JUDICIAL REVIEW ACT

A Proposed Bill to Reform a Fragmented and Improper Law

GHSL
Għaqda Studenti tal-Liġi

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JUDICIAL REVIEW ACT

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Furthermore, GħSL acknowledges all those who attended the Consultation and Drafting Conference held at the Chamber of Advocates on the 11th January 2023, and the Chamber of Advocates for hosting and promoting the event. GħSL is also thankful to Fenech & Fenech Advocates for sponsoring the printing of this publication and Matthew Drago for formatting this book.

Foreword

This year marks my tenth as a resident academic within the Faculty of Laws, and my fourth as Dean of the same Faculty of Laws. Hand on heart I can say that I have never looked back, because these years have been packed with beautiful experiences, thanks to the people around me, whether colleagues or students.

The GħSL students who proposed a new law on judicial review subject of this publication are no exception, indeed they are a big part of what makes my role at the University of Malta truly worth the time I put in, and more. Having taken Id-Dritt to new heights, these Law Students published the local OSCOLA guidelines and are now taking on Parliament, prompting the members of our legislative body to think, and hopefully to update and amend the legislation dealing with judicial review; all this is extremely impressive and serves as a reminder to the academics, not least to me, what our *raison d'etre* is. These young people are tomorrow's leaders, they are full of energy and motivation, willing not only to learn but also to contribute to Society, and it is our mission as academics to guide, to encourage, to mentor, to help them reach their full potential. These students do the Faculty of Laws proud, and I take the opportunity to thank them publicly for this.

Mr Andrew Drago and his peers within GħSL are focusing on what I consider to be a cornerstone of the rule of Law in Malta: we have heard it said time and time again that nobody is above the Law; I myself always insist that the courts of justice are the ultimate bastion of legality, that when everything else fails we can go to Court and seek a remedy. If we ever had to find ourselves unable to contest in court the government and its actions, then the Rule of Law's very existence would be put at risk because the Government will sit comfortable knowing that its actions are not subject to scrutiny; the Government will then be above the Law and therefore can trample over the Individual's rights and interests at its convenience. This is not the case in Malta, because government action has always been subject to court scrutiny (albeit to

different extents throughout the years), but the issue which needs to be resolved where judicial review is concerned is: what does one do when he/she is restricted in seeking a judicial remedy because the lawmaker created a path riddled with pitfalls? GħSL's reply is: change the law!

GħSL went further: they did not just reply that the law should be changed, but actually went to great pains and effort to come up with a credible draft bill that addresses the difficulties and limitations which straddle our current legislation on judicial review. The result of GħSL's efforts is this publication, the fruit of many hours of thought, discussion, research and consultation including with Academics namely Professor Tonio Borg; the credit (apart from Prof Tonio's guidance and feedback from other experts and professionals) goes to GħSL, while the obligation lies squarely on the decision-takers and on the current members of Malta's legislative body, to read the contents of this publication from cover to cover and consider it very carefully, to listen to what Mr Drago and his peers within GħSL have to say, and having done so to not only actively consider but to actually take concrete action. I augur that both the Government and the Opposition will not hesitate to rise to the occasion.

Dr Ivan Mifsud
Dean, Faculty of Laws
University of Malta
April 2023

GħSL President's Preamble

It is my proud honour to pen the preamble for this year's Policy Paper on Judicial Review, in my role as President for the term 2022/2023. It is no secret that this office is particularly close to heart, considering that two years ago I held this role myself as Policy Officer for the term 2020/2021, where we worked on a policy paper on the regulation of the legal profession, colloquially known as the Lawyers Act.

Public Law, with administrative law in particular, is controversial by its very nature. Judicial review is the mode of contestation of acts of the Government, but is necessary in a free and democratic society. It is the method for any aggrieved person to have an unlawful act of the administration reviewed, and potentially annulled. Even in jurisdictions where there was no legislation on the matter, the courts have taken such power for themselves.[1]

This paper does not advocate for a complete overhaul of administrative law. Such a work would be impossible to complete within a singular term, and in fact has been attempted by Professor Kevin Aquilina with the drafting of an Administrative Code.[2] This 497 page document outlines various procedural and substantive norms of Public law, and notably proposes the introduction of an Administrative Court. While this would be an important step to ensure well trained judges in this sector, similarly to the Family and Commercial sections of our Civil Court, our paper is focused on tackling the most pressing issues in administrative law.

The aim of this paper is to synthesise Malta's fractured system of judicial review. At present, there exist three main avenues of judicial review. Administrative acts, which are reviewed under Article 469A of the Code of Organisation and Civil Procedure, judicial acts, which are reviewed under a creative interpretation of Article 32(2) of the same Code, and legislative acts, which are reviewed under the *actio popolaris*

[1] *Marbury v. Madison*, 5 U.S. 137 (1803).
[2] Motion No. 10006 - Draft Bill on the Administrative Code HR (XII 2012).

found in Article 116 of the Constitution.

Besides consolidation, several procedural irregularities are clarified. The juridical interest preliminary plea is substituted for "sufficient interest", in order to widen review for those persons who ought to have access to a court, but because their interest is not juridical, direct, and actual, their action fails. This is a civil law concept which has, due to a lacuna which we have in public law, been applied to judicial review cases. Sufficient interest is a less rigid standard which allows representative groups to institute an action if the action complained of falls within their remit.

Of course, a massive thank you is in order to Andrew Drago, as well as everyone else who worked on this project over the past months. A work of this calibre takes time and energy to make sure it is done right, and time and time again, the Policy Office does not disappoint. This paper is no different. The proposals contained within are not out of this world. They are practical, and they take into account the realities faced in instituting an action for judicial review in Malta. It is Għaqda Studenti tal-Liġi's sincere wish that the legislator takes our proposals on board, and remedies the flaws found in this area of law.

Andrew Sciberras
President of Għaqda Studenti tal-Liġi
2022-2023

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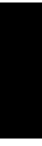
CHAPTER 1



Proposed Bill

1.1 In English

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled and by the authority of the same as follows:

Short Title

1. (1) The Short Title of this Act is the Judicial Review Act of 2023.

   (2) This Act shall enter into force on that date which the Minister responsible for Justice may establish by notice in the Gazette, and different dates may be appointed for different purposes or different provisions of this Act.

Interpretation

2. In this Act, unless the context otherwise indicates:

   "administrative act" means the issuing by a public authority, any order, licence, permit, warrant, or a decision, or refusal to any demand of a claimant, but does not include any measure intended for the internal organisation or administration within the said authority:

   Provided that, saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority, following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition;

   "Armed Forces of Malta" as the same meaning as that assigned to it by the Malta Armed Forces Act (Cap 220);

   "judicial act" means: a pronouncement by any entity, tribunal authority, or organ established by law which decides disputes brought before it; but shall also include any entity on whose findings a public authority commences any kind of proceedings or action or where a public authority is bound by law to follow such decision and shall never include pronouncements by a Court of Law;

"judicial authority" means: any tribunal established by law that adjudicates disputes pending before it;

"legislative act" means: an instrument having the force of Law, which emanates from a power granted by Parliament to any Minister, or public authority, and which requires to be laid on the table of the House of Representatives;

"legitimate expectation" means a promise of a lawful benefit or advantage made through words, writing, or behaviour to a person by a public authority which had the power by law to make such promise.

"parent Act" means: any Act of Parliament authorising any Public Authority to make delegated legislation;

"public authority" means: The Government, including its Ministries and departments, local authorities, the Armed Forces of Malta, and any body corporate established by law, including Boards which are empowered in terms of law to issue warrants for the exercise of any trade or profession, and any body corporate which performs a public function, or one whose functions are such that the State would have to intervene if such body corporate did not exist or did not provide its services;

"public officer" has the same meaning as that assigned to it by Article 124 of the Constitution of Malta;

"review" means a revision of any act on points of law, including the grounds of review as laid down in this Act, and shall not include any points of fact.

"sufficient interest" shall not only include personal interest in the proceedings but any representative interest, that is to say where the plaintiff represents a social group or the public interest.

Action For Review

3. Without prejudice to the provisions of Articles 5 and 7 of this Act, any person may request, through an action before the First Hall of the Civil Court, a review of any administrative, legislative, or judicial act requesting that such act be annulled; in the case of review of administrative and judicial acts, such person only needs to

prove sufficient interest in instituting the action, and not necessarily juridical; in cases of review of legislative acts, no such interest is required and any person without any such interest may institute such action: Provided that the court, before whom such proceedings are instituted, may not substitute its discretion for that of the competent authority concerned.

Grounds of Review

4. (1) In the case of review of administrative and judicial acts, the grounds of review shall be the following:

    (a) when the act emanates from a public or judicial authority that is not authorised to perform it;

    (b) when a public or judicial authority has failed to observe the principles of natural justice, or mandatory procedural requirements in performing the act, or in prior deliberation thereon;

    (c) when the act constitutes an abuse of the authority's power in that it is done in bad faith, or for improper purposes, or is unreasonable, or done on the basis of irrelevant considerations; or when it ignores relevant considerations or when it runs counter to a legitimate expectation.

    (d) when the act is otherwise contrary to law;

   (2) A legislative act may be reviewed when it was performed ultra vires the parent Act or other instrument having the force of law authorising it, or is in conflict with any Act of Parliament, or was not in conformity with the mandatory procedural requirements established by law, or when it constitutes an unreasonable, or improper exercise of power in consideration of the purpose of the parent Act.

Judicial Review of a Decision of the Attorney General

5. (1) Where the Attorney General takes a decision

    (a) not to prosecute in accordance with the powers conferred upon him by any law; or

    (b) not to allow the inspection or the issuing of copies of a procès-verbal or of any depositions or documents filed

therewith in terms of the proviso to Article 518 of the Criminal Code;

the First Hall of the Civil Court, may enquire into the validity of the said decision and declare such decision null, invalid, or without effect, and consequently, send back the matter to the Attorney General for review in accordance with the judgment of the court when finding that the decision is not properly directed on legal considerations, or is unreasonable, in that it is not open to a reasonable prosecutor.

(2) An action for judicial review of a decision of the Attorney General, as provided in paragraph (a) of sub-article (1) may be filed by any person who proves sufficient interest, not necessarily juridical, and an action in terms of paragraph (b) of sub-article (1) shall be filed by such person within six months from when such person becomes aware or could have become aware of the decision, whichever is the earlier

Provided that where the law provides for a procedure, whereby the Attorney General may be requested to conduct an internal review of the decision, the said period of six months shall commence to run as from the date when the person requesting such revision is informed of the results of the said review.

Provided further that for the purposes of this article, the Auditor General, the Commissioner for Standards in Public Life, the Permanent Commission Against Corruption, and the Ombudsman shall always be entitled to make any claim under this article.

(3) Judicial review cannot be made where an agreement has been reached with the competent authorities of another country that the courts of that country shall exercise jurisdiction over the crime.

Time within which action must be instituted

6. (1) Any action for the review of an administrative or judicial act has to be instituted within a period of forfeiture of one year

from when the act occurred, or when the person instituting the action came to know of the act, whichever is the earlier.

Provided that if the person instituting such action has referred the act being challenged to the Commissioner for Administrative Investigations (Ombudsman), such period shall be suspended until such Commissioner disposes of the matter in accordance with the Ombudsman Act (Cap 385).

(2) No forfeiture period shall apply for the institution of an action to review a legislative act.

Other mode of Contestation

7. The provisions of this Act regarding review of administrative and judicial acts shall not apply where the mode of contestation or of obtaining redress before a court or tribunal is provided for in any other law

Damages

8. In any action brought under this Act, 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 or judicial authority in tort or quasi-tort, arising out of the acts performed. The said damages shall not be awarded by the court where, notwithstanding the annulment of the acts, the authorities did not act in bad faith, or unreasonably, or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.

Repeal

9. Subject to the provisions of Article 7 of this Act, articles 469A and 469B of the Code of Organisation and Civil Procedure are hereby being repealed.

Transitory Provisions

10. Any proceedings for review pending before a court of law under Article 469A of Chapter 12 of the Laws of Malta, or any other

review proceedings, or in any proceedings for redress before a court or tribunal requesting review of such act, shall remain in force, and shall be governed by the law as in force prior to the coming into force of this Act, unless plaintiff declares his intention in a note filed before the court presiding over such action, that he intends to have his action governed by the provisions of this Act.

1.2 Bil-Malti

IL-PRESIDENT, bil-parir u l-kunsens tal-Kamra tad-Deputati, imlaqqa' f'dan il-Parlament, u bl-awtorità tal-istess, ħarġet b'liġi dan li ġej:

Titolu fil-Qosor

1. (1) It-titolu fil-qosor ta' dan l-Att huwa l-Att tal-2023 dwar Stħarriġ Ġudizzjarju.

   (2) Dan l-Att għandu jidħol fis-seħħ f'dik id-data li l-Ministru responsabbli għal Ġustizzja jista' jistabbilixxi b'avviż fil-Gazzetta, u dati differenti jistgħu jiġu appuntati għal għanijiet differenti jew dispożizzjonijiet differenti ta' dan l-Att.

Tifsir

2. F'dan l-Att sakemm ir-rabta tal-kliem ma teħtieġx xort'oħra:

   "aspetattiva leġittima" tfisser wegħda ta' benefiċċju jew vantaġġ legali magħmula permezz ta' kliem, kitba jew aġir, lil persuna minn awtorità pubblika li kellha l-awtorità skont il-liġi li tagħmel dik il-wegħda;

   "att amministrattiv" ifisser il-ħruġ ta' kull ordni, liċenzja, permess, warrant, deċiżjoni jew rifjiut għal talba ta' xi persuna li jsir minn awtorità pubblika, iżda ma tinkludix xi ħaga li ssir bil-għan ta' organizazzjoni jew amministrazzjoni interna fl-istess awtorità.

   Iżda, ħlief f'dawk il-każijiet fejn il-ligi tistabilixxi xi perjodu li fiħ awtorità pubblika teħtieg tagħti deċiżjoni, meta ssirilha talba bil-miktub minn persuna, li tigi notifikata lill-awtorità u din l-awtorità tibqa' ma tagħtix deċiżjoni dwar it-talba, dak in-nuqqas għandu,

wara xahrejn minn dik in-notifika, jikkostitwixxi rifjut għall-finijiet ta' din it-tifsira.

"Att awtoritattiv" ifisser kull Att tal-Parlament li jawtorizza kull awtorità pubblika li toħroġ legislazzjoni sussidjarja;

"att ġudizzjarju" ifisser pronunzjament minn kull entità, tribunal, awtorità jew organu stabbilit b'liġi li tidddiċiedi kawża miġjuba quddiemha iżda tinkludi wkoll kull entità li fuq il-bażi tal-konklużjonijiet tagħha awtorità pubblika tibda kull xorta ta' proċedura jew azzjoni, jew fejn l-awtorità pubblika hija bil-liġi marbuta li timxi fuq dik id-deċiżjoni, iżda ma għandha qatt tinkludi pronunċjament magħmul minn qorti mwaqqfa b'liġi.

"att leġislattiv" ifisser kull strument li għandu is-saħħa tal-liġi li joħrog minn poter mogħti mill-Parlament lil kull Ministru jew awtorità pubblika u li jeħtieġ li jitpoġġa fuq il-Mejda tal-Kamra tad-Deputati;

"awtorità ġudizzjarja" tfsser kull tribunal mwaqqaf b'liġi li jiddeċiedi kawżi pendenti quddiemu;

"awtorità pubblika" tfisser il-Gvern ta' Malta, magħdudin il-Ministeri, u d-dipartimenti tiegħu, awtoritajiet lokali, il-Forzi Armati ta' Malta u kull korp magħqud kostitwit permezz ta' liġi, u tinkludi Bordijiet li jkollhom l-awtorità bil-liġi li joħorgu warrants għall-eżerċizzju ta' xi sengħa jew professjoni u kull korp kostitwit li jaqdi funzjoni pubblika jew korp li il-funzjonijiet tiegħu huma tali li l-Istat kien jintervjeni kieku dak il-korp ma kienx jeżisti jew ma kienx jipprovdi dak is-servizz.

"Forzi Armati ta' Malta" għandhom l-istess tifsira mogħtija lilhom fl-Att dwar il-Forzi Armati ta' Malta (Cap 220).

"interess suffiċjenti" jinkludi mhux biss interess personali fil-proċeduri izda wkoll kull interess rappreżentattiv, jiġifieri fejn l-attur jirrapreżenta grupp soċjali jew l-interess pubbliku;

"Ombudsman" għandu l-istess tifsira mogħtija lilu fl-Att dwar l-Ombudsman (Cap 385);

"stħarriġ" ifisser reviżjoni ta' att fuq punt ta liġi inklużi ragunijiet għal stħarriġ kif kontenuti f dan l-Att u ma jinkludux punti ta' fatt;
"uffiċjal pubbliku" għandu l-istess tifsira mogħti lilu bl-Artikolu 124 tal-Kostituzzjoni ta' Malta;

Azzjoni għal Stħarriġ

3. Mingħajr preġudizzju għad-disposizzjonijiet tal-Artikoli 5 u 7 ta' dan l-Att, kull persuna tista' titlob b'azzjoni quddiem il-Prim' Awla tal-Qorti Civili stħarriġ ta' att amministrattiv, leġislattiv jew ġudizzjarju sabiex jiġi annullat dak l-att; f'każ ta' stħarriġ ta' atti amministrattivi jew ġudizzjarji dik il-persuna għandha tipprova biss interess sufficjenti biex tibda l-azzjoni li ma jkunx neċessarjament ġuridku; f' każ ta' stħarriġ ta' atti leġislattivi, dak l-interess ma hux meħtieġ u kull persuna anki mingħajr dak l-interess, tista' tistitwixxi l-azzjoni.

   Iżda il-qorti li quddiemha il-proċeduri jiġu istitwiti ma tistax tissostitwixxi id-diskrezzjoni tagħha għal dik tal-awtorità kompetenti konċernata.

Raġunijiet ta' Stħarriġ

4. (1) Fil-kaz ta' stħarriġ ta' atti amministrattivi u ġudizzjarji, ir-raġunijiet għal stħarriġ ikunu dawn li ġejjin:
   - (a) meta l-att jitwettaq minn awtorità pubblika jew ġudizzjarja li ma tkunx awtorizzata li twettaq dak l-att;
   - (b) meta l-awtorità pubblika jew ġudizzjarja tkun naqset milli tosserva il-prinċipji tal-ġustizzja naturali jew ħtigijiet proċedurali mandatorji fit-twettiq tal-att jew fid-deliberazzjoni qabel dwar dak l-att;
   - (c) meta l-att jikkostitwixxi xi abbuż ta' setgħa tal-awtorità pubblika billi dan isir b' mala fede, jew għal għanijiet mhux xierqa, jew huwa irraġjonevoli, jew jissejjes fuq konsiderazzjonijiet mhux rilevanti, jew jinjora konsiderazzjonijiet rilevanti, jew l-att imur kontra l-aspettativa leġittima;
   - (d) meta l-att ikun imur mod ieħor kontra il-liġi.

   (2) Att leġislattiv jista' jiġi mistħarreġ meta jkun sar ultra vires l-Att jew strument ieħor li għandu forza ta' liġi li jawtorizzah, jew ikun f'kunflitt ma' xi Att tal-Parlament, jew ma sarx b'konformità ma' ħteġijiet proċedurali mandatorji stabbiliti b'liġi, jew meta jikkostitwixxi eżerċizzju irraġjonevoli

jew mhux xieraq meta wieħed iqis l-iskop tal-Att li jawtorizza dak l-att.

Stħarriġ Ġudizzjarju ta' Deċiżjoni tal-Avukat Ġenerali

5. (1) Meta l-Avukat Ġenerali jieħu deċiżjoni:

(a) li ma ssirx prosekuzzjoni skont is-setgħat mogħtija lilu minn xi liġi; jew

(b) li ma jurix jew ma jagħtix kopja ta' proċess verbali skont il-proviso tal-Artikolu 518 tal-Kodiċi Kriminali, il-qrati ta' ġustizzja ta' kompetenza ċivili għandhom ġuriżdizzjoni biex filwaqt li jagħtu konsiderazzjoni xierqa lill-indipendenza kostituzzjonali tal-Avukat Ġenerali, jistħarrġu l-validità ta' dik id-deċiżjoni u biex jiddikjaraw dik id-deċiżjoni nulla, invalida jew mingħajr effett u biex konsegwentement jibagħtu lura l-każ lill-Avukat Ġenerali biex jirrevedi dik id-deċiżjoni b'mod konformi mad-deċiżjoni tal-qorti biss f'każ ta' sejbien li dik id-deċiżjoni ma tkunx imsejsa kif jixraq fuq konsiderazzjonijiet ta' liġi jew li dik id-deċiżjoni tkun irraġonevoli in kwantu li ebda prosekutur raġonevoli ma kellu jasal għaliha.

(2) Kawża għall-istħarriġ ġudizzjarju ta' deċiżjoni tal-Avukat Ġenerali kif provdut fil-paragrafu (a) tas-subartikolu (1) tista' ssir minn kull persuna li jipprova interess suffiċjenti li mhux bilfors ikun ġuridiku, u kawża skont il-paragrafu (b) tas-subartikolu (1) għandha ssir mill-persuna li tagħmel it-talba fi żmien sitt xhur minn meta dik il-persuna ssir taf jew setgħet issir taf bid-deċiżjoni, skont liema żmien tiġi l-ewwel:

Iżda fejn il-liġi tkun tipprovdi għal proċedura li biha l-Avukat Ġenerali jkun jista' jintalab biex iwettaq reviżjoni tad-deċiżjoni, l-imsemmi żmien ta' sitt xhur jibda jgħaddi mid-data li fiha il-persuna li titlob ir-revizjoni tkun ġiet informata bir-riżultat ta' dik ir-reviżjoni:

Iżda wkoll għall-finijiet ta' dan l-artikolu, l-Awditur Ġenerali, il-Kummissarju ghall-Istandards fil-Ħajja Pubblika, il-Kummissjoni Permanenti Kontra l-Korruzzjoni u l-Ombudsman

għandu jkollhom l-fakultà li jagħmlu kull talba u li jeżerċitaw kull azzjoni li skont dan l-artikolu tispetta lill-parti offiża fejn huma jkunu rrapportaw att ta' korruzzjoni kif imfisser fl-Att dwar il-Kummissjoni Permanenti Kontra l-Korruzzjoni lill-Avukat Ġenerali.

(3) Ma jistax isir stħarriġ ġudizzjarju fejn ikun intlaħaq ftehim mal-awtoritajiet kompetenti ta' pajjiż ieħor li l-qrati ta' dak il-pajjiż għandhom jeżerċitaw ġuriżdizzjoni dwar id-delitt.

Żmien li fiħ l-azzjoni trid tiġi istitwita

6. (1) Kull azzjoni għal stħarriġ ta' att amministrattiv jew ġudizzjarju trid tiġi istitwita fi żmien ta' dekadenza ta' sena minn meta ġara l-att jew il-persuna li tistitwixxi il-kawża saret taf bl-att, skont liema jiġi l-ewwel.

Iżda jekk il-persuna li tistitwixxi l-azzjoni tkun irreferiet il-kaz li jkun qed jiġi kontestat lill-Kummissarju għal Investigazzjonijiet Amministrattivi (Ombudsman), dak il-perjodu jiġi sospiz sakemm dak il-Kummissarju jiddeciedi il-każ skont l-Att dwar l-Ombudsman (Cap. 385).

(2) Ebda perjodu ta' dekadenza jew preskrizzjoni ma japplika ghal min jistitwixxi azzjoni għal stħarriġ ta' att leġislattiv.

Metodi ohra ta' kontestazzjoni

7. Id-disposizzjonijiet ta' dan l-Att dwar stħarriġ ta' atti amministrattivi u ġudizzjarji ma għandhomx japplikaw meta il-mod ta' kontestazzjoni jew ta' ksib ta' rimedju ieħor dwar dawk l-atti partikolari quddiem qorti jew tribunal, jiġu provduti dwarhom f'xi liġi oħra.

Danni

8. F'azzjoni li ssir bis-saħħa ta' dan l-Att dwar atti amminsitrattivi u ġudizzjarji, l-attur ikun jista' jinkludi fit-talbiet tiegħu talba għal ħlas ta' danni li tkun imsejsa fuq ir-responsabbilità allegata tal-awtorità pubblika jew ġudizzjarja li tkun għamlet delitt jew kważi-delitt li joħorgu mill-att mwettaq minnhom. Dawn id-danni ma

għandhomx jingħataw mill-qorti meta minkejja annullamnet tal-att, l-awtorità pubblika jew ġudizzjarja ma tkunx aġixxiet in mala fede jew b'mod mhux raġjonevoli, jew meta l-azzjoni mitluba mill-attur setgħet legalment u raġjonevolment ġiet miċħuda taħt kull setgħa oħra.

Tħassir

9. Mingħajr preġudizju għall-Artikolu 7 ta' dan l-Att, l-Artikoli 469A u 469B tal-Kodiċi ta' Organzazzjoni u Proċedura Ċivili qed jiġu mħassra salv kull ħaga li validament saret taħt dawk l-artikoli qabel ma daħal fis-seħħ dan l-Att.

Disposizzjoni Transitorja

10. Kull proċeduri għal stħarriġ pendenti quddiem qorti imwaqqfa b'liġi taħt l-Artikolu 469A jew l-Artikolu 469B tal-Kapitolu 12 tal-Liġijiet ta' Malta, jew kull proċeduri oħra ta' stħarriġ, jew f' kull proċeduri għal rimedju quddiem qorti jew tribunal fejn jkun qed jiġi mitlub stħarriġ ta' att amminstarttiv, leġsilattiv jew ġudizzjarju, jibqgħu fis-seħħ u jiġu regolati mil-liġi kif tkun minnufiħ qabel ma jidħol fis-seħħ dan l-Att, sakemm l-attur ma jiddikjarax l-intenzjoni tiegħu b'nota presentata quddiem il-qorti li tkun qed tippresjedi l-azzjoni, li l-intenzjoni tiegħu hija li l-azzjoni tiegħu tiġi regolata bid-disposizzjonijiet ta' dan l-Att.

CHAPTER 2

Abstract

This Bill is concerned with the judicial review of acts of public authorities. Judicial review is the Court's ability to inquire into the legal validity of decisions taken by the administration with the intention of providing protection from abuse of power and ultimately curbing any unbridled accumulation of authority, which gnaw at the democratic foundations of the State.

The democratically elected Government has a mandate to govern, consequently it is given the authority to make decisions. In administrative law, this is known as discretion. H.L.A. Hart remarks that in law, the term 'discretion' is not a synonym to the word 'choice', a *tout court,* but rather a discernment and distinguishing of *'what in various fields is appropriate to be done'*[3];

> *discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections*[4]

The pronouncements of Lord Coke in the famous Rooke's case are the bedrock philosophy which shaped the modern understanding of Administrative Law. It is a covenant of the Rule of Law, that discretion is exercised lawfully and not arbitrarily, and thus;

> *every act of governmental power, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strict legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act.*[5]

A deficient law on judicial review is a law which, either directly or indirectly, ousts the jurisdiction of the Courts to review the legality of executive decisions, one which disfavours judicial participation in the enforcement of law. Lamentably, this is our law. The issues remarked in the forthcoming chapters are not mere academic observations, but

[3] Hart H.L.A, 'Discretion' (2013) 127(2) Harvard Law Review, 652-65.

[4] *Rooke v Withers* (1598), 5 Rep. 99 b.

[5] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 17.

factual deficiencies which have cost litigants their opportunity of review, denying plaintiffs their right of access to court.[6]

The proposed Bill is not a revolution, nor is it a *pass' partout* to the entire legal quandaries of public law, yet it is a valid and well-founded proposal to remedy the grave impasses of the current law of judicial review.

2.1 Abbreviations

- "COCP" - Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta;
- "ECHR" - European Convention of Human Rights;
- "ECtHR" - European Court of Human Rights;
- "Bill" - The proposed Bill in Chapter 1;
- "Article 469A" - Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A;
- "Constitution" - The Constitution of Malta.

[6] The Constitution of Malta, Article 47; European Convention on Human Rights, Article 6.

CHAPTER 3

Memorandum

Tonio Borg

The Bill is intended to codify the norms of judicial review in one Act and gather all such norms under one legal roof.

The law of judicial review in Malta, under administrative law, can be divided into two stages: the pre-1995 position and the post-1995 position.

Prior to 1995, there was no statute governing the matter. Consequently, the courts applied the lacuna doctrine, namely that where there is a lacuna in Maltese public law, the Maltese courts may, if they so wish, apply English common law rules to fill the void. That is what the courts invariably did. In the Dunkin case, popularly known as the Blue Sisters case, the Court applied English common law norms on reasonableness to decide the case and annul an unreasonable condition attached to a private hospital licence which had been imposed by the Health Minister.

After 1995, Parliament enacted Article 469A in Chapter 12 of the Laws of Malta. In spite of the enactment of this statute, as shall be seen, only administrative acts are covered by this Article in our Code of Organisation and Civil Procedure.

Fragmentation

One of the main problems of the law on judicial review in Malta, under administrative law, is that it is scattered and fragmented. In spite of the enactment of Article 469A of Chapter 12 in 1995, this Chapter on judicial review of administrative action, does not cover, according to our courts' jurisprudence, acts relating to administrative tribunals or judicial review of subsidiary legislation. The result has been that the judicial review of administrative acts, subsidiary legislation and administrative tribunals are regulated by three different laws, with different periods of prescription/forfeiture for each category.

This fragmentation baffles scholars, students, and lawyers alike, let alone the private citizen. According to local jurisprudence, if it is intended to review an administrative act, one applies Article 469A including the restrictive provisions regarding the time limit within which to institute an action, the question of damages arising from ultra vires actions and the requirement for plaintiff to have juridical interest.

If one intends to review subsidiary legislation, the courts have ruled that such review falls under Article 116 of the Constitution the, so-called *actio popularis*, with the consequence that there is no need to prove

personal juridical interest, nor is there any time limit of prescription or forfeiture applicable.

When it comes to judicial review of administrative tribunals, there is no provision of law in Malta covering such case and therefore, applying the time-honoured lacuna doctrine, the Maltese in the context of Article 32(2) of Chapter 12, have applied English rules of common law as a direct source of Maltese administrative law on this particular issue.

This state of affairs is not satisfactory. In 1995 the intention of the legislator was to legislate through statute on a matter which for decades had been exclusively governed by English common law. The real consequence, however, has been that since Article 469A is laconic, our law is fragmented.

The Bill attached to this Memorandum intends to gather and collect all the norms of judicial review. However, it is not a mere codification of current norms. The Bill introduces important change to the law, based mainly on English common law, statute, and jurisprudence on the subject. This Bill was also inspired by cases which have been decided by our courts and which have restricted access to a court of law mostly through a restrictive interpretation of the requirement to prove juridical interest.

The Bill does not revolutionise the law on judicial review. It even crystallises in a written provision, certain basic principles enunciated by our courts culled from English public law. Consequently, the Bill defines judicial review, distinguishing it from appeal and laying down the norms by which review is only based on points of law as laid down in the law, and is narrower than an appeal, as proclaimed in several cases by our Courts. Now this principle is being set in black and white in a written statute to prevent abuses of the right to request a review of an act of a public or judicial authority. The same applies to the English common law rule, supported by local case law, that a court in judicial review, never substitutes its discretion for that of the public authority in deference to the doctrine of separation of powers.

The Bill also retains the requirement that for damages to be awarded in judicial review cases, the plaintiff has to prove that the public authority or judicial authority acted in bad faith or unreasonably. No action for damages arising out of a judicial review case relating to subsidiary legislation is being put forward in deference to the principle enshrined

in Article 11 of the Interpretation Act (Cap. 249).

The Bill, however, solves matters and issues procedural and substantive, which have caused individuals to falter in matters even of public interest where it is alleged that the public administration has overstepped the parameters of what is lawful.

The changes which are being introduced in this Bill apart from grouping all forms of judicial review in one Act are the following:

Juridical Interest

Our courts have applied the strict notion of juridical interest or legal standing found in civil law, to judicial review cases. This means that a plaintiff has to prove actual, personal and juridical interest in the subject matter of the review case to proceed. This strict interpretation practically excludes non-governmental organisations from proceeding with judicial review cases, for they rarely have a direct personal interest in the matters in which they are active. Usually their interest is political, environmental, economic, moral, philanthropic or another lofty purpose.

The Bill therefore introduces the 'sufficient interest' rule which exists in English common law and statute namely that while not every busy body can institute a judicial review action, the plaintiff needs not prove direct and personal interest. A non-governmental organisation (NGO) can proceed with a judicial review case, if it proves that as an association it has an interest in the case which could be either a representative interest or one related to the public interest.

The criterion of sufficient interest will now also apply to any person who brings an action to review decisions made by the Attorney General particularly as regards the prosecution of criminal cases, or the issuing of copies of Magisterial inquiry reports. Till today only a complainant or injured party could do so.

Grounds of Review

The Bill covers judicial review of three different acts, namely administrative acts, judicial acts and legislative acts.

In the case of administrative acts, the definition has been extended to include decisions taken by a Board which recommends action on which the public administration then proceeds with actions, decisions, or measures, based on such recommendations. In the case of judicial acts,

namely decisions made by administrative tribunals, this matter, which is not at present regulated by any statute, will now fall under this Act. In the case of legislative acts, namely the exercise of powers under a parent Act, whereby subsidiary legislation is issued, the Bill retains the current legal position of review as contained in Article 116 of the Constitution.

As to the particulars of grounds of review, the most important innovation has been the inclusion of legitimate expectation as a formal ground of review. Even though in some cases the courts of law have applied this ground of review as a form of abuse of power, the Bill contains a definition of such ground which is included under abuse of power. This definition refers to legitimate expectation as *'a promise of a lawful benefit or advantage made through words writing or behaviour to a person, by a public authority which had the power by law to make such promise.'*

The Bill aso expressly mentions other grounds of review which were interpreted by local case law as amounting to abuse of power such as unreasonableness , bad faith and ignoring relevant considerations.

The provision which formally allowed a constitutional case alleging breach of the highest law as a judicial review case has been excluded since the Courts have firmly refused to fuse the two actions, namely the constitutional and the administrative one. Besides, once constitutional breach cases are governed by the Constitution, it was fit and proper to separate the two litigations and assign them to their respective *iter* according to their appropriate law.

Definition of Public Authority

Another innovative feature is the definition of 'public authority'. Until today the definition of public authority included only Ministries, government departments, the public service and bodies corporate established by law; the so-called public corporations. The Bill adds two other entities, namely bodies corporate which have a public function even though not public corporations, and for the first time, even private entities if they provide such an important service that had they not existed the State would have intervened to provide such service. This definition is culled from English statute and common law and will apply to companies whether belonging to Government or the private sector. This definition will also cover government companies which have a public function which today, not being government departments or public corporations

are technically excluded from Article 469A.

Relaxation of Time Periods to Institute Action

Another innovation is the relaxation of the time period within which a judicial review case has to be instituted. Under the current law there is a strict forfeiture period of six months. This period cannot be suspended for any reason not even if one files a case with the Office of the Ombudsman. The period is being extended to one year. Besides, considering that the remedy before the Ombudsman has been included in the Constitution, the highest law of the land, it makes sense that such period is suspended whenever a case is referred to the Ombudsman until that Office decides the case.

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April 2023

CHAPTER 4

Scope of Judicial Review

4.1 Definition of Administrative Act

Judicial review applies to administrative acts, as defined in Article 469A:

> *"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 organisation or administration within the said authority*

It is a pity however to recall that there is a grave disparity between the English and Maltese text of the law; a glaring blunder in translation as the Maltese text reads: "egħmil amministrattiv" tfisser [means], not "includes".

Given the rules of interpretation, the Maltese version reigns supreme, rendering this divergence not just a mere blunder but rather a pivotal determinant of what can and cannot be scrutinised.[7] This has been remedied in the Bill, with the English version reading "means".

Notwithstanding the above lapsus, the definition of administrative act is generally broad:

> *'**Any**... decision, or a refusal to **any** demand of a claimant'*

A decision need not be in writing, but it must be final[8] and conclusive.[9] Consultative acts are extraneous to Article 469A, and thus our courts have pronounced that:

> *meta ċ-ċirkolarijiet ma humiex atti normattivi jew deċiżjonali, u ma humiex riprodotto fil-forma ta' provvediment jew ta' ordni amministrattiva, dawn ma jistgħux jiġu meqjusa atti idoneji li jinċidu fuq il-posizzjoni ġuridika tal-interessati*[10]*.*

[7] Borg Tonio, *Judicial Review of Administrative Action*, (Kite 2020) 37, whereby the author describes the definition of 'administrative act' as a "definition of paramount importance, since article 469A permits a court of Law to enquire only 'into the validity of administrative acts'. If an act is not administrative according to this definition it falls beyond the pale of judicial review at least under article 469A."

[8] *Joseph Galea et vs Commander Task Force*, Court of Appeal 5 October 1998 Vol LXXXII.II.541.

[9] 21/2014 *Christine Borda vs Id-Direttur (taxxi interni)*, Civil Court (First Hall) 26 November 2015.

[10] 409/2007 *Capital Fund Advisors LTD vs Malta Financial Services Authority et*, Civil Court (First Hall) 15 April 2015.

In one case, the court ruled that the decision of the Commissioner for Tax to initiate an investigation did not fall within the definition of administrative act:

> *Kwindi hu żgur illi l-ftuħ tal-investigazzjoni ma jistax jikkostitwixxi ebda għemil amministrativ fis-sens li teħid ta deċiżjoni li għalqet il-kwistjoni. Il-kwistjoni għadha kemm infetħet f'dan l-istadju.* [11]

The definition provides more of what does not constitute an administrative act, namely:

> *any measure intended for internal organization or administration within the said authority.*

Nonetheless, there is no definition of measures intended for internal organisation, and thus we revert to the teachings of the Courts for interpretation. In *Camilleri vs Is-Segretarju ewlieni fi ħdan il-Ministeru għall-Edukazzjoni u x-Xogħol*[12], the court asserted that:

> *Illi fid-duttrina, l-atti magħmula bil-għan ta' organizzazzjoni jew tmexxija interna fi ħdan xi awtorità pubblika jirreferu u jillimitaw irwieħhom għal dawk il-miżuri meħuda biex l-istess awtorità iżżomm ċerta ordni fit-tmexxija tagħha ta' kuljum. Iżda, fejn tali miżura tilħaq ċerta livell fejn tolqot drittijiet ta' persuni, imbagħad dik il-miżura tidħol fit-territorju ta' għemil amministrattiv li dwaru l-Qrati jistgħu jinqdew bis-setgħa tagħhom li jistħarrġu*

Thus, measures of 'internal organisation' are further qualified to those measures which do not affect the personal rights of the person challenging the measure. GħSL favours a wide definition of 'administrative act' as it allows the courts to assess the nature of the act on the merits. This is reflected in the aforementioned judgement, whereby the court had to assess whether a termination of employment, based on an allegedly unlawfully composed board, was an administrative act in terms of Article 469A. The Court ruled:

[11] 1126/2015 *John Grech vs Kummissarju tat-Taxxi*, Civil Court (First Hall) 2 March 2016.

[12] 315/2017 *Maria Dolores sive Doreen Camilleri vs Is-Segretarju Ewlieni fi ħdan il-Ministeru għall-Edukazzjoni u x-Xogħol*, Civil Court (First Hall) 11 November 2021

> *l-Qorti tagħraf li dan huwa każ fejn il-linja bejn dak li jaqa' fl-ambitu għal kollox intern fi ħdan awtorità pubblika u dak li joħroġ il-barra minnha m'hijiex daqshekk waħda ċara. Għal-daqstant, biex il-Qorti tindirizza dan l-ilment, ma tistax tieqaf fil-livell ta' kif kwestjoni tidher mid-daqqa t'għajn. Dan qed jingħad għaliex 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 amministrattiv li jkun.*[13]

GħSL affirms that although the definition of 'administrative act' may not be particularly informative, it serves a functional purpose in that it supports review and court scrutiny.

Contractual Relationships

When a public authority contracts with individuals, it is the Law of contract, namely the Civil Code[14], or other special laws, which regulates that relationship, not judicial review. In the context of the Bill, this becomes even more relevant, as it would be an unmerited intrusion, to overturn purely contractual relationships on the grounds of review mentioned in the Bill when there is no public element.[15] Government and non-statutory bodies performing a public function, are legal persons, capable of being sued in tort or quasi-tort, or for the performance of contractual obligations.

In one case, the termination of a concession to operate as a sightseeing tour bus, was deemed to be a relationship governed by contract and not Article 469A.[16] It is important to highlight, that in the aforementioned scenario, the actual termination of concession is within the definition of administrative act in terms Article 469A, however, the court

[13] ibid.

[14] Civil Code, Chapter 16 of the Laws of Malta.

[15] Refer to Borg Tonio, *Judicial Review of Administrative Action*, (Kite 2020) 35-41.

[16] 901/2009 *Supreme Travel Ltd vs Malta Transport Authority*, Civil Court (First Hall) 18 January 2011.

denied jurisdiction to hear the case on the basis that when there is an alternative method of contestation, article 469A does not apply. Wade and Forsythe comment:

> *If Contract is made into a rigid barrier against judicial review, victims of abuse of power may be left without remedy where they are not themselves parties to a contract under which some public service is administered. 'Government by contract' is now so extensive that the case for controlling it may become irresistible.*[17]

The alternative method of contestation clause, as will be discussed in the following section, is interpreted restrictively. The Bill retains both the definition of administrative act in Article 2, and the alternative methods of contestation clause in Article 7. However, the alternative mode of contestation clause is restrictively construed, and thus third parties to a contract, or other methods of contestation which are inefficient, do not oust judicial review.

Service with the Government as a special relationship.

Article 469A(6) states that:

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

This ouster clause, a remanent of Act VIII of 1981[18], has been quashed meaningless by our Courts. In *Helen Borg et vs Il-Prim Ministru et*[19], the Court ruled:

[17] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009).

[18] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 743(5), introduced by Act VIII of 1981.

[19] 781/1996 *Helen Borg vs Prim Ministru et*, Court of Appeal 9 February 2001.

> *Is-sub-inċiz 6 ta' dan l-artikolu [469A] huwa wieħed limitattiv tad-drittijiet. Din il-liġi ġustament, finalment, tat lill-individwu d-dritt għar-rikors quddiem il-Qrati ordinarji biex jissindika ġjudizzjarjament l-atti amministrattivi. Dan biex jassigura amministrazzjoni pubblika ġusta u ekwa. Kien allura sub-inċiż li kellu jiġi nterpretat b'mod restrittiv, u f'kaz ta' dubju dan kellu jmur favur li jkun hemm stħarriġ gjudizzjarju ta' azzjoni amministrattiva u mhux kontra.*

In *Aaron Haroun vs Prim'Ministru et*[20], the court, after delving into a historical consideration of the limitations posed by Act VIII of 1981, considered the *ratio legis* of Article 469A and concluded that:

> *wieħed irid iqis ukoll l-imsemmi artikolu 469A (6) fid-dawl tal-fehmiet aġġornati dwar il-qagħda tas-servizz pubbliku f'għajnejn il-liġi. Irid tassew jingħad li, illum il-ġurnata, l-ideja li s-servizz pubbliku huwa rabta "non legali" - fis-sens li s-setgħa tal-Istat bħala suċċessur tal-Kuruna li jagħti ingaġġ u li jtemm l-ingaġġ ma tistax tiġi mistħarrġa minn ħadd jew m'hijiex għajn ta' jeddijiet ċivili - ixxellfet jekk mhux saħansitra twarrbet għal kollox; Illi huwa minnu li r-rabta bejn l-ufficjal pubbliku u min iħaddmu hija waħda speċjali, imma b'daqshekk din il-karatteristika ma tfissirx li dik ir-rabta ma tnissilx obbligi u jeddijiet ċivili reċiproċi. U waħda mis-sisien ewlenin tal-istitut tal-Istħarriġ Amministrativ huwa dak li joħloq makkinarja li jiżgura li tali obbligi u jeddijiet jiġu mħarsin u msoffijin mill-arbitrarjeta' jew l-abbuz tal-poter.*

In *Edward Paul Tanti vs Segretarju Amministrattiv tal-Uffiċju tal-Prim'Ministru*[21], the court held that Article 469A(6) did not oust the Court's jurisdiction to review, but rather it assisted the interpretation of Article 469A itself:

> *Kif tajjeb osserva l-appellat fir-risposta tiegħu għall-appell odjern, kulma jagħmel dana s-subartikolu huwa li jagħti direzzjoni dwar x'liġi jew liġijiet huma applikabbli fir-rigward*

[20] 772/2000/1 *Aaron Haroun vs Onor. Prim'Ministru*, Civil Court (First Hall) 15 March 2001.

[21] 1773/2001/1 *Edward Paul Tanti vs Segretarju Amministrattiv tal-Uffiċju tal-Prim Ministru*, Court of Appeal 7 October 2005.

> *ta' kundizzjonijiet ta' impjieg u ta' servizz mal-Gvern għall-fini ta' interpretazzjoni u applikazzjoni kemm ta' l-Artikolu 469A kif ukoll ta' kull disposizzjoni ta' liġi oħra, iżda mhux li jeskludi l-applikazzjoni ta' l-istess Artikolu 469A għal kull ħaġa li tinvolvi servizz mal-Gvern.*

In the case of *Logotenent Kurunell Andrew Mallia vs Kap Kmandant tal-Forzi Armati*[22], the plaintiff contested his exclusion from promotion within the Armed Forces of Malta. The court dismissed the sub-Article 6 ouster clause:

> *Qari tal-Artikolu 469A (6) juri illi dan l-artikolu m'huwiex intiż sabiex jeskludi għal kollox il-possibilita illi impjegati tal-Gvern iresqu azzjonijiet ta' stħarriġ ġudizzjarju f'għemil amministrattiv. L-eskluzjoni hija waħda ċara u limitata u titratta biss kondizzjonijiet t'impjieg. Il-każ odjern pero m'huwiex dwar kondizzjonijiet t'impjieg, iżda dwar deċiżjoni meħuda mill-intimati relattiva għall-promozzjonijiet fir-rank ta' Kurunell fi ħdan il-forzi armati. Għalhekk fil-fehma tal-Qorti huwa ċar li din l-esklużjoni ma tapplikax fil-każ odjern għaliex il-promozzjoni tal-membri tal-forzi armati m'hijiex kondizzjoni ta' impjieg iżda tinvolvi eżercizzju ta' diskrezzjoni minn naħa tal-awtoritajiet amministrattivi kompetenti. Dan l-eżerċizzju ta' diskrezjoni huwa regolat bil-ligi, u għalhekk din il-Qorti ma tistgħax tiġi żvestita mill-ġurisdizzjoni u kompetenza li tissindika jew l-awtoritajiet amministrattivi segwewx id-dettami tal-liġi fl-eżercizzjoni ta' diskrezzjoni tagħhom.*

Our Court have rendered this ouster clause obsolete, and thus it has been eliminated in GħSL's proposed Bill.

4.2 Other methods of Contestation

Article 469A(4) provides that:

> *The provisions of this article shall not apply where the mode of contestation or of obtaining redress, with respect to any par-*

[22] 187/2016 *Logotenent Kurunell Andrew Mallia vs Kap Kmandant, Forzi Armati ta' Malta et*, Civil Court (First Hall) 17 June 2020.

> *ticular administrative act before a court or tribunal is provided for in any other law*

Contractual relationships and relationships regulated by special laws such as the Rent Laws[23], the Customs Ordinance[24], the Local Council's Act[25] etc. fall outside the ambit of Article 469A through sub-article 4. This is also the case when special laws refer to *ad hoc* tribunals, such as the Environment and Planning Review Tribunal[26]. This ouster clause is retained in Article 7 of the Bill, with the aim of avoiding a situation of double jurisdiction.[27]

The Courts tend to interpret ouster clauses restrictively, protecting their jurisdiction to review with zeal.[28] Lord Carnwath in *R (Privacy International) v Investigatory Powers Tribunal*[29], asserted that:

> *it should remain ultimately a matter for the court to determine the extent to which, in the light of its purpose and context and the nature and importance of the legal issue in question, a statutory ouster of review of an ordinary error of law should be upheld.*

Professor Stanton comments:

> *Cases in the UK, as well as here in Malta, demonstrate that the courts seek restrictive interpretations of ouster clauses and, in so doing, cling earnestly to their responsibility to the rule of law.*[30]

[23] 2349/2000 *Justin Caruana vs Kummissarju tal-Artijiet et,* Civil Court (First Hall) 16 October 2006.

[24] 167/2007/1 *Priscilla Cassar vs Kontrollur tad-Dwana*, Court of Appeal 29 January 2010.

[25] *Joseph Galea vs Kummissjonarju Elettorali Ewlieni*, Court of Appeal 26 February 1998.

[26] Environment and Planning Review Tribunal Act, Chapter 551 of the Laws of Malta.

[27] A situation of double jurisdiction used to exist with regards to the Administrative Review Tribunal, whereby the definition of 'administrative act' was maintained *ad verbatim* as Article 469A COCP in Chapter 490 establishing the ART. Act No. IV of 2016 remedied the situation whereby today, the ART can only review administrative acts as prescribed by Chapter 490 itself or by any other Act of Parliament granting jurisdiction to the ART.

[28] *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147.

[29] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[30] Tonio Borg, Ivan Mifsud and John Stanton, Speeches on Administrative Law. Three speeches on administrative law delivered at the book launch of Dr Tonio Borg's book titled Maltese Administrative Law, held at the Chamber of Advocates Conference Hall on the 10 November 2021, GħSL Online Law Journal.

In *Bunker Fuel Oil Company limited et vs Paul Gauci et*[31], the court applied this general sentiment to the application of Article 469A(4), in asserting that:

> *Fil-fehma tal-Qorti, dan is-subartikolu (4) ta' l-Artikolu 469A, biex jiġi interpretat ġustament, m'għandhux jingħata interpretazzjoni restrittiva. L-eskluzjoni tal-ġurisdizzjoni tal-Qorti, biex tistħarreg l-għemil amministrattiv, tkun ġustifikata biss jekk il-Qorti tkun sodisfatta li, fil-prattika, persuna kellha rimedju effikaci u adegwat verament disponibbli għaliha u hija irraġonevolment ma utilizzatx tali proċeduri disponibbli*

In *Rezk vs Awtorità għat-Trasport F'Malta*[32], the Court asserted:

> *That article 469A(4) of Chapter 12 is an exception to the general rule that the Courts have jurisdiction. It is settled caselaw that the Court's exclusion from determining administrative action is only justified if the Court is satisfied that, in practice, the individual had an effective and adequate remedy to resort to, and he failed to do so for no just reason.*

In one case[33], the owners of a semi-detached house challenged via Article 469A, the development permits on an adjacent plot of land which would effectively enclose their property. The defendant Housing Authority and Planning Authority argued that the plaintiff could have challenged the decision by appealing to a special board of planning appeals as established in the Development Planning Act of 1992. However, the plaintiffs successfully pleaded that the Board of Appeal was not an effective or suitable method of contestation as the board had developed a jurisprudence that it was only competent to hear appeals from persons who have themselves applied for a planning permit. The court ruled that:

> *Fil-fehma tal-Qorti, la darba l-ġurisprudenza kostanti tal-Bord kienet teskludi persuni mid-dritt ta' appell quddiemu,*

[31] 1836/1995/1 *Bunker Fuel Oil Company limited et vs Paul Gauci et*, Civil Court (First Hall) 7 December 2011.

[32] 897/2016 *Sabri Rezk vs Awtorità Għat-Trasport F'Malta et*, Civil Court (First Hall) 31 October 2019.

[33] 1447/1996/1 *Joseph Muscat vs Chairman ta' l-Awtorità tad-Djar et*, Civil Court (First Hall) 28 January 2004.

> *jekk dawn ma kienux applikanti, allura jsegwi li l-appellanti ma għamlu xejn ħazin li segwew din il-ġurisprudenza...Meta allura l-interpretazzjoni ta' l-organu kompetenti kienet dik li hi, diffiċilment din il-Qorti tista' tlum lill-atturi li fiż-żmien indikat jadixxu lill-Qrati għall-ħarsien ta' jeddijiethom... Il-Qorti għandha dejjem il-prerogattiva reviżjonali ta' l-att amministrattiv u għalhekk, denotati ċ-ċirkostanzi speċjali f'dan il-kaz, hi wkoll il-fehma ta' din il-Qorti illi teżisti ġustifikazzjoni serja u aċċettabbli biex ma tadoperax id-dispost tas-subinċiż (4) ta' l-Artikolu 469A. B'hekk qed tafferma ukoll f' dan il-każ il-ġurisdizzjoni tagħha.*

The test of whether there exists an alternative mode of contestation, is based on the facts of the case, and on whether the alternative remedy was factually efficacious to the complainants.[34] For this reason, the provision of Article 469A(4) is being retained in Article 7 of the Bill as it assists in providing legal certainty and efficiency. The judicial interpretation of this clause and its interpretation is consonant with the general tenants of accessibility to review.

The Jurisdictional Enigma of Article 469A(4) and Article 46(2) of the Constitution.

Article 469A(1)(a) allows an individual to challenge the validity of any administrative act on the ground of Constitutionality. Apart from the arguable constitutional validity of reducing the jurisdiction of the Constitutional Court to that of an ordinary Court, this ground of review has created a situation of convoluting jurisdictions which disturbs the interpretation of the exhaustion of remedies proviso contained in Article 46(2) of the constitution of Malta, which reads:

> *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*

[34] 1682/1999/1 *Dottor Philip Galea vs Tigne' Development Co. Ltd et*, Civil Court (First Hall) 29 March 2004 – *'Fl-ahhar mill-ahhar, din hija kwistjoni ta' provi u ta' interpretazzjoni tad-disposizzjonijiet relevanti tal-Kap. 356 (Development Planning Act), fis-sens li jrid jirrizulta li l-atturi kellhom raguni tajba biex ma jutilizzawx ir-rimedju moghti lilhom taht l-artikolu 469A'.*

> *for the contravention alleged are or have been available to the person concerned under any other law.*

If the Constitutional Court is considered to be a Court of last resort, it is to be said that the review of whether an administrative act is constitutional falls within the competence of the ordinary courts in an Article 469A COCP action. Our Courts have interpreted these juxtaposing provisions tumultuously. In one case[35], the court noted that:

> *illi l-ġurisprudenza ta' din il-Qorti f'tentattiv biex tirrikonċilja dan l-inċiż (1)(a) ta' l-artikolu 469A tal-Kap 12 u ta' l-artikolu 46 tal-Kostituzzjoni fejn si tratta ta' leżjonijiet tad-drittijiet fundamentali, jidher li tiffavorixxi interpretazzjoni bażata fuq l-effettività tar-rimedju fis-sens illi rikors kostituzzjonali kellu jkun aċċessibbli f'dawk il-każijiet fejn ir-rimedju effettiv għal-leżjoni subita ma setax jingħata taħt l-artikolu 469A. Interpretazzjoni din mhux għal kollox linejari u ma kenitx nieqsa minn diffikoltà interpretattiva. Mill-banda l-oħra, ta' min ifakkar illi jidher illi l-legislatur oriġinarjament intenda li, bl-introduzzjoni ta' l-inċiz (1)(a) ta' dan l-artikoli, jintroduci u jimponi terminu ta' dekadenza ta' sitt xhur li fih setgħet tiġi avanzata allegazzjoni ta' jeddijiet protetti bil-Kostituzzjoni inklużi, forsi, ukoll dawk fondamentali, tant illi originarjament l-inċiż (3) ta' dak l-artikolu kien japplika wkoll ghall-inciz (1)(a). Eventwalment u fortunatament wara kontestazzjoni, il-leġislatur gie konvint jelimina dan il-perjodu preskrittiv in kwantu japplika ghal egħmil amministrattiv li jikser il-Kostituzzjoni u dana bl-Att IV ta' l-1998. L-emenda però bl-ebda mod ma ċċarat il-konflitt apparenti bejn il-kompetenza civili u l-kompetenza kostituzzjonali.*

Apart from the dubious interpretation that human rights violations do not qualify as a ground of review under Article 469A(1)(a) COCP[36], these diverging avenues create a lack of legal certainty in the most basic

[35] 701/1999 *Emanuel Ciantar vs Kummissarju tal-Pulizija*, Constitutional Court 2 November 2001.

[36] Borg Tonio, *Leading Cases in Administrative Law*, (Kite 2020) pg 135; and Mifsud Ivan, *Judicial Review of Administrative Action in Malta. An Examination of Article 469A COCP and of Judicial Review in General* (Self-published 2018) 59.

constitutional action. In the case mentioned above, the Constitutional Court concluded that Article 469A(1)(a) was an effective alternative mode of challenging the decision of the Commissioner of Police.

In *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et* [37], the Constitutional Court considered that:

> *Din il-Qorti lanqas ma tista' tilqa' l-eċċezzjoni ta' nuqqas ta' eżawriment ta' rimedji ordinarji stante il-Artiklu 469A (4) Kap 12 jistipula illi ma jistax jintuza l-Artiklu 469A fejn att amministrattiv jista' jiġi kontestat jew rimedjat quddiem Qorti jew Tribunal skond xi liġi oħra*

Although the proviso to Article 46(2) is discretionary and does not bind the Constitutional Court in declining jurisdiction, authors have noted how our Courts have enforced it with a heavy hand *'to prevent confusion between civil or administrative and constitutional issues'*[38] However, in *Mark Calleja vs Ministru Għall-Edukazzjoni u Impiegi*[39], the Constitutional Court, deciding on whether the plaintiff could have challenged an allegedly discriminatory scholarship grant under Article 469A COCP, ruled:

> *Il-Qorti tqis ukoll il-fatti specie ta' dan il-każ u tqis illi għandu almenu jkun paċifiku jingħad illi dak li jidher illi kostantament ġie deciz mill-Qrati tagħna, mhux neċessarjament illi jsib il-konfort u s-sostenn fil-liġi miktuba tagħna. Il-Qorti tqis illi dan l-istat ta' inċertezza, li ċertament mhux maħluq minn xi azzjoni da parti tar-rikorrent, għal finijiet ta' din l-eċċezzjoni hawnekk diskussa u deċiża [Exhaustion of ordinary remedies], tista' biss timmilita a favur ir-rikorrent u kontra l-akkoljiment tal-istess eccezzjoni mressqa mill-intimati. Il-Qorti, fid-dawl ta' dan diskuss, ma tista' qatt tkun serena tgħid illi r-rikorrenti kellu rimedju ieħor effettiv, xieraq u adegwat biex jindirizza l-ilment tiegħu, partikolarment in vista tal-komplessita' tal-vertenza mressqa.*

[37] 87/2013, *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et*, Constitutional Court 21 April 2015.

[38] Borg Tonio, *Judicial Review of Administrative Action* (Kite 2020) 93.

[39] 287/2020, *Mark Calleja vs Ministru Għall-Edukajzzjoni u Impjiegi*, Constitutional Court 28 October 2022.

The Constitutionality ground of review in Article 469A, as will be considered in the following chapters, is an inoperable ground of review, which has created an extra unnecessary procedural hurdle for victims seeking constitutional redress. It is for this reason that GħSL has not included Constitutionality as a ground of review in the proposed Bill.

4.3 Legislative Acts

Parliament cannot attend to every minute detail in the running of the state. It is thus common for Parliament to delegate its powers to public authorities who absorb the legislative function given specifically to them by Act of Parliament. Whilst the definition of an administrative act, as has been expounded in the previous chapter, is intentionally expansive in its scope, the scrutiny of delegated legislation has not been subsumed therein.

There is no more characteristic administrative activity than legislation. Measured merely by volume, more legislation is produced by the executive government than by the legislature.[40]

It is also being submitted that:

> *There is only a hazy borderline between legislation (the author is here referring to delegated legislation) and administration, and the assumption that they are two fundamentally different forms of power is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can be more readily in judicial power) is a legacy from an old era of political theory.*[41]

In the original draft Bill to the 1995 COCP amendments, the definition of 'administrative act' specifically excluded delegated legislation[42]. It could be suggested that the fact that this exclusion was not followed through in the Act, that it was the intention of the legislator to include administrative legislation within the purview of the definition of 'administrative act'. However the Courts have not tended to this argument, and

[40] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 731.

[41] ibid.

[42] Borg Tonio, *Judicial Review of Administrative Action* (Kite 2020) 57.

have concluded (in the most part) that the avenue for review of delegated legislation is the *actio popolaris* of Article 116 of the Constitution, and not Article 469A COCP. Article 116 reads:

> *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.*

The Interpretation Act is clear, that 'Law' does not only mean an Act of Parliament, but shall also include *'any instrument having the force of law.'* It is to note, that the *actio popolaris* was utilised by our courts to escape the draconian provisions of Article 742 COCP introduced by Act VIII of 1981. Yet prior to 1981, the Courts never mentioned Article 119, which is the now Article 116 of the Constitution.[43] In fact, it has been commented, that *'delegated legislation was treated by the courts on a par with other forms of administrative action'*[44].

However, the Court of Appeal in *Carmelo Borg vs Il-Ministru responsabbli mill-Ġustizzja*[45] asserted:

> *Din il-Qorti ma tistax taqbel ma' l-appellant li l-liġi sussidjarja in diżamina u/jew il-bidu fis-seħħ tagħha jammonta għal "egħmil amministrattiv" għall-finijiet ta' l-Artikolu 469A tal-Kap. 12. Din il-liġi u/jew il-bidu fis-seħħ tagħha hija eminentement att jew egħmil leġislattiv, għalkemm imwettqa mir-ram Eżekuttiv tal-Gvern fuq delega tar-ram Leġislattiv. Għalkemm huwa veru li diversi awturi Ingliżi, meta jirreferu għal deċiżjonijiet li jittieħdu mill-amministrazzjoni pubblika, spiss jiddistingwu bejn funzjonijiet leġislattivi, amministrattivi, ġudizzjarji u ministerjali ta' tali amministrazzjoni pubblika, fis-sistema legali tagħna qatt ma ġie dubitat li liġi sussidjarja tista' tigi sindakata mill-Qorti ta' ġurisdizzjoni ordinarja – in effetti mill-Prim Awla – biex wieħed jara jekk*

[43] ibid, 59.

[44] Farrugia Marse-Ann, 'The Development of Judicial Review of Administrative Action in Malta' (LL.D. thesis, University of Malta), 78.

[45] 839/2005/1 *Carmelo Borg vs Il-Ministru responsabbli mill-Ġustizzja u l-Intern et*, Court of Appeal 8 November 2005.

> *tali liġi hix intra vires jew ultra vires is-setgħat mogħtija mill-Parlament. 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' "liġi" mogħtija fl-Artikolu 124(2) ta' l-istess Kostituzzjoni (bi dritt ta' appell skond kif provvdut fl-Artikolu 95(2)(e) ta' l-istess Kostituzzjoni, cioe' lill-Qorti Kostituzzjonali u mhux lil din il-Qorti).*

After the *Carmelo Borg* case it became generally accepted that Article 116 of the Constitution was applicable to the review of administrative legislation.[46] Yet the avenue as to which court, or under which law is applicable, remained mired in uncertainty, as although the Courts accepted that Article 116 was the applicable law, they nonetheless maintained that the Civil Court retained competence to review delegated legislation under the general jurisdiction of the First Hall. This was spelled out in *Liquigas vs Ir-Regolatur għas-Servizzi tal-Enerġija u l-Ilma*[47], whereby the appellate court confirmed that:

> *Il-Qorti ma taqbilx mas-Soċjetà attriċi illi l-promulgazzjoni ta' leġislazzjoni tikkostitwixxi deċiżjoni tal-Ministru għall-finijiet ta' dan l-artikolu. Id-deċiżjoni tal-Ministru li jippromulga leġislazzjoni sussidjarja mhijiex att amministrattiv għal finijiet tal-Artikolu 469A tal-Kapitolu 12 tal-Liġijiet ta' Malta... Din il-Qorti però ma taqbilx illi liġi sussidjarja tista' tiġi sindikata* ***biss*** *mill-Qorti Kostituzzjonali taħt l-Artikolu 116 tal-Kostituzzjoni u li leżistenza ta' dan l-artikolu tal-liġi tfisser li m'hemm l-ebda mod ieħor kif tista' tiġi mpunjata liġi sussidjarja. Fil-fehma ta' din il-Qorti n-nuqqas ta' aderenza mal-liġi ordinarja, hjia sindikabbli wkoll mill-Qrati ordinarji. Il- Qorti tqis li lment bħal dak imressaq mis-soċjetà attriċi jista' jiġi mistħarreġ mill-Qrati ordinarji a bażi tal-Artikolu 32(2) tal-Kapitolu 12 tal-Liġijiet ta' Malta, li jvesti fihom po-*

[46] Refer to: 409/2007 *Global Capital Fund Advisors Limited vs Awtorità ghas-Servizzi Finanzjarji ta' Malta*, Civil Court (First Hall) 15 April 2015; and 1198/2011 *Falcon Investments Limited vs Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar et*, Court of Appeal 27 October 2017, whereby the court considered that a local plan was a legislative act and not an administrative act.

[47] 1158/16/1 *Liquigas Malta Limited vs Ir-Regolatur għas-Servizzi tal-Enerġija u l-Ilma et*, Court of Appeal 30 March 2022.

teri residwali fejn il-liġi ma tipprovdix mezz idoneju u effettiv ta' rimedju

The conclusion therefore is that the applicable law in the review of delegated legislation is either Article 116 of the Constitution, or Article 32(2) of the COCP but never Article 469A of the COCP. This is an unreasonable fragmentation of Laws, as although the substance of review is generally the same the procedure is different, with different prescriptive periods and requirements for legal standing.

Proposal

A codification of the review of delegated legislation is being proposed. For the purposes of consistency and ease of navigation through the Law, the Bill utilises the term 'Legislative Act', which is defined in article 2 as:

"legislative act" means: an instrument having the force of Law, which emanates from a power granted by Parliament to any Minister, or public authority, and which requires to be laid on the table of the House of Representatives

It is being submitted in the Bill, that the same requirements and time frame of the *actio popolaris* be transposed within the review of legislative acts. This is inspired by the observations made in the *Carmelo Borg* case[48], whereby the court noted that:

Punt ieħor ta' min isemmi fir-rigward ta' jekk hawn si trattax o meno ta' "eghmil amministrattiv" li jaqa' taht l-Artikolu 469A huwa illi kieku din il-Qorti kellha taċċetta t-teżi ta' l-attur appellant, ikun ifisser li għall-impunjazzjoni tal-validità ta' ligi sussidjarja bħalma hi dik in diżamina – għax wara kollox l-appellant m'hux qed jikkontesta li l-"Ordni" in dizamina huwa liġi sussidjarja – ikun japplika tterminu ta' dekadenza għal tali impunjazzjoni ta' sitt xhur imsemmi fis-subartkolu (3) ta' l-Artikolu 469A, meta ebda tali terminu ma hu previst fl-Artikolu 116 tal-Kostituzzjoni.

[48] 839/2005/1 *Carmelo Borg vs Il-Ministru responsabbli mill-Ġustizzja u l-Intern et*, Court of Appeal 8 November 2005.

It would nonsensical and unconstitutional for this proposed ordinary Act of Parliament to limit what is provided for by the Constitution. Thus, it is being put forward in the Bill that no requirement of legal standing[49] and time limit[50] be set up in the review of legislative acts.

Article 4(2) of the Bill reads:

> *A legislative act may be reviewed when it was performed ultra vires the parent Act or other instrument having the force of Law authorising it, or is in conflict with any Act of Parliament, or was not in conformity with the mandatory procedural requirements established by law, or when it constitutes an unreasonable, or improper exercise of power in consideration of the purpose of the parent Act.*

The grounds of review listed in Article 4(2) are a codification of a long line of jurisprudence. In 1928, in the case of *Agius Walter vs Parnis Alfredo*[51] the Court annulled the issue of a government notice on the basis that the Governor's consent was vitiated under a false pretence. In *Stickland vs Galea*[52] (1935), the Court found that a police order prohibiting the affixing of posters on private property to be illegal, as the scope of the regulations empowering the Commissioner of Police was limited to Government property and not Private property. In *Galea vs Galizia*[53] (1935), the Court held that:

> *delegated legislation, unless otherwise provided in the delegating statute, is subject to judicial control for the purpose and to the extent of ascertaining whether it has been enacted within the limits and in accordance with the terms laid down in the principal Statute.*

In *Pulizija vs George Pace*[54] (1937), the Court asserted that it is:

[49] Refer to Article 3 of the Bill: *'in cases of review of legislative acts, no such interest is required and any person without any such interest may institute such action'.*

[50] Refer to Article 6(2) of the Bill: *'No forfeiture period shall apply for the institution of an action to review a legislative act'.*

[51] *Walter Agius vs Alfredo Parnis*, Court of Appeal 14 August 1928 Vol XXVII.1.165.

[52] *Mabel Strickland pro et nomine vs Salvatore Galea,* Court of Appeal 12 June 1935, Vol XXIX.i.116.

[53] *Antonio Galea et vs James Galizia nomine et*, Court of Appeal 8 November 1935 Vol XXIX.i.345.

[54] *Pulizija vs George Pace*, Court of Criminal Appeal (Inferior Jurisdiction) 15 May 1937 Vol XXIX.iv.697.

> *elementari illi r-regolament maħrug mill-poter Eżekutiv bis-saħħa tal-liġi li awtorizzat li jingħamel dak ir-regolament ma jistax joħrog barra mill-limiti ta' 1-istess liġi, u ma jistax jikkontradiċi għal-liġi stess, tant illi lill-Qorti ġie dejjem rikonoxxut il-jedd li jeżaminaw jekk regolament maħruġ bis-saħħa ta' liġi hux "intra" jew "ultra vires".*

Apart from having a well-established history of *ultra vires* and mandatory procedural requirements[55], our courts gradually established that the ground of 'reasonableness' was also applicable in the review of administrative legislation. In *Borg Olivier et vs Anton Buttigieg*[56], a circular issued by the Medical and Health department to prohibit the entry into Hospitals, newspapers which were condemned by the Church, was deemed unreasonable. The Court of appeal, after considering that the circular was in violation of the fundamental right of freedom of expression, considered that it would have to question whether such restriction was *'raġonenvolment ġustifikabbli f'soċjeta' demokratika'.* The Privy Council further expounded:

> *The appellants were undoubtedly entitled to issue **reasonable** orders to regulate the conduct of government employees during their working hours. The prohibition that they imposed went far beyond the scope of any such reasonable orders. It was discriminatory.*[57]

The landmark judgement on the matter is the *Blue Sisters* case[58], whereby the Court of Appeal held that:

> *poteri diskrezzjonarji għandhom jintużaw għal u fl-ambitu tal-iskop li għalieh l-att ġie promulgat u di piu il-Qrati għandhom il-poter u d-dritt li jissindakaw jekk il-poteri diskrezzjonarji mogħtija ġewx użati skond il-liġi fl-ambitu tal-iskop ta' 1-istess*

[55] Refer to: *Antonio Sammut vs John Belle McCance*, Civil Court (First Hall) 19 May 1946 Vol IIIII.ii.350; and *Victor Mifsud vs Lt Col Edward George Carter*, Court of Appeal 1947, Vol XXXIII.i.1.

[56] 1/1962 *Dottor Anton Buttigieg vs Hon. George Borg Olivier*, Court of Appeal 10 January 1964.

[57] *Hon. George Borg Olivier et v. Dottor Anton Buttigieg*, Privy Council [1966] UKPC 6.

[58] 775/1980 *Prim Ministru et vs Luigi Duncan nomine*, Court of Appeal 3 June 1981.

> *Att li jkun ikkonferihom jew inkella b'abbuż u kontra 1-ispirtu ta' 1-istess liġi jew b'mod irraġjonevoli.*

It is thus clear that administrative legislation is generally regulated by the same legal principles as the other types of administrative acts. However, the scope of review of legislative acts is narrower than that of administrative acts. Authors have concluded that:

> *the scope of judicial review in regard to delegated legislation should be more limited than in the case of other types of administrative actions, since certain grounds of review clearly cannot be effectively applied to rules and regulations of general application. Thus, an administrative authority cannot be expected to hear every interested person before issuing a particular regulation, unless of course the relative law gives a right to be heard or consulted. Nor can it be expected to give reasons for issuing a particular order.*[59]

Extending the same argumentation, the ground of legitimate expectations is not effectively applicable in the judicial review of delegated legislation.

Conclusion

The codification of the review of delegated legislation extends beyond merely consolidating it under a single heading; it represents a critical step towards enhancing legal certainty. While judicial review of delegated legislation is firmly established in our legal system, the current laconic legal framework poses a significant obstacle. This is because various sources of applicable laws have led litigants down the wrong path, resulting in the loss of their opportunity to seek redress.

[59] Farrugia Marse-Ann, 'The Development of Judicial Review of Administrative Action in Malta (LL.D. thesis, University of Malta)'

CHAPTER 5

Subjects of Judicial Review

5.1 Public Authorities

In the judicial review of administrative action, the respondent is always a public authority, defined by article 469A as:

> *the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law and includes Boards which are empowered in terms of law to issue warrants for the exercise of any trade or profession.*

It is generally accepted that this definition of public authority unambiguously limits the purview of review to the branches of Government and statutory bodies as established either by an act of parliament, or by an order of the Prime Minister as empowered by the Public Administration Act[60], and not under a Law, such as a government owned companies established under the Companies Act[61] and foundations established under the Civil Code.[62]

However, the Court in *Hotel Cerviola Ltd vs Malta Shipyards Ltd*[63], accepted that a government-owned company, was for the purposes of article 469A, a public authority within the purview of review. The *raison d'etre* of the Court of Appeal was that, if in Human Rights cases, as expounded in *Hon. Joseph Debono Grech vs Albert Mizzi et noe et*[64], that:

> *Kull persuna ġuridika – kemm ċivili u kemm kummerċjali – li hija effettivament kontrollata mill-Gvern – ma tistax tiġi kunsidrata li hija għal kollox, barra mill-ambitu Kostituzzjonali għal dak li huma l-obbligi li jiġu osservati u rispettati d-drittijiet u libertajiet fundamentali ta' l-individwu kontemplati mill-Kostituzzjoni*

As the Constitutional Court stretched the definition of public authority in Article 45(2) of the Constitution by looking at the effective control of a private company rather than its classification, so did the

[60] Public Administration Act, Chapter 595 of the Laws of Malta, Articles 8 and 9.

[61] Companies Act, Chapter 386 of the Laws of Malta.

[62] Civil Code, Chapter 16 of the Laws of Malta, Schedule II Article 26(1).

[63] 350/2006/1 *Hotel Cerviola Ltd vs Malta Shipyards Ltd*, Court of Appeal 23 September 2009.

[64] *Hon. Joseph Debono Grech vs Albert Mizzi et noe et*, Constitutional Court 11 February 1991 LXXV.i.68.

First Hall in *Cerviola*[65] with regards to Article 469A. This analogous interpretation is a *prima facie* wrong interpretation of the term 'public authority' in judicial review of administrative acts, as even the Constitutional Court asserted that this extension in the definition of public authority can only apply in the breach of human rights. The Court in *Cerviola*[66] stated that:

> *Għalkemm ġiet kostitwita din il-kumpanija kummerċjali 'privata', fil-fatt il-kontroll effettiv tagħha baqa' f'idejn il-Gvern bl-intendiment li jinnegozja l-bejgħ tat-tarznari. Bħalma ġie deċiż f'każi oħra dwar ksur ta' drittijiet fundamentali tal-bniedem, il-Qorti hi tal-fehma li anke fil-każ ta' kawżi dwar stħarriġ ġudizzjarju, hi għandha tħares lejn is-sustanza ta' l-affarijiet u ta' dak li qed jiġi mitlub li jiġi protett u mhux toqgħod sempliċement fuq l-apparenzi jew id-definizzjonijiet jew klassifikazzjonijiet formali. Hu ċar li fil-qadi tad-dmirijiet tagħha Malta Industrial Parks Limited qegħda taqdi funzjonijiet pubbliċi, in kwantu xogħolha hu li tamministra ż-żoni industrijali proprjeta' tal-Gvern. F'dawn ic-ċirkostanzi l-qorti ma tara l-ebda raguni għalfejn din il-kumpannija ma tikkwalifikax ukoll bħala awtorita' pubblika, iktar u iktar meta tqies li hi tal-Gvern. Dan irrispettivament mill-fatt li fl-istatut tal-kumpannija jinghad li hi "private limited company".*

In *Paul Licari vs Malta Industrial Parks Limited*[67], the Court of Appeal affirmed this stance in stating that:

> *Is-soċjetà konvenuta, hu veru, qegħdha taqdi funzjonijiet pubbliċi, in kwantu xogħolha hu li tamministra ż-żoni industrijali proprjeta' tal-gvern, u tista' wkoll tikkwalifika bħala "awtorità pubblika" għall-fini tal-Artikolu 469A.*

In *Euro Chemie Products Limited vs Malta Industrial Parks Limited et*[68]:

[65] 350/2006/1 *Hotel Cerviola Ltd vs Malta Shipyards Ltd*, Court of Appeal 23 September 2009.

[66] ibid.

[67] 25/2010 *Paul Licari vs Malta Industrial Parks Limited*, Court of Appeal 25 November 2016.

[68] 1006/2006 *Euro Chemie Products Limited vs Malta Industrial Parks Limited et*, Civil Court (First Hall) 29 September 2009.

> *Il-fatt li dik l-awtorità għandha s-sura ta' kumpannija kummerċjali ma jneħħihiex milli tikkwalifika bħala "korp magħqud kostitwit permezz ta' liġi" kif imsemmi fl-artikolu 469A(2). Din ix-xejra "pubblika" toħroġ ukoll mill-binja azzjonarja tagħha, fejn l-azzjonist ewlieni huwa l-Ministeru tal-Finanzi (b'9,999 sehem ordinarju)*

The same reasoning was adopted in *HP Cole Limited vs Malta Industrial Parks Limited*[69], yet the court emphasised that review was only extended since Malta Industrial Parks Limited had absorbed the functions of the Malta Development Corporations; a body established by law and empowered to observe certain State-owned land by Chapter 169 of the Laws of Malta.

In *Kaptan Mario Grech vs Gozo Channel Company Limited*[70], the court adopted a bolder approach in stating that:

> *il-fatt li l-Gvern ikun għażel li jopera permezz ta' kumpannija u mhux korp kostitwit b'liġi, ma għandux ifisser li b'daqshekk dik il-kumpannija li tkun qegħda taqdi funzjoni pubblika m'għandix tkun soġġetta għal stħarriġ taħt l-Artikolu 469A tal-Kap. 12 fejn twettaq "egħmil amministrattiv"*

Unlike Malta Industrial Parks Limited, Gozo Channel Limited did not acquire the rights and obligations of a body corporate established by Law. It is being submitted that this judgement is Malta's version of *R v. Panel on Take-overs and Mergers*[71] as it is an introduction of the public functions test. The Panel on Take-Overs and Mergers was a self-regulating, unincorporate association which set up a local code for take-over of public companies. Lord Lloyd's reasoning in subjecting the board to judicial review foreshadows the Gozo Channel Limited case in stating that:

> *I do not agree that the source of the power is the sole test whether a body is subject to judicial review... Of course the source of the power will often, perhaps usually, be decisive.*

[69] 547/2008 *H.P. Cole Ltd vs Malta Industrial Parks Ltd,* Civil Court (First Hall) 28 March 2012.

[70] 90/2009 *Kaptan Mario Grech vs Gozo Channel Company Limited*, Civil Court (First Hall) 27 April 2010.

[71] *R v. Panel on Take-Overs and Mergers*, ex parte Datafin PLC [1987] QB 815.

> *If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review... But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. 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*

'Public Law functions' have been widely defined in the UK, to the extent that in *Hampshire County Council v. Graham Beer*[72], Lord Dyson asserted that:

> *It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted*

UK Courts have not been homogenous in the 'investigative' process of inquiring when a body performs public-law functions. Lord Dyson's test in *Graham Beer*[73] was to assess *'whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law.'* In *R v. Disciplinary Committee of the Jockey Club*[74], the applicant sought to challenge a disciplinary decision taken by the club. Notwithstanding that the Jockey Club was a body which regulated the national rules of racing and which handed down sporting permits, the Court of Appeal did not find the Club's decision to have a public law function;

> *I am willing to accept that if the Jockey Club did not regulate this activity the government would probably be driven to create a public body to do so. But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body... I would accept that those who agree to be bound by the Rules of Racing have no effective alternative*

[72] *Hampshire County Council v. Graham Beer* [2003] EWCA Civ 1056.
[73] ibid.
[74] *R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.

> *to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case*[75]

This stricter view of public function was extended in the case law which preceded the Human Rights Act of 1998. In *R v. Leonard Cheshire Foundation*[76], the applicants sought to review the decision to close a nursing home. The National Assistance Act of 1948 obliged the relevant local authorities to provide accommodation for the elderly. The Local Authority outsourced this obligation to a private entity. The Court asserted that the private nursing home was not performing a public function and thus was exempt from review. This restrictive interpretation was scorned by The Joint Committee on Human Rights who asserted that this case created a 'serious gap'[77] in the protection offered by the Human Rights Act of 1998. In the Commission's 9th report on the Definition of Public Authority, the commission considered that this gap is:

> *not just a theoretical legal problem but has significant and immediate practical implications. In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law*

[75] ibid, Sir Thomas Bingham MR.

[76] *R. v. Leonard Cheshire Foundation* [2001] EWHC 429.

[77] House of Lords House of Commons Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act, Seventh Report of Session 2003–04 Report, HL Paper 39 HC 382, 3 March 2004, The Stationery Office Limited.

> *is out of step with reality. The implications of the narrow interpretation of the meaning of public authority are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.*[78]

The Commission argued that the consequence of the interpretation in *Cheshire* was that a private authority could only be considered as a public authority if;

- Its structures and work are closely linked with the delegating or contracting out state body; or
- It is exercising powers of a public nature directly assigned to it by statute[79]; or
- It is exercising coercive powers devolved from the State.

The commission opined that the test utilised in *Aston Cantlow PCC v. Wallbank*[80] was more protective of Human Rights;

> *Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.*

In the aforementioned case, Lord Birkenhead considered that certain private entities had hybrid personalities, performing both private and public functions. He asserted that in assessing the reviewability of hybrid public authorities, it was essential to inquire whether the act being

[78] House of Lords House of Commons Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006–07 Report, HL Paper 77 HC 410, 28 March 2007, The Stationery Office Limited.

[79] In the Maltese scenario, although Article 469A is limited to the composition of the body corporate, in *Armando Tramontano vs Dragonara Casino Limited*, the court extended the review in asserting that a Casino, which was empowered by Law to control access into its premises and its games, was subject to judicial review. vide 1765/2001/1 *Armando Tramontano vs Dragonara Casino Limited,* Court of Appeal 25 May 2007.

[80] *Aston Cantlow Parochial Church Council v. Wallbank* [2003] UKHL 37.

contested in the proceedings was of a public nature, rather than the body itself.

Despite the wave of criticism, the House of Lords in *YL v. Birmingham City Council*[81] affirmed the decision in *Cheshire*[82]. It is absurd that the outsourcing of a service by a public authority exempted the service provider from judicial review, especially considering the clear public nature of a nursing home.[83] The banality of the situation, whereby aggrieved service users could review the acts of the nursing home if it was provided directly by the Council but could not review acts if they had been outsourced, piled pressure on Parliament. The Health and Social Care Act of 2008 was amended to include residential care services akin to *Cheshire* as services of a public function. GħSL submits that the application of a *but for* test, that is; where a private entity performs a public function which, if it had not done so, the state would have had to intervene, would have resolved the gap created by *Cheshire*[84] and *Birmingham City Council*[85]. The outsourcing of an Authority's statutory obligation would in itself satisfy the but-for test. Yet the term 'public function' in the Human Rights Act remains undefined[86] and thus subject to the same interpretation of the House of Lords in *Birmingham City Council.*[87]

Proposal

Although some Maltese judgements have circumvented the strict dictates of Article 469A's definition, it is evident that the Maltese definition of 'public authority' is ripe for change as bodies of a purely public nature incorporated under a law, as well as those hybrid entities which perform public functions are exempted from judicial review. In the proposed Bill, a wider definition is put forward, which would allow Maltese Courts to develop their own jurisprudence of what is to be considered a body exer-

[81] *YL v. Birmingham City Council* [2007] UKHL 27.
[82] *R. v. Leonard Cheshire Foundation* [2001] EWHC 429.
[83] House of Lords House of Commons Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act, Seventh Report of Session 2003–04 Report, HL Paper 39 HC 382, 3 March 2004, The Stationery Office Limited.
[84] ibid.
[85] *YL v. Birmingham City Council* [2007] UKHL 27.
[86] Hansard, House of Commons Debates, 17 June 1998, col 433- *'As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality.'*
[87] *YL v. Birmingham City Council* [2007] UKHL 27.

cising public functions. The forthcoming definition of 'public authority' is thus proposed:

> *"Public Authority" means: The Government, including its Ministries and departments, local authorities, the Armed Forces of Malta, and any body corporate established by law, including Boards which are empowered in terms of law to issue warrants for the exercise of any trade or profession. The meaning of Public Authority shall also include: Any body corporate which performs a public function, or any body corporate which the State would have to intervene if the body did not exist or did not provide its services.*

GħSL asserts that the current socio-political trend of privatisation calls for the broadening in definition of public authority, else an ever-growing branch of administrative decisions remain unchecked. Extending review should not be regarded as an encroachment of the self-determination of non-statutory bodies and private entities, but rather as a safeguard against abuse from entities which *'willingly recognise the realities of executive power'*.[88]

5.2 Judicial Authorities

The extensive proliferation of executive authority within Malta's welfare state prompted the establishment of administrative tribunals to address disputes involving the administration or even between private individuals such as the Rent Regulation Board and the Small Claims Tribunal.[89] Malta has a system of *ad hoc* tribunals created by parent acts; ordinary legislation, which establishes their function and procedure.[90] In 2009, the Administrative Justice Act created the Administrative Review Tribunal which absorbed several specialised tribunals into one tribunal with common rules and procedure.[91] However, this process of absorption has been stopped in recent years and thus there still exist several specific tri-

[88] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 541.

[89] *vide* Borg Tonio, *Maltese Administrative Law* (Kite 2021) 65.

[90] Frendo Chris, 'Questioning the Right to a Fair Hearing before Administrative Tribunals in Malta' (LL.D. Thesis, University of Malta 2014).

[91] Administrative Justice Act, Chapter 490 of the Laws of Malta.

bunals outside the realm of the Administrative Review Tribunal[92], such as the Environment and Planning Review Tribunal.[93] Tribunals do not form part of the court-system in Malta, and form part of the executive branch of government.[94] In *Mifsud vs Carter*[95] the court asserted that:

> *l-Boardijiet, ta' kwalunkwe natura jistgħu jkunu qegħdin jeżercitaw funzjonijiet semiġudizzjarji, huma pero emanazzjoni tal-Poter Eżekuttiv, u mhumiex parti ta' l-organament ta' l-ordni Ġudizzjarju, cioe tal-Qrati. Dan iġib illi għalhekk il-ġurisdizzjoni tagħhom ghandha tkun neċessarjament limitata skond l-istat kreativ ta' dak il-Board; u dik il-ġurisdizzjoni ma tistax tgħaddi dawk il-limiti.*

This notwithstanding, tribunals are still bound under the ECHR to adhere to the right to fair hearing under Article 6, and thus the question of reviewability of administrative tribunals carries a constitutional significance.[96]

Today it is consonant that both judicial/quasi-judicial bodies, and public authorities are to follow the rules of natural justice. However, the jurisprudence coming up to this assertion was turbulent. In the UK it was said that these principles were applicable to decisions of a judicial and quasi-judicial nature. It was only in *Ridge v. Baldwin*[97] were the House of Lords asserted that the principles of natural justice applied also to administrative decision making, and not simply to judicial or quasi-judicial acts. This is deemed as a landmark judgement as it was clarified that rules of natural justice apply to all realms of administrative powers, even when such powers are not judicial or quasi-judicial.[98] This dichotomy between what is classified as purely administrative and judicial acts has lingered in Maltese administrative law.

[92] Borg Tonio, *Maltese Administrative Law* (Kite 2021) 66.

[93] Environment and Development Planning Act, Chapter 504 of the Laws of Malta.

[94] ibid.

[95] *Victor Mifsud vs Lt Col Edward George Carter*, Court of Appeal 16 June 1947 Vol XXXIII.i.122.

[96] *Xhoxhaj v. Albania* (Application no. 15227/19) ECtHR, 9 February 2021 - *"the Court points out that, for the purposes of Article 6 § 1, a tribunal need not be a court of law integrated within the standard judicial machinery. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system."*

[97] *Ridge v. Baldwin* [1964] AC 40, UKHL 2.

[98] Farrugia Marse-Ann, 'The Development Of Judicial Review Of Administrative Action In Malta' (LL.D. thesis, University of Malta), 159.

In *Anthony Ellul Sulivan noe vs Lino Vassallo noe*[99] the plaintiff challenged the minister responsible for shipping (at the time empowered by the now repealed Merchant Shipping Act of 1973) for the cancellation of registration of a vessel. The Court asserted that the rules of natural justice, in this case, the duty to provide reasons, were applicable to judicial and quasi-judicial decisions. The court further considered that the Minister's decision for cancelation of registration had a quasi-judicial effect, and thus the Minister had a duty to provide reasons. Our courts interpreted quasi-judicial decisions to include any form of decision which effected the individual's rights, and not simply decisions of tribunals.[100]

The implementation of Article 469A in 1995 provided definitive clarification that administrative acts must conform to the principles of natural justice. However, the distinction between judicial and administrative decisions perpetuated[101], in the sense that our Courts have on occasions restrictively interpreted the meaning of 'administrative act' in Article 469A to not include decisions or measures by a tribunal.[102] Article 469A, although clarifying that administrative decisions were subject to the rules of natural justice, created a lack of legal certainty with regards to the challenging of decisions by tribunals, which prior to its enactment was generally ascertained through jurisprudence. The problem emanates from the Court's interpretation of administrative act within article 469A, which, according to our Courts, does not include decisions of Tribunals. [103]

There are however conflicting judgements. Certain courts accepted that decisions of tribunals were reviewable under article 469A, namely in *Anthony Busuttil vs Louis Zammit*[104], whereby the plaintiffs chal-

[99] *Anthony Ellul Sullivan noe vs Lino C. Vassallo noe et*, Court of Appeal 26 June 1987 Vol LXXI.ii.356

[100] Farrugia Marse-Ann, 'The Development of Judicial Review Of Administrative Action In Malta' (LL.D. thesis, University of Malta), 159.

[101] ibid. The Author describes the distinction between judicial and administrative as an 'aberration', which 'continued to be applied by the Maltese courts long after the English courts had realized that the distinction between judicial and non-judicial decisions is no longer good law'.

[102] *vide*, 918/2012 *Joseph Genovese vs Awtorità Ta' Malta Dwar L-Ambjent u L-Ippjanar*, Civil Court (First Hall) 27 June 2022; 395/2005 *Awtorita' Marittima ta' Malta vs Philip Abdilla*, Civil Court (First Hall) 27 June 2013; and 1032/2012 *Vincent Bonnici vs Awtorità Ta' Malta Dwar L-Ambjent U L-Ippjanar et*, Civil Court (First Hall) 27 June 2022.

[103] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A(2).

[104] 131/2003 *Anthony Busuttil vs Louis Zammit*, Court of Magistrates (Gozo) (Superior Jurisdiction) 26 October 2005.

lenged the legality of a decision of the Small Claims Tribunal. The First Hall considered that the plaintiff had lost the right of appeal due to a procedural fault and thus the plaintiff:

> *ma kien baqgħalhom ebda triq oħra għajr li jirrikorru għall-qrati ordinarji, kif fil-fatt għamlu bil-kawża preżenti, f'tentattiv li jiksbu r-rimedju mixtieq... Dan ir-rimedju jipprovdih l-artiklu 469A tal-kap 12, introdott fil-liġi proċedurali tagħna bl-emendi tal-1995, li nkorporaw il-ġurisprudenza lokali in materja dwar l-istħarriġ ġudizzjarju ta' azzjoni amministrattiva, żviluppata matul is-snin.*

Also, in *Cassar vs Professur Juanito Camilleri fil-Kapaċita' tiegħu ta' Rettur ta l-Universita' ta Malta et*[105], the Court accepted that a decision of a particular University's disciplinary board was an administrative act in terms of article 469A.

Yet, in *Mohib Abouzidan vs Akram Jirah et*[106] the Court of Appeal asserted that:

> *Illi l-Qorti temmen ukoll 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' xi bord jew tribunal statutorju, l-aktar dawk li jkollhom setgħat ġudizzjarji jew kważi-ġudizzjarji.*

On other occasions[107], the Court considered that it could not review judicial bodies on the basis that they are not public authorities in the purview of Article 469A(2), with a Court asserting that:

> *Din il-Qorti hija tal-fehma li t-Tribunal għall-Investigazzjoni ta' Inġustizzji ma jaqax stricto juris fid-definizzjoni ta' "Awtorità" kif imfisser fl-artikolu 469A(2) tal-Kap 12 tal-Liġijiet ta' Malta. Dan l-artikolu jagħti tifsira preċiża għall-kelma "Awtorità" u ma jħallix spazju għall-definizzjoni iktar wiesgħa*

[105] 386/2010 *Cassar vs Professur Juanito Camilleri fil-Kapaċità tiegħu ta' Rettur ta l-Universita' ta Malta et*, Civil Court (First Hall) 5 April 2016.

[106] 909/2015/1 *Mohib Abouzidan vs Akram Jrirah*, Court of Appeal 23 February 2022.

[107] 395/2005 *Awtorità Marittima ta' Malta vs Philip Abdilla*, Civil Court (First Hall) 27 June 2013.

In another case, the Court[108] held that;

> *Din il-Qorti, kif issa ppreseduta, hi tal-fehma li l-kriterju mhuwiex daqstant jekk il-funzjoni attakkata hix amministrattiva jew ġudizzjarja (inkella kważiġudizzjarja) imma wieħed ikun iktar preċiż jekk jistaqsi jekk il-Bord jaqax taħt id-definizzjoni ta' awtorita' pubblika jew le. Dan jevita d-diffikulta' li spiss tqum biex wieħed jiddistingwi bejn għemil amministrattiv u għemil ġudizzjarju jew, kważi-ġudizzjarju anke għaliex spiss dawn iż-żewġ funzjonijiet ikunu elementi mħalltin flimkien; u xi drabi jkun jipprevali l-element amministrattiv u drabi oħrajn l-element ġudizzjarju*

It may be suggested that prior to the enactment of Article 469A and the definition of 'administrative acts' thereunder, our judicial system, realising that these tribunals are administrative bodies and not part of the court system, regarded decisions made by statutory tribunals as 'administrative acts'. Namely, in *Montalto vs Clews*[109], the court, after reaffirming its general jurisdiction to review the legality of decisions by tribunals when there are no other suitable means of redress (a provision included in Article 7 of the Bill), referred to the decision of the industrial tribunal as 'għemil amministrattiv'.[110]

Notwithstanding, the *jurisprudence constante* is that judicial and quasi-judicial bodies are not reviewed through Article 469A of the COCP but rather through Article 32(2) of the COCP. The Court of Appeal in *Direttur Generali tal-Qrati vs Pinu Axiaq*[111], held that:

> *l-istħarriġ ġudizzjarju ta' tribunali ġudizzjarji jew kwazi-ġudizzjarji, bħalma huwa t-Tribunal in kwistjoni, ma jistax isir in forza ta' l-Artikolu 469A tal-Kapitolu 12. L-Artikolu 469A(1) jipprovdi li l-qrati ta' ġustizzja ta' kompetenza ċivili, għand-*

[108] 190/2022 *Pierre Cremona vs Bord tal-Parole*, Civil Court (First Hall) 27 October 2022.

[109] *Thomas Montalto vs Maggur Stanley J. A. Clews et*, Civil Court (First Hall) 26 May 1987 Vol.LXXI.iii.688.

[110] din il-Qorti taqbel mal-principji enunċjati mill-Qrati tagħna li l-eskluzjoni tal-ġurisdizzjoni tal-Qrati li jistħarrġu għemil amministrattiv għandha tkun ġustifikata biss jekk il-Qorti tkun sodisfatta li fil-prattika, persuna kellha rimedju effikaċi u xieraq disponibbli għaliha u hija naqset li tirrikorri għalih bla raġuni tajba. Illi fondamentali hija l-osservazzjoni li l-kawża in mertu deċiża mit-Tribunal għal Talbiet Żgħar għaddiet in ġudikat.

[111] 2633/2000/1 *Direttur Ġenerali tal-Qrati vs Pinu Axiaq*, Court of Appeal 3 March 2006.

> *hom ġurisdizzjoni biex jistħarrgu l-validita‘ ta' xi għemil amministrattiv jew li jiddikjaraw dak l-għemil null, invalidu jew mingħajr effett fil-każijiet imsemmija fl-istess artikolu. Skont is-subartikolu (2) ta' l-imsemmi artikolu, il-frazi " 'għemil amministrattiv' tfisser il-il-ħruġ ta' kull ordni, liċenzja, permess, warrant, decċiżjoni jew ir-rifjut għal talba ta' xi persuna li jsir minn awtorita‘ pubblika ...". L-istess sub-artikolu jipprovdi li l-frażi 'awtorità pubblika' tfisser il-Gvern ta' Malta, magħdudin il-Ministri u dipartimenti tiegħu, awtoritajiet lokali u kull korp magħqud kostitwit permezz ta' liġi."... Għalhekk jidher li l-Qrati Maltin irritenew illi s-setgħa tagħhom li jissindikaw deċiżjonijiet ta' tribunali ġudizzjarji jew kważi ġudizzjarji, temani mill-ġurisdizzjoni ordinarja li l-liġi (Kodiċi ta' Organizzazzjoni u Proċedura Ċivili – Kap. 12, Artikolu 32(2)) tikkonferixxi lill-Prim'Awla tal-Qorti Ċivili li tieħu konjizzjoni ta' kawżi ta' natura ċivili li ma jkunux jaqgħu fil-ġurisdizzjoni ta' xi qorti oħra bis-saħħa ta' xi liġi ohra... Huwa veru li, kif osserva l-appellant, l-istħarriġ ġudizzjarju taħt l-Artikolu 469A tal-Kap 12 u l-istħarriġ ġudizzjarju in forza tal-ġurisdizzjoni ġenerali konferita lill-Prim Awla tal-Qorti Ċivili, jista' fis-sustanża ikun fil-prattika simili jekk mhux identiku, billi fiż-żewġ każi l-eżerċizzju huwa dejjem dak li jara li l-għemil amministrattiv f'każ wieħed u l-pronunzjament tat-tribunali amministrattivi fil-każ l-ieħor jkunu fil-parametri tal-liġi. Pero‘ dan ma jnaqqas xejn mill-fatt illi l-Kap 12 jikkonferixxi din is-setgħa lill-Prim Awla taħt żewġ disposizzjonijiet separati.*[112]

In *Kummissarju tal-Pulizija vs George Galea*[113], the court retained that:

> *Illi kif ingħad għadd ta' drabi, ma għandu jkun hemm l-ebda dubju li din il-Qorti għandha s-setgħa li tisma' kull*

[112] ibid.

[113] 695/1999 *Kummissarju tal-Pulizija vs George Galea*, Civil Court (First Hall), 3 February 2016. Also refer to: 918/2012 *Joseph Genovese vs Awtorità Ta' Malta Dwar L-Ambjent u L-Ippjanar*, Civil Court (First Hall) 27 June 2022; 395/2005 *Awtorità Marittima ta' Malta vs Philip Abdilla,* Civil Court (First Hall) 27 June 2013; and 1032/2012 *Vincent Bonnici vs Awtorità Ta' Malta dwar L-Ambjent u L-Ippjanar et*, Civil Court (First Hall) 27 June 2022.

kawża dwar deċiżjoni jew imġiba ta' korp ġudizzjarju jew kważi Ġudizzjarju maħluq bis-saħħa ta' xi liġi, u dan bis-saħħa tas-setgħat mogħtijin lilha taħt l-artikolu 32(2)

In *Pierre Cremona vs Bord tal-Parole*[114], the First Hall ruled that the board was not a public authority within the meaning of 469A:

L-Onorabbli Qorti tal-Appell tat għadd ta' sentenzi li interpretaw l-Art. 469A f'dan is-sens [that it does not fall within the purview of 469A]. Din il-Qorti taqbel ma' din l-interpretazzjoni, anke jekk hemm xi sentenzi li jgħidu mod ieħor, għaliex tqisha l-unika waħda konformi mal-ittra tal-liġi… Dan ma jfissirx li jkun qiegħed jiġi ristrett l-istħarriġ ġudizzjarju. Sa minn żmien twil qabel l-introduzzjoni tal-Art. 469A, din il-Qorti affermat li għandha setgħa ġenerali, taħt l-Art. 32(2) tal-kodiċi ritwali, biex tistħarreġ l-imġieba ta' kull tribunal kważi-ġudizzjarju maħluq bil-liġi, għaliex, fi Stat ta' Dritt, ħadd m'hu meħlus mir-rabta li jimxi kif tridu l-liġi.[115]

The Dean of the Faculty of Laws, Dr Ivan Mifsud, points out that:

The above caselaw [particularly referring to Kummissarju tal-Pulizijja vs George Galea] serves to illustrate and confirm that the Court's power of review go beyond article 469A COCP. It is regrettable that the distinction between review under article 469A COCP, and outside article 469A COCP, is sometimes confused.[116]

The sense of 'confusion' referred to herein is evidenced by the inconsistent jurisprudential landscape, such that it effectively constitutes a hindrance to review[117]. As a consequence, the judiciary, legal practitioners, and litigants, are beset with uncertainty as to the proper legal

[114] 190/2022 *Pierre Cremona vs Bord tal-Parole*, Civil Court (First Hall) 27 October 2022.

[115] ibid.

[116] Mifsud Ivan, *Judicial Review of Administrative Action in Malta. An Examination of Article 469A COCP and of Judicial Review in General* (Self-published 2018).

[117] Also refer to: Borg Tonio, *Judicial Review of Administrative Action* (Kite 2020), 45-49.

provision to invoke the grounds of review[118] to avail themselves of, and the applicable prescriptive period.

Proposals

A streamlining of avenues of review is being proposed. GħSL contends that there exists no persuasive justification for maintaining two paths of review, especially considering that our courts have previously declared them functionally equivalent.

Article 3 of the Bill includes the review of 'judicial acts' creating a common form of review:

> *any person may request, through an action before the First Hall of the Civil Court, a review of any administrative, delegated legislation, or judicial act*

'Judicial authority' is defined in Article 2 as:

> *any board or tribunal established by law that adjudicates disputes pending before it;*

and 'Judicial act' is defined as:

> *"judicial act" means: a pronouncement by any entity, tribunal authority, or organ established by law which decides disputes brought before it; but shall also include any entity on whose findings a public authority commences any kind of proceedings or action or where a public authority is bound by law to follow such decision and shall never include pronouncements by a Court of Law.*

In *Elton Taliana vs Onorevoli Ministru għall-Intern u Sigurtà Nazzjonali*[119], the Court of Appeal determined that the statements made by the Board of Police were merely suggestions to the Commissioner for Police and therefore could not be considered as a conclusive decision,

[118] Refer to: *Dottor Vincent Falzon nomine vs Isabelle Grima*, Court of Appeal 17 May 1993, Vol. LXXVII.ii.292, wherein it was held that the grounds of review of Administrative tribunals are: *'(a) eċċess ta' ġurisdizzjoni, (b) nonosservanza tal-istess liġi kostitwita...u finalment (c) non-osservanza ta' xi wieħed mill-prinċipji fondamentali tal-ġustizzja.'*

[119] 177/2014 *Elton Taliana vs Onorevoli Ministru ghall-Intern u Sigurtà Nazzjonali et*, Court of Appeal 20 July 2020.

and therefore outside of the framework of judicial review. Nonetheless, it is important to note that in this particular case, the Commissioner for Police had instructed the same board to conduct the investigation, and thus, there would be no logical reason for disregarding the report's findings. Hence, while the Board's conclusions do not have a finality in the traditional sense of the definition of 'administrative act,' they have a binding effect in practice. It begs the question of what could motivate the Commissioner of Police or any other authority to reject the findings and proceedings of a board or tribunal, as it would render the body entirely ineffective. For this reason, the definition of judicial act in the proposed Bill includes *'any entity on whose findings a public authority commences any kind of proceedings or action, or where a public authority is bound by law to follow such decision.'*

Conclusion

In its current state, the disjointed channels for review generate uncertainty and a piecemeal approach to judicial review. There is no valid rationale for maintaining distinct provisions governing a process that is inherently identical, other than to sow confusion and impede the path of those seeking redress. As such, a cohesive and unified framework for judicial review is necessary to ensure legal certainty for all parties involved.

CHAPTER 6

Who may bring about an Action for Review

This Chapter will consider the issue of juridical interest as a rule of standing in judicial review. Without proof of juridical interest, that is the requirement of the plaintiff to prove that he is affected by the matter of the case, the Court will lack jurisdiction to inquire into the validity of acts. De Smith explains that the reason for having rules of standing is the attainment of balance between:

> *two aspects of public interest- the desirability of encouraging individual citizens to participate actively in the enforcement of law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters which he is not concerned.*[120]

GħSL is not convinced that there exists a "professional litigant", one who challenges without a proper interest in the proceedings. Professor K.F. Scott writes:

> *The idle and whimsical plaintiff, a litigant who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom.*[121]

Notwithstanding the general scepticism[122] for the requirement of a rule-based test for juridical interest, this section will consider whether the current notion of juridical interest maintains a balance between participation in the enforcement of law and the exclusion of the speculative capricious litigant.

In civil proceedings, a plaintiff must show that they have a direct, actual, and immediate interest of a juridical nature.[123] Our courts[124] have explained these requisites in the following manner:

> *a) ġuridiku, jiġifieri d-domanda jrid ikun fiha ipotesi ta' l-eżistenza ta' dritt u l-vjolazzjoni tiegħu;*

[120] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995).

[121] Kenneth E. Scott, 'Standing in the Supreme Court: A Functional Analysis' (1973), 86 Harvard Law Review 645, 646-47.

[122] De Smith insists that *'If there is a satisfactory mechanism for dealing with unmeritorious or frivolous claims most of the arguments for a restrictive approach fall away'*.

[123] *Watson vs Sacco*, Court of Appeal 20 January 1950 Vol XXXIV.ii.453.

[124] refer to: *J. Muscat et vs R. Buttigieg et*, Court of Appeal 27 March 1990 Vol LXXIV.iii.481.

b) dirett u personali: fis-sens li huwa dirett meta jeżisti fil-kontestazzjoni jew fil-konsegwenzi tagħha, personali fis-sens li jirrigwarda l-attur, ħlief fl-azzjoni popolari;

c) attwali fis-sens li jrid joħroġ minn stat attwali ta' vjolazzjoni ta' dritt, jiġifieri l-vjolazzjoni attwali tal-liġi trid tikkonsisti f'kondizzjoni pożittiva jew negattiva kontrarja ghall-godiment ta' dritt legalment appartenenti jew spettanti lid-detentur.

Furthermore:

irid jiġi stabbilit in-ness ġuridiku bejn l-aġir abbużiv u illegali allegatament kommess mill-konvenuti u d-danni jew almenu l-preġudizzju allegatament subit mill-attur…ma jistax ikun ipotetiku.[125]

Plaintiff must also prove that:

dak l-interess (jew aħjar, il-motiv) tat-talba għandu jkun konkret u jeżisti fil-konfront ta' dak li kontra tiegħu t-talba ssir[126]

This judicial doctrine[127], hailing from the traditional continental civil law[128], has been fervently implemented within the purview of public law[129], with the exception of the *actio popularis* stipulated in Article 116 of the Constitution, which mandates that no individual shall be obliged to exhibit a "personal interest" in any legal action impugning the legitimacy of legislation.[130] As previously expounded in Chapter 4.3, it is relevant to accentuate that the challenge of delegated legislation may be pursued through the recourse of Article 116 of the Constitution.[131] The distinction between the challenge of delegated legislation and that of administrative acts, is characterised by a disparity in the requirement of

[125] 659/2005 *MrBookmaker.com Ltd vs Stichting De Nationale Sporttotalisator, entità estera et*, Civil Court (First Hall) 17 May 2011.

[126] *Francis Tonna vs Vincent Grixti*, Civil Court (First Hall) 13 March 1992 Vol LXXVI.iii.592.

[127] Also refer to: *Falzon Sant Manduca vs Weale*, Court of Appeal 9 January 1959 Vol XLIII.i.11.

[128] *Onor. E. Fenech Adami vs Dr. George Abela*, Court of Appeal 6 October, Vol LXXXIII.ii.331: *'definizzjoni aċċettata fil-ġurisprudenza nostrana ta' interess ġuridiku hija dik tal-Mortara'.*

[129] Borg Tonio, *Judicial Review of Administrative Action* (Kite 2020) 73.

[130] Constitution of Malta, Article 116.

[131] 839/2005/1 *Carmelo Borg vs Ministeru tal-Ġustizzja u l-Intern et*, Court of Appeal 8 November 2005.

locus standi. In the former case, the challenge may be mounted without necessitating *locus standi*, while in the latter, the classical approach to juridical interest is adopted. For the aforementioned reason, it is proposed that the exemption from the obligation to provide evidence of personal interest be maintained in the review of delegated legislation. It is now suitable to address standing in the review of administrative acts.

In *is-Soċjetà Filarmonika "La Stella" vs Kummissarju tal-Pulizija*[132], the plaintiff society contested the denial of a license for a particular type of fireworks. According to the Court of Appeal, the refusal was aimed at the individual applicant who had filed the application on behalf of the club, not at the club itself. The court emphasised that the plaintiff society lacks juridical interest and cannot contest the administrative decision, as the refusal was directed at the physical person who is distinct and separate from the society. The court asserted that:

> *Dana ċertament ma jfissirx illi s-soċjeta' attriċi neċessarjament ma setgħatx u/jew ma għandiex interess fil-ħruq tannar u anke fl-eżitu ta' dan l-istanza, pero' l-interess li għallfini tal-liġi u ta' dawn il-proċeduri għandu sinifikat u importanza, huwa l-interess ġuridku u mhux l-interess ġenerali – interess ġuridku jrid jkun fit-termini...tal-artikolu 469A... il-konsegwenza legali ta' dan kollu hija li s-soċjeta' ma setgħat qatt tipproponi din il-kawża biex tikkontesta d-deċiżjoni amministrattiva li kienet tolqot persuna fiżika distinta u separata minnha u li kienet talbet għal-liċenzja u li ġiet irrifjutata lilha*

Despite the Club's annual organization of the feast for over a century and despite its members' steadfast devotion to preparing for the day, the court's ruling, predicated upon a nonsensical legal fabrication, denied the society the requisite juridical interest. Such a ruling is an affront to common sense, rendering the club's historic and devoted contribution to the feast utterly meaningless in the eyes of the law.

In January of last year, the Court dismissed a case that was commenced by the Life Network Foundation[133] half a decade earlier. The

[132] *Soċjetà Filarmonika "La Stella" vs Kummissarju tal-Pulizija*, Court of Appeal 19 July 1997 Vol LXXXI.ii.625.
[133] 494/2017 *Life Network Foundation vs Superintendent for Public Health*, Civil Court (First Hall) 27 January 2022.

Foundation had challenged the over-the-counter sale of particular morning-after pills, which required no medical prescription or documentation. The Court, after five years, ruled in favour of striking off the case on the grounds that the Foundation lacked juridical interest. The plaintiffs contended that where there was a *lacuna* in Maltese public law, British public law should be employed.[134] Nevertheless, the Court affirmed that the doctrine of juridical interest was firmly established and could not be considered as a *lacuna,* and thus the more liberal British interpretation of *locus standi* was inapplicable. Regrettably, setting aside the merits of the case, it remains unclear who possesses the requisite standing to challenge such acts of the administration. Who else, if not an NGO formed specifically for this purpose, would have the necessary standing to challenge this decision? GħSL refers to DeSmith's viewpoint as a foreshadowing of the existing limitations pertaining to legal standing:

> *Where there are strict rules as regards to standing, there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action of obvious illegality or questionable legality. It is hardly desirable that a situation should exist where because all the public are equally affected no one is in a position to bring proceedings.*[135]

In *Ashingdane v. The United Kingdom,*[136] the court explained that the right of access to court[137] is not absolute, in the sense that access is necessarily regularised by the State, and thus the State reserves an element of discretion. However, it is imperative to note that in *Berger v. France*[138], the court emphasised that any restriction imposed on this fundamental right would be deemed excessive if it fails to serve legitimate

[134] Refer to: *James Cassar Desain vs James Louis Forbes noe*, Court of Appeal 7 January 1935 Vol XXIX.i.43; and 675/1980 *Prim Ministru et vs Sister Luigi Dunkin noe,* Civil Court (First Hall) 26 June 1980 (Blue Sisters).

[135] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995)102.

[136] *Ashingdane v. The United Kingdom* App no. 8225/78 (ECtHR, 28 May 1985).

[137] Article 6 ECHR and Article 39 of the Constitution of Malta.

[138] *Berger v. France* App no. 48221/99 (ECtHR, 3 December 2002): *'limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'*

objectives and lacks proportionality between the methods employed and the goals pursued. In *Zubac v. Croatia*[139], the ECtHR held that:

> *The right of access to court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his/her case determined on the merits by the competent court*

The restrictive doctrine of juridical interest; this limitation to the right of access to a court, is no longer a matter of scholarly debate, it is an issue of Constitutional significance. It is hereby submitted that a legislative intervention is a necessity.

6.1 Piercing the Juridical Interest preliminary plea

EU Directive 2003/35 gives standing to environmental non-governmental organisations in cases relating to environment related permits. In *Ramblers Association of Malta vs Malta Environment and Planning Authority*[140], the Court of Appeal considered that the plaintiffs had the sufficient standing only through the EU directive. This in turn reaffirmed the doctrine of juridical interest through the assertion that it is only the promulgation of the EU legislation, that the association has standing; *lex specialis derogat legi generali.*[141]

However there have been attempts to pierce the restrictive doctrine, most notably in *Kamra tal-Periti et vs L-Awtorità tal-Ippjanar et*[142], whereby the plaintiffs challenged an order issued by the defendant authority to demolish the Sea Malta building in Marsa. The planning authority argued that the plaintiffs did not have a direct, actual and immediate interest in the suit, even more so that the building had been demolished. Furthermore, the defendants argued that the aforementioned EU directive did not apply to the plaintiffs since it was incorporated

[139] *Zubac v. Croatia* App no. 40160/12 (ECtHR, 5 April 2018).

[140] 228/2010 *The Ramblers Association of Malta vs L-Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar et*, Court of Appeal 27th May 2016.

[141] Also refer to: 92/2020/1 *The Ramblers Association vs L-Awtorità tal-Artijiet*, Court of Appeal (Inferior) 14 July 2021; and 255/2020 *Bird Life vs Prime Minister et*, Civil Court (First Hall) 18 March 2021.

[142] 260/2018 *Kamra tal-Periti et vs L-Awtorità Tal-Ippjanar et*, Civil Court (First Hall) 4 November 2022.

into the Environment and Planning Review Tribunal Act and therefore did not extend to Article 469A. However, the court rejected both of these arguments. Regarding the latter argument, the court emphasised that while it was accurate that only the Environment and Planning Review Tribunal Act granted NGOs standing to appeal decisions made by the Planning Authority, the same rules of standing could be applied by analogy in cases where decisions made by the Planning Authority were subject to judicial review. The court asserted that:

> *Tassew ma jagħmilx sens li rregoli tal-interess ġuridiku f'azzjonijiet ta' sħarriġ ġudizzjarju ta' deċiżjonijiet tal-Awtorità tal-Ippjanar, li għandhom x'jaqsmu mal-liġi tal-ippjanar, għandhom jiġu mħaddma b'mod differenti skont quddiem liema organu ġudizzjarju jitressaq lilment*

Although this logical approach is welcomed, it once again reaffirms that it is only the *lex specialis* which grants the NGO standing. The Authority further argued that even if it were the case that the plaintiffs enjoyed standing through the transposition of the directive, the fact that the *Sea Malta building* was demolished, rendered the review inadmissible. The Court quashed this plea;

> *l-interess tal-atturi ma mietx bil-fatt waħdu li llum il-binja ġiet imwaqqa'. Kif rajna aktar kmieni, l-interess li nissel flatturi l-jedd li jiftħu din il-kawża jinsab mislut mill-fatt, li huma qegħdin jitolbu lil din il-qorti biex tara jekk l-Awtorità tal-Ippjanar imxietx fil-parametri tas-setgħat mogħtija lilha mil-liġi, meta tat l-awtorizzazzjoni lil Enemalta plc biex twaqqa' l-binja. Il-qorti tkun qiegħda tibgħat messaġġ ħażin li kieku kellha taċċetta din l-eċċezzjoni tal-Awtorità tal-Ippjanar u ta' Enemalta plc. Tassew mhuwiex xieraq li wieħed jgħid li l-istħarriġ ġudizzjarju ta' għemil amministrattiv ma jistax isir, jekk dak l-għemil jilħaq jiġi attwat. Is-setgħa legali mogħtija lill-qorti jew lil kull organu ġudizzjarju ieħor, biex jgħarbel is-siwi legali ta' għemil amministrattiv, għandu jibqa' dejjem miftuħ sakemm l-azzjoni tal-istħarriġ ġudizzjarju ssir fit-terminu li tgħid il-liġi.*[143]

[143] ibid.

This case marks a significant departure from the rigorous requirement of "direct, personal, and actual" harm for legal standing. The approach taken by the court in this matter is highly applauded by GħSL as it reinforces the principle that the court is the last bastion of legality. Although the case is still pending appeal, the words of Mr Justice Falzon Scerri serve as a reminder of the underlying purpose of judicial review;

> *Li qorti tistabilixxi jekk għemil amministrattiv sarx skont il-liġi jew le jibbenefika lil min ikun qed jitlob dak l-istħarriġ ġudizzjarju, għaliex tajjeb jew ħażin, il-qorti tkun tista' tikkonferma jekk dak li jkun kellux raġun jew le fit-tħassib tiegħu dwar l-illegalità ta' dak l-għemil amministrattiv. Bl-istess mod, azzjoni ta' stħarriġ ġudizzjarju hija ta' ġid ukoll lill-istess awtorità amministrattiva għaliex b'dan il-mod hija jkollha l-opportunità sħiħa li tneħħi minn fuqha d-dell tal-illegalità li jkun xeħet fuqha dak li jkun qiegħed jixliha b'għemil ultra vires*[144]

Proposal

Article 3 of the proposed Bill reads:

> *in the case of review of administrative and judicial acts, such person needs only to prove sufficient interest in instituting the action not necessarily juridical; in cases of review of legislative acts, no such interest is required and any person without any such interest may institute such action.*

The proposed change entails the introduction of a "sufficient interest test" for challenging administrative and judicial acts. At present, the only instance of this test in Maltese law can be found in Article 11 of Chapter 551 of the Laws of Malta relating to matters of development or installations which are subject to an environmental impact assessment (EIA) or an integrated pollution prevention and control (IPPC) permit, whereby:

> *all persons having sufficient interest shall have access to a review procedure.*

[144] ibid.

Nevertheless, it should be noted that our courts have implicitly established the dichotomy between "sufficient" and "juridical" interest, as evidenced by the *La Stella*[145] case, where the Court noted that the Club's interest in the proceedings was evident, yet it failed to satisfy the strict requirements of "juridical" interest. The express exclusion of "juridical" interest from the proposal thus grants legal certainty and effectively removes any ambivalences regarding the need for 'direct, personal, and actual' requisites.

The "sufficient interest" test emanates from English law, particularly from the Rules of the Supreme Court, order 53 of 1978. Rule 3(7) of the order read:

> *the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates*

This has been incorporated in Article 31(3) of the Senior Courts Act.[146] The landmark UK judgement on the interpretation of "sufficient interest" is *R v. Inland Revenue Commissioner*[147], whereby an association of taxpayers challenged the Inland Revenue for agreeing to waive a significant amount of arrears of income tax from workers in the newspaper printing industry. Although the plaintiffs lost the case on the merits, the House of Lords asserted that if the group had managed to show that the Inland Revenue based its decision on improper purposes, then they could have succeeded in their action. The House of Lords also considered that, provided the newspaper workers were registered for tax-purposes, no investigations on any lost tax would have been made, precluding anyone from scrutinising the decision. Lord Diplock asserted 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.*

[145] *Soċjetà Filarmonika "La Stella" vs Kummissarju tal-Pulizija*, Court of Appeal 19 July 1997 Vol LXXX.ii.625.

[146] Senior Courts Act 1981, c.54.

[147] *R (National Federation of Self-Employed and Small Businesses Ltd) v. Inland Revenue Commissioners* [1982] AC 617.

Lord Roskill further indicated that the phraseology of "sufficient interest" was one which:

> *could sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not 'sufficient interest' was in fact shown.*

De Smith notes how the courts have applied the same principles with consistency and concluded that the test for sufficient interest has provided for a 'flexible test for standing'.[148] GħSL asserts that the test should remain generally broad as to allow the courts to decide matters of standing on the facts of the case. It is for this reason, that GħSL has not promoted a definition of 'sufficient interest' in the Bill, as a definition would shift the test for standing into a legal test of whether the plaintiff matches a particular criterion of standing; a check-box approach. The lack of definition of 'sufficient interest' allows the court to consider the merits of the case as judged in relation to the plaintiff's concern.[149] It is posited that these considerations would yield a uniform implementation of *locus standi*.

In the interpretative provisions of the Bill, it is provided that:

> *"Sufficient interest" shall not only include personal interest in the proceedings but shall also include representative interest, that is where the plaintiff represents a social group, or the public interest*

This interpretative article adds a new dimension to the concept of 'sufficient interest', albeit not as a conclusive criterion through the words 'shall include'. It has been clarified that groups that do not personally experience the effects of a decision, but represent a social group or the public interest, can have a representative interest in the proceedings. While English courts have recognised representative interest as a qualifying factor for the "sufficient interest" test[150], this new addition to the Bill further clarifies the test and provides legal certainty to NGOs and

[148] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995) 1980.

[149] Law Commission, Consultation paper 126 Administrative Law: Judicial Review and Statutory Appeals London: HMSO.

[150] Refer to: *Greenpeace v. Secretary of State for Trade and Industry* [2007] EWHC 311.

civil society groups, enabling them to challenge decisions related to their cause.

6.2 Standing in Challenging the Decisions of the Attorney General

The challenging of decisions of the Attorney General is provided for in article 469B COCP, whereby the 'injured party' and the Auditor General, the Commissioner for Standards in Public Life, the Permanent Commission Against Corruption and the Ombudsman can challenge:

(a) the decision not to prosecute,

(b) the decision to not allow access to the procès-verbal as provided in article 518 of the Criminal Code

GħSL notes that the current law disregards the reality of 'community victims'[151], which occurs when a crime from within a group or community effects equally the members of the same community, for example, offences of an anti-social nature within a neighbourhood. It is unmerited and unjust that community victims are excluded from challenging a *nolle prosequi* notwithstanding the real impact of the crime and the potential security risk which they face.

It is being proposed in Article 5(2) of the Bill that standing in the judicial review of the Attorney General be that of 'sufficient interest' to include the notion of community victims.

Conclusion

It is evidently clear, that the current requisites for legal standing are insufficient in a modern parliamentary democracy under the rule of law. The Bill provides a fairer approach to legal standing and considers the public interest which is inherit in judicial review actions.

Undoubtedly, the current prerequisites for establishing legal standing are insufficient in a modern parliamentary democracy that espouses the tenets of the rule of law. The issue of restrictive rules of standing is of Constitutional significance, as disproportionate rules of standing limit

[151] Refer to: Stephen James Colman, 'Evaluating Challenges to Decisions Not to Prosecute: Do the Victims' Right to Review, Judicial Review and Private Prosecutions Provide a Coherent and Principled Framework?' (Ph.D. thesis, University of East Anglia 2020).

the right of access to justice The proposed Bill advocates for a more equitable approach to legal standing, one that upholds the principles of fairness and justice and recognises the public interest in judicial review actions.

CHAPTER 7

Grounds of Review

In judicial review, the courts assess the legality of an administrative decision based on specific grounds of review. The grounds of review listed in article 469A, are codifications of *'generalised principles of statutory interpretation'*.[152]

Article 469A seems to divide the grounds of review into two branches: 469A(1)(a) when the administrative act is in violation of the constitution, and 469A(1)(b) when the administrative act is *ultra vires. Ultra Vires* is further categorised into four branches:

(i) when such act emanates from a public authority that is not authorised to perform it; or

(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law.

As outlined in Chapter 5.2.1, the grounds of review of Article 469A(1)(b) have been maintained *ad verbatim* within the review of administrative and judicial acts.[153] GħSL proposes in Article 4(2) of the Bill, the following grounds of review of legislative acts:

> *A legislative act may be reviewed when it was performed ultra vires the parent Act or other instrument having the force of Law authorising it, or is in conflict with any Act of Parliament, or was not in conformity with the mandatory procedural requirements established by law, or when it constitutes an unreasonable, or improper exercise of power in consideration of the purpose of the parent Act.*

The reasons for excluding review based on principles of natural justice, has been explained in Chapter 4.3.1. The Bill proposes two major changes to the grounds of judicial review, namely, the codification of

[152] Farrugia Marse-Ann, 'The Development of Judicial Review of Administrative Action in Malta' (LL.D. thesis, University of Malta) 58.
[153] Refer to Article 4 (1) of the proposed Bill.

the ground of legitimate expectations, and the removal of the ground of constitutionality.

7.1 Constitutionality

As has been highlighted in Chapter 4.2.1, this ground of review has caused procedural issues for plaintiffs of human right violations. On this matter, last year, the Constitutional Court[154] remarked that the duplicity of actions has created a state of confusion and uncertainty, to which it concluded, is not the fault of the plaintiff.[155] In its pronouncement, it concluded that Article 469A (1) (a), could not suffice as an effective remedy in terms of the proviso to article 46(2) of the Constitution.

Moreover, in *Christopher Hall et vs Direttur tad-Dipartiment għall-Akkomodazzjoni Soċjali* et[156], the Constitutional Court considered that Article 469A(1)(a) was not applicable in the challenging of administrative acts on the basis of human rights within Articles 32-45 of the Constitution. This has been held with consistency by our Constitutional Courts[157], and thus it is proper to affirm that the interpretation of the Constitutional Court clearly limits the scope of Article 469A(1)(a) to provisions of the Constitution other than human rights.

In *Christopher Abela et vs Avukat Ġenerali*[158], the Court, after reaffirming the *jurisprudence constante* following the Christopher Hall case, added that:

> *Ix-xorta ta' ksur Kostituzzjonali li qed jirravisa l-artikolu 469A(1)(a) ma hux dak li jirrigwarda dritt fundamentali, iżda drittijiet oħra taċ-ċittadin li huma protetti mill-Kostituzzjoni li pero' ma jaqgħux fil-kategorija tad-drittijiet elenkati f'Kapitolu 4 tal-Kostituzzjoni. Ma hiex ħaġa insolita li jingħata dan ix-xorta ta' dritt ta' natura kostituzzjonali, esklużi pero' mill-*

[154] 287/2020 *Mark Calleja vs Ministru Għall-Edukjazzjoni u Impiegi*, Constitutional Court 28 October 2022.

[155] ibid: *'Il-Qorti tqis illi dan l-istat ta' inċertezza, li ċertament mhux maħluq minn xi azzjoni da parti tar-rikorrent, għal finijiet ta' din l-eċċezzjoni hawnekk diskussa u deċiża* [Exhaustion of ordinary remedies]*, tista' biss timmilita a favur ir-rikorrent u kontra l-akkoljiment tal-istess eccezzjoni mressqa mill-intimati.'*

[156] 1/2003/1 *Christopher Hall et vs Direttur tad-Dipartiment għall-Akkomodazzjoni Soċjali*, Constitutional Court 18 September 2009.

[157] 1168/2012 *Martin Baron pro et noe vs Kummissarju tal-Artijiet et*, Civil Court (First Hall) 28 May 2015.

[158] 1164/2012 *Christopher Abela et vs Avukat Ġenerali*, Civil Court (First Hall) 2 December 2019.

operazzjoni u eżerċizzju tiegħu, id-drittijiet fundamentali tal-bniedem, bħal ma huwa fil-każ ta' artiklu 116 tal-istess Kostituzzjoni.

In *Smash Communications Limited vs L-Awtorità tax-Xandir et*[159], the appellate Court affirmed that notwithstanding Article 469A(1)(a), the First Hall of the Civil Court can never require a public authority to dismiss a Law, and that it is only the Constitutional Court which can declare Laws invalid and inapplicable:

Huwa minnu illi, taħt l-art. 469A(1)(a) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, il-qorti fil-kompetenza "ordinarja" tagħha tista' tħassar għemil amministrattiv jekk dan "jikser il-Kostituzzjoni"; madankollu, dik il-ġurisdizzjoni tolqot biss l-għemil amministrattiv u mhux il-liġi li taħtha jsir, b'mod illi, jekk lgħemil ikun sar kif tridu l-liġi meta l-liġi ma tħalli ebda diskrezzjoni dwar kif għandu jsir dak l-għemil amministrattiv, il-qorti ma tistax tgħid illi l-liġi għandha titqies li ma għandhiex effett, għax dak tista' tagħmlu biss fil-kompetenza "kostituzzjonali" tagħha, u lanqas ma jkollha l-possibilità li tinterpreta l-liġi ordinarja b'mod "konformi" mal-Kostituzzjoni jekk dik l-interpretazzjoni ma tkunx possibbli mingħajr ma, effettivament, tgħid illi l-liġi ma tiswiex

GħSL submits that Article 469A(1)(b)(iv), which provides ground of review 'when the administrative act is otherwise contrary to law' is a sufficiently wide umbrella provision. The Courts have interpreted that:

il-kliem "imur mod ieħor kontra l-liġi" fis-subartikolu (1)(b)(iv) tal-Art. 469A jirreferi għal kwalsiasi liġi ad esklużjoni tad-disposizzjonijiet tal-Konvenzjoni kif inkorporati fil-Kap. 319[160]

In *Godfrey Scicluna vs Prim Ministru et*[161], the Court asserted that

[159] 481/2004 *Smash Communications Limited vs L-Awtorità tax-Xandir*, Court of Appeal 24 June 2016

[160] 1/2003/1 *Christopher Hall et vs Direttur tad-Dipartiment għall-Akkomodazzjoni Soċjali*, Constitutional Court 18 September 2009.

[161] 537/2015 *Godfrey Scicluna vs Prim Ministru et*, Civil Court (First Hall) 12 March 2020.

azzjoni għal stħarriġ ġudizzjarju taħt l-artikolu 469A (bħal ma nbdiet din il-kawża) ma għandhiex tieħu l-post u lanqas titqies bħallikieku kienet azzjoni kostituzzjonali (jew konvenzjonali)

It is sufficiently clear that Article 469A(1)(a) has been rendered inoperable and therefore redundant. However, as expounded in Chapter 4.2.1, its existence in Article 469A is not benign as it creates legal confusion. The court in *Emanuel Ciantar vs Kummissarju tal-Pulizija*[162] asserted that:

Il-prinċipju kellu dejjem ikun illi l-kompetenza kostituzzjonali u l-kompetenza ċivili kellhom jibqgħu separati u distinti anke għaliex ir-rikors taħt kull kompetenza hu regolat bi proċeduri appositi b'finalità ta' rimedju mhux dejjem identiku…Eventwalment u fortunatament wara kontestazzjoni, il-leġislatur ġie konvint jelimina dan il-perjodu preskrittiv in kwantu japplika għal egħmil amministrattiv li jikser il-Kostituzzjoni u dana bl-Att IV ta' l-1998. L-emenda però bl-ebda mod ma ċċarat il-konflitt apparenti bejn il-kompetenza ċivili u l-kompetenza kostituzzjonali.

For the above reason, the ground of constitutionality has been excluded from the proposed Bill.

7.2 Ignoring Relevant Considerations

Article 469A prohibits public authorities from basing their decisions on irrelevant considerations.[163] Article 4(1)(c) of the Bill further adds that an act is also *ultra vires* when the public authority 'ignores relevant considerations.' This addition has a practical significance in that a decision of a public authority may not be founded on irrelevant considerations yet may nonetheless be founded on inferior considerations as compared to compelling relevant factors favouring the individual. Authors have concluded that when the enabling act grants the authority a general discretion without factors which the authority must consider, such as

[162] 701/1999 *Emanuel Ciantar vs Kummissarju tal-Pulizija*, Constitutional Court 2 November 2001.

[163] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A(1)(b)(ii).

for example, a general power given to an authority to issue or refuse licences, the Courts will then determine the considerations which ought to be considered by the Public Authority for the fulfilling of its power given by the enabling act.[164]

However, there are instances whereby the statute establishing the discretionary powers of the Public Authority specify the considerations which are ought to be considered by the authority. Such as was established by the House of Commons (Redistribution of Seats) Act 1949, whereby the Boundary Commission was bound to make recommendations to the UK Home Secretary on the boundaries of the parliamentary constituencies. The Act laid out a series of rules for the Commission to consider, such as geography, practicality and that the electorate should be as near to the "electoral quota" as possible. This power of recommendation given to the UK Boundary Commission has been subjected to multiple cases of judicial review, the most notable in this respect being that of *R. v. Boundary Commission ex parte Foot,* whereby members of the Labour party claimed that the Commission had placed excessive consideration to the factor of not crossing local boundaries, while little consideration to the requirement of achieving equality of numbers in the electorates of their constituents.[165] The Court regarded that, notwithstanding the wide disparity in some constituent boundaries, plaintiffs did not manage to prove that the Commission failed to consider a relevant consideration, given the several considerations listed out by the parent act. Authors assert that:

> *when the courts conclude that a wide range of factors may properly be considered, they will be reluctant to lay down a list with which the authority will be required to comply in every case*[166]

Notwithstanding that our law does not make specific reference to ignoring relevant considerations, jurisprudence shows that it has been encapsulated within the ground of irrelevant considerations nonetheless. The most recent case wherein the court adopted this reasoning is *Gaston*

[164] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative* Action (5th ed, Stevens & Sons 1995) 348.
[165] *R. v. Boundary Commission ex parte Foot* [1983] EWCA Civ J0125-2.
[166] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995) 348.

Caruana vs Malta Gaming Authority, whereby the defendant authority failed the plaintiff Maltco employee from a random '*fit and proper test*' on the basis of a past criminal conviction, without taking into consideration the recommendation of his employer that the plaintiff had always performed his duties with diligence for more than eight years. The court asserted that:

> *Illi fil-każ tal-lum joħroġ ċar li t-tagħrif dwar l-imgħoddi tal-applikant (b'mod partikolari, jekk kienx imdaħħal f'xi proċeduri ta' xejra kriminali) hija biss waħda minn bosta taqsimiet li wieħed ried jimla fl-imsemmija formula (referring to the fit and proper test). Imkien ma hemm imsemmi li t-tagħrif f'xi taqsima jiswa aktar minn tagħrif f'xi taqsima oħra. Jidher ċar li d-deċiżjoni tal-Awtorità li tqis lill-attur mhux "fit and proper" kienet imsejsa biss fuq it-tagħrif li taha dwar il-każijiet li kellu fil-Qorti tal-Maġistrati. L-Awtorità la fissret lill-attur u wisq anqas lil din il-Qorti għaliex ma dehrilhiex li kellha titfa' fil-keffa tal-miżien it-tagħrif kollu l-ieħor li taha l-attur u li tatha Maltco dwar il-ħidma għaqlija tiegħu u l-mod ta' min ifaħħru li bih kien wettaq xogħlu f'dan il-qasam għal qrib tmien sħiħ sħaħ qabel ma ntalab jimla l-formola.* ***F'każijiet bħal dawn, in-nuqqas min-naħa ta' xi awtorità li tqis il-fatti kollha rilevanti jaf iwassal għat-teħid ta' deċiżjoni msejsa fuq kunsiderazzjonijiet mhux rilevanti***[167]

This case makes it clear, that, although the Authority had the discretion to subject the plaintiff to a 'fit and proper test', wherein a criminal conviction may be considered for the suitability of an employee, thus making it a relevant consideration, the lack of consideration to the nature of the conviction, the track-record of the individual and the recommendation of the employer, was so manifestly unreasonable and unjust that it directed the court to conclude that the authority based its decision on an irrelevant consideration. Commentators ascertain that the Courts have tended to conclude that administrative acts must not only

[167] 1274/2012 *Gaston Caruana vs Malta Gaming Authority*, Civil Court (First Hall) 12 March 2020.

'be executed rite but also recte'[168], meaning that powers granted to public authorities must not only comply with the strict dictates of Law, but also executed justly while given due account of the rights and interested of the concerned parties.

Our Bill clarifies the situation by codifying the pronouncements of the courts[169] who have assimilated the ignoring of relevant considerations as basing decisions on irrelevant considerations.

7.3 Legitimate Expectations

The ground of legitimate expectations is not expressly derived from Article 469A[170], however our courts have accepted this ground and have developed a reliable ground of review.[171]

The term "legitimate expectations" originates from *Schmidt v. Secretary of State for Home Affairs.*[172] The case concerned a student from the United States studying in the United Kingdom who was denied an extension of his temporary residency permit. Lord Denning, in considering whether a hearing should be granted, stated that it depends on

> *whether he 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.*

The concept of legitimate expectation in the UK expanded vastly following *Schmidt.* In *Council of Civil Service Unions v. Minister for the*

[168] Mifsud Ivan, *Judicial Review of Administrative Action in Malta. An Examination of Article 469A COCP and of Judicial Review in General* (Self-Published 2018) 63.

[169] Also refer to: 127/2007 *Sciriha et vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar*, Civil Court (First Hall) 28 January 2016 -*Huwa impliċitu li l-Parlament, meta jgħaddi xi setgħa lill-Eżekuttiv, jkun irid li dik is-setgħa tiġi mħaddma b'mod ġust u li tingħata kunsiderazzjoni xierqa għad-drittijiet u għall-interessi ta' dawk kollha ikkonċernati* ; and to 113/2001/1 *Piju Attard vs Kunsil Lokali tal-Munxar Għawdex*, Court of Magistrates (Gozo, Superior) 29 February 2008

[170] There is however a reference to the notion of "legitimate expectation" in The Electricity Supply Regulations S.L.545.01, in regulation 36(5)(c): *'A distribution system operator shall have a right to appeal on any grounds of fact and law to the Administrative Review Tribunal from any decision taken by the Regulator in terms of this regulation. In reaching a decision the said Administrative Review Tribunal shall have regard to... any legitimate expectation created by law, regulation, or by the Regulator in favour of the distribution system operator.'*

[171] Refer to the early cases of: *Perit Rene' Buttigieg et vs Carmelo Abela*, Court of Appeal 24 June 1985 Vol LXIX.ii.i.259; and *Kummissarju tal-Artijiet vs Concetta Cassar et*, Court of Appeal 24 February 1986 Vol LXX.i.i.141.

[172] *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149.

Civil Service[173], employees of the Government Communications Headquarters where prohibited from joining any trade union. The reason behind the decision, which was enforced by an order of council, was based on the potential threat to national security. Lord Diplock explained that legitimate expectation may arise from an express promise 'given on behalf of a public authority', and

> *some benefit or advantage which 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.*

De Smith defines legitimate expectation as an expectation which arises:

> *where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the courts have held that the expectation ought not to be summarily disappointed.*[174]

Maltese courts have held that legitimate expectations arise:

> *minn sitwazzjoni legali, jiġifieri kemm-il darba jkun ippruvat li l-ħaġa li ġiet imċaħħda minnha l-parti kellha jedd għaliha. Minbarra dan, biex aspettativa tkun waħda leġittima ma tridx tkun waħda li biex isseħħ tkun tikser xi jedd fundamentali ta' ħaddieħor. Lanqas ma jista' jkun hemm aspettativa bħal dik fejn l-ewwel jinħoloq stat li jikser il-liġi u mbagħad dak li jkun jippretendi li jkun imħares f'dak l-istat*[175]

Maltese authors[176] have defined the requisites of legitimate expectations as being:

[173] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9.

[174] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995) 417.

[175] 37/2007 *Emvic Limited vs Il-Prim Ministru et*, Civil Court (First Hall) 4 November 2019.

[176] Soler Mark, 'A Maltese perspective of protecting legitimate expectations' (LL.D. Thesis University of Malta 2017).

> *(i) a reasonable expectation of a lawful benefit or hearing, (ii) induced by the administration, (iii) and communicated to the individual, which (iv) binds the authority to act in the manner represented, (v) unless the public interest in departure outweighs fairness in the individual case.*

Wade & Forsyth assert that legitimate expectations may be divided into two groups of expectations: substantive legitimate expectations and procedural legitimate expectations.[177] Procedural expectations arise when an authority expresses or implies that a procedure or hearing would be due if any decision was to be made which effected his expectation, and thus giving rise to the necessity of *'audi et alteram partem'*. It is also commented that the concept of procedural legitimate expectation *'extends the procedural protection that would otherwise be applicable; it enhances but does not replace the duty to act fairly.'*[178] Thus the protection of procedural legitimate expectations extends only to the particular promise (either express or tacit) to follow a particular procedure. In all other scenarios it is the duty to act fairly, which is already a ground of review under Article 469A. On the other hand, a substantive legitimate expectation arises when an authority either expressly or implicitly asserts that a person will or will continue to receive a benefit.

The distinction between the two branches of legitimate expectations has seeped its way into Maltese law, particularly in *Attard Petroleum Services Ltd vs Regolatur għas-Servizzi tal-Enerġija u l-Ilma.*[179] Attard Petroleum Services Ltd was granted authorisation by the governing body to carry out the activities of a petroleum importer and wholesaler, and had been engaged in said activities for a duration of six years. The Regulator had provided the company with a renewal form for the aforementioned authorisation, and also indicated that the company was required to submit payment for the annual authorisation fee, which the company had promptly paid. Subsequently, the Regulator requested certain documentation from the company and clarified that the authorisation could not be renewed without the aforementioned documentation. The company submitted the requested documents in a timely manner.

[177] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 453-455.

[178] ibid 454.

[179] 45/2020 *Attard Petroleum Services Ltd (C-44915) vs Regolatur għas-Servizzi tal-Enerġija u l-Ilma*, Administrative Review Tribunal 26 April 2021.

Notwithstanding, the Regulator refused to renew the authorisation. The court found that the company possessed both a substantive legitimate expectation, as evidenced by the payment of the requisite fee and submission of the necessary documentation, and a procedural legitimate expectation, that if the Regulator were to alter their decision, the company would have to be provided the opportunity to challenge and present their arguments.[180]

It is unclear whether the ground of legitimate expectation can be categorised in a particular ground of review within Article 469A. Although as expounded before, the ground of procedural legitimate expectation is not the same as *audi et alteram partem*, procedural legitimate expectations may be squeezed in under Article 469A(1)(b)(ii) which is the ground of natural justice and mandatory procedural requirements.

Substantive legitimate expectations may fall under the three branches: irrationality, irrelevance and contrary to law.[181] Authors have delineated the impracticality of assessing substantive legitimate expectations through a rationality test.[182] The most prevalent test for rationality and reasonableness, is the one formulated by Lord Greene in the *Wednesbury* case[183] :

> *if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming.*

In *R. v. North and East Devon Health Authority, ex parte Coughlan*[184], Lord Woolf expounds how such formulation of "reasonableness" will always favour the public authority in that:

> *a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if it is objectively arbitrary or unfair.*

[180] ibid. *'s-soċjetà rikorrenti tisħaq ukoll illi hija kellha aspettativa leġittima proċedurali u sostantiva li l-awtorizzazzjoni de quo tiġi mġedda. Illi t-Tribunal huwa tal-fehma illi s-soċjetà rikorrenti għandha raġun fuq dan l-aspett'.*

[181] Soler Mark, 'A Maltese perspective of protecting legitimate expectations' (LL.D. Thesis, University of Malta 2017).

[182] ibid.

[183] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

[184] *R. v. North and East Devon Health Authority, ex parte Coughlan*, [2001] QB 213.

Although certain UK commentators disfavour such an approach[185], the Court assessed substantive legitimate expectations as a test of balance between public interest and personal expectation.[186]

Certain Maltese authors comment that Article 469A provides sufficient legal basis to the ground of legitimate expectations, in that they accept that legitimate expectations are formulations of relevant considerations[187]. Relevance, as observed by UK authors, is not the same as rationality, in that a dismissal of an expectation may be reasonable yet founded on a weaker consideration than that of the promise made to the expectant.[188] In *R (Bibi) v. Newham LBC*[189], the court of appeal formulised the ground of legitimate expectation as an abuse of power:

> *if an authority, without even considering the fact that it is in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with that promise then the authority is abusing its powers.*

Here the Court assessed the ground of legitimate expectations as a mandatory consideration to be borne by public authorities, to the extent that any divergence from the promise must be backed by reasonable considerations.

The last ground in which legitimate expectation may be reviewed under is that of Article 469A (1)(b)(iv), which is when the administrative act is contrary to law. This categorisation may seem to apply when the authority, after eliciting a legitimate expectation in the claimant, breaches any other statutory rule which is not covered by the *ultra vires* definition in Article 469A(1)(b).

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[185] Refer to Mark Elliot ‘Legitimate Expectation: The Substantive Dimension’ (2000) 59(3) The Cambridge Law Journal 421–25.

[186] H.W.R. Wade, C.F. Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 456.

[187] Peter Grech ‘Keeping one's word: the protection of legitimate expectations in administrative law’ (2002) 18 Id-Dritt 3-10, *‘Given that the doctrine of 'legitimate expectation' is about... about preventing the abuse of a public authority's power by ensuring that promises are treated as 'relevant considerations' and that any exercise of power that is abusive is generally considered as an illegality, the article provides a sufficient legal basis for the application of the doctrine of legitimate expectation in Maltese law within our system of judicial review.’*

[188] Forsyth Christopher, Legitimate Expectations Revisited. (2011) 16.4 Judicial Review: 429-39.

[189] *R (on the application of Bibi) v London Borough of Newham* [2002] 1 WLR 237.

Proposal

Notwithstanding the difficulty of compartmentalising the ground of legitimate expectation in the particular provisions of Article 469A, Maltese courts have accepted this ground as being a valid ground of judicial review. The values underpinning the grounds of legitimate expectation are often overlapping and generally murky, and thus it may be problematic for plaintiffs to squeeze the ground of legitimate expectation within a particular ground of Article 469A. Considering our Courts' jurisprudence that limits judicial review to the exact grounds advanced by the plaintiff[190], it would be regrettable, despite a well-entrenched tradition of legitimate expectation in Malta, for a claim to be dismissed due to an erroneous application of the law, particularly where the concept of legitimate expectation is variably construed.[191] It is for this reason, that GħSL's addition of the ground of legitimate expectation in the Bill is no more than a clarification of the grounds of review in Maltese administrative Law. Legitimate expectation is being defined in Article 2 of the Bill as:

> *a promise of a lawful benefit or advantage made through words, writing, or behaviour to a person by a public authority which had the power by law to make such promise.*

The definition is sufficiently wide as to include the substantive legitimate expectation which is uncovered in the current grounds of review in Article 469A, and also those procedural legitimate expectations which add on the principles of natural justice in Article 469A(1)(b)(ii). Legitimate expectations are also deemed to be admissible only when the public authority was itself competent of forming such an expectation. Reference is being made here to *Rowland v. Environment Agency*[192] whereby it was held that:

> *law does not allow the individual to retain the benefit which is the subject of the legitimate expectation, however strong,*

[190] 113/2001/1 *Piju Attard vs Kunsil Lokali tal-Munxar Għawdex*, Court of Magistrates (Gozo, Superior) 29 February 2008.

[191] *R (on the application of Bibi) v London Borough of Newham* [2002] 1 WLR 237: *it is important to recognise that there is often a tension between several values in these cases.*

[192] *Rowland v. Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1, [2004] 3 WLR 249.

> *if creating or maintaining that benefit is beyond the power of that public body*

Moreover, benefit should also not be restrictively construed as monetary benefit. Professor Craig explains that:

> *if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any **monetary loss**, or anything equivalent thereto.*

The words *'benefits or advantage'* do not limit the Courts to recognise those expectations which have economic advantage to the plaintiff. The ground of legitimate expectation is not applicable to legislative acts, as public authorities are expected to use their discretionary powers delegated by parliament to satisfy the purposes of the parent act.

Conclusion

The ground of legitimate expectations is a well-accepted ground of review in Malta. The Bill reinforces this ground of review by clarifying and ascertaining its existence; a testament that Maltese administrative law seeks to protect *'regularity, predictability and certainty in government's dealings with the public.'*[193]

[193] De Smith, Stanley, and J.M. Evans, *De Smith's Judicial Review of Administrative Action* (5th ed, Stevens & Sons 1995) 417.

CHAPTER 8

Time within which the Action must be Instituted

Article 469A(3) provides that any action for review must be brought within 6 months, with the exception, as has been enunciated in Chapter 7.1, for the ground of constitutionality to which no time limit is imposed. Furthermore, the 6 months is not a prescriptive period, but rather a period of forfeiture (decadence), meaning that the period cannot be suspended or interrupted.[194] The 6 months run from the date when the interested person becomes aware or could have become aware of such an administrative act. Moreover, when a public authority abstains from taking a decision when it obliged to do so, shall within two months following the service of a written demand by the claimant, be deemed as a refusal.

The 6-month period is further limited by the 10 day prior notification rule in Article 460 of the COCP and any act initiated against the government, a constitutional authority or a person in public office is null *ab ovo* if not preceded by a notification in which the party's claims are defined. This notwithstanding, in *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe* the court argued that the rule of Article 460 was inapplicable to judicial review under Article 469A as it could be considered as a special procedure in terms of Article 460(2) which states that:

> *where in accordance with the provisions of any law a particular procedure including a time-limit or other term is to be observed, the provisions of sub-Article (1) shall not apply*[195]

In *Joseph Spiteri vs Direttur Ġenerali tad-Dipartiment tas-Saħħa Pubblika*[196], the court held that as the 6 months was a period of forfeiture, nothing can suspend or interrupt the period, not even recourse

[194] 880/2014 *Abdel Hamid Alyassin vs Il-Kummissarju tal-Pulizija et*, Civil Court (First Hall) 22 April 2015: *'Illi huwa llum il-ġurnata stabilit, li ż-żmien ta' sitt xhur imsemmi fl-artikolu 469A(3) tal-Kap 12 huwa wieħed ta' dekadenza. 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-għamil amministrattiv ma jservu xejn biex iżommu lmogħdija tas-sitt xhur li ssemmi l-liġi.'*

[195] 573/2018 *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe*, Civil Court (First Hall) 8 July 2019.

[196] 933/2006 *Joseph Spiteri vs Direttur Ġenerali tad-Dipartiment tas-Saħħa Pubblika*, Court of Appeal 26 January 2018: *'la l-korrispondenza li għaddiet bejn il-partijiet fil-kawża, la l-proċeduri quddiem l-Ombudsman u lanqas l-ittra uffiċjali ppreżentata in atti ma setgħet isservi ta' interruzzjoni jew sospensjoni tat-terminu preskritt fil-ligi.'*

to the office of the Ombudsman. Moreover, the plea of forfeiture, as it is interpreted as a rule of public policy, can be raised *marte proprio* by the court[197] and at any stage of the proceedings.[198]

8.1 Proposal

Article 6 of the Bill reads:

> *Any action for the review of an administrative, or judicial act has to be instituted within a period of forfeiture of one year from when the act occurred, or when the person instituting the action came to know of the act, whichever is the earlier. Provided that if the person instituting such action has referred the act being challenged to the Ombudsman, such period shall be suspended until the Ombudsman disposes of the matter in accordance with the Ombudsman Act. (Cap 385).*

As explained in Chapter 4.3.1, the review of legislative acts is to remain unhindered, and thus no time limitations are imposed.

The period for instituting an action for review is being extended by 6 months. GħSL submits that the time frame for instituting an action for review is onerous in that the claimant cannot, beyond the proviso, suspend or interrupt time from running, notwithstanding any ongoing dealings or negotiations with the public authority. Moreover, the conclusion of an administrative act is not often easily identifiable, especially in cases whereby claimants have not been provided with sufficient information which would be essential for the purposes of litigation and pre-litigation. Where there is a written request, and it is unclear whether a decision is being considered, or there is lack of clarity in communication between the claimant and the authority (something which is not the fault of the claimant), the presumption of refusal within two months of the request disproportionately limits the plaintiff's time to institute an action.

[197] ibid.

[198] 25/2008 *Maria Schembri vs Kummissarju tal-Artijiet*, Court of Magistrates (Gozo, Superior) 8 February 2012: *'Ma kien hemm ebda eċċezzjoni da parti tal-konvenut dwar din il-kwistjoni jekk il-kawża ta' l-attiċi kienitx perenta minħabba l-iskadenza taż-żmien konċess taħt is-subinċiż (3) ta' dan l-artikolu. Imma peress li huwa magħruf li lprovvedimenti tal-Kodiċi ta' Organizzazzjoni u Proċedura ċivili huma ta' ordni pubbliku, eċċezzjoni bħal din għandha titqajjem neċessarjament mill-Qorti stess li tkun qed tisma' l-kawża, kif fil-fatt għamlet din il-Qorti.'*

It is also being proposed that when the claimant seeks redress from the Ombudsman, the period for review is to be suspended until the Ombudsman disposes of the matter. GħSL affirms that it should not be the case that a person loses his right of access to a court on the basis of having resorted to the soft-law remedy of the Ombudsman, an office established by the Constitution. The vast majority of cases decided by the Ombudsman take over 9 months to conclude[199], and thus a claimant cannot be expected to wait for the conclusion of the Ombudsman as they might lose their right of review. Dr Claire Bonello points out in a webinar conducted by the Faculty of Laws[200], that the normal route of action is to apply for the Ombudsman and judicial review concurrently, in that if the ombudsman does not close the matter within 6 months, the claimant would not have lost his right of review.

Were a system of suspension introduced, no double proceedings would have to occur, which would give greater significance and moral authority to the work of the Ombudsman, whilst facilitating the prospect of compromise without litigation. GħSL asserts that the Ombudsman remedy as an amicable out-of-court remedy should be encouraged, not punished by fear of loss of judicial remedy. This would also cut those pre-emptory cases initiated by claimants who seek to protect their right of review should they disagree with the outcome of the ombudsman or should the recommendations not be implemented.

[199] Parliamentary Ombudsman Annual Report on period of January to December 2021 – 78 cases remained open for a period longer than 9 months. Parliamentary Ombudsman Annual Report on period of January to December 2020, 94 cases remained open for a period longer 9 months.

[200] Judicial Review: What shortcomings, pitfalls and practical issues?, webinar conducted by the Faculty of Laws on the 7th of May 2021.

Annex

COCP, Chapter 12 of the Laws of Malta, Article 469A

469A.

1. Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:

   (1) where the administrative act is in violation of the Constitution;

   (2) when the administrative act is ultra vires on any of the following grounds:

      (i) when such act emanates from a public authority that is not authorised to perform it; or

      (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or

      (iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or(iv) when the administrative act is otherwise contrary to law.

In this Article

2. "administrative act" includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority:

   Provided that, saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition;

   "public authority" means the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law and includes Boards which are empowered

in terms of law to issue warrants for the exercise of any trade or profession.

3. An action to impugn an administrative act under sub-Article(1)(b) shall be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier.
4. The provisions of this Article shall not apply where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law.
5. In any action brought under this Article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The said damages shall not be awarded by the court where notwithstanding the annulment of the administrative act the public authority has not acted in bad faith or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.
6. For the purposes of this Article, and of any other provision of this and any other law, service with the government is a special relationship regulated by the legal provisions specifically or of employment applies, or ever heretofore applied, to service with the government except to the extent that such law provides otherwise.

English Translation of Maltese Quotes

Footnote 10: When circulars are not normative acts or decisions, and are not reproduced in the specific form, or as an administrative order, these cannot be considered suitable acts that affect the legal position of the interested parties.

Footnote 11: It is certain that the initiation of an investigation does not consist of an administrative act in the sense of a decision which is conclusive.

Footnote 12: Doctrinally, acts made for the purpose of organisation or internal management within any public authority, refer and are

limited to those measures taken for the purpose of maintaining a certain order in its daily management by the same authority. Yet, where such a measure reaches a certain level where it affects people's rights, then that measure enters the territory of an administrative act, where the courts retain the power to review.

Footnote 13: The Court recognises that this is a case where the line between what falls within the entirely internal scope within a public authority and what comes outside of it is not so clear. Therefore, for the Court to address this complaint, it cannot stop at the level of how the issue appears at first glance. This is being said because if the complaint is about unreasonable use of any discretion, violation of any of the principles of natural justice, or even abusive behaviour or acting beyond the powers given by law (ie ultra vires act), it becomes the duty of the Court to investigate that case because the question is no longer one of ”simple” organization or internal management, but one that strikes at the heart of the reason for the action regarding judicial review of the administrative action.

Footnote 19: Sub-Article 6 of Article 469A is one which limits rights of review. This law, rightly so, gave the individual the right of recourse to an ordinary court to judicially review administrative acts. This to assure a just and equitable public administration. It was therefore a sub-Article which had to be interpreted restrictively, and in case of doubt this had to favour judicial review against the public administration.

Footnote 20: One must also consider Article 469A (6) in light of recent views on the state of the public service in the eyes of the law. It must be said that, nowadays, the idea that the public service is a ”non-legal” bond - in the sense that the power of the State as the successor of the Crown to grant engagement and to end the engagement with it cannot be questioned by anyone or it is not a source of civil rights - it has been ignored if not even completely discarded; It is true that the bond between the public official and his employer is a special one, but this characteristic does not mean that the bond does not give rise to reciprocal civil obligations and rights. And one of the main foundations of the Institute of judicial review is a system that ensures that such obligations and rights are protected and protected from arbitrariness or abuse of power.

Footnote 21: As the appellate rightly observed in his response to

the present appeal, all this sub Article does is to give direction on what laws are applicable in relation to conditions of employment and service with the Government for the purpose of interpretation and application of both Article 469A and any other provision of law, but not to exclude the application of the same Article 469A for any matter involving service with the Government

Footnote 22: A reading of Article 469A (6) shows that this Article is not intended to completely exclude the possibility of Government employees from bringing actions of judicial review of administrative acts. The exclusion is clear and limits only employment conditions. The present case however is not about employment conditions, but about a decision taken by the respondents relating to the promotions in the rank of Colonel within the armed forces. Therefore, it is clear that this exclusion does not apply in the present case because the promotion of members of the armed forces is not a condition of employment but involves an exercise of discretion on the part of the administrative authority. This exercise of discretion is regulated by law, and therefore this Court cannot be stripped of its jurisdiction and competence to syndicate whether the administrative authorities have followed the dictates of the law in the exercise of their discretion.

Footnote 31: In the view of the Court, sub-Article (4) of Article 469A, to be interpreted fairly, should not be given a restrictive interpretation. The exclusion of the Court's jurisdiction, to investigate the administrative action, will only be justified if the Court is satisfied that, in practice, a person had an effective and adequate remedy available to him and he unreasonably did not use such available procedure.

Footnote 33: In opinion of the Court, as the consistent jurisprudence of the Board excluded persons from the right of appeal before it, if they were not applicants, then it follows that the appellants did nothing wrong in following this jurisprudence... When then the interpretation of the competent organ was what it is, this Court cannot blame the plaintiffs who in the requisite time period, apply to the Courts for the protection of their rights...The Court always has prerogative to review administrative acts and therefore, given the special circumstances in this case, it is also the view of this Court that there exists a serious and acceptable justification not to operate the provision of sub-Article (4) of Article 469A. The Courts affirms its jurisdiction in this case.

Footnote 35: The jurisprudence of this Court, in an attempt to reconcile this sub-Article (1)(a) of Article 469A of Chapter 12 and of Article 46 of the Constitution where there is violation of human rights, it seems to favour an interpretation based on the effectiveness of the remedy in the sense that Constitutional recourse should have been accessible in those cases where the effective remedy for the injury suffered could not be given under the Article 469A. This interpretation is not entirely linear and was not without interpretative difficulties. On the other hand, it is worth reminding that it seems that the legislator originally intended that, with the introduction of paragraph (1)(a) of this Article, he would introduce and impose a term of decadence of ' six months in which an allegation of rights protected by the Constitution could be advanced including, perhaps, also human rights, so much so that originally, sub-Article (3) of that Article also applied to the sub-Article (1)(a). Eventually and fortunately after contestation, the legislator was convinced to eliminate this prescriptive period as it applies to administrative acts that violate the Constitution with Act IV of 1998. The amendment, however, in no way clarified the apparent conflict between civil competence and constitutional competence.

Footnote 37: This Court cannot accept the plea of non-exhaustion of ordinary remedies given that Article 469A (4) of Chapter 12 stipulates that Article 469A cannot be used where an administrative act can be contested or remedied before a Court or Tribunal according to some other law.

Footnote 39: The Court also considers the specific facts of this case and considers that it should at certain to say that what seems to have been constantly decided by our Courts, does not necessarily find comfort and support in written Law. The Court considers that this state of uncertainty, which is certainly not created by any action on the part of the claimant, for the purposes of this plea discussed and decided here [Exhaustion of ordinary remedies], can only be rendered in favour of the claimant and against the acceptance of the plea as put forward by the respondents. On this matter, the court can never be serene in saying that the claimant had another effective, appropriate and adequate remedy to address his complaint, particularly in view of the complexity of the dispute brought forward.

Footnote 45: This Court cannot agree with the appellant that the

subsidiary law in question and/or its entry into force amounts to ”administrative action” for the purposes of Article 469A of Chapter 12. This law and/or its entry into force is eminently a legislative act, although carried out by the Executive branch of the Government on a delegation from the Legislative branch. Although it is true that several English authors, when referring to decisions taken by the public administration, often distinguish between legislative, administrative, judicial and ministerial functions of such public administration, in our legal system it has never been questioned that a subsidiary law can be syndicated by the Court of ordinary jurisdiction - in effect by the First Hall - to see if such a law is intra vires or ultra vires the powers granted by Parliament. The right of any person to ask the Court to syndicate such laws today is guaranteed by Article 116 of the Constitution when read together with the definition of ”law” given in Article 124(2) of the same Constitution (with a right of appeal as provided in Article 95(2)(e) of the same Constitution, i.e. to the Constitutional Court and not to this Court).

Footnote 47: The Court does not agree with the plaintiff company that the enactment of legislation constitutes a decision of the Minister for the purposes of this Article. The Minister's decision to enact subsidiary legislation is not an administrative act for the purposes of Article 469A of Chapter 12 of the Laws of Malta... However, this Court does not agree that a subsidiary law can only be syndicated by the Constitutional Court under Article 116 of the Constitution and that the existence of this Article of the law means that there is no other way in which a subsidiary law can be enforced. In the view of this Court, the lack of adherence to the ordinary law, is also syndicable by the ordinary Courts. The Court considers that a complaint such as that brought by the plaintiff company can be investigated by the ordinary Courts on the basis of Article 32(2) of Chapter 12 of the Laws of Malta, which vests in them residual powers where the law does not provide a suitable and effective means of redress.

Footnote 48: Another point worth mentioning in relation to whether or not there is an ”administrative act” that falls under Article 469A is that if this Court were to accept the appellant's proposition, it would mean that for the imposition of the validity of a subsidiary law such as the one under review - because after all the appellant is not disputing that the ”Order” under review is a subsidiary law - the term of decadence

would apply for such suspension of six months referred to in subsection (3) of Article 469A, when no such term is foreseen in Article 116 of the Constitution.

Footnote 54: It is essential that the regulation issued by the Executive power by virtue of the law that authorised the making of that regulation, cannot go outside the limits of the same law, and cannot contradict the law itself, so much so that the Court has always recognised the right to review whether a regulation issued by virtue of a law is ”intra” or ”ultra vires”.

Footnote 58: Discretionary powers must be used for and within the scope of the purpose for which the act was promulgated and thereafter the Courts have the power and the right to review whether the discretionary powers granted have been used in accordance with the law in the scope of the purpose of the same Act that has conferred them, or whether these powers have been abused and against the spirit of the law, or unreasonably.

Footnote 64: Any legal person - both civil and commercial - which is effectively controlled by the Government - cannot be considered to be completely outside the Constitutional scope for what is the obligation to observe and respect fundamental rights and freedoms as contemplated by the Constitution.

Footnote 66: Although a commercial “private” company was created, factually, its effective control remained of the Government to negotiate the sale of the shipyards. As decided in other cases regarding violation of fundamental human rights, the Court is of the opinion that even in the cases of judicial review, it shall look at the substance of the matters and what the plaintiffs are asking the Court to protect and not simply rely on the appearances or formal definitions or classifications. It is clear that the responsibilities of Malta Industrial Parks Limited, are responsibilities of a public functions, in that its work is the administration of Government property. In these circumstances, the Court does not find any reason as to why this company does not qualify as a public authority, even more so when it is owned by Government. Irrespective of the fact that on the statute of the company, it is stated that it is a “private limited company”.

Footnote 67: It is true, the defendant company is carrying out a public function, as its function is to administer the industrial zones,

property of government, and may also qualify as a "public authority" for the purposes of Article 469A

Footnote 69: The fact that the authority is formally a commercial company does not exempt it from qualifying as a "body corporate established by law" as is mentioned in Article 469A(2). This "public" nature of the company emanates from the shareholding structure of the company, whereby the major shareholder is the Ministry of Finance (with 9,999 ordinary shares).

Footnote 70: The fact that the Government chose to operate through the use of a company and not a body corporate established by law, should not mean that a company serving a public purpose is not subject to judicial review under Article 469A of Chapter 12, where it performs an "administrative act".

Footnote 95: Boards, of whatever nature may be exercising semi-judicial functions, yet they are an emanation of the Executive Power, and are not part of the judiciary. This means that therefore their jurisdiction must necessarily be limited according to the creative state of that Board; and that jurisdiction cannot exceed those limits.'

Footnote 104: Had no other route else that of recourse to the ordinary courts, doing so in this present suit, in an attempt to attain a remedy... This remedy is provided for by Article 469A of Chapter 12, introduced to our laws of procedure with the amendments of 1995, which incorporated the local jurisprudence regarding judicial review of administrative action as developed throughout the years

Footnote 106: The Court believes that the meaning of the words "administrative act" in Article 469A(2) of Chapter 12 of the Laws of Malta was not intended by the legislator to include decisions of boards or statutory tribunals, especially when these have judicial or quasi-judicial powers

Footnote 107: The Court is of the opinion that the Tribunal for Investigation of Injustices does not fit stricto juris in the definition of authority as defined in Article 469A(2) of Chapter 12 of the Laws of Malta. This Article provides a specific definition of "Authority" and does not give room a broader definition.

Footnote 108: It is the opinion of the Court that the criterion is not that of whether the function syndicated is administrative or judicial (or quasi-judicial) but rather one would be more precise to ask whether

or not the Bord falls within the definition of public authority. This avoids the frequent difficulties of distinguishing between administrative and judicial or quasi-judicial act as the two functions are often mixed together; sometimes the administrative function prevails, and sometimes the judicial.

Footnote 112: Judicial review of judicial or quasi-judicial Tribunals, as is the Tribunal in this case, cannot be done through Article 469A of Chapter 12. Article 469A (1) provides that the courts of justice of a civil competence, have jurisdiction to review the validity of an administrative act or to declare such act null, invalid and without effect as provided for by the same Article. According to sub Article (2) of the mentioned Article, the phrase “administrative act” means the issuing of any order, licence, permit, warrant, decision, or refusal to any demand of a claimant made to a public authority...The same sub Article provides that the phrase ‘public authority’ means “the Government, including its Ministries and departments, local authorities, the Armed Forces of Malta, and any body corporate established by law.”... For this reason, Maltese Courts have retained their right to review decisions of judicial or quasi-judicial tribunals emanating from the ordinary jurisdiction that the law (The Code of Organisation and Civil Procedure – Chapter 12 Article 32(2)) confers to the First Hall of the Civil Court to take cognisance of all cases of a civil nature... It is true, as observed by the appellant, that judicial review under Article 469A of Chapter 12 and judicial review under the general jurisdiction conferred to the First Hall of the Civil Court, can in substance and in practice be similar if not identical, as in both cases, the exercise is always to observe that the administrative act, and the pronouncements of administrative tribunals on the other, be within the parameters of law. However, this does negate the fact that Chapter 12 confers this power to the First Hall under two separate dispositions of the Law.

Footnote 113: There should be no doubt that this Court has the powers to hear all cases regarding decisions or behaviour of a judicial or quasi-judicial body created by law, and this through the powers given to this Court by Article 32(2)

Footnote 114: The Honourable Court of Appeal gave a number of judgments that interpreted Article 469A in this sense [that it does not fall within the purview of 469A]. This Court agrees with this interpretation,

even if there are some judgments that say otherwise, because it considers it the only one in line with the letter of the law... This does not mean that the judicial review is being restricted. Since a long time before the introduction of Art. 469A, this Court affirmed that it has a general power, under Art. 32(2) of the code, to investigate the behaviour of every quasi-judicial tribunal created by law, because, in a State of Law, no one is freed from the obligation to follow the law.

Footnote 124: Interest must be: a) juridical, meaning that the demand must have a hypothesis of the existence of a right and the violation thereof; b) direct and personal: direct in the sense that it exists in the contestation or consequences thereof, personal in the sense that it regards the plaintiff, except in the actio popolaris; c) actual in the sense that it must emanate from an actual state of violation of right, meaning that the violation must consist in a positive or negative condition contrary to the enjoyment of a right legally belonging or due to the holder.

Footnote 125: A juridical nexus between the allegedly abusive and illegal action done by the defendant, and damages or at least prejudice allegedly suffered by the plaintiff...it cannot be hypothetical.

Footnote 126: For one to have an interest in filing an action, that interest (or, motive) for the plea must be concrete and exists against the defendant.

Footnote 132: Certainly, this does not mean that the plaintiff society could not have had/does not have an interest in the letting of fireworks and even in the circumstances of this case, however, for the purposes of these proceedings, ‘interest’ has a particular significance and importance, it is juridical interest and not general interest- juridical interest... the ensuing legal consequence is that the plaintiff society could have never proposed this action to contest this administrative decision which was directed at the physical person who is distinct and separate than the society, and that refusal of the licence was directed at her.

Footnote 142: It is non-sensical that the rules of juridical interest in cases of judicial review of decisions by the Planning Authority, that are related to planning law, are to be differently construed according to which judicial organ hears the complaint.

Footnote 143: The juridical interest of the plaintiff was not exhausted through the fact that the building was demolished. The interest

of the plaintiffs to institute this case emanates from the fact that they are asking the Court whether the Authority followed the parameters of the powers vested to it by law, when it authorised Enemalta plc to demolish the building. The Court would be sending a worrying message were it had to accept this plea by the Planning Authority and Enemalta plc. It is truly unmerited to state that the judicial review of administrative action cannot be effected if the act has been actuated. The Legal powers given to the Courts, or any other judicial organ, to review the legality of administrative acts, must always be accessible so long as it is made within the terms of the law.

Footnote 144: That the Court establishes whether or not an administrative decision was lawful, benefits everyone who seeks judicial review, because notwithstanding whether the decision is wrong or right, the court could confirm whether the claimant is right or wrong in his presupposition of the illegality of that administrative decision. On the same reasoning, judicial review is also of benefit to the administrative authority as it would have the opportunity to remove any suspicion of illegality which would have been inflicted by the party claiming that it acted ultra vires

Footnote 158: The type of Constitutional violation that Article 469A(1)(a) is reviewing is not of human rights, but other rights of the citizen that are protected by the Constitution but do not fall into the category of rights listed in Chapter 4 of the Constitution. It is not unusual to be given this kind of right of a constitutional nature, yet this excludes human rights, as is the case with Article 116 of the same Constitution.

Footnote 159: It is true that, under Article 469A(1)(a) of the Code of Organization and Civil Procedure, the court in its ”ordinary” competence can cancel an administrative act if it ”violates the Constitution”; however, that jurisdiction only affects the administrative act and not the law under which it is done, so that, if an act has been done as the law requires when the law does not leave any discretion as to how that administrative act should be done, the court cannot say that the law should be considered to have no effect, because it can only do that in its ”constitutional” competence, and it does not even have the possibility to interpret the ordinary law in a way ”compliant” with the Constitution if that interpretation is not possible without, effectively, saying that the

law is invalid

Footnote 160: The words ”are otherwise contrary to law” in sub Article (1)(b)(iv) of Art. 469A refers to any law yet exclude the provisions of the Convention as incorporated in Cap. 319.

Footnote 161: An action for judicial review under Article 469A (as is this case) shall not take place nor be considered as if it were a constitutional (or conventional) action.

Footnote 162: The principle should have always been that constitutional and civil competences had to remain separate and distinct, also because the appeal under each competence is regulated by specific procedures which are not always identical...Eventually and fortunately after contestation, the legislator was convinced to eliminate this prescriptive period as it applies to administrative actions that violate the Constitution and this with Act IV of 1998. The amendment, however, in no way clarified the apparent conflict between civil and constitutional jurisdiction.

Footnote 167: In this case it is clear that the information about the applicant’s past (in particular, if he was included in any criminal procedures) is only one of many sections that one was required to fill in this formula (referring to the fit and proper test). Nowhere is it mentioned that information in any section is worth more than consideration than in an other section. It seems clear that the Authority’s decision to consider the plaintiff not ”fit and proper” was based solely on the information it had about the criminal proceedings before the Court of Magistrates. The Authority did not explain to the plaintiff and much less to this Court the reason for not considering all the other information that the plaintiff gave it and that Maltco gave it about the diligent work and the commendable way in which he had carried out his work in this field for nearly eight whole years before he was asked to fill in the form. In such cases, the failure on the part of any authority to consider the relevant facts may lead to the making of a decision based on irrelevant considerations

Footnote 175: From a legal situation, i.e. it has to be proven that the individual had a right to the thing deprived. In addition to this, for an expectation to be a legitimate one, it does not have to be one that, in order to occur, would violate another's fundamental rights. Nor can there be an expectation founded on unlawful state of affairs and the

claimant expects to be protected in that unlawfulness.

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