is well covered by article 469A; and as to points of fact these are not within the purview of article 469A unless they have a direct impact on jurisdiction.

In interpreting article 469A (4) one can by analogy refer to the proviso to article 46(2) of the Constitution and how it has been interpreted by the courts,[26] in order to assess whether the alternative remedy is available and adequate, such as the rule that the remedy has to be practicable, accessible, effective, adequate and complete as regard the complaint of plaintiff

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executive title which constitutes the merits of this case, provided this is done within the parameters of the said article."

[23] *XXX v. Commissioner for V.A.T.* (ART) (28 May 2015) (236/12).

[24] *Johann Said v. Commissioner of Police* (ART) (10 December 2012) (Magte G. Vella) (325/12).

[25] *Eros Trading Limited v. Comptroller of Customs* (FH) (22 June 2016) (603/15).

[26] *John Grech v. Prime Minister* (CC) (31 January 2014) (68/11); *Ryan Briffa v. Attorney General* (CC) (20 March 2014) (83/12) and *Dr L. Gonzi nomine v. Electoral Commission* (CC) (25 November 2016) (26/13).

and that success need not be necessarily guaranteed or where a remedy was available and then expired owing to the negligence of applicant. Besides, in such exercise one has to examine the legal position at the time of the alleged breach of human rights not when the constitutional application is filed.[27]

A number of cases have related to procedures before the development and planning permit organs set up by law. For instance, it has been decided that where a third party who had an interest in a development application did not register such interest, he could not then avail himself of article 469A once he abandoned or neglected a remedy available at ordinary law.[28] Similarly where an appeal is allowed by law on law and fact, an aggrieved party is expected first to raise the matter before such tribunal established by ordinary law, even if the matter raised falls under the *ultra vires* norms of article 469A.[29] Failing to do so would preclude him from then raising the matter for the first time before the court in a judicial review action when he could have raised the matter before an administrative tribunal.[30] In fact a string of judgments [31]have refused to acknowledge that an appeal from a decision of the planning

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[27] *Joseph Caruana et v. Prime Minister* (FG) (14 May 2007) (44/06) (Mr Justice JR Micallef).

[28] *Charles Camilleri et v. Malta Environment and Planning Authority* (FH) (7 July 2004)718/03) (Mr Justice T. Mallia):"Plaintiffs therefore cannot put forward their claims under article 469A of Chapter 12 since they failed to intervene in a formal way in the proceedings and therefore lost their right to make submissions before the competent organs" See also *Gozo Hotels Co Ltd v.et George Sacco et (CMSJ) (15 January 2004) (199/99;) (Magte P. Coppini) confirmed on appeal* (CA) (3 December 2010); *Birzebbugia Local Council v. Malta Environment and Planning Authority (FH) 7 July 2004) (160/03)Mr Justice Tonio Mallia); Boris Arcidiacono et v. Salvu Schembri et* (CA) (28 June 2013) (1825/01). See also *Richard Zammit v. Planning Authority* (CA) (3May 2002) (99/98) and *John Cauchi v. Planning Authority et* (CMSJ) (7 October 2005) (22/01) (Mgte P. Coppini).

[29] *Anthony Cuschieri v. Development Control Commission* (CA) (30 March 2001) (89/00): "This Court feels that the word 'appeal' as used in article 15(2) of the said 1992 Act has a sufficiently wide meaning as to include also investigations on the basis of *ultra vires*; see also *Peter Paul Borg v. Planning Authority* (CA) (8 May 2003) (255/97); *Victor Attard et v. Chairman Planning Authority* (CA) (7 April 2003) (890/95); *Saviour Sciberras v. Planning Authority* (CA Inf.) (24 March 2003) (26/01); *Alexander Agius v. Development Control Commission* (CA Inf.) (13 October 2003) (2/03*); Emanuel Bezzina et v. Chairman Planning Authority (*CC) (18 June 2003) (749/000); *Gelluxa Ltd v. Planning Appeals Board et* (CMSJ) (13 November 2003) (30/020(Magte. P. Coppini); *Angelo Said v. Chairman Planning Authority* (CMSJ) (27 January 2005) (163/97) (Magte. P. Coppini) confirmed by Court of Appeal (CA) (1 February 2008) and *Alfred Cini v. Malta Environment and Planning Authority* (CMSJ) (3 December 2007) (104/02) (Magte. A. Ellul).

[30] *Alfred Cini v. Malta Environment and Planning Authority* (CA) (2 July 2010) (104/02).

[31] *Mario Camilleri v. Development Control Commission* (CA Inf.) (28 October 2002) (18/00) *Manwel Vella v. Development Control Commission* (CA Inf.) (28 October 2002) (15/01); *Salvu Sciberras v. Planning Authority* (CA Inf.) (24 March 2003) (26/01); *George Cassar v. Development Control Commission* (CA Inf.) 26 May 2003) (25/01), *Jane Cini v. Development Control Commission* (CA Inf.) (27 March 2003) (19/01); *Louis Van*

authorities on points of law to the Court of Appeal, includes a power to review under article 469A when no such point of law was raised before the Appeals tribunal of the planning authorities,[32] arguing that the two powers of appeal and review are completely separate. Similarly where a contestation of a decision by the customs authorities can be challenged under the very laws relating to customs, no recourse should be had to article 469A.[33] However, when in a constitutional action an instrument having the force of law was challenged such as the law which empowered the taking over of leased government owned agricultural land in the public interest without any possibility of challenging such interest, the provisions of article 469A did not apply and recourse to the constitutional action was the only course of action.[34]

The reluctance of the Courts to surrender jurisdiction in favour of another forum is evident in the jurisprudence of the Court. Indeed it has been formally stated in one case[35] that:

> Sub Article (4) to be interpreted justly cannot be given a restrictive interpretation. The exclusion of the jurisdiction of the Court, to review administrative action is only justified if

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Den Bossche v. Development Control Commission et (CA Inf.) (26 February 2004) (44/02) and *Gozo Consolidated Building Contractors Ltd v. Development Control Commission* (CA Inf.) (26 May 2004) (3/02). However, the Small Claims Tribunal may not review administrative acts (*Saviour Mifsud v. EneMalta Corporation* (SCT) (13 February 2003) (690/02)and *Philip Pace v. Malta Resources Authority* (FH) (3 June 2-16) (240/11) (Mr Justice A. Ellul). See also *Raymond D Anastasi v. Commissioner of Police* (SCT) (14 July 2003) (91/03); *Jonathan De Maria v. Prime Minister et* (CA Inf.) (29 January 1999) (662/97); *Andrew Mangion v. Development Control Commission* (CA Inf.) (27 October 2003) (45/02) *Ray Debattista v. Development Control Commission* (CA Inf.) (27 April 2004) (1/03) *Anthony Demajo v. Development Control Commission* (CA) (9 June 2005) (232/1999) *Anthony Borg v. Development Control Commission* (CA Inf.) (27 October 2005) (15/03); *Charles Mifsud v. Development Control Commission* (Ca Inf.) (27 October 2005) (14/03);*Francis Schembri v. Development Control Commission* (CA Inf.) (27 April 2006) (12/04) *and Henry Schembri v. Development Control Commission* (CA Inf.) (28 February 2006) (3/04).

[32] *Ian Zammit v. Planning Authority* (CA Inf.) (12 May 2003) (6/01); *Saviour Ellul v. Planning Authority* (CA) (Inf.) (19 November 1999); *Emmanuel Mifsud v. Planning Auth*ority (CA Inf.) (31 May 1996): "There is no right of appeal on points of law unless these were expressly decided in the appealed decision. See also "*Joseph Mifsud v. Development Control Commission* (CA Inf.) (30 May 1997) (31A/96): "One must state that the jurisdiction of this Court as conferred to it by article (2) of article 15 of Act No I of 1992 is very limited. For this Court when hearing appeals from the Appeals Board examines such decisions only on points of law which had been discussed and decided in the said decision."

[33] *Victor Petroni ne v. Comptroller of Customs* (CA) (31 January 2003) (637/89) and *Massimo Cremona v. Comptroller of Customs* (CA Inf.) (8 April 2016) (124/11) (Mr Justice A. Ellul).

[34] *Emanuela Vella pr et ne v. Commissioner of Land* (CC) (27 March 2003) (32/00).

[35] *Marsascala Shop Owners Association v. Malta Environment and Planning Authority* (CA) (8 January 2010) (436/06).

the Court is satisfied that in practice a person had an effective and adequate remedy truly at his disposition and unreasonably did not avail himself of such procedures.[36]

Consequently, where plaintiffs did not avail themselves of a remedy which at the time of filing of the action had been excluded by constant jurisprudence of an administrative tribunal, the Courts still affirmed its jurisdiction and did not apply article 469A(4). In another case[37] the fact that applicant, whose licence had been refused, did not appeal to a special Board, was deemed to be justified by the court since such appeal would have been refused since applicant had not abided by the regulations applicable to the case. Consequently he could seek recourse under article 469A. This judgment was reversed on appeal.[38] Similarly where the remedy was not available for a reason which is outside the control of the interested party, then article 469A applies.[39] The latter article also applies where the alleged alternative remedy is uncertain or vague.[40]

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[36] See also *Dr Joseph Schembri noe v. Minister of Interior et* (FH) (15 April 2014) (329/13) (Mr Justice JR Micallef), *Bunker Fuel Oil Company Ltd. v. Paul Gauci et (CA) (6 May 1998, Cauchi v. Chairman Planning* Authority (CA) (5 October 2001 (Kollezz. Vol. LXXXV.ii.943); and *Ballut Blocks Limited (C10)v.Commissioner of Police et* (710/04) (FH)15 December 2016) (Mr Justice J. Zammit Mckeon). See also *Aaron Haroun v. Prime Minister et* (FH) (15 March 2001) (772/00) (Mr Justice JR Micallef): "As regards art. 469A (6) that provision of the law must be interpreted in a restrictive way and in cases of doubt, this must go in favour of affirming judicial review rather than to the contrary."

37. *Bunker Fuel Oil Company Limited et v. Paul Gauci and Planning Authority* (CA) (6 May 1998); see also *Joseph Muscat et. v. Chairman Housing Authority* (FH) (28 January 2004) (1447/96) (Mr Justice P. Sciberras) : "Reason certainly dictates that the reasonable criterion to be adopted was not what the correct interpretation should have been of the legal provision in question,(article 15 of Act I of 1992) …but the prevailing interpretation given by the tribunal at the moment of the filing of the action. Therefore the interpretation of the competent organ having been what it was, the Court finds it difficult not to understand the plaintiffs` action of seeking recourse before these courts for the protection of their rights. The Court always enjoys the prerogative powers of review of administrative action and therefore, considering the special circumstances of this case, it is also the opinion of the Court that there exists sufficiently serious and acceptable justification for the court not to apply sub-article (4) of article 469A. Consequently it is affirming its jurisdiction to hear this case".

[38] *Alan Debattista v. Director Commercial Services* (FH) (30 January 2008) (771/07) (Mr Justice G. Valenzia): This judgment was overturned by the Court of Appeal (CA) (5 December 2014) since an independent Tribunal can always disagree with the Director, and therefore recourse to the Tribunal was an effective alternative remedy.

[39] *Dr Philip Galea et v. Tigne' Development Ltd et* (FH) (29 March 2004) (1682/99) (Mr Justice G. Valenzia); see also *Anthony Busuttil et v. Louis Zammit* (CMSJ) (26 October 2005) (131/03) (Magte. P. Coppini) where the fact that an action before the Small Claims Tribunal was not notified to plaintiff allowed recourse to art 469A

The Six Month Rule

The law is extremely clear. The action for judicial review has to be filed within six months from the happening of the administrative act or from when the applicant could have known of such act. There is no formal notification required.[41] Consequently in one case[42] the Court observed that:

> The law does not refer to the method by which the person aggrieved of an administrative act gets to know of the act. The law does not state that the period starts running from the moment the interested party receives some formal official written notification regarding such decision. It only states that the period of six months starts running from the moment the party knew or could have known of such act, whichever is the earlier.[43]

Besides the period is one of forfeiture (*dekadenza*) and not prescription[44] and therefore no judicial act will interrupt such period. The *action itself* has to be filed within such period

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since plaintiff could not appeal from such decision. See also *Ragonesi and Co Ltd pr et ne v. EneMalta Corporation* (FH) (18 November 2010) (910/06) (Mme Justice A. Felice).

[40] *Joseph Muscat et v. Chairman Housing Authority et* (FH) (28 January 2004) (1447/96) (Mr Justice Ph. Sciberras): "The remedy envisaged was in the given circumstances only theoretical in nature and as the facts emerged appellants had no effective remedy at all." See also *Environmental Landscape Consortium Ltd v. Data and Information Commissioner et* (FH) (24 May 2018) (764/16) (Mr Justice JR Micallef).

[41] See however *Roberta Scicluna v. Rector University of Malta* (FH) (28 June 2016) 178/16) (Mr Justice M. Chetcuti) where the Court ruled that disciplinary proceedings have to be concluded through all stages for the six month period to start running.

[42] *Antoinette Cutajar v. Prime Minister* (FH) (22 February 2017) (891/14) (Mr Justice JR Micallef); see also Al *Yassin Abdel Hamid v. Social Policy Minister (*FH) (23 March 2010) (951.09) (Mr Justice JR Micallef); *Rodney Metters v. Malta Environment and Planning Authority* (CMSJ) (25 February 2011) (81/10() (Magte. A. Ellul) and *LIDL Immobilare Malta Ltd v. Michael Mifsud et ne* (FH) (16 February 2017) (789/14) (Mr Justice JR Micallef) and *Joshue Agius v. Commander Armed Forces of Malta* (FH) (14 February 2018) (881/15) (Mr Justice M. Chetcuti).

[43] See also *Paul Licari v. Malta Industrial Parks Ltd* (FH) (10 July 2017) (25/10) (Mme Justice M. Hayman).

[44] See *inter alia* , *Gerard Żammit v. Planning Authority (FH) (2 February 2000)* (Mr Justice Raymond Pace; *David Crisp v. Telemalata Corporation (*FH) (5 April 2001) (Mr Justice R. Pace); Roberto *Zamboni et noe v. Director of Contracts et (CA) (31 May 2002* (Kollezz. Vol. LXXXVI.II.313), *Dennis Tanti v. Minister for Social Development et* (FH) 27 June 2003) (Mr Justice G. Valenzia); *Edward Paul Tanti v. Administrative Secretary in the Office of the Prime Minister* (CA) (7 October 2005) (1773/01); *Michael Mizzi v. Tourism Authority et* (CA) (10 November 2008) (52/04); *Maria Victoria Borg et v. Mayor and Secretary of Pieta' Local Council* (CA) (19 May 2009) (949/04); *Marisa Bonanno v. University of Malta* (FH) (9 December 2015) (487/14) (Mr Justice JR Micallef); *Imnara Ltd v. Malta Environment and Planning Authority* (FH) (4 June 2015) (775/10) (Mr Justice J. Zammit McKeon); *Abdel Hamid Alyassin v. Commissioner of Police et*" (FH) (23 November 2011) (148/10) (Mr Justice JR Micallef); *Joseph Borg v. Commissioner of Police* (FH) (14 February 2001) (481/96) (Mr Justice R. Pace); *Dr Paul Daniel Micallef v. Chief Government Medical Officer* (FH) (21

which is absolute.[45] Consequently even if the applicant has sought redress elsewhere such as before the Ombudsman for his grievance arising from the administrative act, the six month period still continues to run.[46] Indeed since it is a peremptory period, such plea of forfeiture can be raised at any stage of the proceedings[47] and even by the court *ex officio*.[48] Similarly the fact that plaintiff had requested a reconsideration of the decision by a public authority does not suspend the six month period;[49] nor can plaintiff, in order to thwart the six month rule, argue that an action is one based on damages under tort, if the demands relate to judicial review of an administrative act, even if article 469A is not mentioned in the judicial demand.[50] However, if an administrative act is challenged under some special law, other than

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May 2004) (1528/01) (Mr Justice J. Azzopardi); *Mizzi Antiques Ltd v. Commissioner of Police* (FH) (3 May 2004) (793/02) (Mr Justice J. Azzopardi) confirmed on appeal on 13 April 2007;*Michael Mizzi v. Tourism Authority (*CMSJ) (30 June 2006) (52/04) (Magte. P. Coppini); *Joe Mizzi MP v. Malta Resources Authority* (FH) (25 January 2011) (231/10) (Mr Justice JR Micallef); *Karmenu Mifsud v. Malta Transport Authority* (FH) (28 October 2013) (1001/09) (Mr Justice M. Chetcuti) and *Martin Baron pr et ne v. Commissioner of Land et* (FH) (28 May 2015) (1168/12) (Mme Justice L. Schembri Orland).

[45] *Gerald Zammit* (n 44): "This means that such period is not interrupted or suspended as happens in the case of a period of prescription. In other words, the judicial acts which are usually considered capable of interrupting the prescriptive period or the fact that negotiations are under way between the parties after the occurrence of the administrative act, do not serve to halt the running of the six month period mentioned in the law." Moreover, the requirement under article 460 of Ch. 12 to file a judicial letter prior to instituting an action against Government does not in any way extend the six month period for the benefit of plaintiff: (see *George Azzopardi v. Heritage Malta et* (CA) (28 September 2012) (522/05): **"**Certainly article 460 of Ch. 12 cannot, and is not intended to be availed of in order to, extend the period established by article 469A (3) of Ch. 12). However where a decision by a disciplinary board needed confirmation by a higher authority then the period started to to run from the date of the decision by the latter" (*Roberta Scicluna v. Rector of University of Malta)* (FH) (28 June 2016) (178/16) (Mr Justice M. Chetcuti).

[46] *See Joseph Spiteri et v. Director General Public Health Department et* (CA) (26 January 2018) (933/06).

[47] *Ibid:* "The preliminary plea which is the subject of this judgment is a peremptory one regarding a decision.

[48] *Maria Schembri v. Commissioner of Land* (CMSJ) (8 February 2012) (25/08) (Magte. P. Coppini).

[49] *C. Fenech Clarke Tyres Ltd v. Malta Environment and Planning Authority* (FH) (18 May 2017) (Mr Justice JR Micallef) (609/11); see also *Paul Licari v. Malta Industrial Parks Limited* (FH) (10 July 2017) (25/10) (Mme Justice Miriam Hayman); *Khalil Samir Rezk Gadalla et v. Director Citizenship and Expatriates et* (FH) (9 March 2011) (1009/09) (Mr Justice JR Micallef);and *Malta Towage Ltd v. Director Department Fisheries* (FH) (3 October 2017) (348/16) (Mr Justice M. Chetcuti); see however *Mizzi Antiques Ltd v. Chairman Malta Enterprise* (FH) (31 October 2013) (810/24) (Mme Justice L. Schembri Orland) where a reconsideration was deemed to suspend the six month period: "Here one is dealing with a decision of an administrative authority communicated through a letter and unequivocal actions on its part that it was going to review or better still study again the case in issue. These were absolutely not negotiations with a compromise in mind where each party sticks to its position but then is ready to concede a bit and reach a compromise or a solution. In the case under examination there is a request through an application, refusal of such application, reconsideration which *de facto* suspended the effects of the refusal and then a refusal of the reconsideration."

[50] *Marisa Bonanno v. University of Malta* (FH) (9 December 2015) (487/14) (Mr Justice JR Micallef). See also *Dr Jeffrey Dalli v. Public Service Commission et* (FH) (22 April 2015) (880/14) (Mr Justice JR Micallef) and *Karmenu Mifsud v. Malta Transport Authority* (CA) (31 May 2013) (1001/09):"The decision of refusal of the defendant Authority was certainly an administrative act as described in art 469A(2) and when an action for damages is based on tort or quasi-tort emanating from an administrative act so that in order to examine whether

article 469A, the time limit does not apply.[51] The same applies if the action against the pubic authority is based on contract rather than article 469A.[52] It has also been decided, somewhat strangely, that the time limit applies even as regards action impugning administrative acts which occurred prior to the introduction of article 469A.[53]

However, in one case regarding an executive decision relating to the concession of a kursaal-casino licence,[54] where the grounds for annulment of an executive decision, though similar to those listed in article 469A, are based on norms emanating from a European Union Directive in the awarding of public contracts, the rule did not apply, for the basis of the action was a legal instrument other than article 469A.[55] Where a member of the Armed Forces challenged an executive decision of his superiors on the basis of a special law namely the Armed Forces Act (Cap 220) the Court ruled that the six month period only started running from the date

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the action is liable to tort one has to first examine its validity, then the matter remains regulated by the *lex specialis*. See also *Emidio Azzopardi et v. Malta Environment and Planning Authority* (CM) (14 December 2007) (13/06) (Magte A. Ellul) See however *Starshine Enterprises Limited v. Chairman Malta Tourism Authority* (FH) (18 September 2012) (316/04) (Mr Justice A. Ellul) where the Court decided that a lack of decision in issuing a commercial licence by the Tourism Authority was not based on art 469A and therefore the six month limit did not apply. ; see also *Paolo Bonnici Ltd v. Comptroller of Customs* FH) (2 October 2001) (2154/97) (Mr Justice R. Pace); *Sylvana Tanti v. Noel Tanti et* (FH) (9 October 2014) (819/08) (Mr Justice JR Micallef) *Daniella Vella v. Housing Authority* (FH) (30 October 2014) (508/09) (Mr Justice J. Zammit McKeon); *Carmelo Caruana Distribution Services Ltd v. Comptroller of Customs* (FH) (4 October 2004) (1582/01); *Borg & Aquilina Ltd v. Director Public Health Department et* (FH) (28 February 2007) (75/03) (Mr Justice R.Pace) and *Alfred Spiteri et v. Malta Transport Authority* (FH) (28 October 2010) (369/09) (Mr Justice G. Caruana Demajo).

[51] *Alfred Spiteri v. Malta Transport Authority* (CA) (30 May 2014) (369/09); see also *Michael Debono Ltd v. Malta Environment and Planning Authority* (CA) (27 May 2016) (959/11).

[52] *Euro Chemie Products Ltd v. Malta Industrial Parks Ltd* (FH) (7 May 2014) (1081/12) (Mme Justice J. Padovani Grima).

[53] *Emanuel Caruana v. Chief Government Medical Officer* (FH) (1 April 2003) (1805/01) (Mr Justice JR Micallef): "As stated authoritatively (*Roberto Zamboni noe et v. Director of Contracts et* (CA) (31 May 2002) the period mentioned in art 469A(3) applies also to administrative acts which might have occurred before the coming into force of the said article; and certainly it should not be interpreted as meaning that a person could propose a judicial review action only when such article came into force. " This judgment is in direct conflict and contrast with *The Margarine Import Co Ltd v. Comptroller of Customs* (CA) (26 May 2006 (3064/96) and *Dr. Malcolm Pace v. Dr C. Mifsud Bonnici pr et ne* (FH) (15 July 2015) (1146/13) (Mr Justice A. Ellul).

[54] *Dragonara Gaming Limited (C49848) v. Minister of Finance et* (FH) (12 October 2016) (1000/15) (Mr Justice L. Mintoff)**.**

[55] *Ibid.* "Plaintiff's demand may be classified as falling under an alleged breach of the European Union norms as well as on the basis of an infringement of pre-contractual and contractual obligations. This Court is asserting this only for the purposes of classifying the action of plaintiffs and the possibility of proposing such action and not regarding whether such action is justifiable."

when a final decision under the special law was made rejecting plaintiff's demands.[56] Besides as regards administrative acts which occurred prior to the coming into force of article 469A on 1 October 1995, the six month rule did not apply, and the thirty year period under article 2143 of the Civil Code was applicable.[57] The six month period does not apply to review actions before the Administrative Review Tribunal but only to those before the ordinary courts under article 469A.[58]

The court in one case[59] however refused to take into consideration the six month limit when defendants never formally raised the issue at all throughout the proceedings except in the final written submissions after all evidence had been gathered. Nor did the Court, in spite of rulings to the contrary,[60] deem it fair to raise the matter *ex officio*. It stated:

> The Court is of the view that, unless the plea is not formally raised and the Court rules on the issue of additional pleas, the matter raised remains only an issue or argument put forward and does not by itself become a plea on which the Court has to decide. The said defendants apparently complain that the Court did not spontaneously raise this issue (*ex officio*). On this point, the Court will only say that once it is accepted that the period envisaged in article 469A(3) of Chapter 12 is one of forfeiture and not prescription, it was incumbent on whoever had an interest to raise this plea to raise it at the proper stage of the cause *in limine litis*; so that if he chose not to do so or did not realize that he had to do so at that stage, it will be deemed that he waived such plea – which is what happened in this case where defendants raised this issue for the first time four years after the action had commenced.[61]

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[56] *Lieutenant Colonel Andrew Mallia v. Commander Armed Forces of Malta* (FH) (5 October 2016) (187/16) (Mr Justice Mark Chetcuti**)** confirmed by the Court of Appeal on 30 January 2018: "The Court considers that the plaintiff availed himself of the ordinary remedy given to him by law namely Chapter 220 in accordance with article 220 so that then he could be in a position to present this action. The decision of the Office of the President is the "*punctum temporis*" from when the period mentioned in article 469A started running."

[57] *Dr. Malcolm Pace v. Dr C. Mifsud Bonnici pr et ne* (FH) (15 July 2015) (1146/13) (Mr Justice A. Ellul); see also *The Margarine Import Co Ltd v. Comptroller of Customs*(CA) (26 May 2006 (3064/96) where the six month period was deemed not to apply to pre-1995 administrative acts.

[58] *Martin Spiteri pr et ne v. Transport Malta* (ART) (13 May 2011) (6/01) (Magte. G. Vella).

[59] *Romina Delicata Mohnani v. Commissioner of land et* (FH) (16 December 2015) (957/10) (Mr Justice JR Micallef). See also *Kevin Azzopardi v. Prime Minister et* (FH) (27 March 2014) (758/09) (Mr Justice JR Micallef).

[60] *Maria Schembri v. Commissioner of Land* (CMSJ) (8 February 2012) (25/08) (Magte. P. Coppini).

[61] See, however, *Sylvana Tanti v. Noel Tanti et* (FH) (9 October 2014) (819/08) (Mr Justice JR Micallef) where defendant was allowed with success to raise the plea of forfeiture towards the end of the proceedings. The Court accepted such plea though it condemned part of the costs to be borne by defendant. See also Commission for the Holisitic Refom of the Justice System: Final Report (30 November 2013) Parliamentary Secretariat for Justice Office of the Prime Minister , Valletta :73: "This Commission is of the opinion that the role of the Court is to be a neutral one and that the Court at no stage, even in judgment, should be perceived that it is standing with any party at the expense of another. When the Court *di Sua sponte* raise *ex officio* pleas, as it is permitted by the existing civil and criminal

The time limit applies even when there is a refusal of a request, and in cases where no decision is taken then the six month period starts running from the end of a two month period since the request was notified to the public authority,[62] though in one case the court stated that since a refusal to act was a continuous action the period of forfeiture had never started running.[63] It is up to defendant who raises the plea to prove that the forfeiture period had elapsed.[64] However, where subsidiary legislation itself is challenged as being *ultra vires*, the time limit does not apply, for such an action is not an administrative act.[65] Similarly the time limit plea cannot be raised by a private party but only by a public authority since article 469A applies to the latter not the former.[66]

Need of Prior Judicial Act

A further procedural obstacle which was introduced by the notorious Act No. VIII of 1981 but which still remains on the statute book, one of the few vestiges of such pernicious legislation, is article 460 of Chapter 12 which provides as follows:

> No judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded, against the Government, or against any

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procedural law, it can still give rise to a violation of a constitutional right and conventional to a fair hearing."

[62] *Co-op Services Ltd v. Public Transport Authority* (FH) (25 September 2003) (1351/01 (Mr Justice JR Micallef): "In such a case the period when a lack of decision is deemed as a refusal starts running from the end of a two month period which commences from the date when a request in writing is notified to the authority concerned." See also *Longbow Ltd v. Permanent Secretary in Ministry of Sustainable Development* (FH) (26 November 2013) (195/13) (Mr Justice JR Micallef) and *Rami Hamid v. Director Citizenship and Expatriate Affairs et* (FH) (7 February 2014) (632/13) (Mr Justice JR Micallef).

[63] *Joseph Spiteri et v. Director General Public Health Department et* (FH) (23 February 2012) (933/06) (Mme Justice Anna Felice): "Though the aforementioned article imposes a period of six months from the act complained of, in the present case, the act is a continuing one since essentially it amounts to a lack of action on the part of defendants, the core of the applicant's complaint. Consequently this plea is being rejected." This judgment was overturned by the Court of Appeal on 26 January 2018 since there was a clear rejection of applicants' request for a pharmacy licence when it was put on a waiting list and the six months from such event had elapsed." See also *Colette Schembri v. Chief Government Medical Officer* (FH) (9 March 2017) (893/07) (Mme Justice A. Felice).

[64] *John Bonnici et v. Malta Transport Authority*) (FH) (2 December 2009) (299/06) (Mr Justice C. Farrugia Sacco).

[65] *Melita Cable PLC et v. Minister for Transport and Communications* (FH) (13 November 2006) (1076/03) (Mr Justice J. Azzopardi).

[66] *Peter Borg et. v. Angelo Xuereb pr et ne et* (FH) (16 February 2007) (488/04) (Mr Justice G. Caruana Demajo).

authority established by the Constitution, other than the Electoral Commission, or against any person holding a public office in his official capacity, except after the expiration of ten days from the service against the Government or such authority or person as aforesaid, of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated.

This means that in every action for judicial review, a judicial letter or protest has to precede such action, and if such procedure is not followed, the filing of the action is null and void. This draconian procedure is anachronistic in this day and age, for even if the administration has no intention of withdrawing its administrative action which is then challenged, any action taken without filing and notification of the judicial act at least ten days prior to the institution of proceedings, will lead to the annulment of such proceedings. This procedural privilege in favour of Government, and in particular the annulment of the proceedings rather than their suspension until a judicial act is filed, is of dubious constitutional validity; for government has no such obligation of filing such act in proceedings of any nature filed by the Administration against the ordinary citizen. Besides this procedural privilege constitutes an unfair advantage to one of the parties to a case, to the detriment of another.[67]

[67] See Kevin Aquilina *The Notice of Action Procedure in Maltese Law: Should it be Reealed?* Mediterranean Journal of Human Rights Volume 12 (Double Issue)(20078):57-81 wherein it is stated that this provision is "reprehensible and repugnat to the principles of fairmess and justice ."(p.1) Reference is also therein made to a judgment of the South African Constitutional Court in *Leach Mokela Mohlomi v. Minsiter of Defence* (Case CCT 41/95 (26 September 1996) where a provision similar to article 460 was declared to be constitutionally invalid. See also Ruth Bonnici "*Government Litigation Privileges in Malta : is the right to a Fair Hearting at Risk?* (ELSA Malta Review Edition IV (2014) . See also Permanent Law Reform Commission Final Report on Human Rights and the Code of Organization and Civil Procedure (Valletta) Permanent Law Reform Commission (9 February 1993) :88-90 wherein it is stated that art 460 "runs counter to the provisions protecting fundamental rights in the Constitution and the Convention."See also Final Report Commission fo the Holistic Reform of the Justice System (30 November 2013) :64 :"This Commission recommends that a Court case against the Government, will start immediately and there will be no need for the citizen to waste time to follow an unnecessary procedure and spend money to send an official letter to the Government entity concerned, simply informing it that it will be opening a Court case against that Government entity. This apart from the fact that this procedure puts the goverrnment in an advantageous position on the citizen, when the citizen does not have the same equality of arms against the government. " However see *Fish and Fish Co Ltd v. Minister for Sustainable Development* (FH) (29 March 2017) (334/16) (Mr Justice M. Chetcuti) where the Court *en passant* remarked that: "This Court does not agree with the submissions made by the plaintiff company that this procedural rule strangles any of its rights for what it does is to only impose a norm requiring it to forewarn government. The failing of plaintiff to abide by this procedural rule cannot in the Court's view be used as a pretext for such shortcoming."

In one case[68] plaintiffs argued that there was no need for such act, for the issue subject of the judicial review action had been ongoing at least for two years between the parties prior to the institution of judicial action. The Court regarded such requirement as one of public order which not even the public authority itself could waive. The plea could even be raised *ex officio* by the Court itself.[69] Besides, it is the duty of the Court Registrar not even to accept the filing of such judicial action against the Government unless he ensures that a judicial act had been filed against and notified to, Government at least ten days prior to the institution of such action.[70] However only government and the public authorities mentioned in article 460 can raise this plea.[71]

The Court[72] has also ruled that:

> The Court is of the opinion that this article applies also to cases of judicial review filed under article 469A of Chapter 12 of the Laws of Malta; and this because such action does not fall under any one of the procedural acts mentioned in sub-article (2) of article 460, a list which is exhaustive. It appears that the argument submitted by S and D that in any case there was nothing to request from respondents if it had chosen to send a judicial act prior to instituting court action, is not a valid one justifying its dispensation from abiding by the procedural requirements imposed by article 460 for the validity of plaintiff' s action.[73]

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[68] *S and D Yachts Limited v. Director Office of Fair Competition* (FH) (20 April 2010) (210/09) (Mr Justice JR Micallef).

[69] *Dominic Savio Spiteri v. Prime Minister et* (CA) (27.2.2004); vide also *Gauci v. Registrar of Courts et* (FH) (1 February 1990);*Dr. L. V ella et v. Ronald Grech et* (FH) (22 June 1992); *Roger Sullivan noe v. Comptroller of Customs* (FH) (15 January 1993, *Michael Spiteri v. Chairman Planning Authority et noe* (FH) (2 October 1996); and *Smash Communications Limited v. Malta Communications Authority*(FH) (22 November 2007) where it was held that the word 'person' as used in article 460(1) of Chapter 12 includes also a legal person.

[70] *Joseph Bellizzi v. Attorney General* (FH) (5 February 1999) (Mr Justice F. G. Camilleri).

[71] *Emanuel Bugeja v. Mary Rose Bugeja et* (FH) (26 June 2003) (1456/02) (Mr Justice R.Pace).

[72] S and D Yachts (n 470); see also *Grace Sacco v. Medical Superintendent at Gozo General Hospital et* (CMSJ) (16 October 2007) (17/07) (Magte. A. Ellul).

[73] See also *Venugopal Jeyakrishna Moorthy v Chairman Employment Training Corporation* (FH)(24 November 2010)(398/10)(Mr. Justice JR Micallef) and *Corinne Ward v. Foundation for Medical Services et* (FH) (13 August 2015) (263/13) (Mr Justice JR Micallef). In the latter case it was also decided that applicant was not justified in presenting an action of judicial review **before** the ten days expired to avoid running counter to the six month limit imposed by art. 4659A. See also *Anthony Spiteri Parnis v. Director Joint Office* (FH) (7 November 2017) (265/17) (Mr Justice JR Micallef) and *P.T. Matic Environmental Services Ltd v. Directro General Contracts et* (FH) (14 March 2018) (304/11) (Mr Justice JR Micallef). Article 460 has also been applied in the case of a counter claim (*Director General in the Office of the Prime Minister et v. Fithome Ltd)* (FH)(16 May 2002)(Mr Justice JR Micallef) as well as in the case of retrial proceedings (*Dr Leslie Grech pr et ne v. Acting Commissioner of Lands* (LAB)(8 April 2003).

Besides, in that case the Court ruled that the fact that the Registrar had accepted the filing of judicial proceedings without verifying whether a judicial act in accordance with article 460 had been filed, did not regularize such procedural irregularity on the part of plaintiff.[74] Consequently the plea was accepted and the proceedings declared null and void.

In interpreting article 460 of Chapter 12, the courts of law have also foundered on the interpretation of *body corporate established by law.* First of all there are serious doubts as to whether a body corporate established by law falls under the article 460, namely "*any authority established by the Constitution, other than the Electoral Commission, or against any person holding a public office in his official capacity*." The courts have, with one notable exception,[75] held that they are.[76] But even then the courts of law seem to ignore the difference between a body corporate established BY law, and one UNDER the law. Consequently in one

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[75] *Leo Camilleri et v. Malta Environment and Planning Authority (FH*) (12 October 2012) (1205/09) (Mr Justice G. Camilleri):"The said article provides that no proceedings may commence against government, an authority established by the Constitution or a public officer in his official capacity except after 10 days from the notification of a judicial act where the request in issue is clearly explained. **The Court doubts whether the defendant Authority falls within the ambit of these provisions.**" (emphasis added).See also *David Harding v Lawrence Farrugia* (CA)(9 February 1987) (Kollezz. Vol. LXXI. II.115) where a selection board for admissions of students to University was not considered to be covered by article 460.

[76] *Smash Communications Ltd v. Malta Communications Authority* (FH) (22 November 2007) (733/05) (Mme Justice A. Lofaro); *George Xuereb ne v. Joseph Kennely ne* (26 January 1996) (149/95); *Domenico Savio Spiteri v. Chairman Planning Authority* (FH) 29 May 1997; *Ersilia Bigeni et noe v. Victor Sultana et" (*CMSJ) 27 October 1998; *Arleen Barlow noe v. M. R. Properties et"* (FH) (1 August 1997) and *Samantha Grima v. Kevin Micallef et* (FH) (11 January 2012) (842/10) (Mr Justice C. Farrugia Sacco) and *Oliver Ruggier v. Malta Environment and Planning Authority* (FH) (25 February 2016) (419/14) (Mr Justice JR Micallef); see also *Gopinath Venugopal Jeyakrishna Moorthy et v. Employment Training Corporation* (FH) (24 November 2010) (398/10) (Mr Justice JR Micallef) where the defendant public corporation was deemed to be covered by article 460 but only because there had been delegated to it by law public functions which belonged to a Government Minister: "The wording of the particular delegation of power given to ETC shows that the delegated powers transferred also the personality and discretion which the said Executive held if the delegation had not occurred"; see also *Fawzi Mohammed M El Bkay v. Employment Training Corporation (*FH) (3 February 2011) (753/09) (Mr Justice JR Micallef) and *Mario Dingli v. Commissioner of Land et* (FH) (30 May 2017) (614/09) (Mr Justice J. Zammit McKeon).

case[77] the Malta Industrial Parks Limited, a commercial company in which Government has a controlling interest was deemed to be such a body corporate for the purposes of article 460. Consequently, a pernicious provision in procedural law granting undeserved procedural privileges to Government was extended to cover as well companies in which Government has a controlling interest. This is the same error committed by the Courts in encompassing such commercial companies within the purview of article 469A. However, while the latter error extended judicial review to cover companies which technically should not be subject to such review, in the case of article 460 the Courts have imposed a restrictive unfair provision on companies which should be unshackled by such provisions. Article 460 which contains a procedural privilege, rather draconian in favour of Government against all ordinary rules, should be interpreted in a restrictive and not extensive way.[78] Besides, once the Court ruled that "body corporate established by law" includes government commercial companies, the logical consequence of such erroneous assertion leads to the conclusion that any commercial company, even a private one, once covered by the phrase *body corporate established by law*, should also fall under the strangling provisions of article 460.

Citing with approval the *Euro Chemie* case[79] the Court ruled that:

> The Court disagrees with this argument (that MIP is a private entity) and considers it frivolous for MIP is in fact a public authority with power to decide whether an eviction order should be issued and give advice to the Commissioner of Land whether such Order should be issued.The fact that the authority takes the form of a commercial company does not diminish its qualification as "a body corporate established by law" as mentioned in article 469A (2) .[80]

Besides, it is submitted that the words "person holding a public office acting in an official capacity" found in article 460 refers to public officers as understood by the Constitution

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[77] *VG Tiles Co. Ltd v. Malta Industrial Parks Ltd* (FH) (13 May 2010) (355/07) (Mr Justice C. Farrugia Sacco).
[78] Consequently if the action was initiated against two defendants and only one received a judicial act under article 460, the other is declared non suited but the case continues against the former: *Dr Cedric Mifsud nomine v. Malta Identity Agency and Minister of Justice and Local Government* (FH) (7 July 2016) 144/16) (Mr Justice M. Chetcuti).
[79] *Euro Chemie Products Limited v. Malta Industrial Parks Limited,* (FH) (29 September 2009) (Mr Justice JR Micallef).
[80] *ibid.*

namely persons in offices of emolument employed by Government in a civil capacity.[81] The Court however ruled that since person covered also legal persons, MIP was a legal person holding public office.[82]

In 2016 the Court of Appeal[83] reversed this trend of applying article 460 widely. It remarked that:

> This Court first of all remarks that this article, as has been stated many times by the courts, is a procedural privilege given to Government and as such must be give a strict interpretation. Today it may be said that this privilege creates a state of anachronism in the context of the need that all parties are put in the same position before the law and therefore the rule must not be give an interpretation wider than is prescribed.

The court refused to apply the provision to a commercial company in which government had a controlling interest reversing the judgment of the lower court.

Where article 460 is observed only *vis a vis* some of the respondents, the action will continue against those respondents while the others will be declared non-suited.[84] The courts have also ruled that if a warrant of prohibitory injunction has been issued prior to the filing of an action against government, then the obligations arising from article 460 are deemed to have been fulfilled.[85]

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[81] See article 124 of the Constitution: *Public office* means an office of emolument in the public service. *Public service* means the service of the Government of Malta in a civil capacity.

[82] This argument was rejected in *CFF Filiberti SRL v. Grand Harbour Regeneration Corporation PLC* (FH) (23 May 2017) (44/16) (Mme Justice A. Felice) where the Court ruled that: "article 124 of the Constitution provides a definition of *public office* as one of emolument in the public service and the same article provides that *public service* means the service of the Government of Malta in a civil capacity. The company which raised the plea does not fall under this definition."

[83] *Paul Licari v. Malta Industrial Parks Ltd* (CA) (25 November 2016) (25/10); see also *CFF Filiberti SRL v. Grand Harbour Regeneration Corporation PLC* (FH) (23 May 2017) (44/16) (Mme Justice A. Felice). However in *Duncan Sant v. Malta Industrial Parks Ltd* (SCT) (28 February 2018) (3/18) (Dr C Zammit) the Small Calims Tribunal again ruled that a government controlled company was a public authority for purposes of art. 460 Ch. 12.

[84] *Angelo Borg v. Director General Works* (FH) (11 March 2009) (Mr Justice J. Azzopardi) and *Dr Cedric Mifsud ne v. Identity Malta Agency et* (FH) (7 July 2016) (144/16) (Mr Justice M. Chetcuti).

[85] *H.P.Cole Ltd v. Malta Industrial Parks Limited (*FH) (28 March 2012) (547/08) (Mr Justice A. Ellul); *Leo Camilleri et v. Malta Environment and Planning Authority (FH*) (12 October 2012) (1205/09) (Mr Justice G. Camilleri) and *Charles Pace et v. Mosta Local Council* (FH) (13 June 2013) (892/12) (Mr Justice JR Micallef)

Attorney General must be notified of all actions for judicial review

Another procedural advantage given to Government in review cases is that any action under article 469A has to be notified to the Attorney General and if it is not, then the period fixed by law for the filing of a statement of defence is suspended *vis a vis* all public authority defendants.[86] Consequently in one case[87] where the Commissioner of Land had failed to file such statement, but the application was not notified to the Attorney General, the Court of Appeal revoked the judgment of the lower court and put all parties in *status quo ante*, until such application was notified to the Attorney General which meant that a second chance was given to a public authority to correct its failure and inertia.

Action for Damages under Article 469A.

Damages arising from the exercise of an administrative act which is *ultra vires* and declared unlawful under the provisions of article 469A may be awarded under sub-article (3). [88] Article 469A (5) provides that such request for damages may be contained in the main action for judicial review. However, no damages may 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.

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[86] Art 181B (3) (Ch 12): "Every application, writ of summons or other judicial act filed against Government shall be served upon each head of a government department against whom it is directed and upon the Attorney General and every time limit for the filing of any reply or statement of defence to any such act by any head of a government department being a defendant or respondent in judicial proceedings shall not commence to run before the act is served upon the head or heads of the government departnenst against whom it is directed and upon the Attorney General."

[87] *Joseph Attard et v. Planning Authority et* (CA) (25 May 2001) (1717/98) "for the said defendant, namely the Commissioner of Land to be deemed to have been duly notified, it was necessary not only to notify him, but also to affect an additional notification of a copy of the writ of summons to the Attorney General."

[88] See *Alfred Spiteri et v. Malta Transport Authority* (CA) 39 May 2014) (369/09) where the court ruled that one cannot claim damages for illegal or *ultra vires* behaviour without first impugning the validity of an administrative act.

This provision underlines the difference between judicial review and governmental liability for while the latter exposes Government to damages even if caused by negligence, in the case of judicial review damages will only be awarded in those cases where the Administration persisted in error knowingly causing damage to plaintiff either through malice or unreasonableness. Consequently, the mere fact that an act is *ultra vires* does not by itself give rise to an action for damages.[89]

Another point to be stressed is that in cases of request for a declaration that an administrative act is unlawful; no action for damages can be submitted except under this sub-article. Consequently in one case where plaintiff alleged that the Transport Authority had unlawfully refused to issue a license for a particular type of vehicle, the Court ruled that it was not possible to claim damages under tort but only under article 469A.[90]

This provision is indeed draconic. It was one of the reasons why Government shunned the adoption of the Australian model of judicial review and opted for a home grown system which would not award damages over and above those applicable under ordinary law. The

[89] In *David Anthony Pollina v. Malta Transport Authority* (ART) (11 April 2011) (1/09) the Administrative Review Tribunal, while affirming its right to review administrative action, ruled that it had no right, however, to award any damages. That right at law belonged only to the ordinary courts.

[90] *Josef Borg v. Malta Transport Authority* (FH) (11July 2013) (682/12) (Mr Justice M. Chetcuti): "This is.. an administrative act performed by a public authority consisting in refusing to issue a licence after call had been unilaterally withdrawn by the Authority and as result of which plaintiff is alleging that he suffered damages. Consequently the Court is of the opinion that the action as proposed cannot be instituted under the general law of tort but had to be filed within the parameters of article 469A of Chapter 12. See also *Ragonesi and Co et ne v. Enemalta Corporation* (CA) (24 November 2017) and *Casapinta Design Group Ltd v. Director General Contracts et* (FH) (26 February 2018) (939/15) (MMe Justice J. Padovani Grima); however see in contrast *Karmenu Mifsud v. Malta Transport Authority* (FH) (30 March 2012) (1001/09) (Mme Justice A. Lofaro) where applicant claimed damages following a refusal of a permit by a public authority which he claimed was "abusive, illegal and unreasonable" the Court came to a different conclusion: "This Court therefore holds that the responsibility of the Administration in Malta, though forming part of public law, is also regulated by those provisions of private law and ordinary law which are applicable to the private citizen so long as the law does not specifically exempt the public administration from such responsibility." See also *Franco Azzopardi et v. Malta Environment and Planning Authority* (CMSJ) (1 March 2016) (41/15) (Magte. P. Coppini): " There appears to be nothing in the law regulating the Authority which grants it immunity from being sued for damages under this article (art. 1033 Civil Code) and this notwithstanding that it might be liable for damages as well under article 469A(5) of Chapter 12 regarding its abusive administrative act."

result was this restrictive provision which prohibits the award of damages whether the Administration acts without authority or does not observe the rules of natural justice, or acts contrary to law provided it proves that it did not act out of bad faith or unreasonably.

Consequently, in *Denise Buttigieg v. Rector of University of Malta et* [91] the First Hall of the Civil Court ruled that even though the University Regulations required that compulsory subjects had to be expressly listed in writing, the *ultra vires* action of the University authorities, did not amount to malice, bad faith or unreasonableness and therefore no damages were awarded, in spite of the fact that an express provision of the law drawn up by the University itself had been ignored, the Court ruled that:

> Not only was there no bad faith on the part of the University authorities, but when the plaintiff's lecturers realized that she was failing in the exam on *Principles of Nutrition* which they considered as a core unit, the latter were anxious and worried; so much so that they sent for her on more than one occasion to stress the fact that it was indispensable for her to pass the exam, and even offered her all the assistance she required; an attitude which certainly excludes bad faith.[92]

As to whether the University had acted unreasonably in not abiding by its own Regulations, the First Hall of the Civil Court remarked that:

> In the present case it clearly results that although in terms of the Regulations the decision of defendants was outside the legal parameters, it cannot be said that they acted unreasonably *vis a vis* plaintiff. Their decision was taken after an exchange of correspondence between the lecturers and Senate where the former expressed their preoccupation to the fact that she had not managed to reach the expected standard in a core subject… The decision was taken also after they informed plaintiff that the subject was being considered an obligatory one and stressed the importance that she pass the exam in that subject.[93]

It is respectfully submitted that these were the wrong considerations for the Court to take into account in determining whether the University had acted reasonably or not. The fact that

[91] (FH) (22 December 2003) (1435/02) (Mr Justice N. Cuschieri).
[92] *Ibid.*
[93] *Ibid.*

lecturers had expressed pathos with the student after wrongly applying the law, did not diminish the shortcoming of the University authorities in not abiding by an express provision of the Regulations which they themselves had drafted and approved. In a different context, where the customs authorities had acted *ultra vires* by not releasing a product named after a drug, in line with the National Drug Policy, but in breach of the customs legislation which did not allow such confiscation, the Court swiftly came to the conclusion that the Administration, by breaching the law had automatically acted *ultra vires* and unreasonably.[94] In this latter case, while the Court admitted that the customs authorities had not acted in bad faith, ruled that in so far as they had applied policy rather than a legal provision, they had acted unreasonably and therefore subject to an action for damages. It stated with regard to the public authority's decision to base itself on a national drug policy drafted by the state agency *Sedqa*, that:

> Although there is no doubt that respondent acted in good faith, this does not mean that he could simply on the basis of conjectures, violate the rights of private persons who had not infringed any law. In fact the Court considers the wording of the document as being generic when addressing the educational aspect of the national policy, and could not serve as a basis and reason for the administrative act in question. Therefore the Court considers his action to be unreasonable and therefore applicant has a right to claim damages suffered by him.[95]

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[94] *All for Property Limited v. Director General Customs* (FH) (30 September 2014) (741/08) (Mme. Justice L. Schembri Orland); see also *Malta Police Association et v. Commissioner of Police et* (FH) (29 May 2017) (633/15) (Mme Justice M. Hayman) where the notion of acting beyond the authority given by law and unreasonableness seem to have been considered as one and the same thing.

95 See, however, *Tabone Computer Centre Ltd v. Regulator Wireless Telegraphy et* (FH) (27 January 2011) (674/00) (Mr Justice JR Micallef) confirmed on appeal (CA) (5 December 2014) where a wrong application of the law regarding a license of an internet service provider was not deemed to give rise to an action for damages: "Even if defendant was not applying correctly the law in force, it cannot be said that he was acting in bad faith." In *Alan Debattista v. Director Commercial Services* (FH) (7 April 2011) (771/07) (Mr Justice J. Zammit McKeon) however, the fact that a head of department erroneously revoked a trading license in breach of the law was deemed to be unreasonable and therefor such action gave rise to a claim for damages under art 469A. "(The public authority) does not have the right to revoke or annul a licence issued. The revocation of a licence may only be done at the request of the licensee who amongst other things decides not to continue conducting his commercial activity.. therefore the Court considers that the decision of defendant Director to revoke the licence in question was an unreasonable administrative act in the context of article 469A (5) of Chapter 12." See also *Paul Cassar ne v. Malta Transport Authority* (CA) (25 January 2013) (11465/06) where the fact that a public authority ignored the principles of natural justice in revoking a vehicle road worthiness test garage license, was deemed by the court to amount to an unreasonable administrative act for which damages had to be paid under art 469A (5); see however *Halida Kuduzovic v. Prof Juanito Camilleri ne et* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef) where the Court rightly stated that: "While not all reasonable exercise of discretion is necessarily correct nor is an erroneous exercise necessarily unreasonable." More controversially however in the same case the Court stated that for there to be an abuse of power there must be an element of intention to harm:

So while prohibiting the importation of products which were named after a dangerous drug was deemed to be an unreasonable act to the point of exposing the public authority to damages, in the *Denise Buttigieg* case, a public authority which ignored its own regulations having the force of law in failing a student from a compulsory subject which should have been expressly indicated in the regulation itself, was not deemed to be unreasonable for the same purpose of awarding damages.

It is submitted that in the light of the wording of the law in limiting an action for damage under article 469A to when the public authority acts in bad faith or unreasonably (a) not every breach of the law amounts to an unreasonable exercise of a discretion (b) secondly that while bad faith implies an element of malicious intent to do harm, the notion of unreasonableness does not;[96] consequently the two extremes are wrong at law; there is no need to prove intent to do harm, nor is any breach of the law necessarily an unreasonable exercise of discretion.

In the *Denise Buttigieg* case the court also summarily dismissed a claim for the payment of moral damages, again in virtue of the private law principle that non-pecuniary damages are anathema in our legal system.[97] Although the Court was following a general trend of thought in Maltese jurisprudence, one should be extremely cautious before transporting lock, stock and barrel private law notions into public law. An action for judicial review is governed by special rules. Why should the prohibition of moral damages under the law of tort in the Civil

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"For behaviour to be considered abusive, who so alleges must prove that there was an intentional element to harm, an element which must be proven through external action which is part of the exercise of the said discretion."

[96] See s*upra* 234.

[97] "In the first place it must be observed that in our legal system the concept of damages is limited to material damages and it is not envisaged at law the award of damages under the title of psychological damages and therefore this part of the claim is *a priori* legally unsustainable."

Code be blindly applied to public law actions? This matter has not been seriously dealt with or examined thoroughly till now by our courts of law.[98]

Under Maltese constitutional law, the Constitutional Court has, in the past twenty-seven years, accepted such damages in cases of human rights violations even though there is no express provision of the law in this regard, justly interpreting the wide powers "to make such orders, issue such writs and give such directions" under article 46 of the Constitution as including such right.

In *Mario Gerada v. Prime Minister et* [99] a nursing officer was summarily dismissed by the health authorities. He alleged that such dismissal was *ultra vires* and in breach of the rules of natural justice and procedural fairness. The court of first instance upheld his claim and without referring to any provision of article 469A awarded material damages as well as

> €10,000 as "existential damages" determined *arbitrio boni virii* for the psychological consequences and the humiliation suffered by applicant due to what had occurred.

The court therefore in a public law action, obviously based on article 469A, felt free to award moral damages when these are anathema in the Maltese legal system, and in obvious breach of tradition. No reference is made to the damages provision contained in article 469A, including the requirement of proof of bad faith; although the court did observe that the health authorities had acted in breach of good faith.

[98] A similar cut-and-paste application of a private law notion is the question of juridical interest. Applying such notions to public law, such as constitutional proceedings or in matters of judicial review in administrative law, can render futile the application of the law since in a number of cases there is no interested person at least legally to file the action. In this regard see Tonio Borg: *Juridical Interest in Constitutional Proceedings* Għ.S.L. Online 17 February 2017 and Giovanni Bonello *When Civil Law trumps the Constitutional Court* (Għ.S.L.).
[99] (FH) (14 November 2012) (993/08) (Mr Justice S. Meli).

The Court of Appeal[100] in its judgment, while confirming the judgment of the lower court on the merits, summarily referred to article 469A (5) and reduced the damages awarded, applying the Civil Code provisions on damages, and then, without giving any reason, ignored and deliberately omitted the award of *non-pecuniary or moral* damages given by the court of first instance.

In another case[101] a distinction was made between governmental liability and article 469A. Where a public corporation causes damages, one need not refer to article 469A for no public authority is exempted from the provisions of the Civil Code regarding tort. In that case it was alleged by plaintiffs that in executing an enforcement notice the Planning Authority had exceeded what was stated in the notice and demolished parts of a building which were not covered by such notice.[102]

A public authority was also held not to have acted unreasonably where applicant complained of a delay of six months in having his disciplinary case decided, the more so when he was not dismissed from work even though the facts of the case indicated that dismissal would have been a proper sanction.[103]

Conclusion

The matter of damages under article 469A needs to be clarified. There is no doubt considering the genesis of this provision, that Government intended to restrict the award of damages in judicial review cases. The contradictory statements of the courts of law, some

[100] (CA) (28 April 2017) (993/08).
[101] *Albert Satariano et v. Planning Authority* (FH) (19 April 2010) (1721/01) (Mr Justice J. Azzopardi) confirmed on appeal (CA) (28 March 2014) (1721/01).
[102] "On this matter there was not even the need to refer to article 469A of Chapter 12 to render the Authority responsible for damages since it does not enjoy any immunity from the articles of the Civil Code relating to responsibility for damages by whoever acts beyond his rights."
[103] *Anthony Gauci v. Malta Maritime Authority* (FH) (30 October 2014) (Mme Justice L. Schembri Orland).

allowing only the application of these restrictive provisions on damages found in article 469A, others allowing an action in tort under civil law to proceed as well, needs legislative intervention to prevent different statements by the court on the same matter.

Conclusions

Following this examination of statutes, judgments and writings on the subject of judicial review of administrative action in Malta, one may summarize the main findings and the proposed solutions to clear certain issues, break certain impasses, clarify certain matters to avoid uncertainty, and render the remedy under article 469A more accessible to the ordinary citizen.

The **first point** regards *who* may access article 469A. The application of the civil law doctrine of juridical interest has rendered the access to judicial review more difficult than in other countries. The least one could do, apart from doing away with the doctrine all together in public law actions, is to require only "*sufficient interest*" for one to start an action of judicial review. This would widen the meaning of legal standing to include non-governmental organizations who specialize in particular areas as well as individuals who have assiduously shown interest in any particular matter which falls under article 469A; more or less on the lines of British statute where leave is granted to initiate a judicial review action if one proves *sufficient interest.*[1]

The **second issue** relates to who may be sued as a respondent in judicial review actions; the law is clear: only Ministries and government departments, local authorities and public corporations may be sued. It makes sense to extend judicial review to any private or public commercial company which in view of vast privatisation processes have assumed a public function such as the supply of utilities. This would be more akin to the English common law

[1] Section 31(3) Senior Court Act 1981: No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application **unless it considers that the applicant has a sufficient interest in the matter to which the application relates.** (emphasis added).

position that any body "performing a public law function" should be subject to judicial review i.e. regulating an aspect of national life. The test as in the United Kingdom should be whether had there not been such an authority or company in existence, Parliament would have had to intervene to regulate such activity.

The **third** point is one of centralization and certainty. The law on judicial review is scattered too much; it is derived from ordinary statute (art. 469A) for administrative acts,including the confusing sections contained in the Administrative Justice Act (Ch 490) for review of administrative acts by the Administrative Review Tribunal not covered by article 469A; not to mention review in virtue of special laws ; then judicial review of administrative tribunals originates from article 32 of the Code of Organization and Civil Procedure (Ch 12) along with the application of English common law. Article 116 of the Constitution (art. 116) then regulates review of delegated legislation. It makes sense to centralize all judicial review actions under one statute through the establishment of an Administrative Court covering all kinds of judicial review and preferably applying an Administrative Law Code which would comprise all the current norms related to judicial review of whatever nature . [2]

Besides, it does not make legal sense to regulate judicial review of administrative action in the Code of Civil Procedure. Civil procedure applies to civil law matters. Judicial review belongs to the realm of public law. A special statute regulating all matters relating to judicial review of all administrative actions would be more appropriate. The time perhaps has come for such special statute to set up an administrative court which would be presided over by a member of the judiciary where all judicial review matters would be decided. The past Diceynian fears of special administrative courts going against the grain of English concepts of freedom and equality before the law have long been put to rest. The setting up of the Administrative Review Tribunal has already served a significant blow to this idea. One might

[2] See Ivan Mifsud: *Judicial Review of Administrative Action* in Malta (BDL) (2017)121.

as well go the whole hog and not only establish an Administrative Court[3] but also codify all matters relating to the law of the Administration, the redress of grievances and judicial review, in one Code to be applied by the new Administrative Court which can absorb the functions of the current Administrative Review Tribunal. In any case, even if the latter Tribunal is allowed to continue functioning, its reviewing powers should be expunged from the Administrative Justice Act and its role is limited to that of gradually absorbing the role and functions of the multifarious administrative tribunals found in several statutes.

A draft Administrative Code has already been proposed by one Maltese scholar[4] which can form the basis of a wide discussion as to what should form part of such Code or not. The draft Code is a genuine attempt at codifying English norms of common law on practically all the grounds of review including natural justice and legitimate expectation.

The time has also come, and this is the **fourth** issue, to widen and clarify the grounds of review; a strict interpretation of article 469A would apparently apply the grounds of judicial review to *all* administrative acts; a perusal of judicial review from the source of our law, namely English common law, shows that the norms of natural justice, for instance, apply only in certain particular situations and cases; as regards grounds of review, besides the sphere of application, one need also clarify the position of such relatively new concepts as *legitimate expectation* and the ground of *uncertainty* within the current grounds of review; although a liberal interpretation would classify them under abuse of power, a restrictive and positivist construction would not.

[3] A special section could deal with administrative offences and administrative penalties in view of the constitutional judgment in *Federation of Estate Agents v. Director General Competitition* (CC) (3 May 2016) (87/13) which ruled that in spite of the depenalisation of certain offences, if the sanction for such new administrative offences remains punitive, then such offences retain their criminal law nature and in virtue of art 39(1) of the Constitution can only be decided by a court, i.e a court presided over by a Judge or Magistrate.
[4] Professor Kevin Aquilina, Dean of the Faculty of Laws of the University of Malta.

Fifthly, as to procedural issues, the draconian six month limit and the way the law is formulated, that such limit starts running from the moment one would or should be in a position to know about an administrative act, should be changed by lengthening such period which should start running from the moment an official notification is made. Furthermore, when a means of redress is envisaged in a law, such as for instance recourse to the Office of Ombudsman, such period should be suspended until the Ombudsman compiles his final report. Besides, the requirement of filing a judicial act prior to initiating a judicial review action should either be abolished or, if retained, should not bring about the nullity of the action, if breached, but only a postponement of its commencement until such act is filed.

Sixthly, the question of *fusion* of the constitutional and administrative action should be resolved. As the law now stands, article 469A allows judicial review to be based on breaches of the Constitution; however the courts have interpreted this to mean that a judicial review action can only challenge the validity of an administrative act on grounds *other* than human rights. This judicial creativity of changing the simple construction of words contained in a law is not the best way of solving problems arising from this provision. Either the provision should be done away with altogether adopting a strict separation of both actions, or else allow the institution of a *hybrid* action which would involve administrative law issues and in *subsidium* constitutional ones. The fact that the court of first instance in both actions is the same facilitates such a solution. It is true that this will mean allowing an appeal to the Constitutional Court on matters other than constitutional ones However, the Constitution already envisages such a situation regarding actions which contain constitutional and ordinary law issues in article 95(2)(f) Berides such hybrid action is more justified in this case where a constitutional issue is part the action, than in the current state of affairs where

any review of delegated legislation in second instance ends up before the Constitutional Court where no constitutional issue is involved.

The **seventh** point is that the question of damages under article 469A must be clarified. Although jurisprudence on this point is contradictory with some judgments deciding that no action under tort can be combined with an action under 469A, the latter exclusively regulating damages arising from an *ultra vires* administrative act, other decisions state the contrary. The time has come to allow an actions for damages in tort or quasi-tort under article 469A and of abolishing the requirement[5] that for the Administration to be liable to damages under article 469A it must have acted in bad faith or unreasonably.

Final Remarks

The development of judicial review is the corner stone of the rule of law. In this regard Malta follows those Commonwealth countries which, in spite of being imbued by common law rules of judicial review, have also developed constitutional review based on their written constitution. This double protection against executive action depends on its effectiveness on a resilient and pro-active judiciary. In spite of early misgivings in the beginning, over time the Maltese courts boast in my opinion of a veritably active jurisprudence in this regard, circumscribing Government within the four corners of the law. Dangers still loom in the background, the most pernicious one being the static application of the strict juridical interest rule. As in other countries, the judiciary is, however, able to overcome these difficulties. The

[5] See Ivan Mifsud (n 2):118

time indeed has come to make a qualitative leap forward, in order to abide by that time honoured saying: *Be you ever so high, the law is above you.*

Annex I

Plaintiffs in Judicial Review Actions

The law does not specifically mention *who* can file such an action in the six-sub-articles to article 469A but makes direct reference to such person only once in sub-sub article (5) where it is stated that

> 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.

Consequently any person may commence such action, provided according to the general rules and practice of the Maltese legal system, such person proves juridical interest to start an action under article 469A. According to article 4 (d) of the Interpretation Act (Ch.249), a person is any physical or legal person, and in the latter case a legal person may also be unincorporated.

The problem which has arisen in other areas of public law e.g. in human rights actions under article 46 of the Constitution and article 4 of the European Convention Act (Ch. 319) [1] is whether a public authority, agency or official can file an action of judicial review of executive action. The law is silent on the matter; but the issue does arise whether parts of the Administration can sue other sections of the Administration.

The answer to this problem perhaps depends on the *type of action* involved. One may argue that judicial review of an action of the administration cannot be commenced by a part of that Administration, namely a public authority as defined in article 469A, regarding acts which can be classified as "administrative act" on grounds such as abuse of power. However, does

[1] See *Marscascala Local Council v. Attorney General* (CC)((28 June 2012)(5/06) where the Constitutional Court ruled that a local council , being part of the State could not file a human righst action which is necessarily an action against the State.

this argument hold good for an action challenging the validity of a decision of a judicial or quasi-judicial organ of the administration such as an administrative tribunal, whose review does not fall under article 469A? It would seem that a public corporation can sue such administrative tribunals; cases have been instituted and the matter was never raised either by defendant or the Court *ex officio*.[2] Indeed in one[3] case relating to a challenge by a local council of the validity of a permit issued by the planning authorities, the Court ruled that:

> The Council has all rights as any person entitled to make representations before the Appeals Board which has a quasi-judicial function and that it must be given the basic rights which have to be abided by in its regard such as the principle of natural justice and therefore it naturally follows that if these rights are lacking, or as is alleged in this case the right procedures were not followed, the said Council has full rights to request the Court to review any administrative failing under article 469A (i) (b) (iii) as is being requested by the Local Council in this case.

Art 469 A and its applicability in time

The problem has arisen whether the rules laid down in article 469A have retrospective effect, or else apply only to administrative acts made after the enactment of such article in 1995. This point has been expressly decided by the Court of Appeal ruling that the law was not retroactive.[4] This means that for acts prior to the enactment, one has to apply the law at that

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2. *Malta Transport Authority v. Attorney General et* (FH) (12 May 2011) (592/09). See, however, *Prime Minister v. Victor Vella Muskat (*CMSJ) (24 January 2006) (81/03) (Mgte. T. Micallef Trigona) where the Court, in a case where the Prime Minister challenged the legal validity of a decision of the Tribunal for the Investigation of Injustices, ruled that: " plaintiff here is acting in his capacity as Prime Minister under whom falls the administration of the country and in this capacity he is challenging the acts of the very administration which falls under his powers, which for this Court is incongruous and not legally sustainable; see however *EneMalta Corporation v. Malta Resources Authority* (FH) (9 February 2009) (642/07) (Mr Justice C. Farrugia Sacco) confirmed on appeal (CA) (18 September 2009) where a public corporation sued under art. 469A another public corporation relating to a decision of the Resources Appeals Board.

3 *Marsascala Local Council et v. Malta Environment and Planning Authority* (FH) (29 November 2012) (336/07) (Mr Justice M. Chetcuti).

4 *Frank Pace et v. Commissioner of Police et* (CA) (28 January 2005) (1311/78) "Sub-article (5) of the said article 469A is applicable in the case of "an action submitted in virtue of this article" (underlining by Court) that is to say, in virtue of article 469A. This means that that sub-article cannot be applicable to actions which were pending when the said article came into force since such actions cannot be logically considered as having been made in virtue of article 469A which had not yet entered into force when they were instituted. The current action was already pending when art 469A came into force, and therefore one cannot say that sub-article (5) applies to the current action."

time. Since there was no statutory provision at that time, recourse is made once again to English common law which therefore remains of the outmost importance in Maltese administrative law, not only to cover areas of judicial review which fall beyond the pale of article 469A but also actions of the Administration which pre-date the enactment of the rules of judicial review in Chapter 12. There are serious doubts as to whether such pronouncement is legally correct. The transitory provisions to Act No. XXIV of 1995[5] which introduced article 469A, expressly states that:

> Subject to the provisions of the following subsections of this section, the provisions of the principal law as amended by this Act and of the laws referred to in the Schedule to this Act as amended by this Act, shall apply to any procedures before any court or tribunal to which such Code or laws apply, and which on that date are still pending and have not become *res judicata*.

The court pre-empted such criticism by arguing that sub-article (5) of article 469A referred to actions filed "in virtue of this article". This is true, but the transitory provisions make it clear that *pending cases* are to be subject to the rules laid down in article 469A as if the action had been filed under article 469A. To argue otherwise would be constitute a pure legal tautology.

This is not just an academic exercise, for since pre-1995 administrative acts do not fall under article 469A, the six month period is *not* applicable to them, but, as has been seen,[6] the thirty year extinctive prescription applies.

[5] Section 362 of Act No. XXIV of 1995.

Annex II Footnotes, Excerpts and Quotations in the Maltese and Italian Languages

FN = Footnote

PG =Page

Chapter I

Historical Evolution of Judicial Review in England

FN 10: Din is-setgha gurisdizzjonali tal-Qrati ordinarji taghna – garantita mill-Kostituzzjoni – hija parti integrali mill-awtorita` ta' Qrati ta' pajjiz demokratiku kif inhu dak ta' Malta, u derivanti mill-kuncett ta' "rule of law" li fuqu hu bbazat l-Istat Malti. (*Emmanuel Borda v. R. Ellul Micallef ne* (CA) (20 May 2009)

FN 17: Huwa xieraq li jigi ribadit illi s-setgha diskrezzjonali investita fl-Awtorita` mil-ligi ma tistax tigi kunsidrata bhala assoluta. Dan ghal raguni illi dik l-istess diskrezzjoni trid dejjem tigi ezercitata fil-limiti tal-ligi u f' dawk il-limiti li mill-gurisprudenza gew senjati ghall-ezercizzju tad-diskrezzjoni. Primarjament, li l-Awtorita` hi tenuta timxi mhux biss "rite" imma anke "recte". (Kollez. Vol. XXXII P II p 317 u Vol. XLV P I p 110 (*Emmanuel Zahra v. Maritime Authority et* (CA) (Inf (10 January 2007) (8/05)

FN 17: Il-Qorti ghalhekk tikkonkludi illi fil-process ta' l-ghazla *per se* ma jidhirx illi kien hemm xi haga irregolari, ghalkemm wiehed jista', koncettwalment, ma jaqbilx mad-decizjoni tal-konsorzju maghzul jew mal-hafna segretezza illi nzammet meta l-atturi odjerni gew michuda kopja tal-kuntratt iffirmat, minkejja t-talba ripetuta taghhom) (*Bezzina and Sons Ltd et v. Malta Maritime Authority)* (FH) (19 May 2014) (1069/06) (Mme Justice J. Padovani Grima)

FN 17: Tqis li dwar l-iskrutinju tal-politika u l-għemejjel tal-Ministri tal-Gvern, hija tajba u toqgħod għall-każ ir-regola li l-Ministri tal-Gvern "are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge": per Diplock L.J. in the case *R v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1962] AC 617 (*The Hon. Dr Albert Fenech v. Minister for Health et* (FH) (27 December 2013) (Warrant No 1893/13) (Mr Justice JR Micallef)

FN 17: Il-*policy* tal-Gvern jaghmilha l-esekuttiv, mhux il-qorti, u l-qorti ma tindahalx sakemm ma jintweriex li nkisret il-ligi. (*Michael Trapani et v. Commissioner of Land)* (FH) (30 October 2003) (1438/00) (Mr Justice G. Caruana Demajo)

FN 17 Jekk, kif irid ir-rikorrent, din il-qorti tiehu s-setgha li tindahal fit-tehid ta' decizjonijiet ta' politika nazzjonali, kemm dwar l-immigrazzjoni kif ukoll dwar hwejjeg ohra, tkun qieghda tmur kontra l-principju kostituzzjonali fondamentali li jrid illi t-tliet setghat ta' l-Istat — is-setgha legislattiva, dik esekuttiva u dik gudizzjarja — ikunu fdati f'idejn organi differenti fl-interess tal-harsien ta' l-istess libertajiet li jrid ir-rikorrent. (*Simon Gallard v. Prime Minister) (*FH) (21 October 2003) (4/03) (Mr Justice G. Caruana Demajo)

FN 18: "Illi b'mod partikolari, tali eżerċizzju ta' stħarriġ ġudizzjarju hekk sewwa msejjaħ ġeneralment ma jgħoddx fih intervent dwar jekk it-tribunal jew korp kważi-ġudizzjarju kienx konsistenti bejn dak li tressaq quddiemu bħala fatti u dak li iddeċieda, jew jekk l-apprezzament tal-fatti jew in-nuqqas ta' apprezzament ta' oħrajn kienx wieħed rilevanti, jew jekk it-tribunal messux fehem xi kunċett legali b'mod minflok mod ieħor. Fuq kollox l-ebda azzjoni ta' stħarriġ ġudizzjarju ma timmira li tqis mill-ġdid il-mertu. (*Police v. Gorg Galea*) (FH) (3 February 2016) (695/99) (Mr Justice JR Micallef)

FN 20: Il-Qorti f'kawza ghal stharrig gudizzjarju ma tistax tissostitwixxi ruhha ghall-awtorita` li tkun u, per ezempju, tordna li tinhareg il-licenzja li tkun giet rifjutata mill-awtorita` kompetenti. (*David Axiaq v. Public Transport Authority* (CC) (14 May 2004)

FN 20: Xogħol il-Qorti huwa dak ta' "kassazzjoni" tal-egħmil li minnu jitressaq l-ilment quddiemha: il-Qorti ma tiħux fuqha b'rimedju t-teħid jew it-twettiq tal-egħmil amministrattiv, liema egħmil huwa setgħa li l-liġi tagħti biss lill-awtorita' pubblika li tkun. *Antoinette Greta Grima v. Minister for Education* (FH) (2 January 2015) (1097/14) (Mr Justice JR Micallef).

FN 20: Mhux kompitu ta' din il-Qorti tissostitwixxi l-fehma taghha ghal dik tal-Bord u d-decizjoni tal-Bord ghandha tigi kkonfermata anke jekk il-Qorti jkollha fehma differenti, diment li d-decizjoni tal-Bord hija wahda li setghet ragjonevolment tittiehed fic-cirkostanzi. (*Adrian Deguara v. Superintendent for Pubic Health*) (CA) (27 February 2015 (350/14)

FN 20: L-azzjoni tal-attrici hija wahda msejsa fuq **"the dislike of the manner in which the discretion itself was exercised..."** li m'hijiex "**a valid objection to the proceedings..."** (*Guseppa Portelli v. Director Joint Office et) (*CMSJ) (3 October 2017) (127/07) (Magte J Vella Cuschieri)

FN 21: Illi meta wieħed jitkellem dwar diskrezzjoni, wieħed tabilfors ikun qiegħed jara sitwazzjoni fejn trid issir għażla bejn iżjed minn linja waħda ta' azzjoni. Jekk m'hemmx din għażla ta' iżjed minn triq waħda, allura wieħed ma jitkellimx dwar diskrezzjoni imma dwar dmir. F'dan il-kuntest, il-Qorti tħoss li għandha tiċċita din is-silta li ġejja minn xogħol ewlieni f'dan il-qasam u li, fil-fehma tagħha, tfisser b'mod ċar il-perm kollu tal-istħarriġ li hija mitluba tagħmel f'din il-kawża. (*Lawrence Borg nomine v. Governor Central Bank* (CA) (9 March 2007) (2959/96)

FN 22: F'dan l-stadju ma tistax tissaporti aktar trasgessjoni tad-drittijiet tac-cittadin u agir ta' l-intimat li jibqa' jaghmel li jrid, u wara l-ksur arbitrarju ta' tant ligijiet jibqa' jisfida apertament il-ligijiet u l-ordnijiet tal-Qorti. (*Reginald Fava et ne v. Malta Medicines Authority et* (FH) (10 July 2012) (594/07) (Mr Justice C. Farrugia Sacco)

FN 22: Awtorita' li hija mogħnija b'diskrezzjoni tista' tiġi ordnata teżerċitaha f'każ li tkun naqset li tagħmel dan, imma ma tistax tiġi dettata x'għandha tiddeċiedi jew litwettaqha b'xi mod partikolari. Biex jiġi assikurat li din id-diskrezzjoni." (*Halida Kuduzovic v. Prof Juanito Camilleri ne et* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef)

FN 23: Sakemm dan l-eżercizzju jibqa' wieħed "ta' kassazzjoni", il-Qorti ma tindaħalx dwar jekk id-deċiżjoni jew l-għemil imwettaq ikunx wieħed sostantivament korrett, sakemm ikun formalment raġonevoli u jaqa' fil-limiti tas-setgħat mogħtija lil dik l-awtorita' li tkun wettqet l-istess għemil." *Aaron Haroun v.Prime Minister e*t (8 June 2017) (772/00) (Mr Justice JR Micallef)

FN 37: Anke jekk hasbu li kellhom il-poter jagixxu hekk, din il-Qorti tista` tintervjeni meta dakn l-esercizzju jkun zbaljat, ghax kif tajjeb osservaw l-awturi Wade & Forsyth, fil-ktieb "Administrative Law" (Oxford Press, 7 Edit, pag. 304): "The break-through made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity". (*Grezzju Ellul v. Joseph Spiter*i (FH) (19 October 2006) (142/02) (Mr Justice T. Mallia)

Chapter II
The Development of Judicial Review of Administrrive Action in Malta

PG 68: Safejn il-principju anterjorment accettati u applikati mill-Qrati taghna fuq il-bazi tad-Dritt Pubbliku Ingliz ma gewx spustati mill-Kostituzzjoni u huma kompatibbli maghha jew ma' xi ligi ohra ta' Malta, ma ghandhomx bla raguni jigu mwarrba. (A. Callus et v. A. Paris ne (CA) (28 February 1969)

PG 68: Id-dritt Pubbliku Ingliz jista' jigi invokat fejn il-ligi taghna ma tiddisponix. (Mintoff v Borg Olivier ne (CC)(5 November 1970)

PG 68: Id-dritt pubbliku amministrattiv ta' Malta huwa ormai sostanzjalment adottat mil-ligi Ingliza, ga inkorporata fil-gursiprudenza u fit-taghlim tal-avukati taghna, u b'ebda mod abrogat jew modifikat wara il-wasla tal-Indipendenza nazzjonali, anzi x' aktarx imsahhah mid-disposizzjonijiet tal-Kostituzzjoni li affidaw it-tutela ta' certi drittijiet u tal-validita' kostituzzjonali tal-ligijiet lil dawn il-qrati (Lowell v. Caruana ne (FH) (14 August 1972) (Mr Justice M. Caruan Curran)

FN 15: "L-applikazzjoni ghamja ta`ligi barranija anke meta cara u tajba fil-pajjiz taghha, bilfors tohloq diffikoltaijiet meta tigi applikata band`ohra. Dan l-ahhar inqalghu kwestjonijiet fil-qrati Maltin li donnhom geghlu lill-imhallfin li fejn hemm il-vojt jimlewh huma: haga li llum lanqas fl-istess Ingilterra fejn il-*common law* inholqot mill-imhallfin ma hi aktar lecita li ssir. Il-Gvern huwa elett mill-poplu u responsabbli lejh, u ghalhekk ghandu jigi gudikat l-ewwelnett u fuq kollox mill-poplu u mhux mill-qrati. Ghandha tinqata` l-uzanza li kull haga li jaghmel il-Gvern u ma tintghogobx, anke minn cittadin wiehed tigi mdahhla fin-nofs il-Qorti." (Press Release DOI 5 February 1981)

FN 16: Ugo Mifsud Bonnici: “Issa, jekk int tgħidli ma kienx hemm ħafna minnhom dawn il-każijiet”, jien ngħidlek: “Veru li ma kienx hemm ħafna minn dawn il-każijiet imma dan mhux argument, lanqas jekk ma kienx hemm”. Għaliex għandek tilleġisla biex ma jkunx hemm? Għaliex għandna nagħmlu l-abort legali ta’ dawn id-drittijiet (Debates HOR: Fourth Legislature Sitting No 469 (18 February 1981 p.712)

FN 20 : Il-kuncett tar-ragjonevolezza ghandu jikkwalifika l-esercizzju ta’ kwalsiasi diskrezzjoni esekuttiva, b’ mod li anki jekk ma jissemmiex espressament fil-ligi li tistabilixxi tali diskrezzjoni, xorta wahda il-legislatur f cirkostanzi normali, ikun intenda li d-diskrezzjoni tigi esercitata “ragjonevolment.” (*Tonio Vella v. Commissioner of Police et* (FH) (5 December 1986) (Mr Justice J.D.Camilleri)

FN 21: Ligi miktuba tfisser ligi miktuba ohra u mhux xi interpretazzjoni li tista’ tinghata lill-istess provvediment ta’ ligi” *(Lawrence Micallef v. Housing Secretary (*FH) (13 November 1985) (Mr Justice W. Gulia)

PG 72: Il-Qorti ghandha gurisdizzjoni tiddeciedi dwar il-validita` ta` att impunjat imma ma ghandiex il-gurisdizzjoni li taghti hi stess id-decizjoni fl-mertu tal-kwistjoni li jispetta lill-Esekuttiv… Din id-distinzjoni imbaghad taghmel eku, u sa certu punt takkolji..l-ahhar bran ta` l-ewwel eccezzjoni tal-konvenuti...fejn huma stess iddistingwew bejn l-indagni tal-validita` legali ta` l-att tal-Esekuttiv u l-ordnijiet tal-Qorti lill-istess poter Ezekuttiv ta` l-Istat. (*Anthony Ellul Sullivan v. Lino Vassallo noe* (CA) 26 June 1987) (Kollezz. Vol. LXXI.I. 356).

FN 25 “Jien kont rajt il-mudell Franciz illi huwa bazat fuq erba principji qosra u skjetti: incompetence, vice de forme, detournement de pouvoir u violation de la loi. Kont ukoll rajt l-kazijiet fejn taht id-dritt Franciz (illi huwa ukoll il-bazi tad-dritt amministrattiv tal-UE) il-Gvern jista’ jkun responsabbli ghad-danni minhabba att *ultra vires* u bbazajt fuqu.” (Interview on 9 December 2016 with Dr Peter Grech, the current Attorney General)

FN 26: Ministru Joseph Fenech: “Zidna l-ġurisdizzjonijiet tal-qrati li jistgħu jissindakaw u tajnihom il-poteri li jissindakaw l-Atti tal-Gvern. Din qabel ma kenitx teżisti permezz tal-liġi, mam peress li konna nadottaw is-sistema Ingliża, l-Atti Amministrattivi tal-Gvern kienu soġġetti għall-*Judicial Review* għax ma kellniex liġi ad hoc. Issa adottajna parti mis-sistema Awstraljana dwar il-*Judicial Review of Administrative Action* tal-Gvern u tad-Dipartimenti tal-Gvern u tajna wkoll lill-qrati ġurisdizzjoni kontemporanja ma’ qrati oħra barra minn Malta.” (Debates HOR Seventh Parliament Sitting 378) (11 January 1995) p. 786)

FN 27: “L-artikolu Awstraljan kien sejjer iwassal ghal wisq opportunita biex kull decizjoni amministrattiva tigi annullata u di piu’ l-artikolu propost kien jinkludi klawzola li kienet taghti dritt illi wiehed ifittex lill-Gvern ghad-danni minhabba atti ultra vires apparti kull azzjoni ghad-danni ohra spettanti lilu.” (Interview on 9 December 2016 with Dr Peter Grech, the current Attorney General)

PG 80: Illi fl-assenza ta`tribunali specjali bhal *Conseil d` Etat* ta` Franza u ta`xi pajjizi ohra, is-sistema taghna huwa dak Anglo-Amerikan li jghozz il-koncett kostituzzjonali ta` Qrati

ordinarji indipendenti li jassiguraw id-debita osservanza tal-ligi mhux mill-privati imma anki, fil-limiti tal-*powers of judicial review*, ta`l-organi tal-Istat (*Lowell v. Caruana*) (FH) (14 August 1972) (Mr Justice M Caruan Curran)

PG 82: Ghalhekk illum jissussistu zewg proceduri – il-procedura ta' stharrig giudizzjarju ta' azzjoni amministrattiva ai termini ta' l-Artikolu 469A tal-Kap.12 tal-Ligijiet ta' Malta quddiem il-Prim' Awla tal-Qorti Civili u l-procedura ta'revizjoni ta' atti amministrattivi a tenur tal-Kap.490 tal-Ligijiet ta' Malta quddiem dan it-Tribunal – **li huma paralleli ghal xulxin izda ghal kollox distinti minn xulxin**." (*S&R (Handaq) Limited (C-5790) v. Malta Enterprise Corporation* (ART) (24 September 2012) (234/11)

PG 83: Jista' jkun ukoll li kemm din il-Qorti kif adita biex twettaq l-imsemmi stħarriġ u kif ukoll it-Tribunal ta' Reviżjoni Amministrativa jwettqu setgħat li jixxiebhu. Iżda huwa fatt li t-Tribunal imsemmi huwa kompetenti fir-rigward ta' dawk l-awtoritajiet pubbliċi jew dawk il-korpi biss li l-Att kostituttiv tiegħu espressament jagħnih bihom, u ma għandux is-setgħa li jistħarreġ l-għemil ta' awtoritjiet oħrajn li jaqgħu fil-kompetenza waħdanija ta' din il-Qorti. (*Eros Trading Limited v. Comptroller of Customs*) (FH) (22 June 2016) (603/15)

PG 83: Izda huwa fatt li t-Tribunal imsemmi huwa kompetenti fir-rigward ta' dawk l-awtoritajiet pubblici jew dawk il-korpi biss li l-Att kostituttiv tieghu espressament jaghnih bihom fit-Tielet Skeda tieghu [Artikolu 25(2) tal-Kap.490 tal-Ligijiet ta' Malta] u ma ghandux is-setgha li jistharreg l-ghemil ta' awtoritajiet ohrajn li jaqghu fil-kompetenza wahdanija ta' din il-Qorti. (*Raymond Abela v. Malta Transport Authority* (FH) (23 February 2012 (295/11) (Mr Justice JR Micallef)

PG 84: Ma hemmx dubju li il-guriprudenza relattiva ghall-proceduri dwar stharrig ta' ghemil amministrattiv u il-principji hemm stabbiliti, ma ghandhiex tigii njorata anzi ghandha tifforma bazi soda fuq liema ghandu jopera u jkompli jevolvi dan it-Tribunal(Melita plc v. Malta Communications Authority. (ART) (13 June 2013) (202/12) (Magte G. Vella) .

FN 45: Dan it-Tribunal ma ghandux is-setgha fil-ligi li jiddikjara l-*Port Notice* in kwistjoni irregolari u konsegwentement jordna t-thassir, ir-revoka jew ir-riforma taghha ghar-ragunijiet imressqa mir-rikorrent nomine. Lanqas ma jista' dan it-Tribunal jiddikjara xi awtorita' pubblika responsabbli ghad-danni sofferti stante li dan imur lil hinn mill-poteri attribwiti lilu. (*Mark Cassar ne v. Malta Transport Authority)* (ART) (24 April 2015) (76/14) (Magte C. Galea)

Chapter III
The area of Application of Judicial Review of Administrative Action

PG 91: Il-Gvern, anke meta jagixxi bil-poteri tieghu bhala organu amministrattiv fl-interess tal-pubbliku, irid isegwi l-principji ta' gustizzja naturali, u f'dan il-kuntest irid jinforma lillproprjetarji ta' l-art bil-progett kontemplat, jaghti lill-proprjetarji l-opportunita' li jsemghu lehinhom u jaghtu lveduti taghhom, u wara jikkunsidra c-cirkostanzi kollha talkaz, inkluz l-interess pubbliku, u jiddeciedi. (Giovanni Fenech v. Commissioner of Land)(FH)(2 April 2004)(2341/00)(Mr Justice T. Mallia)

FN 6: Ladarba l-art kienet giet skedata bhala triq, il-Kummissarju ma kellu l-ebda xelta hlief li jesproprja l-art kif fil-fatt ghamel, sabiex tigi iffurmata dik it-triq… Ghalhekk, fil-fehma kunsidrata ta' din il-Qorti, id-disposizzjoni ta' l-Artikolu 469A(b) (ii) tal-Kap. 12, li jikkoncernaw l-applikazzjoni tal-principji ta' gustizzja naturali, ma kienitx applikabbli ghall-fattispecje tal-kaz odjern. (*Giovanni Fenech v. Commissioner of Land*) (CA) (30 November 2007) (2341/00)

FN 7: Ghemil amministrattiv jista' jkun biss sindakabbli mill-Qrati jekk dan ikun jirrigwarda att decizjonali ta' awtorita' pubblika li jinvolvi il-hrug jew rifjut f 'dal-kaz tal-licenzja mitluba. (*Joseph Galea v.et, Commander Task Force et)* (CA) (5 October 1998) (Kollezz. Vol. LXXXII.II. 541)

FN 8: Meta c-cirkolarijiet ma humiex atti normattivi jew decizjonali, u ma humiex riprodotti fil-forma ta' provvediment jew ta' ordni amministrattiva, dawn ma jistghux jigu meqjusa atti idoneji li jincidu fuq il-posizzjoni guridika ta' l-interessati." (*Global Capital Fund Advisors Ltd v. Malta Financial Services Authority et* (FH) (15 April 2015) (409/07) (Mme Justice A. Felice)

FN 9: Il-ftuh tal-investigazzjoni ma jistax jikkostitwixxi ebda ghemil amministrativ fis-sens li tehid ta' decizjoni li ghalqet il-kwistjoni. (*John Grech et v. Commissioner for Tax* (FH) (2 March 2016) (1126/15) (Mr Justice M. Chetcuti)

FN 9: Mhux kull kitba li tohrog minn hdan xi awtorita' pubblika tikkostitwixxi "decizjoni": biex ikollha dawk il-kwalitajiet, dik il-kitba trid tkun ghalqet kwestjoni jew ilment billi tghid li dik hija l-fehma ahharija tal-awtorita' pubblika li tkun ghall-ilment jew ghat-talba li jkunu sarulha (*Christine Borda v. Director Inland Revenue) (*FH) (26 November 2015) (21/14) (Mr Justice JR Micallef)

FN 10: Din il-Qorti tirrespingi bhala nfondat fid-dritt l-argument tal-atturi li l-Kap 125 huwa *lex specialis* fir-rigward tal-Art 469A tal-Kap 12. Ladarba dak li ghamel id-Direttur fil-kaz tal-lum ghandu jitqies bhala eghmil amministrattiv allura l-Kap 125 ma hija xejn *lex specialis* izda l-mertu jingabar kollu kemm hu fl-Art 469A." (*Carmel Massa et v. Director Social Accomodation* (FH) (17 September 2013) (799/05) (Mr Justice J. Zammit McKeon)

FN 20: Id-deċiżjoni li ħadet Transport Malta biex ittemm il-konċessjoni mogħtija lil Supreme Travel Ltd (STL) kienet għal kollox linja ta' aġir imnissel mill-kuntratt li kienu daħlu għalih iż-żewġ partijiet f'sura privata, u b'mod partikolari mill-imġiba allegata lill-kontroparti (jiġifieri STL) meta meqjusa fid-dawl tar-rabtiet li daħlet għalihom taħt l-istess kuntratt. Għall-Qorti, din hija waħda miċ-ċirkostanzi fejn ma jgħoddx ir-rimedju mogħti liċ-ċittadin għall-istħarriġ ġudizzjarju tal-amministrazzjoni pubblika. (*Supreme Travel Ltd v. Malta Transport Authorit*y (FH) (18 October 2011) (Mr Justice JR Micallef)

FN 22: Att amministrattiv normalment jolqot persuna partikolari. Mhux l-istess jinghad fil-kaz ta' pjan lokali. B'ligi l-Awtorita' intimata ghandha obbligu li tapplika l-pjanijiet lokali fl-ipprocessar ta' applikazzjoni (Artikolu 69 tal-Kap. 504). Din m'hijiex kwistjoni ta' diskrezzjoni. Li jigi kwalifikat bhala ghemil amministrattiv jkun ifisser li l-qorti tkun tista' tissindika l-pjan lokali dwar jekk huwiex ragonevoli. Fil-fehma tal-qorti din ma kenitx l-intenzjoni tal-legislatur meta fl-Att relattiv ipprovda li l-Awtorita' ghandha tapplika l-

pjanijiet meta tigi biex tiddeciedi dwar applikazzjoni ghall-permess ta' zvilupp. (*Giulia Briffa v. Commissioner of Land et* (FH) (21 June 2013) (Mr Justice A. Ellul)

FN 22: Ir-revizjoni ta' Pjan ta' Struttura giet approvata u deciza mill-Kamra tad-Deputati u ghalhekk dan sar b'att legislattiv u mhux amministrattiv. (*Gozowide Properties Ltd v. Prime Minister)* (FH) (31 May 2011) (38/07) (Mr Justice R. Pace)

FN 23: Hu car li l-attur qed iressaq l-ilment tieghu a bazi ta' dan l-artikolu ta' din il-ligi specjali, u ladarba l-mod ta' kontestazzjoni hu regolat b'ligi *ad hoc,* l-Artikolu 469A tal-Kap. 12 ma japplikax. (*Mario Camilleri v. Commander Armed Forces* (CA) (3 October 2008) (270/05)

FN 26: Irid tassew jinghad li, illum il-gurnata, l-ideja li s-servizz pubbliku huwa rabta "non legali" -fis-sens li s-setgha tal-Istat bhala successur tal-Kuruna li jaghti ingagg u li jtemm l-ingagg ma tistax tigi mistharrga minn hadd jew m'hijiex ghajn ta' jeddijiet civili – ixxellfet jekk mhux sahansitra twarrbet ghal kollox." (*Aaron Haroun v. Prime Minister et)* (FH) (15 March 2011) (772/00) (Mr Justice JR Micallef)

PG 98: It-teorija tad-Dritt Amministrattiv Ingliz tan-'non legal nature of the civil service' illum giet konsiderevolment mxellfa u m'ghadhiex dak il-principju assolut li qabel kienet. M'ghadux daqstant accettat illi l-impjieg ma' lamministrazzjoni pubblika kien kwazi prekarju ghax is-Sovran kellu l-jedd assolut "to hire and fire" u li allura l-impjegati kollha kienu meqjusa li qeghdin fl-impjieg "at Her Majesty's Service and pleasure", anke jekk "Her Majesty" kienet ukoll fit-teorija konsidrata bhala l-kwintessenza tal-gustizzja, oggettivita' u ragonevolezza anke fir-rigward ta' dawk is-sudditi taghha li kienu mpjegati taghha u jservuha. F'dan ir-rigward il-Kostituzzjoni nfisha gustament u sewwa kkrejat il-makkinarju biex jigu regolati r-relazzjonijiet bejn l-Ezekuttiv u s-servizz pubbliku fil-Kapitolu X taghha, b'mod partikolari fit-twaqqif tal-Kummissjoni dwar is-Servizz Pubbliku";(*Helen Borg et v. Prime Minister et* (CA) (9 February 2001) (781/96 GV)

FN 32: Illi f'dan ir-rigward, il-Qorti temmen li t-tifsira mogħtija lill-kliem "egħmil amministrattiv" fl-artikolu 469A(2) tal-Kap 12 ma kenitx maħsuba mil-leġislatur biex tgħodd fiha wkoll deċiżjonijiet ta' bord jew tribunal statutorju (*Xermus Trading Limited v. Director General (Value Added Tax)* (FH) (22 November 2012) (Mr Justice JR Micallef) (1168/11)

FN 33: Illi dwar il-principji ta' stharrig amministrattiv (judicial review) u l-principji ta' gustizzja naturali huwa pacifiku illi l-ligi amministrattiva Maltija hija bbazata fuq dik Ingliza **(ara "Cassar Desain v. Forbes noe"** A.C. – 7 ta' Jannar 1935 u **"Lowell et v. Caruana et"** P.A. – 14 ta' Awwissu 1972). Il-Qrati Maltin minn dejjem affermaw illi fejn kellna tirrizulta *lacuna* fid-Dritt Pubbliku (u d-Dritt Amministrattiv huwa fergha tad-Dritt Pubbliku) japplikaw il-principji tal-Ligi Ingliza. (*Smash Communications Ltd v. Broadcasting Authority* (FH) (7 February 2012) (481/04)

FN 37:: Illi fil-kawza **"***Dr Anthony Farrugia v. Electoral Commission***" (**A. C. 18 ta' Ottubru 1996) gie ritenut li l-Kummissjoni Elettorali hija awtorita' kwasi gudizzjarja u b'hekk mhix soggetta ghar-regoli ta' stharrig dwar eghmil amministrattiv ai termini tal-artikolu 469A. Izda minkejja dan xorta wahda d-decizjonijiet tal-Kummissjoni jistghu jkun mistharga taht il-poteri konferiti lill-qrati ordinarji biex jistharrgu decizjonijiet minn kull awtorita' gudizzjarja

jew kwasi gudizzjarja. (*Smash Communications Ltd v. Broadcasting Authority*) (FH) (7 February 2012) (Mr Justice R. Pace)

FN 37: Ghandu jinghad li llum huwa stabbilit, mill-gurisprudenza taghna, li l-Qorti Civili tista' tissindika l-operat ta kwalsijasi tribunal amministrattiv, l-ewwelnett biex tassigura li l-principji tal-gustizzja naturali jkunu osservati u, fit-tieni lok, biex tassigura li ma jkunx hemm xi enuncjazzjoni hazina jew inkompleta ta li potesi tal-ligi u dana minghajr ma tipprova b'xi mod jissostitwixx i d-diskrezzjoni taghha ghal dik tal-Bord u dan billi, la darba l-ligi afdat il-funzjoni kwazi-gudizzjarja f'idejn il-Bord, huwa l-Bord u hadd iehor ghalih li jrid jiddeciedi. (Anthony Cassar v. Accountant General) (FH) (29 May 1998)

PG 103: F'dan il-kaz mhux qed issir talba ghal revizjoni tad-decizjoni imma ghall-impunjattiva taghha in bazi ghall-allegazzjonijiet kontenuti fil-korp tac-citazzjoni.Huma dawn l-istess allegazzjonijiet kif formulati – vjolazzjoni tal-ligi, estraripar tal-gurisdizzjoni u ksur tal-jedd fundamentali ta' gustizzja naturali – li jaghtu l-poter residwali lill-Qorti ordinarja li tissindika l-operat tal-Kummissjoni u li allura jivvestu lil din il-Qorti bil-gurisdizzjoni in materja;(Simonds Farsons Cisk Ltd v. Acting Director Office Fair Competition) (FH) (27 October 2004)

FN 38: Kull att amministrattiv ta' awtorita`pubblika fis-sens l-aktar wiesgha tal-kelma, li jaffettwaw id-drittijiet ta' persuni terzi, u kull decizjoni ta' kull Qorti,Bord jew Tribunal, li taffettwa d-drittijiet ta' persuni terzi,ta' natura gudizzjarja jew kwazi-gudizzjarja huma effettivament sindakabbli mill-Qrati Ordinarji ta' pajjizna fid-dawl tal-principji tal-gustizzja Naturali u biex il-Qrati jassiguraw li ma jkunx hemm xi enuncjazzjoni hazina jew inkompleta ta` l-ipotesi tal-ligi (*Smash Communications Ltd v. Broadcasting Authority)* (FH) (7 February 2012) (Mr Justice R. Pace)

FN 39: Bla ma ttawwal wisq fuq dan il-punt, jinghad biss li l-fatt li l-ghamil impunjat jikkostitwixxi "gudizzju" ma jirrendix dak l-ghamil "mhux amministrattiv": ghall-kuntrarju, dan tinkludih il-ligi nnifisha meta, fost l-atti tissemma l-kelma "decizjoni". Minbarra dan, diga' huwa stabilit li l-artikolu 469A jaghti lill-Qrati ta' kompetenza civili s-setgha li, bla ma jikkostitwixxu appell, jistharrgu r-regolarita' ta' decizjonijiet "kwazi-gudizzjarji" fil-limiti hemm imfissra. (*Chairman PBS Ltd v. Broadcasting Authority*) (FH) (5 September 2002) (711/02) (Mr Justice JR Micallef)

FN 41: Il-qrati ordinarji ghandhom is-setgha li jistharrgu l-legalita` tad-decizjonijiet tat-Tribunal ghall-Investigazzjoni ta' Ingustizzji in forza ta' l-Artikolu32(2) tal-Kap. 12. Il-premessi u t-talbiet fic-citazzjoni odjerna ma humiex ibbazati fuq stharrig gudizzjarju tad-decizjoni tat-Tribunal in forza tal-Artikolu 469A tal-Kap 12, izda fuq allegazzjonijiet generici ta' illegalita` tad-decizjoni tat-Tribunal, u ghalhekk ma hemm xejn x'josta lill-qrati ordinarji milli jiehdu konjizzjoni ta' ilmenti ta' l-appellant (*Prime Minister v. Victor Vella Muskat* (CA) (25 September 2006) (81/03)

FN 41 It-tibdil fil-lokuzzjoni tal-Artikolu 32(2) b'rizultat ta' l-emendi introdotti bl-Artikolu 16 tal-Att XXXI tal-2002 fil-fehma tal-Qorti ma jbiddlu xejn fis-sustanza minn dan il-principju. *(Director General Courts of Justice v. Pinu Axiaq* (CA)(3 March 2006)

PG 104: Id-decizjoni tat-Tribunal ghall-Investigazzjoni ta' Ingustizzji ma tikkwalifikax bhala "eghmil amministrattiv". Lanqas hi konkordi mad-definizzjoni moghtija mill-ligi – art 469A.

… Certament li d-decizjoni tat-Tribunal la hi ordni, la licenza, la permess, la ghoti ta' **warrant**, lanqas decizjoni jew ir-rifjut ghal talba ta' xi persuna li jsir minn awtorità pubblika. (*Prime Minister v. Joseph Bonello*) (FH) (27 November 2006) (807/05) (Mr Justice C. Farrugia Sacco)

PG 106: "Ghalkemm huwa minnu li d-definizzjoni ta' "eghmil amministrattiv" teskludi "xi haga li ssir bl-ghan ta' organizzazzjoni interna jew amministrazzjoni interna fl-istess awtorita", din l-eskluzjoni ma tirreferix ghal decizjoni bhal dik li qed jilmenta minnha l-appellant – cioe` jekk hu ghandux jinghata pensjoni skond il-grad li bih huwa spicca mac-Civil jew il-grad ekwivalenti ghax-xoghol li effettivament kien jaghmel – izda tirreferi biss, kif jindika l-uzu tal-kelma "interna", ghal affarijiet organizzattivi u amministrattivi interni ta' l-awtorita`, bhal per ez. tqassim ta' xoghol, orarji ta' xoghol, proceduri ta' kif isir ix-xoghol fi hdan dik l-awtorita`." (*Edward Paul Tanti v. Administrative Secretary in the Office of the Prime Minister* (CA) (7 October 2005) (1773/01)

PG 106: Huwa car li lanqas fi Franza, it-tkeccija ta' ufficjal pubbliku m'hix ikkunsidrata bhala mizura intiza ghal organizzazzjoni jew amministrazzjoni interna, u l-legalita`taghha tista' tigi mistharrga mill-*Conseil d'Etat*. Fil-fehma ta' din il-Qorti dan ma jistax ikun mod iehor, ghaliex it-terminazzjoni forzata ta' l-impieg ta' ufficjal pubbliku mis-servizz pubbliku – irrispettivament mill-forma li tali terminazzjoni forzata tista' tiehu – hija kwistjoni li tolqot lil dik il-persuna, u ma tikkoncernax l-amministrazzjoni interna nnifisha. Inoltre l-aspetti finanzjarji ta' terminazzjoni forzata ta' impieg fis-servizz pubbliku huma ta' certa importanza ghall-ufficjal pubbliku koncernat, u tali aspetti certament ma jisthoqqilhomx li jigi ekwiparati ma' dawk ta' mizuri merament ta' organizzazzjoni jew amministrazzjoni interna, u dan apparti li tali mizura, kieku jkunu insidakabbli, jistghu jaghtu lok ghal abbuzi serji u ingustizzji kbar.(*David Gatt v. Prime Minister et*) (CA) (6 September 2010) (1548/01)

PG 107: Id-diskrezzjoni uzata mill-konvenut fir-rigward ta' l-attur mhux sindakabbli minn din il-Qorti billi fl-ewwel lok ma tinkwadrax fid-definizzjoni ta' x'jikkostitwixxi att amministrattiv li huwa sindakabbli a termini ta' l-artikolu 469A. Fit-tieni lok id-dritt tal-konvenut li jaghti jew ma jaghtix promozzjoni f'cirkostanzi partikolari jammonta ghall-att maghmul bil-ghan ta' organizzazzjoni jew amministrazzjoni nterna u l-ezercizzju ta' dan id-dritt ghad-decizjoni tieghu, ghandu jiehu in konsiderazzjoni l-fatturi relevanti fl-interess tas-servizz pubbliku u tan-nazzjon in generali. (*Edward Falzon v. Commissioner of Police* (FH) (22 October 2002) (2459/99) (Mr Justice A. Magri)

FN 51: Ikun pass għaqli li tqis mhux biss l-għamil kif ikun jidher mad-daqqa t'għajn, imma wkoll x'inhu l-ilment dwar tali għamil. Dan jingħad għaliex jekk l-ilment ikun wieħed dwar użu irragonevoli ta' xi diskrezzjoni, ksur ta' xi wieħed mill-principji tal-ħaqq naturali, jew saħansitra agir abbużiv jew lil hinn mis-setgħat mogħtija mil-ligi (jigifieri għamil *ultra vires*), jaqa'fuq il-Qorti d-dmir li tistħarreg dak il-każ għaliex il-kwestjoni ma tibqax waħda ta' "semplici" organiżżazzjoni jew tmexxija interna, imma waħda li tolqot fil-qalba r-raguni tal-azzjoni dwar stħarrig gudizzjarju tal-att amministrativ li jkun. (*Ivan Consiglio v. Prime Minister et* (FH) (18 February 2010) (446/08) (Mr Justice JR Micallef**)**

FN 53: Fil-fehma tal-Qorti il-kawza odjerna taqa' taht id-definizzjoni tal-artilu 469A (1) (iii) u forsi anke is-subinciz (iv). Dan ghaliex l-atturi qed isostnu li l-konvenut ma' kellu ebda dritt jiehu l-pass li ha u dan kwindi jista' jkun jfisser jew abbuz ta' setgha fuq konsiderazzjonijiet

irrilevanti jew li l-att amministrattiv in kwistjoni b' xi mod imur kontra l-Ligi (*Bernardette Agius et v. Prime Minister et*) (FH) (9 January 2014) (526/02) (Mr Justice J Azzopardi)

FN 60: llli, ghar-rigward tat-tieni sottomissjoni tal-konvenuti fis-sens li,fil-kaz presenti, d-decizjoni li ttiehdet fil-konfront tal-attur li l-ingagg tieghu ma jergax jiggedded kienet decizjoni mahsuba bhala misura ta' organizzazzjoni u tmexxija interna fi hdan l-istess awtorita', din il-Qorti thoss li biex jigi mistharreg jekk dan hux minnu jew le, tabilfors li din il-Qorti trid taghmel indagni. (*Aaron Haroun v.Prime Minister et*) (FH) (15 March 2001) (722/00) (Mr Justice JR Micallef)

FN 61: Illi l-Qorti hija tal-fehma li, bid-deciżjoni meħuda li tirtira *t-tag* lill-attur u li tirrifjuta li terga' tqis id-deeiżjoni tagħha meta hekk mitluba minnu (permezz tal-avukat tiegħu) l-Awtorita' mħarrka kienet, fil-fatt, qiegħda twettaq għamil amministrativ kif imfisser mil-ligi. Dan jingħad kemm għaliex "deciżjoni" taqa' taħt it-tifsira ta' "egħmil amministrativ", imma wkoll għaliex dak ir-rifjut ukoll jikkostitwixxi nuqqas li dawn il-Qrati jistgħu jintalbu jistħarrgu; Mhux hekk biss, imma ntwera bil-fatti li l-miżura meħuda kontra l-attur tirriżulta fattwalment diskrezzjonarja għaliex l-Awtorita' ma ħaditx l-istess passi kontra ħaddieħor li kien fl-istess ilma miegħu;" (*Paul Borg v. Public Transport Authority*) (FH) (21 May 2009) (821/08) (Mr Justice JR Micallef)

FN 62: Ma jidhirx li l-hrug tal-applikazzjonijiet kienet wahda "interna" jew miftuha biss ghal min kien diga' ghalliem fl-Universita', jew li kienu eskluzi milli japplikaw persuni li mhumiex diga' membri fuq l-istaff akkademiku ta' l-Universita'. Il-Qorti tifhem illi l-eccezzjoni tal-imharrek nomine kienet tkun misthoqqa kieku ntwera is-sejha ghall-applikazzjonijiet kienet wahda interna biss, jew kieku ntwera li d-decizjoni kienet wahda ta' ri-organizzazzjoni tad-Dipartiment koncernat. Li kieku kien hekk, l-ebda ezami pubbliku jew sejha ghall-applikazzjoni miftuha ghall-barranin imnedija minn xi awtorita' pubblika ma tista' qatt tigi mistharrga mill-Qorti.`. (*Emmanuel Borda v. Prof. Roger Ellul Micallef noe)* (PA) (30 January 2003) (Mr Justice JR Micallef) (1908/01)

FN 67: L-atti magħmula bil-għan ta' organiżżazzjoni jew tmexxija interna fi ħdan xi awtorita' pubblika jirreferu u jillimitaw irwieħhom għal dawk il-miżuri meħuda biex l-istess awtorita' iżżomm ċerta ordni fit-tmexxija tagħha ta' kuljum. B'dan li fejn tali miżura tilħaq ċerta livell fejn tolqot drittijiet ta' persuni, imbagħad dik il-miżura tidħol fit-territorju ta' għamil amministrativ li dwaru l-Qrati jistgħu jinqdew bis-setgħa tagħhom li jistħarrġu *(Rita Vella v. Chief Government Medical Officer et* (FH) (31 October 2012) 140/12) (Mr Justice JR Micallef)

FN 72: Din, pero', hi biss decizjoni li jitkomplew proceduri kriminali kontra l-akkuzat, izda bl-ebda mod ma tinfluwixxi fuq il-htija *o meno* tal-akkuzat. Id-decizjoni hi wahda amministrattiva jew quasi-gudizzjarja, u ghal dik id-decizjoni ma japplikax l-artikolu 6 tal-Konvenzjoni Ewropea u lanqas l-artikolu 39 tal-Kostituzzjoni ta' Malta... id-decizjoni tibqa' wahda amministrattiva li bl-ebda mod ma tista'titqies li tista' tkun ta' pregudizzju ghad-dritt tal-akkuzat ghas-smiegh xieraq minn tribunal indipendenti. Id-decizjoni tal-Avukat Generali tista', f'kazijiet kongruwi, tkun soggetta ghall-"review" fit-termini tal-artikolu 469A tal-Kap. 12 tal-Ligijiet ta' Malta,(*Police v. Joseph Lebrun*) (FH) (27 June 2006) (16/06) (Mr Justice Tonio Mallia)

FN 73 : Jekk kellu japplika dan il-provvediment f'kazijiet fejn il-pulizija tiddeciedi li tressaq persuna fil-qorti, tinholoq sitwazzjoni fejn qorti civili tistharreg id-decizjoni li jittiehdu proceduri kriminali li potenzjalment ifisser iktar dewmien fil-process kriminali. *(Mario Saliba v. Comptroller of Customs* (FH) (25 April 2014) (487/11) (Mr Justice A. Ellul)

FN 75: Il-Qrati ordinarji ghandhom gurisdizzjoni jindagaw jekk trasferiment bhal dak li nghata l-appellat kienx verament mizura ta' organizzazzjoni jew amministrazzjoni interna, u jekk jirrizulta li fil-fatt kien jikkostitwixxi tali mizura, jieqfu hemm, stante li huma prekluzi li jissindakaw il-mertu tieghu. Jekk, pero`, min-naha l-ohra jirrizulta li fil-fatt it-*transfer* ma kienx jikkostitwixxi tali mizura, imma kien biss kopertura, jezercitaw il-funzjonijiet taghhom ai termini ta' l-Artikolu 469A tal-Kapitolu 12 . (*Denis Tanti v. Prime Minister et*) (CA) (16 November 2004) (1164/95)

FN 77: Jekk l-ilment ikun wieħed dwar użu irraġonevoli ta' xi diskrezzjoni, ksur ta' xi wieħed mill-prinċipji tal-ħaqq naturali, jew saħansitra aġir abbużiv jew lil hinn mis-setgħat mogħtija mil-liġi (jiġifieri għemil *ultra vires*), jaqa' fuq il-Qorti d-dmir li tistħarreġ dak il-każ għaliex il-kwestjoni ma tibqax waħda ta' "sempliċi" organiżżazzjoni jew tmexxija interna, imma waħda li tolqot fil-qalba r-raġuni tal-azzjoni dwar stħarriġ ġudizzjarju tal-att amministrativ li jkun." (*Carmen Grech v. Prime Minister et)* (FH) (6 July 2017) (1040/16) (Mr Justice JR Micallef)

FN 77: Ebda illegalita'jew abbuz ta' poter ma tista' qatt tiqies bhala azzjoni ta'amministrazzjoni nterna (*Dr Anthony Degaetano v. Planning Authority*) (FH) (30 March 2005) (1356/01) (Mr Justice G. Valenzia)

FN 78: L-att deċiżjonali jista' jkun wieħed fejn tittieħed deċiżjoni li tilqa' talba, daqskemm jista' jkun wieħed fejn it-talba ma tintlaqax. Ir-rifjut ta' talba jitqies li jkun seħħ mhux biss meta t-talba tkun miċħuda espressament imma wkoll fejn tibqa' ma titteħidx deċiżjoni fi żmien xahrejn (jew xi żmien ieħor differenti li xi liġi partikolari tista' tistabilixxi) mill-wasla għand l-awtorita' pubblika li tkun ta' talba bil-miktub minn persuna li tkun trid deċiżjoni għal daqshekk.`(*Garden of Eden Garage Ltd v. Malta Transport Authority)* (CA) (28 June 2012) (474/09)

FN 79: Mhux kull kitba li toħroġ minn ħdan xi awtorita' pubblika tikkostitwixxi "deċiżjoni": biex ikollha dawk il-kwalitajiet, dik il-kitba trid tkun għalqet kwestjoni ilment billi tgħid li dik hija l-fehma aħħarija tal-awtorita' pubblika li tkun għall-ilment jew għat-talba li jkunu sarulha. (*Christine Borda v. Direttur Taxxi Interni*) (FH) (26 November 2015) (21/14) (Mr Justice JR Micallef)

FN 79: Jekk kemm-il darba persuna tkun ingħatat indikazzjonijiet biżżejjed dwar x'sejra tkun il-pożizzjoni ta' awtorita' pubblika dwar xi għamil amministrativ, mhux meħtieġ li tali pożizzjoni tkun komunikata formalment lill-parti konċernata qabel ma din tista' tressaq l-azzjoni speċjali għal stħarriġ ġudizzjarju fuq is-saħħa ta' dawk l-indikazzjonijiet. *(Dr T. Degaetano v. Planning Authority et)* (FH) (26 February 2004) (2219/00) (Mr Justice JR Micallef)

FN 80: L-istħarriġ li tista' tintalab tagħmel din il-Qorti jgħodd għal kull deċiżjoni amministrattiva li b'xi mod tolqot liċ-ċittadin, kemm jekk tkun fis-sura ta' deċiżjoni li torbot, u kif ukoll jekk tkun fis-sura ta' rapport li fuqu l-awtorita' pubblika ssejjes id-deċiżjoni

aħħarija tagħha, imqar jekk tali rapport ikun jikkostitwixxi l-motivazzjonijiet li fuqhom l-istess awtorita' pubblika mbagħad issejjes id-deċiżjonijiet tagħha. Il-liġi ma tagħtix tifsira ta' x'tista' tkun 'deċiżjoni' għall-finijiet ta' x'jaqa' taħt ilkliem 'egħmil amministrattiv'. Jidher li, sakemm xi deċiżjoni ma tkunx biss komunikazzjoni ta' tagħrif, il-Qrati jistgħu jintalbu li jistħarrġuha fil-limiti ta'stħarriġ tas-siwi tagħha bla ma jindaħlu fil-mertu tagħha. (Elton Taliana v. Ministru Intern (FH) (7 November 2017)

FN 81: Kemm taħt is-sistema ta' stħarriġ ġudizzjarju in ġenerali u kif ukoll taħt l-azzjoni ta' stħarriġ ġudizzjarju maħsuba fl-artikolu 469A tal-Kapitolu 12 tal-Liġijiet ta' Malta,l-istħarriġ li tista' tintalab tagħmel din il-Qorti jgħodd għal kull deċiżjoni amministrattiva li b'xi mod tolqot liċ-ċittadin, kemm jekk tkun fis-sura ta' deċiżjoni li torbot, u kif ukoll jekk tkun fis-sura ta' rapport li fuqu l-awtorita'pubblika ssejjes id-deċiżjoni aħħarija tagħha. (*Elton Taliana v. Minister for Home Affairs et)* (FH) (16 March 2015) (177/14)

FN 82: It-talba tal-Kummissarju ghall-informazzjoni hi maghmula biex tghinu jasal ghal konkluzzjoni qua ahjar decizjoni jekk ghandux ikun hemm revizjoni tar-returns tat-taxxa tal-konvenuti. Din it-talba ma tippregudika bl-ebda mod lil konvenuti ghaliex huma fil-liberta li ma jaghtux koperazzjoni lil Kummissarju. (*John Grech et v. Tax Commissioner*) (FH) (2 March 2016) (1126/15) (Mr Justice M. Chetcuti)

PG 115 : Id-dritt ta' kull persuna li titlob lill-Qorti li hekk tissindika tali ligijiet illum huwa garantit bl-artikolu 116 tal-Kostituzzjoni meta moqri flimkien mad-definizzjoni ta' ligi moghtija fl-artikolu 124(2) tal-istess Kostituzzjoni (bi dritt ta' appell skond kif provdut fl-artikolu 95 (2) (e) tal-istess Kostituzzjoni cioe' il-Qorti Kostituzzjonali u mhux lil din il-Qorti (Carmelo Borg v. Minister Justice and Home Affairs (CA) (8 November 2005) (839/05)

FN 85: Il-kelma "ligi" skond l-Att dwar l-Interpretazzjoni (Kap 249) tinkludi kull dokument li jkollu s-sahha ta` ligi. Fi kliem iehor, il-kelma 'ordni', bhalma tista` tintuza bhala l-isem ta` xi ligi – minflok per ezempju 'regolamenti', tista` wkoll tintuza fis-sens ta` ordni amministrattiv li jkun jikkwalifika bhala eghmil amministrattiv ghall-finijiet tal-imsemmi artikolu 469A. *(Carmelo Borg v. Ministry responsible for Justice and Home Affairs* (CA) (8 November 2005)

FN 87: L-esercizzju ta' diskrezzjoni assoluta jista`jkun kontestata fil-Qorti jekk dak l-att ta`diskrezzjoni ma jkunx esercitat fil-formalitiajiet preskritti jew mill-awtorita` kompetenti investita bih bil-ligi. (*Edgar Baldacchino et v. Dr T. Caruana Demajo nomine et* (CA) (26 February 1954) (Kollezz. Vol. XXXVIII.I.61)

FN 94: Fin-nuqqas ta' provvediment statutorju li jirregola l-materja, l-azzjoni li torigina mill-vjolazzjoni tal-jedd fondamentali ma kienet soggettta ghal ebda prsekrizzjoni estintiva. Ghalhekk ir-rikors promotur mhux *fuori termine*. (Architect Joseph Barbara v. Prime Minister) (CC) (7 October 1997) (Vol. LXXXI.I.39)

Chapter IV
Obstacles to Review

PG 120: Si ha da considerare lo Stato sotto il duplice aspetto ossia Governo investito del sovrano potere, incaricato di dettare leggi, di prendere tutte le disposizioni necessarie perche`

siano eseguite, di distribure la giustizia, di mantenere l`ordine e la sicurezza tra i cittadini proteggendo i loro interessi morali, intellettuali e materiali; e di Stato ossia governo come persona morale, come persona giuridica o civile avente i suoi beni, le sue proprieta, i suoi interessi, i suoi crediti, i suoi debiti che non si confondono con in beni, la proprieta, gli interessi, i crediti ed i debiti degli individui che compongono lo Stato, che puo` comprare, vendere, obbligarsi, stare in guidizio, fare in somma tutti quegli atti della vita civile che sono compatibili con la sua natura di persona giuridica e dai quali nascono que rapporti di diritti e di obbligazioni che sono regolati dal Codice Civile (Busuttil v La Primaudaye (FH) (15 February 1894)(Kollezz, Vol XIV.94)(Mr Justice A. Chapelle)

PG 121: Illi indubbjament din l-esekuzzjoni hija parti u haga wahda ma` dak id-dritt u jekk dan id-dritt fl-esercizzju tieghu mhux sindakabbli, mhux spjegabili kif jistghu jigu sindakati il-mod u z-zmien li fihom l-atti relativi jigu adempiti. Dawn jikkostitwixxu il-parti accessorja li skond ir-regola ghandha ssewgi il-haga principali. *Gioacchino dei Baroni Attard Montalto v. Edgar Cuschieri nomine*) (FH) (27 June 1953) (Mr Justice A. Magri) (Kollezz. Vol. XXXVII.I.749)

FN 4: Il-Qrati ghandhom dejjem is-setgha li jissindakaw jekk l-att giex imwettaq mill-awtorita' kompetenti u fil-forma rikjesta mil-ligi. (Guza Formosa v. Joseph Ellul Mercer ne (FH) (28 June 1957) (Mr Justice Alberto Magri)

PG 122: Ghalkemm il-kwistjoni regghet giet hekk sollevata mil-legali tal-Kuruna, hija ma taqbadx u tapplikaha kif gie gie u cjekament fuq precedenti ta' zmenijiet ohra, li wara kollox lanqas ma huma fl-istess kontest, minghajr ma tassogettaha ghall-iskrutinju serju fid-dawl tal-hsebijiet iktar liberali ta` zmenijietna u specjalment tal-kritika li l-imsemmija dottrina sofriet f` dawk il-pajjizi li jistghu joffru l-ahjar ezempju u mudell, x'aktarx minn ohrajn li s-sistema, il-hsieb u il-valuri taghhom ma tantx jaqblu ma` taghna. (*John Lowell ne et v. Dr Carmelo Caruana nomine et* (FH) (14 August 1972-) (Mr Justice M. Caruana Curran)
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PG 126: Il-Qorti ma tistax taqbel ma' din is-sottomissjoni, u mill-mod kif inhi mfassla l-eccezzjoni, jidhrilha li la hija misthoqqa fl-ittra u lanqas fl-ispirtu tal-ligi.L-ewwel nett, fil-fehma taghha, l-artikolu 118(8) huwa mahsub biex iseddaq l-awtonomija tal-Awtorita' waqt li tkun qeghda twettaq id-dmirijiet taghha moghtija mill-Kostituzzjoni u mil-ligi. Fi kliem iehor, il-Qorti tifhem li dak il-provvediment tal-oghla ligi tal-pajjiz huwa mahsub biex jassigura li l-Awtorita' tithalla twettaq id-dmirijiet u l-funzjonijiet taghha minghajr l-indhil ta' hadd. Imma dak zgur m'ghandux jittiehed li jfisser li l-Awtorita' tista' taghmel li trid jew li tqieghed lilha nnifisha lil hinn minn kull kontroll li jaghmilha oghla mill-oghla ligi tal-pajjiz (*Chairman PBS Ltd et v. Broadcasting Authority et*) (CA) (15 January 2003) (711/02)

FN 20: Fl-applikazzjoni tal-ligi, il-Kummissjoni Elettorali mhux suggetta ghad-direzzjoni jew kontroll ta xi persuna jew awtorita' ohra, frazi din ta' l-ahhar "xi persuna jew awtorita' ohra li certament tinkludi lill-Qorti. (*Michael Vella noe v. Emmanuel Farrugia noe*) (FH) (13 April, 1987) (Kollezz. Vol. LXXI.III.639) (173/87)

FN 22 'Hu principju ta' dritt, però, li l-ġurisdizzjoni inerenti tal-qrati ta' "judicial review" ma tista' titneħħa minn ebda liġi, għax ma jistax jigi aċċettat li l-leġislatur qatt jista' jippermetti li deċiżjoni tittieħed bi ksur tal-prinċipji ta' ġustizzja naturali jew kontra l-liġi" (*Paul Washimba v. Refugees Appeals Board et*) (CA) (8 July 2008)

PG 130: Jekk l-Istat bil-liġi vesta lill-Ombudsman bis-setgħa msemmija rigward ħatriet, promozzjonijiet, salarji u drittijiet ta' pensjoni ta' uffiċċjali u suldati fil-Forzi Armati allura humiex dawn *acts of state* jew atti *iure imperii* ma tagħmel ebda differenza għall-pożizzjoni legali. (*Chief Justice Emeritus J. Said Pullicino v. Minister Justice and Home Affairs* et (CA) (31 October 2016) (164/15)

Chapter V
Procedural issues in Judicial Review Actions

PG 132: Illi ghal bosta snin il-Qrati taghna fissru li l-elementi mehtiega biex isawru interess tal-attur f'kawza huma tlieta, u jigifieri li l-interess irid ikun guridiku, li l-interess irid ikun dirett u personali u li dak l-interess ikun attwali. (Emilio Persiano v Commissioner of Police) (FH) (18 January 2001) (1790/00) (Mr Justice JR Micallef)

PG 133: Mill-istatut tal-assocjazzjoni attrici, irrizulta lil din il-Qorti mhux biss in-natura tal-ghaqda u cioe` *a political,voluntary, non-governmental organisation* izda l-iskopijiet li ghalihom twaqqfet. Dawk l-*aims and objectives*, anke jekk fejjieda b`mod generali fl-iskop taghhom, ma jistghux jitqiesu bhala jedd ghall-fini tar-rekwizit tal-interess. Sabiex setghet l-assocjazzjoni attrici tipprocedi bil-kawza tal-lum, kellha bhala pre-rekwizit tipprova illi hija kienet qeghda tagixxi sabiex tilqa` kontra ksur ta` jedd taghha." (*The Ramblers Association of Malta v. Malta Environment and Planning Authority*) (FH) (6 March 2012) (228/10) (Mr Justice J. Zammit McKeon)

PG 133 : Bl-eccezzjoni tal-*actio popularis*, ir-rekwizit tal-interess huwa l-kejl ta` **kull** azzjoni minghajr distinzjoni. Sahansitra f`kawzi ta` indole kostituzzjonali jew konvenzjonali, l-interess huwa l-qofol tal-azzjoni (*The Ramblers Association of Malta v. Malta Environment and Planning Authority)* (FH) (6 March 2012) (228/10) (Mr Justice J. Zammit McKeon)

FN 6: Fis-sistema legali modern, l-azzjoni popolari mhix aktar ammissibbli hlief fil-kazijiet espressament specifikati fil-ligi. (*PL Benecict Dingli v. G. Borg Olivier ne*) (CA) (5 April 1963)

FN 7: Ghalhekk din il-Qorti tghid li ghall-kaz tal-lum m`ghandux ikun hemm regoli specjali jew deroga mill-interess guridiku kif tradizzjonalment ikkoncepit mid-dottrina (biex din il-Qort ticcita minn dak rilevat mill-ghaqda attrici). Din il-Qorti qieset b`reqqa r-riferenzi li ghamlet l-ghaqda attrici u tghid li ma sabet l-ebda fondament fil-pretensjoni attrici li fil-kaz ta` azzjoni bhal dik tentata minnha, ir-rekwizit tal-interess ghandu jiehu xejra aktar liberali u riflessiv lejn l-esigenzi ta` harsien li l-azzjoni stess hija intiza sabiex tasal ghalih. " (*The Ramblers Association of Malta v. Malta Environment and Planning Authority*) (FH) (6 March 2012) (228/10) (Mr Justice J. Zammit McKeon)

FN 27 Forsi wasal iz-zmien anki f'pajjzina li il-ligijiet u il-gurisprudenza taghna progressivament jaggornaw ruhhom ma' dawn il-fenomeni socio-guridici godda in materja ta' interess guridiku.(*Martin Debrincat v. Malta Environmnet Planning Authority* (CA Inf.) (12 January 2005) (13/03) (Mr Justice Ph. Sciberras)

PG 144: llli fuq din id-definizzjoni din il-Qorti thoss li s-socjeta' intimata tikkwalifika bhala awtorita' pubblika a bazi tad-disposizzjonijiet fuq indikati u dan peress li jirrizulta li s-socjeta' intimata hija kumpanija kostitwita u registrata taht il-ligijiet ta' Malta (*Hotel Cerviola Ltd v. Malta Shipyards Ltd* (FH) (31 May 29097) (359/06) (Mr Justice R. Pace)

PG 144: Ghalkemm giet kostitwita din il-kumpanija kummercjali "privata", fil-fatt il-kontroll effettiv taghha baqa' f'idejn il-Gvern bl-intendiment li jinnegozja il-bejgh tat-tarznari. Bhalma gie deciz f'kazi ohra dwar ksur ta' drittijiet fundamentali tal-bniedem il-Qorti hi tal-fehma li anke fil-kaz ta' kawzi dwar stharrig gudizzjarju hi ghandha thares lejn is-sustanza tal-affarijiet u ta' dak li qed jigi mitlub li jigi protettt u mhux toqghod semplicement fuq l-apparenzi jew id-definizzjonijiet jew klassifikazzjonijiet formali. (Hotel Cerviola Ltd v. Malta Shipyards Ltd (CA) (23 September 2009)

PG 145: L-MIP hija, fil-fatt, l-awtorita' pubblika li waħedha għandha s-setgħa li taqtagħha jekk jinħarigx Ordni ta' Żgumbrament u tagħti "pariri" lill-Kummissarju tal-Artijiet biex jordna l-ħrug ta' Ordni bħal dak. Il-fatt li dik l-awtorita' għandha s-sura ta' kumpanija kummercjali ma jneħħihiex milli tikkwalifika bħala "korp magħqud kostitwit permezz ta' ligi" kif imsemmi fl-artikolu 469A(2). Din ix-xejra "pubblika" toħrog ukoll mill-binja azzjonarja tagħha, fejn l-azzjonist ewlieni huwa l-Ministeru tal-Finanzi (b'9,999 sehem ordinarju) u l-azzjonist minoritarju (M.I.M.C.O.L.) (b'sehem ordinarju wieħed) ukoll kumpannija b'investiment pubbliku qawwi. MIP tqis lilha nnifisha wkoll bħala "Government agency responsible for the management, development and administration of Government-owned industrial estates"; Illi, minbarra dan, ħarsa lejn id-dispożizzjonijiet relattivi tal-Kap 16911 tal-Ligijiet ta' Malta jagħmluha cara li MIP ngħatat setgħat (b'delega) li jikkaratteriżżaw lil kull awtorita' b'funzjoni pubblika. L-istess dispożizzjonijiet jixhdu wkoll li MIP tgawdi setgħat ta' funzjoni regolatrici, pubblika u amministrattiva. Il-Qorti tinnota li kienet MIP nnifisha li tistqarr daqstant,… meta tgħid li hija "s-successur" tal-Korporazzjoni għal Żvilupp ta' Malta". (*Euro Chemie Products Ltd v. Malta Industrial Parks Limited) (*PA) (29 September 2009) (Mr Justice JR Micallef) (1006/06)

PG 145: Il-fatt li l-Gvern ikun ghazel li jopera permezz ta' kumpannija u mhux korp kostitwit b'ligi, ma ghandux ifisser li b'daqshekk dik il-kumpannija li tkun qeghda taqdi funzjoni pubblika m'ghandix tkun soggetta ghal stharrig taht l-Artikolu 469A tal-Kap. 12 fejn twettaq *"eghmil amministrattiv"*. Hu fatt maghruf li *"**The actions of public corporations are judicially reviewable in the same way as those of other bodies, where they have powers of a public law character"*** *Administrative Law*, 10 Edizzjoni H.W.R. Wade, u C.F. Forsyth, 2009 pagna 123). (Captain Mario Grech v. Gozo Channel Co Ltd (CMSJ) (27 April 2010) (2/09) (Magte A. Ellul)

FN 39: Is-soċjeta` konvenuta, hu veru, qegħdha taqdi funzjonijiet pubbliċi, in kwantu xogħolha hu li tamministra ż-żoni industrijali proprjeta` tal-gvern, u tista' wkoll tikkwalifika bħala "awtorita` pubblika" għall-fini tal-Artikolu 469A tal-Kap. 12 tal-Liġijiet ta' Malta.
(*Paul Licari v. Malta Industrial Parks Limited* (CA) (25 November 2016) (25/10)

Chapter VI
The first ground of review Administrative acts contrary to the Constitution

FN 1: Il-principju kellu dejjem ikun illi l-kompetenza kostituzzjonali u l-kompetenza civili kellhom jibqghu separati u distinti anke ghaliex ir-rikors taht kull kompetenza hu regolat bi proceduri appositi b'finalita' ta' rimedju mhux dejjem identiku. (*Emmanuel Ciantar v. Commissioner of Police*) (CC) (2 November 2001) (701/99)

FN 3: Fi kliem iehor – u din il-Qorti tittama li din il-kwistjoni issa tigi risolta darba ghal dejjem, cioe` anke ghal kazijiet futuri– l-appellanti ma setghux jifthu kawza ordinarja ghal stharrig gudizzjarju taht is-subartikolu 1(a) ta' l-Artikolu 469A tal-Kap. 12, u jallegaw ksur tad-drittijiet fundamentali taghhom protetti taht il-Kostituzzjoni, ghax dak is-subartikolu jirreferi ghal ksur tal-Kostituzzjoni minn ghemil amministrattiv li (i) ma jkunx jammonta ghall-ksur, ossia allegat ksur, tad-drittijiet fundamentali kif protetti bl-Artikoli 33 sa 45 tal-istess Kostituzzjoni, u li (ii) ai termini ta' l-istess Kostituzzjoni jkun jista' jigi mistharreg mill-qrati ordinarji. U, bl-istess argument – cioe` li wiehed ghandu jzomm il-kompetenza kostituzzjonali u l-kompetenza civili separati u distinti – il-kliem "imur mod iehor kontra l-ligi" fis-subartikolu (1) (b) (iv) tal-Art. 469A jirreferi ghal kwalsiasi ligi ad eskluzjoni tad-disposizzjonijiet tal-Konvenzjoni kif inkorporati fil-Kap. 319. (*Christopher Hall v. Director Social Accomodation*) (CC) 18 September 2009 (1/03)

Chapter VII:
Acts emanating from an authority not authorised to perform it

PG 154: Le corte di giustizia sono competenti a prendere cognizione della legalita' di esso, quando si pretenda leso il diritto altrui nel senso che possono esaminare se tale provvedimento rientra nelle attribuzioni dell'autorita`che l'ha emanato e se e` regolare in quanto alla forma, ma non possono discutere l' opportunita` o la giustizia di esso se l'autorita` suddetta era competente a prendere la deliberazione impugnata e questa fu presa nelle debite forme (Boselli v Roupell (CA)(28 February 1912)

PG 156: Il-gurisdizzjoni tal-Gvernatur hija limitata ghal dawn il-Gzejjer; u ghalhekk id-dritt li jzomm internati sudditi Brittanici ma jsitax jigi estiz ghal barra minn Malta; u dana kien ikun il-kaz kieku s-sezzjoni 18 li ssemmiet kellha tiftiehem fis-sens li taghti lill-Gvernatur il-jedd tad-deportazzjoni ta sudditi biex jigu internati barra minn Malta. Barra minn dan id-*Defence Regulations* saru bis-sahha ta` l-*Emergency Powers (Defence) Act, 1939*, applikat ghal Malta bl-Order in Council tal-25 t'Awissu 1939. Daka l-Att ma jidhirx li jaghti fakolta` li jigu deportati sudditi Brittanici barra minn pajjizhom, ghax dak l-Att fis-sec 1, para 1 (a) jaghti lir-Re, u ghalhekk lill-Gvernatur, il-jedd mhux li jiddeporta, izda "to make provision for the apprehension, trial and punishment of persons offending against the Regulations, and for the detention of persons whose detention appears to the Secretary of State – u fil-kaz taghna il-Gvernatur – to be expedient in the interests of public safety or the defence of the realm". Li kieku l-Att ried jaghti il-fakolta` tad-diportazzjoni, kieku kien isemmih car u tond, u mhux jillimita il-fakolta` ghad-detenzjoni preventiva. U la darba l-ghajn tas-setgaht ma taghtix din is-setgha, mhux possibbli li jippermetti id-deportazjoni. (*Guido Abela et v. Walter*

Bonello noe) (FH) (7 February 1942) (Mr Justice A. Montanaro Gauci) (Kollezz. Vol. XXXI.II.54)

FN 6: "Il-kamp fl-Uganda skond din it-tezi, kien isir bhal bicca minn Malta taht il-Gvernatur ta` Malta. Malta, skond il-Gvern Kolonjali, kienet bhal saret tal-lastiku, tkabbarha kemm trid." (Ganado Herbert: *Rajt Malta Tinbidel* (1977) (Malta) (Vol. II. p. 333)

PG 158: Rekwisizzjoni mahruga *in the public interest* ma hijiex realment mahruga u adoperata ghal dan l-iskop meta, bhalma sar fil-kaz persenti, isservi direttament bhala intromissjoni bejn dritt ta`individwu li jirriprendi pussess ta`daru ghax ma ghandux fejn joqghod u obbligu ta`indivìdwu iehor li jirrlaxxjalu dak il-pussess ghal dik ir-raguni – dritt sancit u rikonoxxut b'sentenza li tikkostitwixxi gudikat bejniethom. (*Giuseppe Sciberras v. Housing Secretary*) (FH) (21 July 1973) (Mr Justice V. Sammut)

Pg 159: Il-kliem interess pubbliku, in kwantu necessarajament jikkomprendu kull aspett tal-hajja socjali tal-pajjiz, huma ta`portata mill-aktar estensiva; u kif ma jistax u qatt ma gie dubitat li fond jista, fl-interess pubbliku, jigi rekwisizzjonat ghall-skopijiet kulturali, religjuzi u sportivi, daqstant iehor ma jistax jigi ddubitat li fond jista' jigi rekwisizzjonat fl-interess eminentement pubbliku li tigi mhejjija l-attivita` politika ta' pajjiz (Albert Galea v. Patrick Holland ne (CA) (29 January 1980)

PG 160: Il-pubbliku interess li f'ismu jittiehdu dawn id-decizjonijiet u jsiru dawn l-atti mill-awtorita' pubblika – emanazzjoni tar-*res publica*, l-universalita' tar-res li fiha jingabar il-gid komuni tac-cittadini kollha u ghal liema gid komuni huma diretti il-ligijiet – qatt ma jista' jkun riferit ghal kwalsiasi interess privat. Il-possibilita' ta' access tal-pubbliku ghal dik l-attivita' ma tirrasformahiex b' daqshekk minn attivita' li hija intrinsikament privata f 'attivita' intrinsikament pubblika. (*Dr C Vella v. Segretarju Djar*) (CA) (30 November 1993) (Kollezz. Vol. LXXVII.I.390)

PG 160: Il-Qrati jigu jawtorizzaw l-indhil tal-Istat f`kull attivita koncepibbli, inkwantu illum prattikament kull attivita` tinteressa l-Istat modern, u ghalhekk flok mal-koncett iservi sistema demokratiku, jigi jservi sistema totalitarju. (*Dr C Vella v. Segretarju Djar (*CA) (30 November 1993) (Kollezz. Vol. LXXVII.I.390)

PG 161: L-intimati, min-naha taghhom ma jaqblux ma' dan l-insenjament u jelaboraw hafna fuq is-siwi socjali u kulturali tal-kazini tal-banda. Din il-Qorti ma trid tnaqqas xejn minn dan is-siwi. Madanakollu hija tal-fehma, kif intqal aktar 'il fuq, li dan ma jammontax ghall-interess pubbliku kif rikjest mill-Konvenzjoni u interpretat mill-Qrati. *(Josephine Vella et v. Director Social Accomodation et*) (FH) (11 October 2011) (Mmme Justice A. Felice) (15/07)

PG 161: Din il-Qorti rat is-sentenza tal-Qorti tal-Appell fl-ismijiet *Dr. C. Vella et v. Segretarju tad-Djar et* li fuqha l-ewwel Qorti bbazat il-gudizzju taghha u tghid li llum 'il gurnata, fuq l-iskorta ta' gurisprudenza ta' din il-Qorti u dik ta' Strasbourg, ghalkemm dak li nghad f'dik is-sentenza ghad ghandu certa validita` izda illum il-gurisprudenza evolviet u l-interpretazzjoni ta' x'inhu interess pubbliku hija aktar fis-sens indikat fis-sentenzi li saret referenza ghalihom fl-ewwel aggravju tal-intimati. Skont din il-gurisprudenza dak li jiswa' huwa li l-interess pubbliku jkun immirat ghal generalita` u marbut mal-finalita` ahharija li ghaliha l-proprjeta` qed tintuza, u dan indipendentement mill-fatt li dan is-servizz qed jinghata mill-privat u mhux mill-Gvern. (*Josephine Vella et v. Director Social Accomodation*) (CC) (25 May 2012) (15/07)

PG 162: F'dan il-kaz ma jistax jinghad li l-interess kien merament privat billi l-interess ghandu applikazzjoni ghall-generalita` tac-cittadini. 'Skop socjali jew kulturali' jolqot firxa differenti ta' nies, anke jekk ikun hemm persuni li ma jinteressawx ruhhom f'attivitajiet ta' din ix-xorta".Fil-fehma ta' din il-Qorti l-ordni ta' rekwizzjoni harget fl-interess pubbliku billi l-ghan ahhari tal-Kazin hu wiehed socjali u kulturali li jseddaq l-identita` generali tal-lokalita`u jizviluppa t-talent muzikali fil-lokal, u dan indipendentement mill-fatt li dan is-servizz qed jinghata mill-privat u mhux mill-Gvern.' (*Josephine Vella et v. Director Social Accomodation*) (CC) (25 May 2012) (15/07)

FN 21: It-test biex wiehed jara jekk hemmx l-"interess pubbliku" f'kaz ta' uzu u kontroll tal-proprjeta`huwa wkoll il-finalita` ahharija li ghaliha l- proprjeta`tkun qed tintuza. (*Victor Gatt et v. Attorney General*) (CC) (5 July 2011) (55/09)

PG 163: Hu veru li f'pajjjiz demokratiku l-pluralita` ta' partiti politici hija necessarja ghall-izvilupp demokratiku ta' dak il-pajjiz, pero`, l-interess ta' kull partit hu necessarjament partiggjan, peress li l-iskop tieghu hu li jattira kemm jista' jkun membri ghal fehma politika u socjali tieghu. Ma jistax jinghad li l-interess ta' sezzjoni mill-pubbliku, huwa ekwivalenti ghall-interess generali, specjalment fil-kamp politiku meta nies ta' fehma opposta jikkontradicu lil xulxin. (*Philip Grech v. Director Social Accomodation*) (CC) (7 December 2010) (60/06)

FN 28: Din il-Qorti taqbel li ma kien hemm l-ebda skop pubbliku f'din l-esproprjazzjoni. Jekk kien hemm problema ta' rimi ta' skart generat mill-industrija tal-kostruzzjoni f'Ghawdex, is-soluzzjoni ma kellhiex tkun li tittiehed proprju l-barriera ta' min ra kif ghamel biex b'mod legali u a spejjez kompletament tieghu ikollu r-radam personali tieghu. Ma kien hemm xejn x'izomm lill-kuntatturi l-ohra biex jaghmlu bhall-attur u huma wkoll ifittxu siti adattati ghar-rimi ta' l-iskart taghhom. (*Gioacchino sive Jack Bugeja v. Commissioner of Land* (Court of Magistrates) (Gozo) (Superior) (13 June 2012) (134/95)

FN 30: Huwa erroneju li jinghad li f'dan il-kaz l-esproprju sar fl-interess merament privat, ghax il-provi juru li sar fl-interess generali ta' min joqghod f'dik il-gzira, f'inizjattiva intiza sabiex jonqos it-tfiegh bl-addocc u abbuziv ta' terrapien b'detriment ghall-ambjent u wkoll ghas-sahha tal-pubbliku. (*Gioacchino sive Jack Bugeja v. Commissioner of Land* (Court of Magistrates) (Gozo) (Superior) (13 June 2012) (134/95)

FN 33: L-istess *Manoel Theatre Management Committee* ma zammewx l-ambjenti esproprjati kollha f'idejhom imma fil-maggor parti taghhom krewhom lill-terzi, fosthom fejn hemm hwienet mikrija lill-terzi, cafeteria u restaurant li jkopru l-pjan terren, u wkoll ufficini mikrija lill-entitajiet ohra. Dan ifisser li effettivament l-istess proprjeta' qed tintuza minn terzi persuni ghal skopijiet anke ta' kummerc. Konsegwenti ghal dan kollu jirrizulta li t-tielet proviso ta' l-artikolu 5 tal-Kap. 88 kellu jigi osservat, b'dan li fid-dawl ta' dan kollu, din il-Qorti thoss illi l-esproprju hekk kif sar, ma sarx skont d-disposizzjonijiet tal-Kap. 88 tal-Ligijiet ta' Malta u kien *ultra vires* ghall-istess. (*Agnes Gera de Petri Testaferrata Ghaxaq v. Attorney General* (FH) (18 June 2009) (392/07) (Mr Justice R. Pace)

PG 167: Il-legislatur ried li haga serja bhala ma kienu l-kundizzjonijiet ghad-dhul fl-Universita` ma kellhomx jithallew fl-arbitriju esklussiv ta` l-amministrazzjoni taghha, imma esiga li dawn ikunu inkorporati f'regolamenti maghrufa lil kull min kien interessat u mqieghed ghall-iskrutinju tal-Kamra tad-Deputati. Dan biex jigi assigurat mezz ta` ghazla li

mhux biss ikun gust imma jidher li jkun gust, ghax verifikabbli minn min ikun involut u interessat. Mhux allura koncepibbli illi il-ligi setghet tippermetti illi provvediment ta` din l-importanza u bazilari ghall-gudizzju fis-sistema edukattiv universitarju jigi *bypassed* u newtralizzat bl-espedjent semplici li direttiva importanti fil-process ta` l-ghazla tissejjah *criteria* jew nomenkaltura ohra minflok regolament. Espedjent li jkun ifisser li direttiva ma tkunx giet sottomessa ghall-gharbiel tal-legislatur … (*Nicholas Attard v. Professor Roger Ellul Micallef nomine*) (CA) (4 March 1998) (Kollezz. Vol. LXXXII. II.40)

FN 41 Il-kwestjoni jekk certi emendi maghmula ghall-Istatut tal-Universita' kenux validi jew le ghaliex jiksru xi disposizzjoni tal-Ordinanza, taqa fil-gurisdizzjoni tal-qrati ordinarji. (*Joseph Fenech v. Prof. Serafino Zarb ne*) (CA) (10 October 1952) (Kollezz. Vol. XXXVI.I.236)

FN 43: Ir-*ratio legis* f'dan ir-rigward huwa manifest u cioe' li dawk l-*istudy units* li huma obbligatorji u li ghalhekk fuqhom tiddependi l-hajja universitarja tal-istudenti fil-korsijiet rispettivi jkunu indikati f'mod car, u li l-obbligatorjieta' taghhom tkun tirrizulta inekwivokabilment bil-mitkub; b'hekk ikunu maghrufa lil min, u verifikabbli minn, kull min hu involut u interessat, bil-konsegwenza li tigi eliminata sitwazzjoni ta'incertezza li tista' tkun ta' pregudizzju ghall-istudenti. (*Denise Buttigieg v. Rector University of Malta)* (FH) (22 December 2003) (1435/02) (Mr Justice N. Cuschieri)

FN 45: Din il-qorti ma tidħolx fil-kwistjoni jekk id-deċiżjoni tat-tribunal, meta sab li ma kienx hemm riżenja jew abbandun tal-post tax-xogħol, kinitx deċiżjoni tajba jew le, għax il-ġurisdizzjoni ta' din il-qorti hija waħda ta' stħarriġ dwar legalita u mhux ta' appell. (*Mediterranean Film Studios Ltd v. Albert Galea et*) (FH) (5 May 2004)9502/00) (Mr Justice G. Caruana Demajo)

FN 46: Hu ben assodat il-principju illi l-kwestjoni tal-*fair hearing* trid tigi meqjusa fil-kuntest tal-gudizzju fl-assjem tieghu. Mhux kwalsiasi pretest allura ghandu jservi biex jitwaqqghu gudikati, li, invece, jmisshom u ghandhom jibqghu fis-sehh. (*Reno Alamango v. Mary Rose Ciantar*) (CA) (29 May 1991)

PG 170: L-impunjazjoni ta `decizjoni ta` Tribunal Industrijali pero` hija limitata ghal tliet kategoriji ta' difetti – (a) eccess ta` gurisdizzjoni (b) non-osservanza ta' l-istess ligi kostitwita – Kap 266 u finalment (c) non-osservanza ta` xi wiehed mill-principji fondamentali tal-gustizzja (*Dr Vincent Falzon nomine v. Isabelle Grima) (*CA) (17 May 1993 (Kollezz. Vol. LXXII.I.92)

PG 170: L-appell tal-kumpanija mhux biss m` huwiex attendibbli – imma l-azzjoni taghha, sa mill-bidu nett, ma kenitx proponibbli quddiem dawn il-Qrati ordinarji (*Dr Vincent Falzon nomine v. Isabelle Grima*) (CA) (17 May 1993 (Kollezz. Vol. LXXII.I.92)

FN 49: Illum hu car li l-Qorti (Civili) tista` tissindika l-operat ta' kwalsiasi tribunal amministrattiv, l-ewwel nett biex tassigura li l-principji tal-gustizzja naturali huma osservati, u t-tieni, biex tassigura li ma kienx hemm xi enuncjazzjoni hazina jew inkompleta ta' l-ipotesi tal-ligi, u dana minghajr ma tipprova b'xi mod tissostiwixxi d-diskrezzjoni taghha ghal dik tal-Bord (*Dr A. Farrugia v. Electoral Commission) (*CA) (18 October 1996)

FN 49: Il-Qrati tagħna segwew id-dottrina ngliża wkoll anke f'dan l-aspett tad-dritt amministrattiv u rrikonoxxew illi, minkejja illi l-liġi partikolari tirriserva dritt ta' appell fuq

punt ta' liġi deċiż mit-tribunal amministrattiv, il-Qorti ordinarja tista', xorta waħda, tissindika l-operat ta' dak it-tribunal, biex tinvestiga jekk dan issuperax il-poteri leġittimi tiegħu jew osservax il-prinċipji ta' ġustizzja naturali biex wasal għal xi deċiżjoni (*Anthony Cauchi v. Malta Environmnet and Planning Authority*) (CMSJ) (18 October 2005) (5/04) (Mgte P. Coppini)

FN 49: Illi ma hemmx dubju li din il-Qorti għandha l-kompetenza li tissindika l-operat ta' kwalsiasi tribunal amministrattiv, l-ewwelnett biex tassigura li l-principji ta' gustizzja naturali jkunu osservati u fit-tieni lok biex tassigura li ma jkunx hemm xi enunejazzjoni ħażina jew inkompleta tal-ipotesi tal-ligi. (**"Cassar v. Accountant General"** – Prim' Awla,29 ta' Mejju 1998) (*Perit Joseph Mallia v. Attorney General et* (FH) (11 July 2011) (Mr Justice J. Azzopardi)

PG 172: Il-Ministru ta xi opportunita` imma ma tax opportunita` **xierqa** kif trid il-ligi ghax ma tax lill-attur l-inqas hjiel fuqhiex kellu jirrispondi u jaghmel is-sottomissjonijiet, ir "representations" tieghu. …Kienu `x kienu dawn ir-ragunijeit li il-Ministru kellu f` mohhu, ma esprimihomx, u baqghu f`mohhu, u b`hekk kiser il-volonta` lilu imposta bi kliem espresso l-izjed cari mill-Parlament. (*Anthony Ellul Sullivan v. Lino C. Vassallo ne et) (*FH) (2 June 1983) (Mr Justice M. Caruana Curran)

PG 173: Dan l-ahhar kategorija ta` nuqqas ta` gurisdizzjoni ghalhekk, min-natura taghha stess, tesigi interpretazzjoni strettissima u ristretta, ghaliex tohloq sitwazzjoni eccezzjonali fl-Istat ta` Dritt. L-espressjoni "jissodisfa lill-Kontrollur tad-Dwana" interpretata b` mod naturali, kif normalment ifissru dawk il-kliem, tindika obbligu ta` l-emigrant li jipproduci provi tat-tliet elementi ta` fatt li ssemmi il-klawsola, tali li jissodisfaw lill-Kontrollur. Dawk il-kliem ma jindikaw ebda diskrezzjoni tal-Kontrollur ghaliex diskrezzjoni timplika l-esercizju ta` decizjoni li tiehu in konsiderazzjoni apprezzament ta` fatturi li mhux prattikament possibbli li jigu sottomessi ghall-iskrutinju ta` min ma jistax jigi investit b` dawk il-fatturi kollha; (*Dr A Sammut nomine v. Comptroller Customs*) (CA) (30 November 1993) (Kolezz. LXXVII.II.376)

FN 55: Il-konvenut nomine ma jistax jahrab arbitrarjament mill-konsegwenzi guridici tal-impenji tad-dipartiment li ghalih huwa responsabbli, u ghandu jirrispetta il-limitazzjonijiet maghmula bil-fuq imsemmija ittra lir-Requisition Order, billi jesegwixxi in buona fede l-impenji assunti i*ure gestionis*, li jirritorna lill-attur il-hanut. " (Giovanni *Aquilina v. Joseph Ellul Mercer nomine*) (CA) (28 March 1958) (Kollezz. Vol. XLII.I165)

PG 174: Ma hemm xejn x` jimpedixxi id-dritt normali ta `kull cittadin jew ghaqda ta` cittadini li jimpunjaw fil-Qrati l-attijiet kollha governattivi non-diskrezzjonali. Kieku ma kienx hekk, kull ufficjal governattiv ikun "above the law" fl-esercizzju ta` kull funzjoni tieghu, u din mhix il-posizzjoni tal-Esekuttiv fil-pajjiz….l-attijiet kollha tal-Esekuttiv, bhal dawk tal-privat, ma jistghux ikunu kontra il-ligi, ghax il-ligi qatt ma tawtorizza illegalitajiet. (*Victor F.Denaro v.. Tabone Emmanuel noe et*) (CA) (25 October 1957) (Kollezz. Vol. XLI.I.34)

FN 66: Fid-dawl ta' dan kollu, hija l-fehma ta' din il-Qorti li d-decizjoni amministrattiva li hadu l-konvenuti ma tghaddix it-*test* tar-ragjonevolezza ghaliex bbazata fuq kriterji mhux mgharrfa lil kulhadd, inkluzi ghalhekk l-atturi, li irrendu dik id-decizjoni mhux oggettiva u l-

istess ghal kulhadd. (*Carmelo Dingli v. Comptroller of Customs) (*CA(27 March 2009) (66/92)

FN 69: L-Artikolu 34(1) tal-Kap. 363 jipprovdi illi: (1) Kunsill jista'jaghmel, jemenda jew jirrevoka *bye-laws* sabiex jaqdi l-funzjonijiet tieghu u sabiex ihares u jnaqqas inkonvenjenzi fil-lokalità tieghu." Issa ma jista' qatt ikun li l-iskema ta' l-ipparkeggjar riservat in kwistjoni saret in forza ta' dan l-artikolu,ghaliex m'hemmx dubju li din l-iskema ma gietx inmnedija in forza ta' *bye-law*, izda in forza ta' decizjoni tal-Kunsill appellant mehuda waqt wahda mil-laqghat tieghu. (*Maria Victoria Borg v. Mayor Pieta Local Council*) (CA) (19 May 2009) (949/04)

FN 70: Il-mixi kellu jsir fuq il-bankina u *pedestrian* ma ghandu qatt jaqsam triq diagonalment (Joanne Cini v. Superintendent for Public Health) (CMSJ) (14 April 2011) (17/11)

PG 181: Meta l-ufficjal amministrattiv jesercita diskrezzjoni assoluta, huwa jagixxi *iure imperii*, skond il-frazeologija tad-dottrina kontinentali li hija segwita mill-gurisprudenza tal-Qrati taghna. Kontra din id-diskrezzjoni tieghu ma jista`jkun hemm ebda appell lill-Qrati tal-Gustizzja. B`danakolu, l-esercizzju ta `diskrezzjoni assoluta jista`jkun sfidat fil-Qorti jekk ikun *ultra vires*, jigifieri jekk ma jkunx fil-limiti tal-poter statutorju li jikkonferixxi d-diskrezzjoni, jew jekk dak l-att ta`diskrezzjoni ma jkunx esercitat bil-formalitajiet preskritti, jew mill-awtorita`kompetenti investita bih mil-ligi. Dan juri illi din id-diskrezzjoni assoluta ma tistax tigi esercitata arbitrarjament imma biss *intra vires*; u biex tkun tali, jehtieg illi fost hwejjeg ohra, tkun fil-limiti tal-poter statutorju li jkun ikkonferiha. (*Baldacchino v. Caruana Demajo nomine) (*CA) (26 February 1954) (Kollez. Vol. XXXVIII.I.61)

FN 74: Hija regola universalment rikonoxxuta li sakemm il-ligi stess ma tghidux car, il-ligijiet godda, hlief dawk li jirrigwardaw materji procedurali, *in corso*, ma ghandhomx forza retroattiva. (*Baldacchino v. Caruana Demajo nomine*) (CA) (26 February 1954) (Kollez. Vol. XXXVIII.I.61)

Chapter VIII
Third Ground of Review: Procedural Fairness
The Rules of Natural Justice

FN 1: Huwa risaput li l-principji tal-gustizzja naturali huma dawk il-principji **minimi** li ghandhom ikunu osservati waqt proceduri anke ta` entita' amministrattiva illi ghandha l-kompitu li tiddeciedi dwar fatti li fuqhom imbaghad ghandha s-setgha li tiehu decizjonijiet li jaffettwaw id-drittijiet tal-persuna. (*CCD Ltd v. Malta Transport Authority et) (*CA) (18 July 2017) (355/.05)

FN 3: Il-Qrati ordinarji fuq id-decizjonijiet tal-*Emergency Compensation Board* ghandhom biss sindakat limitat, jigifieri illi huma jistghu biss jaraw jekk fid-decizjoni tal-Board hemmx xi haga *ultra vires* u jekk hemmx xi vjolazzjoni ta` gustizzja naturali. (*Sammut v. Mc Cance*) (FH) (29 May 1946) (Mr Justice W. Harding)

PG 187: Il-Qorti hi tal-fehma illi in-norma ghandha tkun ili il-kwestjoni ta` l-invalidita` ta` Att tal-Parlament, ta` issa jew ta` dejjem, f`kaz ta` azzjoni bhall-prezenti fuq il-motiv ta`

irregolaritajiet ta` forma jew procedura, fil-process legislattiv fil-Kamra tad-Deputati, tiddependi minn ragunijiet gravi li verament, kunsidrati ic-cirkostanzi kollha, jolqtu r-rekwiziti kostituzzjonali. Fil-kaz prezenti, minkejja li kien hemm certi irregolaritajiet kif fuq issemma, il-Qorti ma jidhrilhiex li tirriskontra din il-gravita'. (*Mintoff v. Borg Olivier nomine* (CC) (22 January 1971)

PG 187: Ghandha wkoll issir distinzjoni bejn regoli li huma "directory" jew inkella "mandatory"; fl-ewwel kaz l-inosservanza taghhom thalli bla mittiefsa il-validita` tal-ligi, u *invece*, taffettwa din il-validita` fit-tieni kaz jekk tilledi r-rekwiziti imposti mill-Kostituzzjoni. (*Mintoff v. Borg Olivier nomine*) (CC) (22 January 1971)

PG 188: L-Awtorita`, għalhekk, naqset mill-obbligu statutorju tagħha li tinforma lill-pubbliku sewwasew x'kien bi ħsiebha tagħmel fir-rigward, u għalhekk ċaħditu mill-opportunita` li jressaq il-fehmiet tiegħu, kif irid il-leġislatur. (*Joseph Sciriha et v. Malta Environment and Planning Authority*) (FH) (28 January 2016) (127/07) (Mr Justice JR Micallef)

PG 189: Il-Qorti hi tal-fehma li dan it-terminu hu mandatorju u m'huwiex qieghed hemm biex iservi biss bhala gwida. Kieku kien mod iehor ma kienx ikun hemm bzonn li (i) jigi ffissat perjodu definit ta'sentejn (ii) jinghad li il-Kunsill ghandu jtemm l-inkjesta fi zmien sentejn u (iii) jinghad li t-terminu ta'sentejn ma japplikax fejn id-dewmien m'huwiex responsabbli ghalih il-Kunsill. (Dr Frank Portelli v. Dr Josella Farrugia ne (FH) (25 April 2014) (1110/09) (Mr Justice A. Ellul)

PG 189 : Fi kliem il-ligi…il-ħtieġa tal-għoti ta' xhieda taħt ġurament hija waħda mandatorja u tassattiva meta persuna tissejjaħ biex tixhed quddiem il-Bord. Fi kliem ieħor, id-diskrezzjoni li l-Bord għandu (u li għaliha jirreferu l-imħarrkin) hija dwar jekk, fit-tmexxija ta' xi investigazzjoni tiegħu, jismax xhieda jew le: imma ladarba jkun qatagħha li jrid jisma' xhieda, irid jismagħhom taħt ġurament. (*Elton Taliana v. Minister Home Affairs et) (*FH) (7 November 2017) (177/14) (Mr Justice JR Micallef)

FN 8: Certament li l-qrati tal-gustizzja ghandhom gurisidizzjoni li jistharrgu jekk fit-thejjija tal-pjan lokali l-Awtorita'segwitx il-procedura kontemplata mil-ligi. Dan irrispettivament jekk l-ezercizzju jsir taht l-Artikolu 469A(b) (ii) tal-Kap. 128 jew abazi ta' principji ohra ta' ligi (*Falcon Investments Ltd v. Malta Environment and Planning Authority)* (FH) (17 June 2013) (1198/11) (Mr Justice A. Ellul)

FN 9: Huwa lampanti fatt, u cioe` li d-decizjoni moghitja mill-Awtorita` fil-mument li nghatat ma kenitx skond id-dettami ta' l-artikolu 41(3) tal-Kap 350, ghax ma osservatx il-garanziji ta' smigh xieraq u fil-pubbliku. Ma kienx hemm avviz ta' akkuza a tenur ta' l-artikolu 41(5) tal-Kap 350 u anqas ma kien hemm informazzjoni moghtija lis-socjeta`attrici li qed tigi indagata u akkuzata a tenur ta' l-artikolu 41(8). Naqset ukoll milli tinforma lis-socjeta` attrici li kellha dritt tressaq xhieda biex tiddefendi ruhha kif ukoll id-dritt taghha li tkun assistita minn avukat. Anqas ma kien hemm kontro ezami tal-persuna li ghamlet dikjarazzjonijiet bil-miktub. (*Public Broadcasting Services Ltd. v. Broadcasting Authority* (FH) (11 May 2009) (1692/00) (Mr Justice C. Farrugia Sacco)

FN 13: Il-principji tal-gustizzja naturali jridu dejjem u skrupolozament jigu osservati minn kull Qorti, Tribunal, Bord jew Kummissjoni mahtura biex tiehu decisjoni fir-rigward ta' individwu, u ebda awtorita' moghnija b'dan il-poter ma tista twarrab dawn il-principji b'immunita'. (*Dr J. Cachia Fearne v. Permanent Secretary Ministry Resources and Infrastructure*) (FH) (20 October 2005) (106/03) (Mr Justice T. Mallia)

PG 194: Il-Qrati Ordinarji fuq id-decizjonijiet tal-*Emergency Compensation Board* ghandhom biss sindakat limitat, jigifieri illi huma jistghu biss jaraw jekk fid-decizjoni tal-Board hemmx xi haga *ultra vires* u jekk hemmx vjolazzjoni ta' gustizzja naturali..ir-regola *audi alteram partem* ghandha tigi skrupolzamet osservata u il-partijiet ghandhom id-dritt li jkunu prezenti fl-investigazzjonijiet li jaghmel id-delegat tal-Bord biex ikunu jistghu jikkontrollaw l-informazjzonijiet li jigu moghtija lil dak id-delegat ghall-finijiet ta' dik l-investigazzjoni (*Antonio Sammut v. John Bell Mc Cance et*) (FH) (20 May 1946) (Kollezz. Vol. XXXII. II.350)

FN 30: M'hemmx ghalfejn jinghad illi fil-gudizzju quddiem tribunali ta' kwalsiasi specje, il-gudikant, ankorke' hu fakoltizzat li jirregola l-proceduri quddiemu bil-mod li jidhirlu l-aktar opportun, hu obbligat li josserva mhux biss il-verbali tieghu izda, fuq kollox, il-kanoni fondamentali li jiggarantixxu lill-partijiet id-drittijiet ampji tad-difiza b'mod li jkunu jafu r-rizultanzi tal-process u li jesponu l-assunti taghhom in mertu. (*Professor Edward Mallia v. University of Malta*) (CA) (Inf.) (11 June 2010) (17/10)

FN 35: Ili jirrizulta li I-Ufficju rcieva I-ilment siegha u nofs qabel ma nzammet I-ewwel laqgha mal-persuni kontra min sar l-ilment, ghalhekk dawn ta' ahhar, ma setghux ikunu ippreparati sabiex iwiegebu ghall-llment u dan kuntrarjament ghal dak stabbilit fil-kaz *Trensoceen* fejn il-Qorti qalet li r-regola generali hi li intrapriza ghandha tkun, "clearly informed, in good time,of the essence of the conditions to which the Commission intends to subject an nexemption and it must have the opportunity to submit its observations to the Commission." (*Liquigas Malta Ltd v. Office of Competition*) (CCAT) (1/11) (Mr Justice M. Chetcuti)

FN 44: "Il-principju tal-*equality of arms* jesigi *inter alia*: li kull parti f'kawza jkollha l-opportunita' ragjonevoli li tipprezenta l-kaz taghha, inkluza l-fakolta' li tressaq xhieda, taht kondizzjonijiet li l-ebda parti ma tkun "at a substantial disadvantage" *vis-a-vis* l-parti l-ohra; li kull parti jkollha l-opportunita' u z-zmien adegwat biex tipprepara u torganizza d-difiza taghha b'mod approprijat u minghajr restrizzjoni; li kull parti jkollha l-opportunita' li tezamina d-dokumenti, inkluzi rapporti ta' periti nominati mill-Qorti, ezibiti fil-kawza u wkoll tezamina x-xhieda prodotti mill-parti l-ohra; u, b'mod generali, li r-restrizzjonijiet imposti mill-ligi domestika ma jwasslux sabiex parti ssofri "actual prejudice" b'mod li d-dritt taghha ghal smigh xieraq jigi vjolat. (*Teshome Tensae Gebremariam v. Refugee Appeals Board* (CA) (30 September 2016) (65/10)

FN 46: "Id-dritt li d-decizjoni tkun bazata fuq stharrig probatorju logiku u b' motivazzjoni sobrija li tindika r-ragunijiet ghaliex t-talba jew l-eccezzjonijiet ghaliha jkunu qed jigu milqugha jew michuda. Fi kliem iehor, il-process ghandu jipproduci dik id-decizjoni akkurata li tirrifletti l-verifiki korretti ta' fatt u l-applikazzjoni tal-ligi." (*Mary Zarb v. Fiona Azzopardi*) (CA Inf.) (28 March 2007)

FN 47 : Il-Bord ghandu l-obbligu (*shall*) li jiddeciedi l-appell prezentat quddiemu wara debita konsiderazzjoni tal-ilmenti kif kontenuti fl-ittra mibghuta mill-istess socjeta' u ma jistax, bhal kif ghamel fil-kaz prezenti, jinjora dawn l-ilmenti u jaghti decizjoni li skont il-ligi mhi decizjoni xejn, ghax ma hemmx dikjarazzjoni espressa li tghid li l-appell gie michud. (*Support Services Ltyd. v. Central Procurement and Suplies Unit Gozo Hospital et* (CA) (15 December 2016) (302/16)

FN 51: Ta' min isemmi wkoll illi l-opportunita` tad-difiza pjena, anke jekk dan mhux precizat b' mod kategoriku u dirett fl-accennati sentenzi, tinkorpora fiha l-principju daqstant iehor importanti ta' l-hekk definit "equality of arms". Principju dan illum sew stratifikat fi procedimenti ta' indoli kostituzzjonali u konvenzjonali (*Austin Gonzi v. Malta Drydocks Corporation*) (FH) (27 October 2004) (1808/97) (Mr Justice Ph. Sciberras)

PG 198 : Motivazzjoni mhux biss trid tirrizulta mis-sentenza izda wkoll li din tkun adegwata. Motivazzjoni li kellha tkun tali li fil-minimu tissodisfa fuq kollox il-partijiet in kawza fuq il-korrettezza fattwali u guridika tar-ragunijiet li wasslu ghad-decizjoni. Ir-razzjonalita' tal-motivazzjoni kellha fil-minimu tindika raffront bejn ir-raguni tad-decizjoni u r-rizultanzi probatorji u l-principju tad-dritt applikabbli. (*Eugene Cardona v. Transport Appeals Board,*) (CA Inf.) (18 June 2010) (18/2010)

PG 201: Jekk l-ghemil ikun sar kif tridu il-ligi, meta il-ligi ma thalli ebda diskrezzjoni dwar kif ghandu jsir dak l-ghemil amministrattiv, il-Qorti ma tistax tghid illi il-ligi ghandha titqies li m` ghandhiex effett, ghax dak tista` taghmlu biss fil-kompetenza kostituzzjonali taghha; u lanqas ma jkollha il-possibilita` li tinterpreta il-ligi ordinarja b` mod "konformi" mal-Kostituzzjoni jekk dik l-interpretazzjoni ma tkunx possibbli minghajr ma effettivament tghid li il-ligi ma tiswiex. (*Smash Communications Limited v. Broadcasting Authority et*) (CA) (24 June 2016)

FN 60: Illi kif inghad fis-sentenza "*Maltacom plc v. Awtorita' ta' Malta dwar il-Kommunikazzjoni*" (A.I.C. (RCP) 26 ta' Gunju 2008) huwa necessarju li decizjoni tkun fiha r-ragunament ghaliex min iddecieda ikun wasal ghal tali decizjoni u din ma hijiex kwistjoni semplici li l-Arbitru naqas li jaghti risposta dettaljata ghal kull argument … izda li effettivament l-istess decizjoni hija bla motivazzjoni ghax naqset li tittratta u tiddeciedi dwar dak sottomess lilha mill-partijiet. (*Natalia Aquilina v. Director Social Services*) (CA) (Inf.) (17 May 2011)

FN 66: Din il-Qorti thoss li gie ppruvat li f'dan il-kaz kien hemm ksur tal-principji ta' gustizzja naturali ghaliex ma kienx hemm smigh xieraq, ma kienx hemm parita' ta' armi, u kien hemm nuqqas ta' osservanza tal-principju ta' *audi alteram partem* u wkoll peress li l-attur qatt ma kien informat li kien qed jigi akkuzat bl-agir li jekk tieghu jinstab li kien responsabbli huwa kien b'konsegwenza tal-istess proceduri seta' jehel penali ta' Lm5,000, li fil-fatt giet inflitta fuqu bid-decizjoni msemmija (*Paul Cassar ne v. Malta Transport Authority*) (CA) (25 January 2013) 1146/06)

PG 204: F'materji fejn id-drittjiet tal-individwu huma materjalment u sostantivament affetwati, bhal fil-kazijiet fejn permess tal-bini gie irtirat, kien principju tal-gustizzja naturali li l-Awtorita' li irtirat il-permess kellha qabel xejn tisma' il-partijiet kollha koncernati qabel ma twettaq dak l-irtirar. (*Mary Grech v. Minister Development Infrastructure*) (CA) (29 January 1993)

PG 206: Illi llum il-ġurnata huwa stabbilit li biex jitqies li awtorita' tkun qdiet il-funzjoni tagħha tajjeb, huwa mistenni illi dik l-awtorita' tgħid lill-persuna mhux biss x'kienu r-raġunijiet li wasslu għad-deċiżjoni li l-istess awtorita' tkun ħadet fil-konfront tagħha, iżda wkoll li l-persuna tingħata l-opportunita' illi ssemma' leħenha, u f'każ fejn il-persuna ma tkunx taf x'inhuma r-raġunijiet li wasslu lill-awtorita' toħroġ l-ordni fil-konfront tagħha, l-awtorita' għandha tagħti lil dik il-persuna l-opportunita' xierqa li tagħmel l-osservazzjonijiet tagħha. (*Rita Vella v. Chief Government Medical Officer et*) (FH) (17 November 2016) (140/12)

FN 72: Din il-Qorti tghid li huwa principju ta` amministrazzjoni tajba illi kull persuna li fir-rigward taghha tkun sejra tittiehed decizjoni, specjalment fil-qasam tal-amministrazzjoni pubblika, kif ukoll fejn ikun hemm involut l-impieg ta` persuna fis-settur pubbliku, u l-aktar fejn dik id-decizjoni tista` teffettwa d-drittijiet tal-persuna koncernata, dik il-persuna ghandha tinghata mhux biss ir-ragunijiet ghal kwalsiasi decizjoni li tirrigwardaha izda ghandha tinghata wkoll l-opportunita` li ssemma lehinha bis-shih specjalment fejn hemm involut l-impieg kif kien il-kaz tal-lum. (*Carmel D`Amato v. Malta Tourism Authority*) (FH) (29 November 2011) (875/06) (Mr Justice J. Zammit McKeon)

FN 74: Illi ghalkemm il-principju tal-gustizzja naturali *nemo iudex in causa propria* kien originarjament japplika ghall-Qrati Civili, konsegwentement ghat-tkabbir tas-setghat amministrattivi, dan gie estiz ukoll ghall-isfera amministrattiva. (*Mary Mifsud ne v. Superintendent Cultural Heritage et*) (FH) (31 May 2012) (863/07) (Mr Justice R. Pace)

FN 75: Din il-Qorti ma taqbilx, *in generalibus*, mas-sottomissjoni tal-atturi li l-principji ta' gustizzja naturali ma japplikawx biss u strettament ghal min huwa parti minn proceduri,"izda ghal kull min jista' jigi avversament milqut minn decizjoni ta' awtorita` pubblika". Din l-asserzjoni hija wiesgha wisq u titfa' obbligu fuq l-awtorita` li tfittex u tindaga hi min jista' jkun "avversament milqut" mid-decizjoni taghha. (*Boris Arcidiacono et v. Salvu Schembri et)* (CA) (28 June 2013) (1825/01)

FN 87: Huwa principju assodat fis-sistema guridika nostrali li l-principju tad-dritt kwezit ifisser li normi godda jridu jirrispettaw dawk id-drittijiet li jkunu twieldu minn fatt akkwizittiv u validu taht il-ligijiet ezistenti u li jkunu allura già jifformaw parti mill-patrimonju ta' l-individwu. Essenzjalment il-principju tad-dritt kwezit isib l-applikazzjoni tieghu fil-kuntest tal-kwistjoni tar-retroattività u l-iktar u b'mod partikolari fil-kuntest tar-retroattività tal-Ligijiet (*XXX v. Commissioner for V.A.T.*) (ART) (28 May 2015) (236/12)

FN 87: Li fejn jezisti veru u proprju dritt kwezit kompjut taht il-ligi antecedent dana ghandu effikacja fih innifsu li jirrezisti ghall-applikazzjoni tal-ligi anki fiskali f`kaz ta`mutament tal-ligi anterjuri (*Antonio Cassar Torregiani v. Dr Vincent Gatt*) (CA) (12 May 1950) (Kollezz. Vol. XXXIV.I.148)

PG 211: B'hekk dak li tishaq fuqu l-Qorti Ewropea ta' Gustizzja huwa l-effett retroattiv tal-Legislazzjoni l-gdida u mhux tant l-impossibilità li s-sitwazzjoni futura ma tigix mibdula permezz ta' Legislazzjoni gdida, li traspost fil-kaz in ezami jfisser li d-Direttur Generali (Taxxa fuq il-Valur Mizjud) ghandu dritt jibdel u addirittura jirrevoka arrangament specjali li jkun fis-sehh sa' dak iz-zmien basta li tali bdil jew revoka jeffettwaw transazzjonijiet futuri u mhux ikollhom effettiv retroattiv fuq transazzjonijiet li taht dak l-arrangament specjali kien accettati bhala validi.`(*XXX v. Commissioner for V.A.T.*) (ART) (28 May 2015) (236/12)

Chapter IX:

Abuse of Power

FN 3: L-interpretazzjoni ta' dak li huwa ekwu u ragonevoli jista' jkun soggettiv. Din izda tista' tkun diffikulta' aktar apparenti milli reali. Id-drittijiet tac-cittadin huma garantiti mill-Kostituzzjoni taghna. Fl-istess waqt il-gustizzja, l-ekwita' u r-ragonevolezza huma principji li ghandhom janimaw l-interpretazzjoni ta' l-istess. F'cirkostanzi normali, ir-ragonevolezza ghandha tikkwalifika l-esercizzju ta' kwalsiasi diskrezzjoni esekuttiva anke jekk il-ligi stess ma ssemmix jew ma tikkwalifikax espressament tali diskrezzjoni. (*Reginald Fava pro et noe v. Superintendent for Public Health et) (*FH) (7 April 2010) (278/10) (Mr Justice J. Zammit McKeon)

FN 3: Id-decizjoni tas-Supretendent tas-Saħħa Pubblika ma kellhiex tkun motivata mill-biża' reali jew preżunta ta' azzjoni jew reazzjoni ta' terzi, liema biza' kienet ir-raguni principali wara l-*administrative freeze* li cahdet lir-rikorrenti mid-drittijiet tagħha għal snin sħaħ. (*Colette Schembri v. Chief Government Medical Officer)* (FH) (9 March 2017) (893/07) (Mme Justice Anna Felice)

FN 4: Il-kejl ta' r-raġonevolezza jkun wieħed oġġettiv marbut maċ-ċirkostanzi fattwali li fihom dik l-istess diskrezzjoni titwettaq. B'żieda ma' dan, biex imġiba titqies abbużiva, min jallegaha jrid juri li kien hemm element ta' intenzjoni biex wieħed jagħmel il-ħsara,liema fehma wieħed jista' jasal biex juriha b'xi prova ta' mġiba esterna li tagħmel parti mill-eżerċizzju diskrezzjonali li jkun. Minbarra dan, l-eżerċizzju diskrezzjonali jrid ikun kemm "rite" u kif ukoll "recte", jiġifieri jrid jitwettaq skond il-proċedura stabilita u kif ukoll imħaddem b'ħaqq. Dan kollu jitlob ukoll li d-diskrezzjoni titwettaq b'mod raġonevoli. (*Dr Daniel Grixti Soler et v. Public Service Commission et*) (FH) (10 April 2015) (736/14) (Mr Justice JR Micallef)

FN 41: Il-Kummissarju tal-*Housing* igawdi id-dritt li jirrikewisizzjona kull fond.. u l-azzjonijiet tieghu mhumiex sindakabbli mill-qrati sakemm l-ordni ta' rekwisizzjoni inharget fil-form rikjesta mil-ligi. (Victor Trapani ne v. Oscar Pace Feraud) (CA) (6 February 1950) (Kollezz. Vol. XXXIV/I.17)

FN 42 . "Trattandosi di un provvedimento amministrattivo emanato da un funzionario del governo o da una giunta governattiva in virtu` di una legge o di un regolamento, le Corti di Giustizia sono competenti a prendere cognizione della legalita` di esso, quando si pretenda leso il diritto altrui nel senso che possono esaminare se tale provvedimento rientra nelle attribuzioni dell` Autorita` che l` ha emanato e se e` regolare quanto alla forma, ma non possono discutere l`opportunita` o la giustizia di esso se l`Autorita suddetta era competente a prendere la deliberazione impugnata e questa fu presa nella debita forma."(Mallia Tabone v Stivala(CA)(11 January 1926) .

FN 42 Colle parole dalla legge adoperate espressamente "a giudizio del Direttore dei Servigi Veterinari" si volle chiaramente sottrarrre il giudizio di detto Direttore al giudizio di altra autorita'.. (Giorgio Demarco v. James Trurner ne et (FH)(12 October 1933) (Kollezz. Vol. XXVIII.II. 455)(Mr Justice G. Depasquale).

FN 46: “L-esproprijazzjoni ta` art ghal utilita` pubbika tikkostitwixxi att li jigi maghmul mill-awtorita` *iure imperii*. U kif id-dritt ta` l-awtorita`, li tesprorija art ghal skop pubbliku mhux sindakabbli mill-Qrati sakemm jigi esercitat mill-awtorita` kompetenti u fil-forma preskritta mil-ligi, hekk ukoll hija insindakkabli l-esekuzzjoni ta` dak id-dritt li hija parti u haga wahda ma `l-istess dritt. (*Gioacchino Attard Montalto v. Edgar Cuschieri noe*) (FH) (27 June 1953) (Kollezz. Vol. XXVII.I.749)

PG 226: “Il-kliem “in its opinion” ghandhom jigu interpretati fis-sens li il-Qorti ma twaqqax id-decizjoni ammenocche’ mhix tali li ebda grupp ta’persuni ragjonevoli ma jista’ jasal ghall-istess konkluzjoni, jew ikun hemm malafede jew il-korruzzjoni.” (*Toni Pellegrini noe v. Edward Arrigo noe et*) (FH) (10 March 1964) (Vol. XLVIII.II 869)

FN 58: Fil-kaz in ezami l-Korporazzjoni imxiet fuq kriterji stabbiliti (almenu ma giex pruvat kuntrarju quddiem dina l-Qorti) ghall kull minn qaghad ghal ezami. Il-Qorti taht l-artikolu 469(A) bhala qorti ta’ revizjoni ma tidholx fil-kwistjoni ta’ kif taw il-marki u ghaliex taw dawk il-marki u jekk saritx evalwazzjoni tajba tal-kapacitajiet ta’ l-attur. Dawn huma affarijiet li kienu fid-diskrezzjoni ta’ min ezamina u dina l-Qorti ma tidholx f’kwistjonijiet dwar jekk l-ezami kienx tajjeb jew le, jew jekk l-attur jafx ix-xoghol aktar minn dawk li ntghazlu. (*Joseph Attard v. Enemalta Corporation*) (FH) (5 October 2001(2282/97) (Mr Justice G. Valenzia)

FN 60: L-Artikolu 469A imsemmi, introdott bl-Att XXIV ta’ l-1995 u applikabbli ghall-procedura odjerna, jinvesti bl-ewwel subinciz tieghu lill-qrati ordinarji ta’ kompetenza civili gurisdizzjoni biex jistharrgu l-validita` ta’ l-ghemil amministrattiv jew li jiddikjaraw dak l-ghemil null, invalid jew minghajr effett; Dan it-trattament akkordat mil-ligi lil qrati jiddipartixxi certament minn dik il-gurisprudenza, ormai destitwita minn kull logika, li kienet tirritjeni li l-funzjoni tal-Qrati kienet limitata ghall-indagini dwar jekk l-ghemil kienx jirrientra attribuzzjonijiet ta’ l-awtorita` izda mhux ukoll li jezaminaw “l’opportunita` o la giustizia di esso”. Ara decizjoni fl-ismijiet *Marchese Giuseppe Mallia Tabone v. Maggiore Frank Stivala nomine”,* (Appell Civili, 11 ta’Jannar 1926.) li kienet titratta minn nuqqas ta’ renova ta’ licenza lill-attur ghall-garr ta’ arma tan-nar ghall-iskop ta’ kacca. Huwa ovvju minn din is-sentenza illi l-kuncett ta’“reasonableness” kif zviluppat fir-Renju Unit jew dak ta’ “detournement de pouvoir” fid-dritt Franciz bhala mezz ta’ kontroll fuq l-ezercizzju arbitrali tad-diskrezzjoni, ma kienx konoxxut mill-Qorti. (*Anthony Psaila v. Commissioner of Police*) (FH) (28 January 2004) (1734/97) (Mr Justice Ph. Sciberras)

FN 61: Mill-provi prodotti din il-Qorti ma jirriżultalhiex illi d-deċiżjoni li dwarha jilmenta l-attur hija *ultra vires* għaliex arbitrarja. Minkejja li din il-Qorti għandha d-dubji tagħha dwar il-qisien applikati mill-Awtorità sabiex waslet għall-konklużjoni li t-triq hija wiesa biżżejjed sabiex tippermetti parkeġġ ta’ vetturi u l-passaġġ ta’ vetturi kbar bħal ma huma ambulanzi… b’daqshekk ma jfissirx illi d-deċiżjoni tal-Awtorità kienet tikkostitwixxi abbuż ta’ setgħa għaliex kienet deċiżjoni arbitrarja. Kien jispetta lill-attur li juri għas-sodisfazzjon tal-Qorti li d-deċiżjoni kienet ibbażata fuq għanijiet mhux xierqa jew kunsiderazzjonijiet mhux rilevanti.” (*Dr John Vassallo v. Malta Transport Authority et*) (FH) (27 June 2017) (288/14) (Mme Justice Anna Felice)

FN 62: In-nuqqas ta' awtorita' vestita mil-ligi li tuza ssetghat diskrezzjonali taghha jikkostitwixxi abbuz ta' dik is-setgha [De Smith *Judicial Review of Administrative Action*,(4th Edit.) Chap 6. pp 298 sa 321) l-izjed meta dik l-awtorita'tonoqs li taghti raguni ghaliex naqset li tezercita setgha bhal dik. Nuqqas bhal dan igib mieghu il-konsegwenza ta "abbuz amministrattiv li jehtieg rimedju kif iddecidiet din il-Qorti diversament kostitwita f'kawza simili ta' rifjut ta' ezercizzju ta' diskrezzjoni fl-ismijiet ***Whelpdale et noe v. Kontrollur tad-Dwana*** maqtugha fil-31 ta' Mejju, 2004. (Tabone Computer Centre Ltd v. Director Wireless Telegraphy (CA) (31 January 2007) (519/97)

FN 63: Il-Qorti taqbel ma' l-atturi li din m'hijiex deċiżjoni motivata iżda dettata. Tribunal, hu x'inhu, ma għandux jiddeċiedi għax sempliċement ġie informat minn parti, hi min hi, li qed iżżomm ma'xi pożizzjoni, hi x'inhi. Anke fir-rigward tal-parir tal-UNESCO it-Tribunal aċċetta dak li qallu d-dipartiment mingħajr imqar ma ġie muri dokument f'dan is-sens. (*Carmel Fenech v. Commissioner of Police et*) (FH) (14 February 2007) (1622/00) (Mr Justice J. Azzopardi)

PG 229: Fil-kaz tal-lum irrizulta li l-Kummissarju tal-Pulizija, mhux semplicement ikkonsulta mal-Awtorita` konvenuta, haga li seta` jaghmel, izda spicca halla ghal kollox fl-idejn ta` l-Awtorita` konvenuta sabiex tkun hija li –realment u effettivament – tiddeciedi dwar l-applikazzjoni tas-socjeta`attrici. Fil-mument li l-Awtorita` ma tatx *clearance*, il-Kummissarju tal-Pulizija waqaf hemm, ma ddelibera xejn, u lanqas wiegeb kif dovut ghall-applikazzjoni tas-socjeta` attrici. (*Ballut Blocks Limited v. Commissioner of Police et*) (FH) (15 December 2016) (710/04) (Mr Justice J. Zammit Mckeon)

FN 67: Hija wkoll irragjonevoli u abusiva tad-diskrezzjoni amministrattiva moghtija lilu mill-istess artikolu (art. 84) li ma jawtorizzahx li jimponi kondizzjonijiet li jeccedu l-iskop tal-Ligi Principali u hija wkoll irrilevanti ghall-iskop tal-ligi li tiddikjara espressament liema huma il-kondizzjonijiet li fihom il-Ministru ma ghandux johrog licenzja. (*Prime Minister v. Sister Luigi Dunkin*) (FH) (26 June 1980) (675/80) (Mr Justice J. Herrera)

FN 69: Minn dan kollu johrog il-principju illi Att li qieghed jaghti poteri diskrezzjonarji lill-Ezekuttiv, dawn il-poteri diskrezzjonarji ghandhom jintuzaw ghal, u fl-ambitu tal-iskop li ghalih l-Att gie promulgat, u di piu` il-Qrati ghandhom il-poter u d-dritt li jissindakaw il-kazijiet li jitressqu quddiemhom kemm direttament b'applikazzjoni tal-persuna li qed tilmenta kemm ukoll indirettament bhala forma ta` difiza minn persuna li tilmenta biex tezamina jekk il-poteri diskerzzjonarji moghtija gewx uzati skond il-ligi fl-ambitu ta` l-iskop tal-istess Att li jkun ikkonferihom jew inkella b'abbuz u kontra l-ispirtu tal-istess ligi jew b'mod irragjonevoli. (*Prime Minister v. Sister Luigi Dunkin*) (FH) (26 June 1980) Mr Justice J. Herrera) (675/80)

PG 232: Fil-fehma ta' din il-Qorti l-iskop principali ta`dan l-Att fejn inghataw il-poteri diskrezzjonarji lill-Ministru biex johorg licenzji taht l-artikolu 84(1) huma biex il-Ministru koncernat ma johrogx licenzji u ma jippermettix illi postijiet jintuzaw ghal skopijiet imsemmija fl-art. 84(1) qabel ma huwa jassigura ruhhu li "l-istandard of medical care or service "li ser jigi provdut minnhom ikun ta` kwalita` tajba u gholja u dan dejjem biex jissalvagwardja il-harsien tas-sahha pubbliha f'Malta … minn dan johrog allura illi l-ewwel kondizzjoni imposta mill-On. Ministru tas-Sahha fil-hrug tal-licenzja lill-konvenuta u cioe` li il-konvenuta kellha tipprovdi mhux inqas minn 50% tal-facilitajiet tal-Isptar inkluzi 50% tan-numru tas-sodod lill-Gvern ma ghandha l-ebda relazzjoni ghall-iskop principali li ghalih gie promulgat l-Att XX tal-1977… barra minn dan jidher ukoll li l-istess Onor. Ministru tas-

Sahha bl-imposizzjoni ta` l-ewwel kondizzjoni tal-licenzja *de qua* esercita id-diskrezzjoni amministrattiva moghtija lilu mill-art.84 tal-Kap 51, abusivament, illegalment u irragjonevolment (*Prime Minister v. Sister Luigi Dunkin) (*FH) (26 June 1980) (675/80) (Mr Justice J. Herrera)

PG 233: Il-Gvern ma jistax jirrevoka jew johrog mill-obbligi tieghu minn kuntratt b'semplici att amministrattiv. …il-Gvern qieghed jimponi kondizzjoni li hija direttament kontrarja ghall-kondizzjoni li hemm fil-kuntratt ta` donazzjoni. (*Prime Minister v. Sister Luigi Dunkin*) (FH) (26 June 1980) (675/80) (Mr Justice J. Herrera)

FN 72: "Il-kejl ta' r-raġonevolezza jkun wieħed oġġettiv marbut maċ-ċirkostanzi fattwali li fihom dik l-istess diskrezzjoni titwettaq. B'żieda ma' dan, biex imġiba titqies abbużiva, min jallegaha jrid juri li kien hemm element ta' intenzjoni biex wieħed jagħmel il-ħsara, liema fehma wieħed jista' jasal biex juriha b'xi prova ta' mġieba esterna li tagħmel parti mill-eżerċizzju diskrezzjonali li jkun. Minbarra dan, l-eżerċizzju diskrezzjonali jrid ikun kemm "rite" u kif ukoll "recte", jiġifieri jrid jitwettaq skond il-proċedura stabilita u kif ukoll imħaddem b'ħaqq. Dan kollu jitlob ukoll li d-diskrezzjoni titwettaq b'mod raġonevoli (Abdallah Ahmed Abdalla Bashshar v. Minister Foreign Affairs et) (FH) (26 February 2013) (273/09) (Mr Justice JR Micallef)

FN 73: Jehtieg li lill-Qorti jirrizultalha li dik l-awtorita` tassew qieset il-kwestjoni li kellha quddiemha, u li dan ghamlitu minghajr l-indhil tal-ebda haddiehor jew bla ma poggiet lilha nnifisha f'qaghda fejn ma setghetx jew irrifjutat li twettaq dik id-diskrezzjoni. Siewi wkoll li jigi accertat li l-awtorita` mistharrga m'ghamlitx dak li kienet espressament mizmuma milli taghmel, jew jekk ghamlitx xi haga li ma kinitx awtorizzata taghmel. Fuq kollox, l-awtorita` mistharrga trid tkun imxiet *bona fide* u qieset il-konsiderazzjonijiet rilevanti tal-kaz. Dawn huma, fil-qosor, il-gabra tal-kategoriji fid-Dritt Amministrattiv ta' nuqqas ta' ezercizzju ta' diskrezzjoni u ta' eccess jew abbuz ta' dak l-ezercizzju. (*Lawrence Borg nomine v. Goveror Central Bank*) (FH) (1 March 2014) (2959/96) (Mr Justice JR Micallef)

PG 235: L-uzu diskrezzjonali huwa kjarament f'konflitt u f'kuntrast ma' wiehed (mill-anqas) principji fundamentali ta' l-ordinament guridiku Malti, u cjoe' illi d-drittijiet u l-obbligi kollha, ta' kull cittadin ghandhom jigu determinati minn xi organu guridiku, indipendenti u imparzjali. Huwa manifest illi l-Kummissarju ghalhekk ma jistax bis-sahha tad-dover diskrezzjonali kif ezercitat bil-'kundizzjoni' in kwistjoni – jiddeciedi unilateralment il-kontravenzjonijiet tal-'kundizzjoni' u jikkomina l-piena ta' inkamerament ta' Lm600" (*Frank Pace v. Commissioner of Police*) (CA) (18 November 1994) (1311/78)

FN 74: Hija l-fehma ta' din il-Qorti li d-decizjoni amministrattiva li hadu l-konvenuti ma tghaddix it-test tar-ragjonevolezza ghaliex bbazata fuq kriterji mhux mgharrfa lil kulhadd, inkluzi ghalhekk l-atturi, li jirrendu dik id-decizjoni mhux oggettiva u l-istess ghal kulhadd. (*Carmelo Dingli et v. Comptroller of Customs et*) (CA) (27 March 2009) (66/92)

FN 79: Ma hemm xejn irragjonevoli fl-interpretazzjoni tal-konvenuti li l-*candy sticks* ghandhom forma ta' sigarett u li jikkunsidrawhom bhala helu f'forma ta' sigarett. Il-candy stick qeghdin f'pakketti bhal ma jigu pakkettjati s-sigaretti, qeghdin f'daqqa go kaxxa u ma jinbieghux f'borza bhal helu jew bil-kwart`. (*Sweetsource Ltd v. Superintendent for Public Health et) (*FH) (30 May 2007) (1079/05) (Mr Justice G. Valenzia)

FN 83: Il-gudizzju tal-konvenut kien fic-cirkostanzi wiehed korrett, tenut maggorment qies tal-fatt illi l-licenza mitluba kienet ghall-arma tan-nar li, ghalkemm distinta, fl-imghoddi kienet il mezz li dwarha l-attur gie imputat u instab hati ta' reat serju u gravi. (*Anthony Psaila v. Commissioner of Police* (FH) (28 January 2004) (1734/97) (Mr Justice P. Sciberras)

PG 236: Id-diskrezzjoni trid tigi esercitata mhux biss fil-parametri ta`dak li l-awtorita`tikkunsidra bhala l-interess pubbliku, imma wkoll, u bl-istess enfasi, fil-parametri ta`dak li hu gust u ragjonevoli.… l-interpretazzjoni ta `dak li hu gust u ta ` dak li hu ragjonevoli ghandha tkun l-istess wahda li nuzaw biex ninterpretaw il-Kostituzzjoni demokratika taghna." (*Joseph Portelli et v. Minister for Works et) (F*H) (15 March 1993) (Kollezz. Vol. LXXVII.III.70) (Mr Justice G. Muscat Azzopardi)

FN 88: L-MTA qeghda taghti zewg verzjonijiet ghar-raguni ghaliex hija ma zammitx lil attur. Minn naha wahda tghid illi l-attur ma kienx kapaci f`xogholu u minn naha l-ohra tghid illi l-kariga li kien jokkupa kienet saret superfluwa wara r-ristrutturar li kien sar. Li jidher car pero` huwa li l-Awtorita` ghazlet illi ma tissenjax lill-attur izda li titrasferih lil IPSL sabiex isibu xoghol iehor (*Carmel D'Amato v. Malta Tourism Authority*) (FH) (29 November 2011) (Mr Justice J Zammit Mckeon)

FN 89: Din il-Qorti taqbel mar-rikorrenti li fil-kuntest tat-talba taghha dwar stharrig gudizzjarju taht l-Artikolu 469A tal-Kap. 12 il-Qorti tista'tistharreg jekk l-agir tal-Awtorita` kompetenti kienx, apparti ragunijiet ohra, diskriminatorju wkoll u indipendentement minn kwistjonijiet ta' ksur ta' drittijiet tal-bniedem. (*Agnes Gera de Petri Testaferrata Bonici Ghaxaqv. Attorney General et*) (CA) (30 September 2011) (327/07)

FN 95: Id-decizjoni tal-Kunsill li jbiddel fehmtu u ma jinsistix ghall-prova ttiehdet hesrem wara l-kaos li kienu qed jaghmlu haddiema tal-Kooperattiva, u l-idea li tittiehed decizjoni malajr u fis-satra tal-lejl ukoll ittiehdet wara storbju u theddid minn membri ta' l-istess Kooperattiva. (*Philip Seguna et v. Zebbug Local Council*) (CA) (3 October 2008) (934/98)

FN 97: Jekk l-attur kiser il-ligi ma jistax jippretendi mmunita' fuq semplici allegazzjoni ta' diskriminazzjoni li certament tigi ndagata fis-sede proprja ta' l-azzjoni kriminali izda li certament u fil-fehma ta' din il-Qorti ma twassalx, u ma tistax twassal, ghan-nullita' jew invalidazzjoni tal-proceduri kriminali. (*Peter Paul Borg v. Planning Authority et) (*CMSJ) (24 January 2016) (255/97) (Mgte T. Micallef Trigona)

FN101: Imma il-fatt innifsu li ntwera certu akkaniment f'dak li kien qieghed jagħmel il-Bord, min-naħa ta' persuna ufficjali fil-Ministeru li ma kellhiex ghalfejn tindahal, jixħet dell fuq kulma kien għaddej, ukoll jekk il-Bord seta' ma kienx jaf bih. (Elton Taliana v. Minister Home Affairs (FH) (7 November 2017) (177/14) (Mr Justice JR Micallef)

FN 102: Billi l-agir tieghu ma kenitx rinforzata bil-Ligi, imma biss minn *policy* emessa bhala linja gwida, din il-Qorti tikkonkludi li l-intimat agixxa *ultra vires* u b'abbuz tal-poteri tieghu billi dan sar fuq konsiderazzjonijiet mhux rilevanti bi ksur ta' dan is-subartikolu 469A(1) (b) (iii) (*All for Propery Limited v. Director General Customs*) (FH) (30 September 2014) (741/08) (Mme. Justice L. Schembri Orland)

FN 103: Fid-dawl ta' dan kollu, hija l-fehma ta' din il-Qorti li d-decizjoni amministrattiva li hadu l-konvenuti ma tghaddix it-*test* tar-ragjonevolezza ghaliex bbazata fuq kriterji mhux

mgharrfa lil kulhadd, inkluzi ghalhekk l-atturi, li jirrendu dik id-decizjoni mhux oggettiva u l-istess ghal kulhadd (*Carmel Dingli v. Comptroller of Customs*) (CA) (27 March 2009)

FN 105: *Policy* tal-Kabinett ma ghandhiex tintuza biex talba li ssir legittimament tigi deligittimizzata ghaliex altrimenti jkun qed jigi pprattikat agir abbusiv mill-iktar assolut. (*Johann Said v. Commissioner of Police*) (ART) (10 December 2012) (Magte G. Vella) (325/12)

FN 106: It-Tribunal josserva li l-awtoritajiet pubblici u anke dawk governattivi ma ghandhomx jadottaw il-funzjoni ta' protetturi jew tuturi ta' l-interessi ta' *lobby groups* li jirrapprezentaw l-interessi personali ta'xi uhud a detriment u bi pregudizzju ta' haddiehor; dana zgur ma jikkostitwixxix *good governance.*` (*Johann Said v. Commissioner of Police* (ART) (10 December 2012) (Magte G. Vella) (325/12)

FN 108: Li l-awtorità ghandha s-setgha li tfassal *policy* mehtiega biex jintlahaq il-ghan li jkun hemm sistema ta' trasport pubbliku integrat sew, minghajr perikolu, ekonomiku u efficjenti, johrog mil-ligi li waqqfitha; izda, safejn il-*policy* tolqot drittijiet ta'terzi, bhal fil-hrug ta' licenzi, ghandha ssir bil-mezz li tipprovdi l-ligi stess fl-art. 27, li jaghti lill-attrici, bil-kunsens tal-ministru, is-setgha li taghmel regolamenti. Hekk il-kriterji ghall-hrug tal-licenzi mhux biss ikunu maghrufa minn kulhadd izda wkoll il-bazi tad-decizjonijiet tkun wahda oggettiva, u l-istess ghal kulhadd. (Nazzareno Fenech v. Chairman Malta Transport Authority (FH) (9 March 2001) (481/96) (Mr Justice G. Caruana Demajo)

FN 110: Ma giex ippruvat ebda abbuz mill-Kummissarju tat-Taxxi Interni ghax dan mexa skond il-ligi, anke jekk l-interpretazzjoni tal-ligi hija wahda xi ftit imgebbda minhabba li wiehed qed jigi innegat id-dritt li jmur it-Tribunal jekk ihallas u b'hekk jevita imghaxijiet ulterjuri. Izda ebda wiehed mill-kapijiet li tahthom tista' ssir azzjoni amministrattiva ma hu applikabbli ghall-kaz odjern. (David Debono v. Commisisoner of Inland Revenue (FH) (5 May 2009) (61/06) (Mr Justice C. Farrugia Sacco)

FN 115: Pero` jidher li ghall-inqas fil-mument li fih l-appellat gie moghti d-doveri ta' marixxall, ma kienx jidher li se jkun hemm intoppi ghal eventwali ezercizzju ta' promozzjoni. Ghalhekk bl-agir tieghu l-appellant holoq *a legitimate expectation* favur l-appellat li jekk hu jakkwista l-esperjenza necessarja, hu kien se jkollu l-possibilita` li jigi promoss ghal grad ta' marixxall. Din l-aspettattiva giet ukoll konfermata f'xi punt mill-Ministru responsabbli ghall-Gustizzja li kien wieghed lill-appellat u lil shabu li kien se jaghmel ghaxar marixxalli. (*Director General Law Courts v. Pinu Axiaq) (*FH) (7 January 2003) (2633/00) (Mr Justice A. Magri)

PG 244: Ghalhekk kellu speranza legittima li hu ma kienx se jinghata aktar tard interpretazzjoni konfliggenti jew kontradittorja ma' dik li kien inghata precedentement." (*AB Ltd v. Director Customs and Excise Duty) (*CA) (Inf.) (6 November 2002)

PG 245: L-istat ta' dritt jirrikjedi u jippresuponi illi individwu ghandu jkun jaf sew x'inhi *a priori* il-posizzjoni tieghu dwar stat ta' fatt permezz ta' ligijiet u regolamenti cari fil-materja relattiva u mhux li jigi rinfaccjat habta u sabta bi kwalunkwe tip ta' kundizzjoni li qatt ma

seta' basar minn qabel biha , kif fil-fatt gara fil-kaz in ezami. *(Socjeta' Filarmonika La Stella v. Commissioner of Police)* (CMSJ) (17 July 19970) (Magte. M. Mallia)

PG 247: Ma kenux jaghtu *commitment* li l-operaturi se jithallew joperaw minghajr licenzja ghal zmien indefinit, jew sa kemm johorgu r-regolamenti godda. (Warrant No 1361/09) and Gaming Operation Limited v. Gaming Authority et (Warrant No. 1374/09) both decided by the FH on 20 August 2009 (Mr Justice Tonio Mallia)

FN 130: Id-deċiżjoni li l-jedd tal-liberta' tal-moviment jittieħed mill-attriċi tfasslet fuq tagħrif li hija ma marret qatt iżżur lil żewġha l-attur kemm dam miżmum il-ħabs. Jekk dan kien tabilħaqq il-każ, l-imħarrkin ma wrewx kif din iċ-ċirkostanza tfisser li l-atturi ma kinux baqgħu jgħixu flimkien. (*Kevin Brincat et v. Principal Immigration Officer et*) (FH) (5 July 2016) (684/05) (Mr Justice JR Micallef)

FN 131: Il-Qorti terġa' ssemmi ż-żmien twil li għadda bejn meta ttieħdet id-deċiżjoni biex jitneħħa l-jedd tal-liberta' tal-moviment mingħand l-attriċi sa dakinhar li qalulha bl-imsemmija deċiżjoni. Din iċ-ċirkostanza jidher li mhux biss tikser kull stennija ta' mġiba raġonevoli, iżda wkoll il-ħarsien tal-prinċipju tal-ġustizzja naturali li persuna tingħata għarfien ta' xi deċiżjoni li tkun ittieħdet fir-rigward tagħha u li tingħata r-raġuni jew raġunijiet għaliex tkun ittieħdet deċiżjoni bħal dik." (*Kevin Brincat et v. Principal Immigration Officer et*) (FH) (5 July 2016) (684/05) (Mr Justice JR Micallef)

Chapter X
Fifth Ground of Review
When the Administrative Act is otherwise contrary to law

FN 5: Konsegwenti ghal dan kollu jirrizulta li t-tielet proviso ta' l-artikolu 5 tal-Kap. 88 kellu jigi osservat, b'dan li fid-dawl ta' dan kollu, din il-Qorti thoss illi l-esproprju hekk kif sar, ma sarx skont d-disposizzjonijiet tal-Kap. 88 tal-Ligijiet ta' Malta u kien *ultra vires* ghall-istess u ghalhekk imur ukoll kontra l-artikolu 469A (1) (b) (iv) tal-Kap. 12 tal-Ligijiet ta'Malta u ghalhekk huwa null u minghajr effett. (*Agnes Gera de Petri v. Commissioner of Land) (Agnes Gera de Petri v. Commssioner of Land* (FH) (11 November 2008) (327/07) (Mr Justice C. Farrugia Sacco)

Chapter XI
Procedural Issues

FN 4: Il-Qorti hi tal-fehma li d-dritt limitat ta` appell li tipprovdi il-Ligi dwar ir-Relazzjonijiet Industrijali ma jipprekludi bl-ebda mod id-dritt ta` din il-Qorti li tissindika l-operat tal-istess Tribunal f`materja ta` gustizzja naturali (*RJC Catrers Ltd v. General Workers Union*) (FH) (9 October 2007(1022/06) (Mme Justice A. Felice)

FN 7: L-artikolu 469A(4) tal-Kap. 12 ukoll jaghti lil Qorti d-diskrezzjoni li ma tezercitax il-poter taghha u tisma' l-kawza meta jigi pruvat li l-attur kellu rimedju ordinarju xieraq u effettiv. Il-parametri uzati f'kaz ta' kawza kostituzzjonali japplikaw bl-istess mod

f'kawza ta' stharrig ta' ghemil amministrattiv. (*Carmel Cini v. Minister for Education*) (FH) (3 October 2017) (348/10) (Mr Justice M. Chetcuti)

FN8: Fil-fatt jista' jkun li l-hrug tal-istess ordni ta' rekwizzjoni sar skond il-Ligi, izda dan ma jfissirx li saret b'rispett lejn l-istess drittijiet fundamentali tal-bniedem ;ghalhekk certament li f'dan is-sens ma kienx hemm rimedju disponibbli lill-atturi hlief din il-kawza. (*Carmel Nassa v. Direttur Akkomodazzjoni Socjali*) (FH) (27 October 2011) (33/08) (Mr Justice R. Pace)

FN 9: L-artikolu 469A jista' biss jigi invokat fi proceduri kontra decizzjoni amministrattiva u mhux f'azzjonijiet fejn qed tigi allegata violazzjoni tad-drittijiet fondamentali protetti mill-Kostituzzjoni u mill-Konvenzjoni Ewropea. *Emmanuela Vella pr et ne v. Commissioner of Land et*) (FH) (2 October 2002) (32/02) (Mr Justice A. Magri)

FN 9: Il-proċess li jwassal ghat-tehid tal-art huwa għemil amministrattiv, mhux ġudizzjarju, ghalkemm bhal kull ghamil amministrattiv iehor, huwa soggett għal stħarriġ ġudizzjarju, u huwa proċess magħruf u aċċettat kemm mill-art. 37 tal-Kostituzzjoni u kemm mill-art. 1 tal-Ewwel Protokoll.

FN 11: Din il-Qorti lanqas ma tista' tilqa' l-eccezzjoni ta' nuqqas ta' ezawriment ta' rimedji ordinarji stante il-Artiklu 469A (4) Kap 12 jistipula illi ma jistax jintuza l-Artiklu 469A fejn att amministrattiv jista' jigi kontestat jew rimedjat quddiem Qorti jew Tribunal skond xi ligi ohra (*Federation of Estate Agents v. Director General Competition)* (FH) (21 April 2015) (87/13) (Mme Justice J. Padovani Grima)

FN 12: Azzjoni ta' stħarrig gudizzjarju tagħti setgħa lill-Qorti (fil-kompetenza tagħha civili ordinarja) li tqis l-ghemil bhala"null invalidu jew minghajr effett" iżda ma tagħtix lil dik il-Qorti s-setgħa li tordna kif kellu jittiehed l-ghemil amministrattiv jew li tiddetta lill-awtorita pubblika mharrka x'imissha taghmel biex taghti riemdju. (*Ivan Vella v. Attorney General)* (FH) (23 June 2005) (39/04) (Mr Justice JR Micallef)

FN 13: Fejn ir-rimedju "ordinarju" li jissemma jkun azzjoni għal stħarriġ dwar għamil amministrattiv, wieħed irid joqgħod b'seba' għajnejn qabel jaċċettah bħala alternativa għar-rimedju "kostituzzjonali" jew "konvenzjonali", u dan għaliex huwa meqjus li r-rimedji li jistgħu jingħataw taħt l-artikolu 469A huma x'aktarx limitati. (*Joseph Caruana v.et v. Prime Minister et*) (CC) (31 October 2007) (44/06)

FN 13: F'kawza ghal stharrig gudizzjarju il-Qorti ma tistax tissostitwixxi ruhha ghall-awtorita` responsabbli mill-eghmil amministrattiv. Huwa biss f`din is-sede, jekk ikun hekk jirrizulta, li jista` jinghata rimedju shih u effettiv bhar-*restitutio in integrum* lill-vittma ta` lezjoni ta` dritt fondamentali. (*Malta Playing Fields Association v. Commissioner of Land et)* (FH) (15 July 2014) (8/09) (Mr Justice J. Zammit McKeon)

PG 258: Jekk ir-rimedju tal-appell li jinghata minn decizjoni ta' tribunal statutorju jkun tant wiesa' li jigbor fih ukoll il-possibilita' li il-Qorti li tkun sejra tisma' dak l-appell tista' tqis ukoll ilmenti jew kwestjonijiet marbutin mal-legalita' tad-deċiżjoni appellate, f'dak il-każ, ir-rimedju tal-appell hekk mogħti jaf ixejjen ir-rimedju tal-istħarriġ quddiem il-Qrati ta' gurisdizzjoni generali. (*Jane Gatt v. Malta Environment and Planning Authority*) (FH) (24 April 2013) (1048/11) (Mr Justice JR Micallef)

FN 17: Huwa minnu li jekk hemm rimedju fil-ligi, l-atturi ghandhom jitqiesu li jafu bih taht il-massima *ignorantia juris neminem excusat*, izda f'dan il-kaz tali rimedju qieghed jigi msemmi mill-imharrka permezz ta' eccezzjoni, u ghalhekk jaqa' fuqha l-obbligu li tfisser x'inhu dak ir~rimedju, u dan skond principju daqstant ewlieni li min jallega jrid jipprova. (*Dr Tony Degaetano et v. Planning Authority)* (FH) (24 September 2001) (2219/00) (Mr Justice JR Micallef)

FN 18: Evidentement, l-atturi appellati kellhom il-possibilta` li jikkontestaw il-"kompetenza" tat-Tribunal, li kieku huma ssollevaw din il-kwistjoni quddiemu, u b'hekk kellhom mod kif jikkontestaw il-pretensjoni ta' Anthony Brincat quddiem l-istess Tribunal. Ghalhekk anke minn dan il-lat ta' analogija, l-appellant kellu ragun li fl-ewwel eccezzjoni tieghu jissolleva l-improponibbilta` tal-azzjoni odjerna. (*Prime Minister et v. Anthony Brincat*) (CA) (9 October 2009) (268/04)

FN 21: Illi f'dan ir-rigward huwa mghallem ukoll mill-awturi li "One of the most common grounds upon which permission to apply for judicial review is refused is that an applicamt has failed to pursue a more appropriate method of pursuing the grievance. For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. It is important that the process should not be clogged with unnecessary cases which are perfectly capable opf being dealt with in another tribunal. (Wade & Forsyth *Administrative Law* (9th Edit, 2004) (pp 949-950)

FN 22: L-istess Tribunal, meta twaqqaf, ingħata setgħat li jixbħu ħafna lil dawk mogħtija lill-Qrati taħt l-Artiklu 469A tal-Kap 12 b'mod li f'għadd ta' istanzi hemm kompetenza doppja. Dan seħħ billi waqt id-dibattitu fil-Kamra tar-Rappreżentanti, għalkemm l-intenzjoni oriġinali tal-Gvern kienet li jittrasferixxi s-setgħat ex-Art. 469A mill-Qrati għat-Tribunal, l-Oppożizzjoni oġġezzjonat għaliex il-Qrati kienu qegħdin jiġi mneżżgħin mill-poter bażiku tagħhom li jissindakaw lill-Eżekuttiv u għalhekk bħala kompromess inħolqot – sa ċertu punt – *overlap* bejn żewġ kompetenzi, jew tal-inqas paralleli għal, iżda distinti minn, xulxin (ara b'mod partikolari Seduta Nru 489 tal-Għaxar Parlament miżmuma fil-31 ta' Jannar 2007, paġni 338 *et seq*. Ara wkoll is-sentenza fl-ismijiet *S & R(Handaq) Limited (C-5790) v. Korporazzjoni Malta Enterprise* – Tribunal ta' Reviżjoni Amministrattiva, 24.09.2012). Din il-Qorti għalhekk hija xorta waħda kompetenti li tissindaka l-validità tat-titolu eżekuttiv mertu ta' din il-kawża basta dan tagħmlu *entro* l-parametri tal-istess Artikolu. (*Mohan M. Barwani v. Commissioner for VAT)* (FH) (25 January 2016) (67/15) (Mr Justice L. Mintoff)

FN 28: L-atturi, kwindi, ma jistghux iressqu t-talbiet taghhom taht l-artikolu 469A tal-Kap. 12, meta naqsu li jintervjenu b'mod formali fil-proceduri u b'hekk tilfu l-opportunita' li jressqu s-sottomissjonijiet taghhom quddiem l-organi kompetenti. (*Charles Camilleri et v. Malta Environment and Planning Authority*) (FH) (7 July 2004)718/03) (Mr Justice T. Mallia)

FN 29: Din il-Qorti jidhrilha li l-kelma "appell" kif uzata fl-artikolu 15(2) ta' l-imsemmi Att ta' l-1992 ghandha sinifikat bizzejjed wiesgha li jista'jinkludi wkoll investigazzjoni dwar aggravju ta' "ultra vires". (Anthony Cuscieri v. Development Control Commission) (CA) (30 March 2001) (89/00)

FN 32: Ma hemmx dritt ta' appell anqas fuq punti ta' ligi sakemm dawn ma jkunux espressament decizi fid-decizjoni appellata. (*Emmanuel Mifsud v. Planning Authority) (*CA Inf.) (31 May 1996)

FN 32: Irid jinghad li l-gurisdizzjoni ta' din il-Qorti, kif konferita bis-sahha tas-subartikolu (2) ta' l-artikolu 15 ta' l-imsemmi Att 1 ta' l-1992, hija wahda limitata hafna. Dan billi din il-Qorti, meta tisma' appelli mid-decizjonijiet tal-Bord ta' Appell, tissindika l-istess decizjonijiet unikament dwar punti ta' ligi li jkunu gew trattati u decizi fl-istess decizjoni". (*Joseph Mifsud v. Development Control Commission*) (CA Inf.) (30 May 1997) (31A/96)

PG 262: Is-subartikolu (4) tal-Artikolu 469A, biex jigi interpretat gustament, m'ghandhux jinghata interpretazzjoni restrittiva. L-eskluzjoni tal-gurisdizzjoni tal-Qorti, biex tistharreg l-ghemil amministrattiv, tkun gustifikata biss jekk il-Qorti tkun sodisfatta li, fil-prattika, persuna kellha rimedju effikaci u adegwat verament disponibbli ghaliha u hija irragjonevolment ma utilizzatx tali procedura disponibbli." (*Marsascala Shop Owners Association v. Malta Environment and Planning Authority*) (CA) (8 January 2010) (436/06)

FN 37: Ir-raguni certament tiddetta illi l-kriterju sensat ma kienx dak ta' dik li kellha tkun l-interpretazzjoni korretta ta' l-artikolu rilevanti tal-ligi (Artikolu 15 ta' l-Att I ta' l-1992), …izda ta' dik li kienet l-interpretazzjoni prevalenti akkordata mit-tribunal fil-mument ta' meta giet intavolata l-attwali azzjoni: Meta allura l-interpretazzjoni ta' l-organu kompetenti kienet dik li hi, difficilment din il-Qorti tista' tlum lill-atturi li fiz-zmien indikat jadixxu lill-Qrati ghall-harsien ta' jeddijiethom. Il-Qorti ghandha dejjem il-prerogattiva revizjonali ta' l-att amministrattiv u ghalhekk, denotati c-cirkostanzi specjali f' dan il-kaz, hi wkoll il-fehma ta' din il-Qorti illi tezisti gustifikazzjoni serja u accettabbli biex ma tadoperax id-dispost tas-subinciz (4) ta' l-Artikolu 469A. B' hekk qed tafferma ukoll f' dan il-kaz il-gurisdizzjoni taghha. (FH) (28 January 2004) (1447/96) (Mr Justice P. Sciberras)

FN 40: Ir-rimedju prospettat kien fid-dati cirkostanzi wiehed li teoretikament u potenzjalment biss kien disponibbli u fil-prattika ta' kif sehhew il-fatti rilevanti l-appellanti ma kellhom l-ebda rimedju effikaci. (*Joseph Muscat v. Chairman Hosuing Authority)* (FH) (28 January 2004) (1447/96) (Mr Jistice Ph. Sciberras)

PG 264: Illi l-liġi ma ssemmi xejn dwar il-mod li bih parti mġarrba minn għemil amministrattiv issir taf b'dak l-egħmil li jkun. Il-liġi ma tgħidx li ż-żmien jibda għaddej minn meta l-parti interessata tirċievi tagħrif formali jew uffiċjali miktub dwar id-deċiżjoni: tgħid biss li ż-żmien ta' sitt xhur jibda jgħaddi minn dak inhar li l-parti ssir taf jew messha ssir taf b'dak l-egħmil, liema data tiġi l-ewwel. (*Antoinette Cutajar v. Prime Minister*) (FH) (22 February 2017) (891/14) (Mr Justice JR Micallef)

FN 45: Dan ifisser li tali terminu ma jiġix interrott jew sospiż bħalma jiġri fil-każ ta' terminu ta' preskrizzjoni. Fi kliem ieħor, l-atti ġudizzjarji li normalment jitqiesu bħala tajbin biex jinterrompu ż-żmien preskrittiv, jew il-fatt li jkunu għaddejjin diskussjonijiet bejn il-partijiet wara li jkun sar l-għemil amministrattiv, ma jservu xejn biex iżommu l-mogħdija tas-sitt xhur li ssemmi l-liġi." (*Gerard Zammit v. Planning Authority)* (FH) (2 February 2000) (Mr Justice

R. Pace) (*Antoinette Cutajar v. Prime Minister*) (FH) (22 February 2017) (891/14) (Mr Justice JR Micallef)

FN 45: Certament l-Artikolu 460 tal-Kap. 12 ma jistax u mhux intenzjonat li jintuza sabiex jestendi t-terminu tal-Artikolu 469 A (3) tal-Kap. 12 **(***George Azzopardi v. Heritage Malta et*) (CA) 28 September 2012) (522/05)

FN 49: Hawnhekk *si tratta* ta' decizjoni ta' Awtorita` amministrattiva komunikata permezz ta' ittra (16 ta' Frar 2004), u azzjonijiet inekwivokabbli da parti tal-istess Awtorita` li hija kienet se tirrevedi, jew ahjar terga' tistudja l-kaz in kwistjoni. Dawn assolutament ma kienux trattattivi ta' transazzjoni, fejn kull parti jibqa' fuq il-pozizzjoni tieghu izda lest li jcedi ftit u jasal ghal xi kompromess jew soluzzjoni. Fil-kaz in dizamina kien hemm talba permezz ta' applikazzjoni, cahda tal-applikazzjoni mill-Awtorita`, rikonsiderazzjoni li *de facto* ssospendiet l-effetti tac-cahda, u cahda tar-rikonsiderazzjoni (*Mizzi Antiques Ltd v. Chairman Malta Enterpris*e) (FH) (31 October 2013) (810/24) (Mme Justice L. Schembri Orland)

FN 50: Id-deċiżjoni ta' rifjut tal-awtorita konvenuta ċertament kienet "att amministrattiv" kif imfisser fl-art.469A(2), u meta l-azzjoni għar-riżarċiment tad-danni hija msejsa fuq "delitt jew kważi-delitt li joħroġ minn att amministrattiv", li, biex tara hux delittwali jew le, trid l-ewwel tistħarreġ il-validita' tiegħu, il-materja tibqa' regolata taħt il-*lex specialis*. (*Karmenu Mifsud v. Malta Transport Authority*) (CA) (31 May 2013) (1001/09)

FN 55: Illi t-talbiet attriċi jistgħu jinkwadraw ruħhom f'allegat ksur ta' dawn in-normi tal-Unjoni Ewropea, kif ukoll abbażi ta' allegat ksur ta' relazzjoni kuntrattwali jew prekuntrattwali. Din il-Qorti qed tistqarru dan purament għall-finijiet tax-xorta, u konsegwentement tal-ammissibilità u tal-proponibbiltà tal-azzjoni, u mhux tal-fondatezza tagħha. (*Dragonara Gaming Ltd v. Minister of Finance et)* (FH) (12 October 2016) (1000/15) (Mr Justice L. Mintoff)

FN 56: Il-Qorti tqis illi l-attur usufruixxa ruhu mir-rimedju ordinarju li taghtih il-ligi permezz tal-Kap. 220 kif irid l-artikolu 160 biex imbaghad hu kien f'pozizzjoni li jintavola din l-azzjoni. Id-decizjoni tal-Ufficcju tal-President hi l-*punctum temporis* li minnha jibda jiddekorri t-termini tal-artikolu 469A. (*Lt Col. Andrew Mallia v. Commandre Armed Forces)* (FH) (5 October 2016) (187/16) (Mr Justice M. Chetcuti

PG 267: Illi l-Qorti hija tal-fehma li sakemm ma tkunx formaliżżat eċċezzjoni u ipprovdiet dwar it-tressiq ta' eċċezzjonijiet ulterjuri, il-kwestjoni mqanqla tibqa' biss kwestjoni jew argument u ma ssirx minnha nnifisha eċċezzjoni li dwarha din il-Qorti trid tagħti provvediment…l-imsemmija mħarrkin bħal donnhom ilumu lil din il-Qorti talli ma qajmitx il-kwestjoni minn rajha ("ex ufficio"). Fuq dan il-punt, il-Qorti tgħid biss li ladarba huwa aċċettat li ż-żmien maħsub fl-artikolu 469A(3) tal-Kap 12 huwa wieħed ta' dekadenza u mhux ta' preskrizzjoni, kien jaqa' fuq min kellu interess li jqajjem l-eċċezzjoni fl-istadju xieraq tal-kawża "in limine litis", b'mod li jekk kemm-il darba għażel jew ma ntebaħx li kellu jqanqal dik il-kwestjoni f'dak il-waqt, ikun meqjus li irrinunzja għaliha, kif jidher li ġara f'dan il-każ fejn l-imħarrkin l-ewwel darba li semmew il-kwestjoni kien 'il fuq minn erba' (4) snin wara li l-kawża bdiet tinstema'. (*Romina Delicata Mohnani v. Commissioner of Land et* (FH) (16 December 2015) (957/10) (Mr Justice JR Micallef)

FN 63: Ghalkemm il-fuq imsemmi artikolu jimponi l-perjodu ta' sitt xhur mill-ghemil ilmentat, fil-kaz in ezami, dan l-ghemil huwa kontinwu u perdurat, stante li essenzjalment huwa nuqqas ta' azzjoni da parti tal-intimati, il-pern tal-ilment tar-rikorrenti. Ghalhekk, din l-eccezzjoni qeghda tigi michuda. (*Joseph Spiteri et v. Director General Public Health Department et*) (FH) (23 February 2012) (933/06) (Mme Justice Anna Felice)

FN 67: Il-Qorti ma taqbilx mas-sottomissjoni tas-socjeta attrici illi din ir-regola procedurali tohnoq xi dritt taghha ghaliex kull ma timponi r-regola hu l-preavviz lil Gvern. In-nuqqas tal-attrici li tottempera mar-regoli procedurali ma jistax ,fil-fehma tal-Qorti, tintuza bhala skuzanti ghal tali nuqqas. (*Fish and Fish Co Ltd v. Minister for Sustainable Development*) (FH) (29 March 2017) (334/16) (Mr Justice M. Chetcuti)

PG 270: Illi l-Qorti hija tal-fehma li l-imsemmi artikolu jgħodd ukoll għal kawża ta' stħarrig gudizzjarju mressqa taħt l-artikolu 469A tal-Kapitolu 12 tal-Ligijiet ta' Malta, u dan għaliex azzjoni bħal dik ma taqa' taħt l-ebda waħda mill-għamliet ta' proceduri msemmija fis-sub-artikolu (2) tal-artikolu 460, liema lista hija waħda tassattiva. Jidher li l-argument ta' S& D li f'kull każ ma kien hemm xejn x'titlob lill-imħarrek kieku kellha tagħżel li tinterpellah b'att gudizzjarju qabel feħet din il-kawża, m'huwiex argument li jiddispensa mill-htigijiet ritwali imposti mill-artikolu 460 għas-siwi tal-azzjoni attrici. (*S and D Yachts Limited v. Director Office of Fair Competition) (*FH) (20 April 2010) (210/09) (Mr Justice JR Micallef)

FN 75: L-imsemmi artikolu jipprovdi li m'ghandhomx jigu inizjati proceduri kontra l-Gvern jew xi Awtorita' stabbilita bil-Kostituzzjoni jew kontra xi ufficjal pubbliku fil-kapacita' ufficjali tieghu jekk mhux wara li jghaddu ghaxart (10) ijiem minn-notifika ta' xi att giudizzjarju fejn it-talba in kwestjoni kontra l-Gvern, l-awtorita'jew l-ufficjal pubbliku tigi kjarament imfissra. Il-Qorti tiddubita kemm l-Awtorita' konvenuta taqa fl-ambitu ta' dawn il-provedimenti. *Leo Camilleri et v. Malta Environment and Planning Authority*) (FH) (12 October 2012) (1205/09) (Mr Justice G. Camilleri)

FN 76: Il-kliem tad-delega partikolari mogħtija lill-ETC jixhed li s-setgħat delegati ttrasferew ukoll il-personalita' u d-diskrezzjoni li l-istess Eżekuttiv iħaddan li kieku dik id-delega ma saritx. (Gopinath Venugopal Jeyakrishna Moorthy Limited v. Chairman ETC (FH) (24 November 2010) (398/100(Mr Justice JR Micallef)

PG 272: Illi l-Qorti ma taqbilx ma' dan l-argument u tqis li huwa x'aktarx fieragħ għaliex MIP hija, fil-fatt, l-awtorita'pubblika li waħedha għandha s-setgħa li taqtagħha jekk jinħarigx Ordni ta' Żgumbrament u tagħti "pariri" lill-Kummissarju tal-Artijiet biex jordna l-ħrug ta' Ordni bħal dak. Il-fatt li dik l-awtorita' għandha s-sura ta' kumpannija kummercjali ma jneħħihiex milli tikkwalifika bħala "korp magħqud kostitwit permezz ta' ligi" kif imsemmi fl-artikolu 469A(2). (*Euro Chemie Products Limited v. Malta Industrial Parks Limited)* (FH) (29 September 2009) (Mr Justice JR Micallef)

PG 273: Din il-Qorti tibda biex tosserva li dan l-artikolu, kif inghad diversi drabi mill-qrati, huwa "privileġġ proċedurali" mogħti lill-Gvern, u bħala tali jrid jingħata interpretazzjoni stretta. Illum, jista' jingħad, li dan il-privileġġ joħloq stat ta' anakroniżmu fil-kuntest tal-ħtieġa li l-partijiet kollha jridu jitpoġġew f'sitwazzjoni identika taħt il-liġi, u allura ma għandux jingħata applikazzjoni aktar wiesa' milli jiddisponi (*Paul Licari v. Malta Industrial Parks Ltd*) (CA) (25 November 2016) (25/10)

FN 82: “L-artikolu 124 tal-Kostituzzjoni jagħti t-tifsira ta’ ‘kariga pubblika’ bħala kariga bi ħlas fis-servizz pubbliku, waqt li l-istess artikolu jiddisponi li ‘s-servizz pubbliku’ ifisser ‘is-servizz tal-Gvern ta’ Malta f’kariga ċivili’. Ċertament illi s-soċjetà eċċepjenti ma taqax taħt din id-definizzjoni. (*CFF Filiberti SRL v. Grand Harbour Regeneration Corporation PLC*) (FH) (23 May 2017) (44/16) (Mme Justice A. Felice)

FN 87: Biex l-imsemmi konvenut, cioe’ il-Kummissarju ta’ l-Artijiet, kellu jitqies li kien“debitament” notifikat, kien jehtieg mhux biss li huwa nnifsu jkun hekk notifikat, izda kien necessarju wkoll li ssir notifika addizzjonali ta' kopja tac-citazzjoni lill-Avukat Generali. (*Joseph Attard et v. Planning Authority et*) (CA) (25 May 2001) (1717/98)

FN 90: Dan….hu att amministrattiv maghmul minn awtorita pubblika konsistenti f’rifjut ta’ hrug ta’ licenzja wara sejha li giet irtirata unilateralment mill-Awtorita u li minhabba f’dan l-agir l-attur qed jallega li sofra danni.Ghalhekk il-Qorti hi tal-fehma illi l-azzjoni kif maghmula mhix proponibbli taht il-ligi generali tad-delitt izda kellhatigi proposta fil-qafas tal-artikolu 469A tal-Kap. 12 (Josef Borg v Malta Transport Authority (FH)(11 July 2013)(682/12)(Mr Justice M. Chetcuti).

FN 90: Din il-Qorti allura tirritjeni illi r-responsablita’ amministrattiva f’Malta, ghalkemm tifforma parti mid-dritt pubbliku, kienet ukoll regolata minn dawk il-provvedimenti fid-dritt privat u cioe’ fid-dritt ordinarju li kienu applikabbli ghac-cittadin privat sakemm il-ligi ma kienitx specifikatament tezenta lill-amministrazzjoni pubblika minn tali responsabilita. (*Karmenu Mifsud v. Malta Transport Authority*) (FH) (30 March 2012) (1001/09) (Mme Justice A. Lofaro)

FN 90: Ma jidher li hemm xejn fil-liġi li tirregola l-Awtorita’ li tagħtiha immunita’ milli tiġi mfittxa għad-danni taħt dan l-artikolu, u dan minkejja li tista’ tkun ukoll responsabbli għad-danni taħt l-artikolu 469A(5) tal-Kap.12 għal xi għemil amministrativ abużiv tagħha. *(Franco Azzopardi et v. Malta Environment and Planning Authority*) (CMSJ) (1 March 2016) (41/15) (Magte P. Coppini)

PG 276: Mhux talli ma rrizultax *mala fede* da parti tal-awtoritajiet universitarji, izda talli meta l-ghalliema tal-attrici, indunaw li dina kien qeghda tehel mill-ezami tal-*Principles of Nutrition* li huma jikkunsidraw bhala *core unit*,dawna kienu mhassba u inkwetati, tant li kienu baghtu ghaliha f’ izjed minn okkazzjoni wahda sabiex jenfasizzawlha li kien indispensabbli li din tghaddi mill-ezami, u wkoll offrewlha li jaghtuha l-ghajnuna kollha li kellha bzonn. Atteggjament li certament jeskludi l-element ta’ *mala fede*. (*Denise Buttigieg v. Rector of University of Malta et* (FH) (232 December 2003) (Mr Justice N. Cuschieri)

PG 276: Illi fil-kaz odjern jirrizulta car li, ghalkemm fit-termini tar-regolamenti d-decizjoni tal-konvenuti kienet tesorbita mill-parametri legali, ma jistax jinghad li huma mxew b’ mod irraggjonevoli mal-attrici. Id-decizjoni taghhom ittiehdet wara korrispondenza skambjata bejn l-ghalliema u s-Senat fejn l-ghalliema tal-attrici kienu wrew it-thassib taghhom ghall-fatt li dina ma kienx irnexxielha tilhaq il-livell mistenni f’ suggett li huma jqisuh bhal *core subject*...Id-decizjoni ittiehdet wkoll wara li kienu nformaw lill-attrici li dan kien suggett li kien qed jigi kkunsidrat bhala obbligatorju u enfasizzawlha l-importanza li tissupera l-ezami f’ dan is-suggett; u wkoll wara li lill-attrici kien gie akkordat lilha li taghmel *recycle* tieghu, u cioe’ terga’tattendi ghall-*lectures* kollha fis-suggett u terga’ toqghod ghall-ezamijiet. B’ dan kollu l-attrici regghet wehlet mill-ezami ghar-raba’ darba. (*Denise Buttigieg v. Rector of University of Malta et)* (FH) (Mr Justice N. Cuschieri) (22 December 2003)

PG 277: Ghalkemm ma hemmx dubbju li l-intimat agixxa *in bona fede*, b'dan ma jfissirx li jista'semplicement abbazi ta' kongetturi, jledi d-drittijiet ta' persuni privati, li ma kissrux l-ebda ligi. Infatti l-Qorti tqis li l-kliem tad-dokument huma generici meta jindirizzaw l-aspett edukattiv tal-politika nazzjonali, u ma kellhomx jifformaw il-bazi u raguni ghall-azzjoni amministrattiva in kwistjoni.Ghalhekk tqies li l-azzjoni tieghu kienet irragjonevoli u kwindi r-rikorrenti ghandha l-jedd li titlob ir-rizarciment tad-danni subiti. (*All for Property Limited v. Director General Customs)* (FH) (30 September 2014) (741/08) (Mme. Justice L. Schembri Orland)

FN 95: Ukoll jekk l-istess imħarrek seta' ma kienx qiegħed iħaddem sewwa l-ligi fis-seħħ, ma jistax jinghad li b'dan il-mod kien qiegħed jimxi b'ħażen jew mala fidi. *(Tabone Computer Centre Ltd v. Regulator Wireless Telegraphy et)* (FH) (27 January 2011) (674/00) (Mr Justice JR Micallef)

FN 95: (L-awtorita pubblika) m'ghandhiex is-setgha li tirrevoka jew tannulla licenza mahruga. It-thassir ta' licenzja jista' jsir biss fuq applikazzjoni tad-detentur tal-licenzja li jiddeciedi li, fost l-ohrajn, mhux ser ikompli jizvolgi l-attivita' kummercjali tieghu (ara Artikolu 16 ta' dawn ir-regolamenti). U allura din il-Qorti tqis li fil-kaz tal-lum id-decizjoni tal-konvenut Direttur li jirrevoka l-licenza *de qua* kienet att amministrattiv irragonevoli fil-kuntest tal-Art. 469A(5) tal-Kap.12)

FN 95: Għalhekk, filwaqt li mhux kull eżerċizzju raġonevoli ta' ġudizzju huwa bilfors korrett, lanqas mhuwa bilfors irraġonevoli kull eżerċizzju ta' ġudizzju żbaljat. (*Halida Kuduzovic v. Prof. Juanito Camilleri ne)* (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef)

FN95:Biex imġiba titqies abbużiva, min jallegaha jrid juri li kien hemm element ta' intenzjoni biex wieħed jagħmel il-ħsara, liema fehma wieħed jista' jasal biex juriha b'xi prova ta' mġiba esterna li tagħmel parti mill-eżerċizzju diskrezzjonali li jkun. (Halida Kuduzovic v. Prof. Juanito Camilleri ne (FH) (30 May 2014) (1138/11) (Mr Justice JR Micallef)

FN 97: Illi fl-ewwel lok jigi osservat li fis-sistema legali tagħna l-kuncett tad-danni huma limitat ghad-danni materjali u mhux kontemplat fil-ligi l-ghoti ta' danni in linea ta' 'danni psikologici' u ghalhekk din il-parti tat-talba hija *a priori* insostenibbli legalment. (*Denise Buttigieg v. Rector University of Malta)* (FH) (22 December 2003) (1435/02) (Mr Justice N. Cuschieri)

PG 279: Euro 10,000 bhala "Dannu Ezistenzjali" likwidat *arbitrio boni viri* ghall-konsegwenzi psikologici u umiljazzjoni sofferti mir-rikorrent kagun tal-akkadut. (*Mario Gerada v. Prime Minister et*) (FH) (14 November 2012) (993/08) (Mr Justice S. Meli)

FN 102: Dwar dan lanqas kien hemm bżonn l-Artikolu 469(A) tal-Kap. 12 biex irendi l-Awtorita' responsabbli, għaliex hija ma għandha ebda immunita mill-artikoli tal-Kodici Civili li jirrigwardjaw ir-responsabbilita' għad-danni ta' min jagixxi oltre d-drittijiet tiegħu." (*Albert Satariano et v. Planning Authority*) (FH) (19 April 2010) (1721/01) (Mr Justice J. Azzopardi)

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