PBL2015 ADMINISTRATIVE LAW

The European Law Students' Association

MALTA

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ACKNOWLEDGMENTS

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INTRODUCTION

Textbooks: **Wade**, **Garner** (British), **Tonio Borg** (Maltese Administrative Law), **Ivan Mifsud** (Judicial Review & the Ombudsman), summaries of the most important cases in Administrative Law by **Professor Ian Refalo**.

Laws: Article 469A & 469B of the **COCP**, the **Administrative Justice Act**, the **Ombudsman Act**.

Development of Administrative Law

The starting point of Administrative Law is that the modern state assigns various functions to the public administration, and, over the years, these functions have always increased, no longer remaining limited to the minimum, i.e., those of keeping public order, providing for national defence and so on. Nowadays, the State is involved in a very wide range of activities which are somehow either regulated by the State or assisted by the State or in which the State somehow gets involved, directly or indirectly.

Somebody has to decide in the first place what a government is going to do, what is sometimes referred to as a programme. The scope and the functions of the Public Administration are normally determined by seeing what you can and cannot do. Normally, what the Government does is determined by the objectives, the priorities, political values, and also the legal framework of the administration. You cannot do something which isn't according to law, so the government programme has to fit into the legal framework, in particular the Constitutional framework, which governs the actions of the Executive/Public Authority.

The technical and human resources and the economic resources at the Government's disposal are also important because you cannot do what you do not have the money, people, etc to do. It affects the extent of the actions of the State. Also, the trust which the Government places in the administrative apparatus; cioè how confident you feel that you can take on certain tasks.

A big leap in State involvement was made with the advent of the so-called **Welfare State** after WWII where governments started involving themselves in the social and industrial field. As already said, nowadays, the State is involved in a lot in areas like social security, healthcare, urban planning, protection of the environment, protection of culture and so on.

Also, another counter-development to that is the advent of the so-called '**privatisation**.' Many activities were taken over by State after WWII. Eventually, it was realised that certain things need not necessarily be done by the State. In fact, in the late 70s and the early 80s a process of so-called 'privatisation' started in the sense that certain activities which were performed by the State started being performed by the private sector. Of course, this does not do away with the need to regulate with Administrative Law because when the delivery of a service is privatised, normally the State takes on or maintains the role of regulator and the regulation of services is an area which gives rise to a lot of Administrative Law issues, a lot of issues between service providers and regulator or issues between consumers and service providers which end up before the regulator. So, the advent of privatisation of

certain public services does not necessarily reduce the involvement and relevance of public law to the government of society.

The development of Administrative Law in Malta mirrors that which occurred in the UK. Legal tradition held that the Maltese legal system, like the English one, **did not admit of a separate Administrative Law applied by special tribunals**.

With the development of the modern state with all its ramifications and added powers, particularly after the evolution of the welfare state, the setting up of public corporations and the increase in delegated legislation, Administrative Law became a subject in its own right, rather than remaining a Cinderella of Constitutional Law. Increasingly, the Maltese judiciary **was drawing from English common law to expand its scrutiny of Government's actions**. For a long time, it only limited itself to querying whether substance and form had been followed according to law; gradually it started inquiring into the reasonableness and proportionality of acts of the Administration.

The Influence of English Administrative Law

Maltese Administrative Law has developed in the shadow of English Administrative Law. This has been confirmed in several cases decided by our Courts. Consequently, the development of judicial review, its limits and *raison d'être*, the development of the rules of natural justice, the meaning of the test of reasonableness, its definition and sphere of application, are all moulded on the English model.

In *Prime Minister et v. Sister Luigi Dunkin noe et* (FH 26/06/1980), the Court quoting *Lowell v. Caruana* stated that, *"There the **said limitations to judicial power** (or one may say duties) to review the actions of Governments, government departments and its officers at the request of citizens are to be also **found in English law** in so far as it has been adopted as part of local law…Therefore, this Court has no alternative choice but to declare **the acts of the administrative authorities are to be regulated by English public law**."*

***Lacuna* Doctrine in Maltese Public Law**

In light of the above, it is important to examine the legal doctrine, created by the Maltese Courts regarding the application in Malta of English common law. In several judgements, the Maltese Courts have affirmed the right to apply English common law whenever there is a *lacuna* in public law in Malta.

The 3 requirements for the application of this doctrine –

1) There is a *lacuna* or hiatus in an area in Maltese public law which is not covered by any statute;
2) It is only the rules of English common law which may be applied;
3) The application of these rules remains within the absolute discretion of the Maltese Courts, even though inevitably, they have been widely applied.

Indeed, up to 1995, the law of judicial review of administrative action, which is **the cornerstone of modern Administrative Law**, was imported lock, stock and barrel form English common law.

It is important to note that ONLY English common law, and not statute law, may be applied in the case of a *lacuna* in Maltese public law. Even when Malta was a colony, according to the Colonial Laws Validity Act, a British Act of Parliament did not automatically apply to Malta, unless an express provision of the law so provided.

It is important to note that this *lacuna* doctrine applied even after Independence. As observed in *Lowell v. Caruana*, national Independence, with a constitution enriched by British constitutional norms and conventions, only strengthened the doctrine itself, *"public administrative law in Malta is substantially that adopted from English law and already incorporated in our jurisprudence and the teachings of our jurists, and was not in any way abrogated or modified by the advent of national Independence; on the contrary the rule was probably strengthened…"*

In *Cassar Desain v. Forbes* (CA 07/01/1935), the Court held, *"saving for any difference that may be due to diversities of place and circumstances, and in the absence of any statutory provisions to the contrary, it is by the principles of Public Law of England that the relations and dealings between the Crown and its subjects are governed in Malta."*

So, this doctrine has been invariably applied along the years. Indeed, even after the enactment of a Sub-Title on *Judicial Review of Administrative Action* in the COCP in 1995, English common law remained an important source of interpretation relating to the ground of review of natural justice and abuse of power; and in areas not covered by the new article 469A in such Code, it remained an **immediate and direct source** of law, in line with the *lacuna* doctrine.

Subject in its Own Right

One can state that today Administrative Law has become a subject in its own right. However, English common law, though still an important source of interpretation, has been complemented by several pieces of Maltese legislation, the most important being **article 496A of the COCP**, but also enactments such as –

- **The Public Administration Act,** Chapter 595 of the Laws of Malta;
- **The Administrative Justice Act**, Chapter 490 of the Laws of Malta;
- **The Ombudsman Act**, Chapter 385 of the Laws of Malta;
- **The Interpretation Act**, Chapter 249 of the Laws of Malta.

And the several enactments setting up the numerous public corporations such as –

- The Planning Authority;
- The Environment and Resources Authority.

Also, **regulations** abound of a disciplinary nature, the most important being those regulating discipline within the public service.

The other development that has made Administrative Law a subject in its own right is the **substantial increase in case law** relating to judicial review of the actions of the Administration. The Courts have developed a *corpus* of norms, covering such subjects as the actual meaning of the term "natural justice" and its reasonableness and the ground of abuse of power.

Maltese Administrative Law

Unlike the United Kingdom, Malta has a written Constitution, although things have changed over the last 20 years in the UK with a number of statutes which are considered to be something more than an ordinary law such as that of human rights. The British Parliament is supreme and can do everything (in legal theory, there are constraints) but the Maltese Parliament's powers are limited by the Constitution.

In the UK, any administrative action can be challenged if it is *ultra vires* the statute under which it was taken or, by voluntary submission of Parliament, if it is in breach of the ECHR under the Human Rights Act. In Malta, administrative action can also be challenged on the ground of unconstitutionality. So, in the UK, you can challenge an administrative act if it goes against a statute passed by parliament while in Malta, it can also be challenged on the ground of unconstitutionality (the Maltese Constitution is supreme over ordinary law so you can always challenge an action as being unconstitutional, even though it is stated in article 469A).

In Malta, administrative action will have to pass 3 tests:

1) The action must have been taken in accordance with the rules and regulations (R&R)
2) Rules & regulations must be in accordance with the parent Act,
3) Rules & regulation and the parent act mist be in accordance with the constitution.

The Range of Judicial Review

The range of judicial review under Maltese law (469A) is quite wide, however we have never had a challenge to an amendment to the Constitution passed in accordance with the Constitution itself. This point arose several times under the Constitution of India. In India judicial review also goes a step further in that the power of judicial review also extends to examining the validity of an amendment to the Constitution since it has repeatedly been held by the Indian Courts that no Constitutional amendment can be sustained if it violates the basic structure of the Constitution. So, if an amendment is so offensive to the basic principles of the Constitution that it is practically changing the nature of the Constitution, then the Court, in those cases, said that that amendment is not valid because Parliament cannot amend the Constitution in such a way as to violate its basic structure. We have never had occasion where such a challenge was made in the local situation.

Different Systems of Administrative Law

Not all Administrative Law systems are the same. Indeed, different countries have different systems of Administrative Law. In this way, every country regulates the **relationship between the individual and the government** in their own way. In other words, the systems of Administrative Law are not all organised in the same manner and therefore, such relationship is regulated differently. The main difference is between the British (Anglo-Saxon) model and the French (Continental) model.

Continental model = The Continental model is seen as a natural development of the notion of the **separation of powers**.

In this system, there is a **separate and distinct jurisdiction** with respect to Administrative Law issues. In this way, the judiciary is kept as separate as possible from the administration

to the extent that it cannot interfere in it whatsoever. So, the concept of separation of powers as implemented under the French model does not accept that an act of the administration should be judged by the ordinary courts. On the other hand, you cannot leave the individual with no remedy in his grievances against the public, so the solution is that the administration has its own administrative courts independent from the ordinary judiciary.

For example, France has its own *driot administrative* which is administered by the judicial wing of the *Conseil d'Etat.* The *Conseil d'Etat* is not a court of law but it is an organ of the administration. In this way, it is staffed by administrators and not by members of the judiciary. It exercises a separate jurisdiction to that of the ordinary courts, and this insofar as the administrative field is concerned.

In addition, in the Continental model, the administration is not subject to the ordinary laws of the land which every citizen is subject to, but it is governed by a special law which specifically regulates the public administration.

So, in summary, in the Continental model, you have **laws which specifically regulate the relationship between the administration and the individuals**, which therefore, is different from that which regulates the relationship between individuals, and this is **applied by special organs created for that task**. These are **specialised Administrative Courts** which are not part of the ordinary judiciary but are Courts which are part of the administration

Common Law model = In this system, it is the **ordinary courts** which decide Administrative Law issues, that is, disputes between the individual and the Public Administration. What is also peculiar to this model is that unlike in the Continental model which has a special law applicable to administrative matters, the Common law model relies on the fact that the public administration is **regulated by the ordinary law of the land**. In this way, no separate Administrative Law exists with the sole purpose of regulating the Public Administration. Indeed, in the past this led the English author Dicey to say that there is no Administrative Law in the UK. With that being said, however, one has to consider the specific legislation that has been enacted to cater for the administration.

In **Malta**, Administrative Law steers away from special courts to review administrative actions, and sticks to the Anglo-American position that **Government is made subject to the ordinary Courts of the land**.

In *Lowell v. Caruana*, the Court held, *"In the absence of any special tribunal as the Conseil d'État in France and other countries, our system is the Anglo-American one which cherishes the constitutional concept of **ordinary and independent courts** which ensure the due observance of the law, not only by private citizens but also, within the limits of the powers of judicial review, by the State organs."*

This is still the position today, though certain developments have moved slightly away from this absolute doctrine – for example, the enactment of the Administrative Justice Act and the setting up of the ART.

In substance there isn't a very big difference with regards to the rights of the citizens between the two systems.

Moreover, over the years the difference between the two, particularly with developments in EU law, has been more and more blurred whereby the situation is more of convergence as opposed to divergence. Indeed, each system admits separate administrative tribunals which decide on particular administrative acts. Moreover, special laws catered for the administration are being enacted even in systems based on the Common law model. Ultimately, so long as either system respects independence and impartiality there are no problems with regards to the right to a fair hearing.

THE SCOPE AND THE APPLICATION OF ADMINISTRATIVE LAW – STRIKING A BALANCE

Fairness & Transparency

Public authorities affect many aspects of our lives and in many cases, decisions taken by a public authority will have important consequences for an individual. Indeed, the individual's economic and social wellbeing often depend on the actions of public authority. It is therefore important that legal systems provide and apply principles of Administrative Law which are not only of interest from an academic perspective, but which are also effective in establishing and **maintaining a fair and proper functioning by public authorities**.

The aim of Administrative Law is to protect the rights and interests in their relations with public authorities irrespective of how those relations arise. In other words, the aim of Administrative Law is to establish that the relationship between individuals and public authorities is carried out **fairly and transparently**.

A developed system of Administrative Law aims at providing **clear rules** in defining this balance between public interest and private rights and these rules are normally provided by **principles**, which sometimes are also general principles of law, and which very often emerge from case law. These aim at providing certainty of the law which refers to the fact that, more or less, a person knows where he or she stands vis-à-vis the law. So, a person can foresee what will happen if he undertakes a certain course of action. Certainty of the law is in fact one of the elements of which is more generally referred to as the **Rule of Law**.

One of the elements of the Rule of Law is that the law must be **accessible** for people, it must be possible for people to know where they stand under the law. This does not mean that no law will require interpretation but if uncertainty goes beyond mere issues of interpretation and study, then there could be a 'Rule of Law' problem.

So, it has been established that one of the main functions of Administrative Law is to limit the arbitrary use of power. This does not mean controlling public authorities for its own sake, but in order to guarantee a State governed by the rule of law as opposed to a State where power is exercised arbitrarily.

The basic principles of Administrative Law cover the decision-making process of public officials from two aspects –

1) The Substantive – the quality of the decision; and
2) The Procedural – the manner in which a decision was taken.

In conclusion on this point, the main issue on this question of public administration and Administrative Law is that the actions of Government, programme and so on, often depend on factors which are political in nature not legal in nature. But once those political decisions are taken, then the administrative authorities become responsible to implement those decisions and policies and the manner in which they implement them must be in accordance with the law/certain fundamental principles of public law which laws govern the relationship of the administration and the citizen. Of course, it is the role of the Courts and other institutions which exercise controls over the actions of the public administration to

examine whether in individual cases (the Court and the Ombudsman have to have an individual case) the administrative authorities performed their task properly.

The role of the European Convention on Human Rights
In this context, the European Convention on Human Rights is also an important source of Administrative Law because this Convention regulates the limits of the actions of the administration vis-à-vis persons within the territory of the State and it being an international convention, also creates international obligations on the State as to how it can treat persons within its territory. So, respect for the basic principles of Administrative Law is not merely a domestic matter but it is also a matter, nowadays, which is increasingly the subject of more and more international obligations.

The European Convention on Human Rights is the most relevant to us because it is incorporated into Maltese domestic law by virtue of chapter 319 of the Laws of Malta which does not leave the European Convention on the level of only an international obligation but it makes it part of domestic law and by doing so, it also imported into Maltese law certain principles which are also principally of public law which previously did not form part of Maltese law, such as that of proportionality. This principle cannot be said to have been part of Maltese Administrative Law before the European Convention on Human Rights was incorporated into Maltese law. But once the State incorporated it into Maltese law, it also imported all the principles which were used in order to interpret that Convention and very prominent amongst these was that of proportionality.

So, Administrative Law and certain principles of Administrative Law, nowadays, also have an international dimension. There are also international obligations of the State, apart from there being European Union obligations. It is not something purely domestic where governments enjoy complete or very extensive freedom to do what they wish. The principles of Administrative Law, therefore, regulate the manner in which a government can implement its political programme and also the extent of that political programme.

A Balancing Exercise
Of course, administrative decisions are often taken on economic and social matters on a wide range of an individual's social life, and it is therefore important for citizens to be treated properly. This can only be the case if those administrative decisions are based and follow these fundamental principles.

The other side to this is the right of the public administration. The rights of citizens must be protected in a context where this does not stop the public administration from functioning. This is where the notion of balance comes in. **The business of Government must be allowed to proceed**. On this, there is this notion of how we view Administrative Law, that is, the perspective one takes. These are referred to as the 'Green-light' and the 'Red-light theory'.

The Green-light theory = this refers to the liberal approach vis-à-vis the Government by giving more importance to the needs of Government in relation to a particular situation concerning private rights of individuals. This only makes a difference where there is a certain discretion with the Court as to how to interpret a certain situation. If the breach of rights is blatant, this will not come into the picture.

The 'Red-light theory' = according to this, the perspective of that is that the State cannot do anything which breaches the rights of the individual or the legitimate interest of the individual and there the perspective would be tilted in favour of safeguarding the rights of the individual even if the consequence may be hampering certain actions by the state.

Of course, there is no hard and fast rule. Some judgements clearly give a lot of importance to the social requirements, the need for the government to be able to function properly even if this steps on the toes of individual interests. Other judgements, however, might tend to give paramount importance to the rights and interests of individuals perhaps to the detriment of the smooth functioning of the business of government.

The approach which the public authorities and which the Courts that review the decisions of those public authorities take is also a very relevant to this study of Administrative Law.

So, there is always this question of balancing the private rights and the public interest (that of society), which is ultimately what Administrative Law is about. It is not only a law about how the State is organised, but it is also a law which **regulates the exercise of administrative powers** and **provides controls and limits on the use of administrative powers** and on the **purposes** for which administrative authority may be used.

DEFINITIONS OF ADMINISTRATIVE LAW

Administrative law is not a subject which as we know it today existed for many centuries. Of course, there must have always been some law regulating the relationship between the civism and the Government but in totalitarian, monarchical, autocratic systems such as was the rule of the day before the 20th century, there was little scope for what we know as Administrative Law today, that is, a set of rules which bind the administration and the citizen in regards of how they interact. It was the change in the role and function of the State that took place in the 20th century, in particular the advent if the Welfare State, which led to the rapid development of this subject. This is the result of the fact that the Modern State performs a much larger range of functions than the traditional minimum of a rather less developed society.

Contrary to what some people make think, Administrative Law does not deal solely with judicial review. Certainly, there do exist other topics covered by Administrative Law in particular –

- The structure of the administration and the public sector;
- The development of non-judicial remedies;
- The development of the office of the Ombudsman since its inception in Malta in 1995, or that of the Commissioner for Standards in Public Life since 2018;
- The powers and control over public corporations or bodies corporate established by law and government companies.

Now, one of the problems here is that it is difficult to evolve a **precise** and **scientific** definition of Administrative Law but there are a number of approaches.

4 main approaches:

1) Administrative Law as the law which **controls the powers of Government**;
2) Administrative Law as the law which **protects individual rights** (red and green light theory);
3) Administrative Law as a set of rules which are designed to ensure that the administration does **perform its proper tasks** (the main task is to act in the public interest);
4) Administrative Law as the law which **ensures Governmental accountability**. Also, a modern development is **the participation by interested parties in decision making** which can be achieved either thorough consultation process but also by recognising the right of the individual to be heard and to make representations to the administration in matters which concern him.

What is certain is that the Legislature and the Judiciary have a prime role to play in shaping Administrative Law. Parliament has enacted laws of an administrative nature in both the UK and Malta so that the subject is not merely based on tradition and convention; however, in both countries, the role of the Courts constitutes an important pillar on which this subject rests.

Administrative Law covers such varied questions as –

- What is the public service? How is it regulated and who exercises discipline over it?
- What kind of parliamentary control exists regarding delegated legislation?
- What is the relationship between a Minister and the public officers in his/her department?
- What is meant by the anonymity and impartiality of the public service?
- How is executive discretion exercised and which are the grounds of judicial review of such discretion?
- What powers do the Courts have when they declare a particular administrative act to have been performed *ultra vires*?
- What remedies are available to the aggrieved citizen whenever s/he feels that s/he has not been given a fair deal by an agent of the Public Administration?
- Is an administrative tribunal bound by the strict procedural rules of a court of law?
- What are the minimum requirements for the rules of natural justice to be observed in the executive exercise of judicial power?
- When is the Government liable for damages for actions performed by its employees?
- When is the Government exempted from liability?
- Is there a duty by the State to guarantee safety in public places?

Sir Ivor Jennings

Sir Ivor Jennings might also have had an influence on the drafting of the Constitution of Malta because he was a professor at Cambridge where the actual author of the Constitution of Malta, John J. Cremona, had studied under. So, he probably had some indirect influence on the way in which the Maltese Constitution was drafted.

In his book, 'The law and the Constitution' (1959) he defines Administrative Law as *"the law which determines the organisation, the powers and the duties of the administration."*

Griffith and Street

In their book, 'Principles of Administrative Law', Griffith and Street see Jennings's definition as being too wide, arguing that it does not distinguish between Constitutional Law and Administrative Law. Moreover, according to them, it gives the impression that Administrative Law goes into substantive aspects of the administration's power which are not actually included within the ambit of Administrative Law. In general, it is not about the merits of a decision, cioè, how a decision was decided, but it is about whether that decision was taken in accordance with certain procedural principles and with regards to the quality of the decision in accordance with the substantive principles. In addition, they claim that Jennings's definition, being so wide, does not cover the important issue of Administrative Law remedies, mainly judicial review. Of course, it seems to be implied in this since somebody must enforce the law.

They defined Administrative Law as, *"the object of Administrative Law is the operation and control of administrative authorities. It concentrates, therefore, on the working of public authorities. Administrative law deals with: what sort of power does the administration exercise? What are the limits of those powers? What are the ways in which the Administration is kept within those limits?"*

'What sort of power does the administration exercise?', 'What are the limits of those powers?'
First you have the question whether a given act is legal, that is, whether the administration is legally authorised to take that decision. It might be that the decision may be taken by another branch of the administration but not by that branch which actually took the decision. This brings us to the ground of incompetence.

'What are the ways in which the Administration is kept within those limits?'
The third question is relevant because it makes the difference as to whether Administrative Law is effective or not. It is a duty under the Rule of Law that the law must be capable of being enforced. So, here, they are asking which are the ways in which the administrative is kept within those limits. Here, we come to as the Administrative Law remedies, the principal one of which is that of judicial review but of course, there are other remedies namely, the Ombudsman type, and also systems within the public authorities themselves which provide for the reconsideration of a decision, that is, internal review by the administrative authorities themselves. These avoid cases going to Court. If an informal remedy can be found on an administrative level, it is more practical than going to Court. Of course, you cannot offer these remedies as a substitute for judicial review. Judicial review emanates from the right to a fair trial and is a fundamental human right. So, you cannot say the internal remedy substitutes the right to access to the Court because it is part and parcel of the right to a fair trial.

<u>Sir William Wade</u>
Sir William Wade, in his book 'Administrative Law' (2004) defines Administrative Law as *"the law relating to the control of Governmental power*." He states that the main object of Administrative Law is *"to keep Government's powers within their limits."*

These limits are the legal limits, sometimes referred to as being defined by the doctrine of *ultra vires*, that the public administrator does not exceed the powers granted to him by the law, and also, the supreme principle that the administration must act in the public interest. Abuse of power tends to arise when public authority either is not used in the public interest or is not used properly in the public interest. This is related to the Rule of Law which requires that even the Government must be subject to the law and should be enforced through independent and impartial courts.

<u>K.C Davies</u>
In his book, he defines Administrative Law as *"the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action"*.

Judicial review applies to administrative decisions, whereby you cannot have judicial review of a Court judgement except through the means provided through the laws of Civil procedure. When we say judicial review, we mean the right to go to Court in order to challenge an administrative decision which does not include a judgement of a Court because the Courts are the judiciary and not the administration.

In the definition there is also an exclusion of a legislative act. In Malta, this issue came to the fore when a person who was going to be sent to Italy on the basis of an EAW challenged the regulations which were issued under the Extradition Act, and which implemented the EAW as being *ultra vires*. The Court had accepted a defence raised by the Government to the affect that judicial review under article 469A of the COCP does not apply to legislative acts and therefore, since the issuing of those regulations was a legislative act.

Then the Court in the case *Borg v. AG* decided that judicial review was not the way to challenge the *vires* of these regulations. The way to challenge those regulations was that provided by article **116 of the Constitution** which gives a right to anyone (an *actio popolaris*) who contends that a law was not passed in accordance with the Constitution. In this case, the Constitutional Court decided that if you are challenging a legal notice, so, a legislative act, then judicia review under 469A does not apply but you have to challenge that administrative act of a legislative nature through article 116 of the Constitution.

Moreover, Davies defines an Administrative Agency as *"a Governmental authority, other than a Court and a legislature, which affects the rights of private parties through administrative adjudication or rule-making."* This also brings out this point that administrative law applies to decisions of the administration, not to legislative acts or to judicial decisions.

Garner
He defines Administrative Law as being *"those rules which are recognised by the Courts as law, and which relate to and regulate the administration of Government."*

Here, we get the introduction of case law. Case law is a very important source of Administrative Law. Of course, Garner speaks coming from Britain where case law is supreme. In Malta, after 1981 we started having codification of the grounds of judicial review, the first one being by means of act VIII of 1981 and in 1995 article 469A of the COCP. In 2020, we had the introduction article 469B which looks at the field of Criminal Law.

But before 1981, the judgements of the Courts were the main source of Administrative Law and so, this definition is certainly much more relevant to that period. This is not to say that when we got codification then judgements became less important. Judgements retained their importance because **ultimately it is the judgements which apply the law in particular cases and which define the meaning and the application of the law**.

We have had cases where judgements either interpreted certain laws in a manner as to not give them too much importance or decided despite the law on the basis of fundamental principles of justice. This was the situation during the period between 1981 and 1995 when the law in force on judicial review was article 742, 2 and 3 of the COCP which were enacted by act VIII of 1981. The Courts by and large accepted in a few cases tended to work their way around that law, they never accepted that law as being the final word in matters of judicial review. So, either on the basis of fundamental principles of justice such as in the case of *Mary Grech v. Minister responsible for the Development of the Infrastructure et* (1993), or by finding a definition of that law which still fitted into the tradition notions of

judicial review, such as in *Anthony Ellul Sullivan ne v. Lino C. Vassallo ne* (1987), where the Courts toned down that law through their interpretation.

So, this reference in the definition to rules which are recognised by the Courts is still very important because ultimately whatever law you have, it is how the Courts will apply that law which counts, that is, which actually makes the law and draws the lines of what the administration can do and what it cannot do. Case law remains always a very important basis of all law, but in particular of Administrative Law.

All these definitions are on the same lines, but they emphasise different aspects and functions of the subject. Administrative Law can be seen as **a branch of Constitutional Law which deals with the powers and duties of administrative authorities and the manner in which** (and the principles according to which) **administrative authorities are obliged to exercise their powers and perform their duties**. It also deals with the **remedies** which are available to persons whose rights are affected by actions of the administrative authorities.

When one states that one of the purposes of Administrative Law is to prevent abuse of power, **this does not necessarily imply that one is dealing only with the exercise of power in bad faith**; the Administration, although its agent and employees, may take a decision which is not reasonable or proportionate, not because there was malice in the minds of the public authority, but because of **error of judgement**, or **relevant considerations were ignored**, or **irrelevant considerations were genuinely taken into account**.

The fact remains that Administrative Law seeks to keep the administration in check.

THE RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

Both Administrative Law and Constitutional Law are concerned with the functions of Government. Both are part of public law and by and large, both have the same sources.

In most English textbooks on Constitutional Law, the title of any such works is *Constitutional and Administrative Law.* The truth is that the subjects are inter-related. While Constitutional Law can be loosely defined as **the law which regulates the function and composition of the three organs of the State, the relationship between these organs which constitute the State, and their relationship with the private individual**, Administrative Law focuses on **only one of these three organs**, namely the Executive, **its structure, functions and relationship with the other organs of the State and the private individual**.

In his *'Constitutional History'* (1995), Maitland said that *"Constitutional Law deals with structure and the broader rules which regulate the functions whilst the details of the functions are left to Administrative Law."* Constitutional Law sets the framework in which the State operates, that is, how it is organised. So, we find the structure and the broader rules in the Maltese Constitution. Since it includes two chapters about principles (Chapter II and Chapter IV), one can perhaps discuss whether the use of the word 'broader rules' is completely in place. This remains the distinction by and large. So, Administrative Law deals with the details of the manner in which the State/Government is run and in which the State deals with the citizens/all persons within the territory.

In his *'Constitutional and Administrative Law'*, Hood Phillips says that *"Constitutional Law is concerned with the organisation and functions of Government **at rest** whilst Administrative Law is concerned with that organisation and those functions **in motion**."* Constitutional Law is setting an organogram, a plan, as to the organisation and functions of the State while Administrative Law is concerned with that organisation and those functions in motion, so actual acts of the administration.

The distinction between Administrative Law and Constitutional Law is mainly one of degree, convenience and custom rather than one of logic and principle. It has also been said that *"it is logically impossible to distinguish Administrative Law from Constitutional Law and all attempts to do so are artificial"* (Keith).

Two Judicial Review Systems

Administrative Law does not deal with laws granting power to the Executive as such, but with **the way such powers are exercised by the Executive or one of its branches**. While Constitutional judicial review deals with whether a law or anything done under it is constitutionally valid or not, in the case of Administrative Law, the Court **examines whether any action of the Executive, in virtue of a valid law, was exercised properly and lawfully**.

In *Smash Communications Limited v. Broadcasting Authority et* (CA 24/06/2016), the CA ruled that, *"The Broadcasting Authority acted according to the procedure established by law and if plaintiff company was not satisfied with this structure, it should have instituted an action so that the law would not be applicable, and this it could have done only by instituting*

a constitutional action and not one of judicial review of administrative action under article 469A."

The relationship, however, between Constitutional and Administrative Law remains strong. In the case of Malta, there are certain **concepts** and provisions, enshrined in the written Constitution, which serve as a source of Administrative Law, such as the concept of the rule of law. The Constitution in several provisions guarantees the rule of law in Malta, through *inter alia* a human rights chapter that limits the powers of the Executive. These provisions apply not only to laws enacted by the Legislature, **but also to measures and decisions taken by the Executive**.

A requisition order issued by the housing authorities may be challenged either under the ground of review of excess of authority, or as being constitutionally invalid if it affects the right of a person to one's own home. Keep in mind that **Art. 46(3)** of the Constitution provides that if an adequate alternative remedy exists, the Court may decline to exercise its constitutional jurisdiction.

On the point of Human Rights, owing to the fact that administrative decisions are often taken in relation to the individual and that such decisions affect the life of such individual, it is very often that human rights issued get involved. This was so in the case *Katerina Cachia v. Direttur Ġenerali tas-Saħħa* (2000) which dealt with the right to life. In this case, Ms Cachia argued that **the refusal by the Government** to provide her with a cancer drug free of charge even though it was not on the list of drugs provided free of charge by the Government, was a violation to her right to life. Indeed, this was an **administrative decision**, taken by the health authorities in the exercise of their discretion. In this way, whilst the right to life, and therefore human rights, is technically speaking a Constitutional Law matter, in this case it was intimately linked with an administrative decision and the exercise of discretion which is very much an Administrative Law issue.

The Constitution also dedicates an entire Chapter to the Public Service. Moreover, the doctrine of **separation of powers** which is reflected in the Constitution by having the three organs of the State dealt with in 3 different Chapters – in judicial review, a Court can never substitute its discretion fir that of the public authority.

THE SOURCES OF ADMINISTRATIVE LAW

1) **The Constitution**

- The Constitution establishes the legal framework of the State and the relationship between the Government and the citizen and persons, both physical and legal, under the jurisdiction of the State;
- It is the Supreme law ultimately enforced by the Constitutional Court even over the Government;
- The Fundamental Human Rights provisions of the Constitution go a long way in controlling Government power;
- The Constitution of Malta also regulates access to public employment and discipline of public officers.

The Constitution of Malta was promulgated in 1964 on the attainment of Independence and is a fundamental source of Administrative Law and is a fundamental source.

First and foremost, the Constitution establishes the legal framework of the State, and it regulates the relationship between the Government and the citizens and any persons (both physical and juridical) under the jurisdiction of the State. Indeed, Chapter VII is completely focused on the Executive.

Moreover, it is the supreme law and ultimately it is enforced by the Constitutional Court with is the highest court of appeal on Constitutional matters, both on fundamental human rights issues and on issues relating to interpretation of the Constitution itself. Indeed, the Court has the power to enforce the Constitution, ruling against the will of the Executive/Government. It is an organ of the State which enforces the supremacy of the Constitution.

Also, the Maltese Constitution includes chapter IV which is enforceable, and the provisions on fundamental human rights go quite a long way in controlling the powers of Government, therefore, influencing Administrative Law.

Also, the Constitution regulates the question of access to public employment in Chapter X which is about the public service with the establishment of the Public Service Commission and the regulation, either directly in article 110, or through the power to make regulations under that article. The Constitution regulates the access to public employment, discipline of public employees and so on. It regulates the public service. Of course, this is very much a matter of Constitutional Law and Administrative Law and in these various ways, therefore, the Constitution is a fundamental source of Administrative Law.

2) **EU Law**

- Most EU law is in the nature of administrative law;
- EU law enjoys supremacy over ordinary law as provided in the European Union Act – supremacy is a fundamental principle of EU Law without which the Union cannot function;
- The spread of EU law and of the case law of the European Court of Justice has increased to many areas over the years thereby making EU law an important source of the control of Governmental power.

This has been a source since Malta joined in 2004. When it comes to EU law, one has to make a distinction between legal norms consisting of Regulations and those consisting of Directives. In terms of the former, these have what is known as direct effect over national law of Member States, whilst on the other hand, directives merely lay down aims which Member States have to achieve in implementing such legislation. Indeed, when such legislation relates to Administrative Law, then they are automatically a source and, on this point, it is important to mention that most EU law is in the nature of administrative law (law which regulates the relationship between the Government and the individual).

Also, another characteristic of EU law is the principle of supremacy of EU law, that EU law prevails over domestic law, as enshrined in Article 3 of the European Union Act (Ch. 460). So, EU law is given more weight in comparison to ordinary legislation to the extent that in a case of conflict between the two, EU law will undoubtedly supervene.

This is a principle about which the ECJ is very adamant because unless you have this principle of supremacy, the Union will not be able to apply very similar standards across borders. It is an essential characteristic of EU law that it has to prevail over national law in those areas where EU law provides. So, in areas where the EU has competence, then EU law prevails. Therefore, it creates Administrative Law, law regulating the relationship with the Executive, in each of the Member States.

Interestingly, EU law as a source of Administrative Law came to the fore in the case *Ramblers' Association v. Malta Environment and Planning Authority et* (2016) which involved an EU Directive which gave environmental organisations *locus standi* insofar as they objected to a building development.

Nowadays, a high percentage of legislative initiatives are EU inspired. EU law is always growing in its field of application, making it all the more important. A lot of legislative initiatives in member states originate from EU law.

3) **The European Convention on Human Rights**

- Many decisions taken by public authorities will concern individual rights and freedoms protected by the ECHR.

This Convention exists in parallel with Chapter IV of the Constitution. Many decisions taken by public authorities will somehow concern the individual rights and freedoms which are protected both by the ECHR, and by chapter IV of the Constitution of Malta. Of course, certain rights are more applicable to the situation of the relationship of the individual with

the State. Of particular importance are, (1) **the right to protection from discrimination** (the manner in which admin authorities behave towards the citizen), (2) **the right to a fair trial**, **the right to respect for private and family life**, **the protection of property** (from taking of fair property without fair compensation. This is a hot topic in Malta with the old rent laws and explosion of constitutional cases), and (3) **the right to education**, **the right to an effective remedy** (the right to be given a remedy when you suffer a breach of your rights. It is not enough to have a declaration; the court must decide that it constitutes an effective remedy. The right to an effective remedy is intimately linked to one of the principles of the rule of law to the effect that the law must also be enforceable).

All these rights are relevant to decisions of public authorities on typical issues such as: planning permits, regulation of businesses and professional bodies, schools, pensions, Social Security (disputes between individuals and the SS department) and care proceedings in relation to minors (taking decisions, which in truth upon ordinary family life in the best interest of children but still you have to live up to certain standards and follow the proper procedures and act fairly).

<u>The right to a fair trial – The ECHR 3</u>

- The fair trial guarantees in Article 6 will apply to judicial review procedures;
- The reference in Article 6 to the determination of civil rights and obligations includes disputes between individuals and public authorities provided that these are decisive of the individual's private rights and obligations;
- Certain types of disputes are excluded from Article 6 such as disputes which arise from the exercise of State sovereignty – in fields such as of Tax, Immigration, standing for elections.

When the State grants a right of access to a Court in order for the individual to challenge an administrative act, that procedure must be **a fair procedure**. It must, like any other Court procedure, **comply with the requirements of Article 6 of the ECHR**; the fair trial guarantees. Article 6 states that in the determination of civil rights and obligations, everybody is entitled to a fair trial before an independent and impartial tribunal established by law.

Civil rights and obligations sometimes raise an issue whether public law rights apply or whether civil rights and obligations only include private law relationships between the individuals or between the individuals and the state. In other words, when you get to certain exercise of public authority, then it is argued that Article 6 does not apply because there is no civil right or obligation involved. However, any dispute which is decisive of the individual's private rights and obligations will fall under Article 6. There are some disputes which are sometimes excluded when it is considered that there is no civil right as such but there is a situation where the state is exercising its sovereignty (what is sometimes referred to as *iure imperii* where the state is exercising its sovereign function).

There, there have been a number of cases where the ECHR has held that there is no civil right, no determination of a civil right involved in such cases and therefore Article 6 does not apply. These are in fields such as **tax** (there is a difference between the position of the Maltese constitutional court and the position of the ECHR. The ECHR in a famous case, <u>*Ferazzini v. Italy*</u> had decided that certain tax issues affected the sovereign power of the

state and therefore did not fall under the guarantees of article 6 of the convention. The minority in that case disagreed. The Maltese Constitutional Court has rather consistently taken up the position of the minority in the ECHR holding that article 6 also applies to tax disputes), **immigration** and sometimes also the issue of **whether a person has a right to stand for election in a country**.

The ECHR – fair trial – public officers

- Public officers also enjoy article 6 protection in disputes with the State as their employer;
- They will only lose this protection where national law specifically denies them access to a court in the particular circumstances and where such an exclusion can be justified by the state concerned on objective grounds such as:
  Where there exists a special bond of trust and loyalty between the public official and the State, and the subject matter of the dispute in issue relates to the exercise of state power (*Vilho Eskelinen and Others v. Finland*).

A particular situation concerns public officers who are appointed by the State to serve the State. For a long time, it was held that public officers could not sue their employer because they served at the pleasure of the Crown/King. This gave rise to a doctrine in British Administrative Law of the non-legal nature of the civil service, that the civil service is law onto itself, governed by its own internal laws but it is not subject to ordinary employment law.

We still have a remanent of this in the sense that in the Employment Industrial Act in Malta, certain parts of that act do not apply to public employment which is regulated by the Public Service Commission. There are cases where a public officer may not go before the Industrial Tribunal.

The situation of public officers is particular in many countries. **The position of the ECHR is to the effect that public officers also enjoy Article 6 protection in disputes with the State as acting as their employer**. However, there are still some cases where the ECHR accepts that Article 6 does not apply. In fact, it has held that public officers may lose Article 6 protection where national law specifically denies them access to a Court in particular circumstances and where such an exclusion can be justified by the State on certain objective grounds. Only limited categories of jobs in the public service are not subject to Article 6.

ECHR – Article 6 – Administrative civil proceedings

- Characterising proceedings as administrative law procedures;
- (Rather than as civil law proceedings) will not preclude the application of Article 6;
- The European Court of Human Rights applies as an autonomous interpretation of national legal proceedings for the purposes of its application of the Convention.

Also, this question of civil rights and obligations in Article 6 raises an issue of **whether administrative proceedings are covered by Article 6**. There is this distinction between the continental system and the British system in the sense that in most continental systems, there is a separate body of Administrative Law, including a separate body of Administrative Courts. Administrative proceedings in those systems are not considered as civil proceedings.

Where there is this distinction, **it is argued that administrative proceedings are not civil proceedings and therefore do not fall under Article 6 of the European Convention on Human Rights**. The European Court accepts this distinction with a caveat that if the ECHR considers that even though the proceedings are defined as or classified as administrative proceedings, they are in the nature of civil proceedings, Article 6 will still apply because the ECHR does not apply the national law definition of civil proceedings and administrative proceedings, but an **autonomous definition**. It sees the elements of these proceedings and if it considers that those proceedings are intrinsically of a civil nature, irrespective of the fact that the domestic law classifies those proceedings as administrative and not as civil, the ECHR will still apply Article 6.

We had this on the issue of **administrative fines** in Malta. The question of a law providing for administrative fines but the Constitutional Court, considering that these fines are quite hefty in certain cases, decided that the fines were intrinsically of a criminal nature not of a civil nature: *Federation of Estate Agents v. Director General for Competition* and *Rosette Thake nomine et v. the Electoral Commission*. Consequentially, only a Court could impose such fines. This raises a big problem with regard Article 39(1) which states that any criminal charge must be determined before a Court. In those cases, the Court decided that the administrative fines were of a criminal nature and therefore only a Court could enforce them. Therefore, the administrative authorities given power under the law to give certain administrative fines could not impose them anymore.

4) **Decisions of Courts and Tribunals**

- Case law is a very important source of administrative law since it interprets the law and applies the law to particular situations thereby defining the law.
- Even when the legislator intervenes it is the Courts which have the final word.

Case law determines what the law means in practice. A Court interprets a provision of the law and applies it to a particular situation. The decisions of Court are a very important source of Administrative Law because ultimately, it is not what the text of the law says, but **how that text has been interpreted by the Courts**. It is considered to be a very dangerous way of studying the law simply reading the written law. Case law is a very important source of Administrative Law since even when the legislator intervenes, ultimately, the Court has the final word.

At a point in time, case law was the body of Maltese Administrative Law whereby some of Administrative Law's main principles have been solely developed by the Courts. Until 1981, Malta did not have any written law on judicial review and its principles were only those which resulted from case law. Owing to this, the whole edifice of Administrative Law depended on case law, with ground-breaking judgements such as *Prime Minister et v. Sister Luigi Dunkin et* (1980) setting the tone for judicial review. Indeed, one principle of Administrative Law, that of *iure imperii* was created, developed, and disapplied by the Courts of law.

Nowadays, we have a number of codified provisions of Administrative Law but still case law remains very important because it is the Court which ultimately has the final word as to the meaning of the law.

5) **Primary legislation**

- Ordinary laws, particularly when they relate to matters of constitutional importance (Public Administration Act, Administrative Justice Act, European Convention Act, European Union Act) but even if they are sector specific, are an important source of administrative law.

Administrative Law is not found in one administrative code, but its sources are spread amongst different pieces of legislation which all, in some way or another, deal with Administrative Law matters and the functioning of the public authority. These include –

- The Public Administration Act;
- The Administrative Justice Act;
- The Interpretation Act;
- The European Convention Act:
- The European Union Act.

In particular, when they relate to matters of Constitutional importance, laws are of course a source of Administrative Law. There are some laws which also have Constitutional implications such as the Public Administration Act. However, it is not only these laws which are of constitutional relevance not just ordinary relevance, but even laws which regulate a particular sector of the economy or the administration. These laws are normally based on the principles of Administrative Law.

6) **Delegated legislation**

- Delegated (or subsidiary) Legislation sometimes also regulates matters of constitutional importance such as the regulations relating to the Public Service Commission which are issued under the Constitution itself.
- Subsidiary legislation also governs the details of the workings of many sectors of the public administration.

There are many reasons why there is subsidiary legislation, primarily because not all laws can pass through the Parliamentary procedure for enacting legislation. Parliament does not have the time to regulate everything, and such a procedure is extremely time consuming, rendering delegated legislation a quick alternative.

Normally, in the principal law you would get the main gist and the principles of the regulations but then the details are left to subsidiary legislation, normally made by a Minister under the authority of the parent act. The Minister is acting on behalf of Parliament in making those regulations which are a source of Administrative Law because they regulate many aspects of administrative activity.

The most important example of delegated legislation which takes the form of a source of Administrative Law is the Disciplinary Proceedings Regulations, issued by the Public Service Commission. As indicated by its title, this deals with the method of discipline of public officers in the public service.

7) **Administrative rules and practices**

- These are neither primary nor subsidiary legislation, but they still regulate the relationship with the State.

Neither primary law nor subsidiary legislation, but they still have a big influence on the relationship between the citizen and the State. These include –

- **Circulars** – normally issues where a public body exercises discretionary power and that body decides to set out how it is going to use that discretionary power,
- **Codes of ethics and codes of practice** – try to go into some detail in a particular situation how that particular law should be applied,
- **Guidance notes on the interpretation of the law by public bodies** – again, this establishes policy which becomes then a source of Administrative Law. Even though they are soft law, so non-enforceable, they are still a source of Administrative Law because they regulate the relationship between government and the citizen.

8) **English common law**

- English Common Law is still a source of Maltese Administrative law.
- The 'skeleton' of article 496A may be Continental but the jargon (such as the reference to 'natural justice') is English;
- Article 469B on judicial review of decisions not to prosecute is also based on English Common Law.

'Common law' refers to the judgments on British courts. Under the common law system, the judgements of the Court are a very important source of law and given the link between the Maltese system of Administrative Law and the British common law system, English common law is and has remained a source of Maltese Administrative Law.

The Court have always reserved the right to apply English common law whenever there is a *lacuna* in Maltese public law (*Prime Minisister v. Sister Luigi Dunkin noe et* (FH 26/06/1980)). This power is discretionary but has been invariably applied. Large parts of the subject were in the past regulated exclusively through English common law, in particular the norms relating to judicial review of administrative action.

Even today that there is a special statutory provision in the COCP, namely Article 469A regulating such matters, English common law is still an important source of interpretation, the more so since certain terms such as "natural justice" are not defined at all in the Maltese statute. While the skeleton of Article 469A is said to be French, the substance is said to be British.

Moreover, article 469B is also based on the principles of English common law, in particular the principle that a decision not to prosecute will be reviewed by the Courts if the Courts consider that it was not a decision which a reasonable prosecutor would take.

9) **Legal writings**

- As in all spheres of the law legal writings contribute to the interpretation and to the development of administrative law.
- They are also often quoted in the judgements of the Courts.

Authors examine the law in an academic manner, so they contribute to pointing out, for example, *lacune* in the law, and to the interpretation of the law, the development of the law and the definition of the law.

They are also a source of Administrative Law not just on the academic plane, but they are a source of administrative law also because they are often quoted in Court judgements. At one time, the Maltese Constitutional Court also used to refer to Indian writings, in particular Bazu. Before Malta adopted the European Convention on Human Rights as part of domestic law, there was this tendency by the court to refer to other common law jurisdiction and in particular to writings on the constitution of India.

THE PRINCIPLES OF ADMINISTRATIVE LAW

The legal framework of administration in a democratic society

The principles are the basis, but they are also important tools in resolving cases and in identifying issues in cases. Data Protection Law, which is basically the law of what you can do with information which you collect about individuals, is nowadays harmonised in Europe through the General Data Protection Regulation. If you were to analyse both the freedom of information act and the GDPR, the principles of Administrative Law are reflected there. This is why the principles of Administrative Law are the key to this subject. Whether you are analysing a law, a case, tackling an essay question and so on, you always encounter the principles.

In a liberal democracy, the purposes of a legal system include or have to include –

1) The setting of limits on the powers of public authorities;
2) Providing a framework of rules for making decisions;
3) Imposing legal responsibilities on public authorities in order that the public authority can fulfil their tasks which in general can be said to be securing people's wellbeing, that is, their safety and welfare.

A system of Administrative Law is necessary because it is **essential to the Rule of Law**. It has to be **based on a number of substantive and procedural principles** with the latter referring to the procedure according to which a decision was arrived at. Procedure is very important because it does not exist for its own sake or for the sake of ritual, but it exists in order to guarantee the rights of persons involved in a dispute with the administration, for example. Ultimately it guarantees that the rights of the individuals are respected. Moreover, a system of administrative law has to provide **effective remedies** and it also has to provide for the government to pay up when, because of breaches of the law, damages are caused. In other words, it must **provide for Governmental Liability and reparation of damages** in situations where such liability is called for/appropriate.

The Nature of Administrative Law Principles

Administrative Law is based on a number of substantive and a number of procedural principles. The 'Substantive' and the 'Procedural' principles of Administrative Law do not only include the grounds of judicial review, but they are wider principles intended to regulate the manner in which the administration abiding by the 'Rule of Law' is considered to be obliged to conduct its business.

Sometimes, **the distinction between what is substantive and what is procedural** is not easy to draw, as in the case of the public authorities' obligation to give reasons for decisions. The law states that if a public authority refuses an individual a permit, it should give reasons why it refused that permit. Say you write to the public authority and get into a situation where it is refusing your application for a permit and as a reason for this, they say that the application was not in line with policy without explaining any further. The question that arises is whether you can say that when they gave you such a vague reason, procedurally they satisfied the law of giving a reason, but in substance they didn't. That is to say, that it is so vague that really it is no reason at all and, therefore, they did not comply with the law to give reasons. Of course, the other argument would be that reasons were given, and

therefore, from a procedural aspect the duty to give reasons was complied with, because from the point of view of a pure formality that requirement was satisfied. However, if you remain not knowing the reasons why, you don't know whether to challenge that decision or not. In practice, you are being denied the right to challenge a decision. The solution found by the courts in such cases is that failure to give reasons itself raises a point of law, so, you can still challenge that decision for the fact that it does not include reasons and it puts you in a position where you cannot know the ground upon which to challenge the decision if it is so vague. Sometimes, what is substantive and what is procedural is also a problem to determine and sometimes these principles tend to overlap.

The Rule of Law Basis

There are a number of **definitions of rule of law**, but a very famous one is of the Declaration of New Delhi. This goes into certain details of what the implementation of the rule of law entails. Also, another more recent definition produced in the form of a report of the rule of law is set out in the "Report on the rule of law", European Commission for Democracy through Law (Venice Commission), CDL-AD (2011) 003rev; and also, in the "Rule of law checklist", adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD (2016) 007.

The basis of Administrative Law is the Rule of Law, meaning that Administrative Law seeks to achieve that the Government acts in accordance with the law. **Administrative Law regulates the exercise of powers by public authorities and provides for the control of their use**. In carrying out their functions, public authorities find themselves in a situation where they have to balance individual interests with the interests of the community they serve, in other words, the "public interest". This is always an issue in any type of public law.

Public authorities are there to act in the public interest but acting in the public interest does not justify riding offshoot in the interest of the private individual. This is often referred to as 'proportionality' or 'reasonableness.' It is essential that the Executive acts in accordance with the law because naturally positioned, the Executive has an advantage over the individual and also, it exercises a function in the public interest which gives the executive certain powers which no individual can exercise. Therefore, because of the powerful positions of public authorities there has to be this proper balance, control, over their exercise of their powers. **Given the privileged place that public authorities have in democratic societies and the public character of their role, it is natural that the Rule of Law is the primary source of many of the principles of Administrative Law**.

<u>The Rule of Law ensures that:</u>

1) Everyone – individuals and public authorities – is subject to the law,
2) That there is legal certainty and that everyone knows what his or her rights and duties are under the law,
3) That public authorities cannot act in an arbitrary manner,
4) That proper application of the law is ensured by an independent and impartial judiciary whose judgements are enforced,
5) That human rights are respected, especially the principles of non-discrimination and equality of treatment.

The Margin of Discretion
This does not mean that the law tries to tie up administrative authorities as to what they should do in every situation. So, the principles of Administrative Law still give public authorities a legal **margin of discretion** in the decisions they take, and this is so that public affairs are managed fairly and efficiently.

Generally, the term 'discretion' has negative connotations with abuse. This margin of discretion is not necessarily arbitrary, that is to say, discretion only becomes arbitrary if that discretion is abused. It is necessary for public authorities to be able to distinguish between one case and another and to implement good administration. Of course, that discretion has to be implemented in accordance with the basic principles of law. It is left to public authorities so that the public authorities can manage public affairs fairly and efficiently and it is not there to be abused. It is essential to any system of public management that there has to be some discretion. The problem only arises if that discretion is not exercised within the law, then it becomes an *ultra vires* action.

Discretionary Power
Administrative law deals with the exercise of **discretionary power**. This refers to a power which **leaves some degree of latitude to an administrative authority to choose from among several legally admissible courses of action**. That is to say, the power to choose between several legally admissible courses of action. It is not the power to choose between what is legal and what is not. Everything must be legal and then there is a choice of what reaction the public administration will adopt.

The Basis of the Principles
The principles of Administrative Law have been developed in law and **case law**. Under the Common Law system, it is case law which is the main source of the principles of judicial review, and which are also the principles of Administrative Law. Besides judgements of national courts, even **international instruments**, like the European Convention on Human Rights and **international court judgements** also contribute to the development of these principles.

Of course, the principles extend to the concept of **democracy**, **public participation in decision making**, and **accountability of decision makers**, particularly through the right of access to a court to seek judicial review of administrative decisions and through 'positive obligations' of the Government. Sometimes it is not enough that the Government does not violate your rights, but there is also a duty to see to it that your rights are safeguarded even against violation by, for example, third parties, therefore not necessarily by the government itself. This is also a source of obligations on public authorities in a democratic system.

Principles can be categorised differently
The categorisation of principles we will be dealing with is not the only way in which the principles of Administrative Law can be categorised. In fact, a look at the list of contents of various textbooks on Administrative Law will reveal that the same material is classified and divided in different ways. The jargon used may vary. For example, 'reasonableness', 'abuse of discretion', 'unreasonableness', 'irrationality', are sometimes used to describe the same principles.

Changes in terminology
Sometimes, changes in terminology indicate some substantive shift in the nature of a principle. For example, traditionally in the British system the so-to-speak 'magic' word was 'natural justice'. This term is also found in the COCP. Essentially, this referred to the right of every individual to be treated with fairness by the public administration. There was a tendency to become closer to the people in the ways the Courts expressed themselves. We find this shift in the jargon tending to replace references to natural justice with references to fairness. So, there was this gradual shift from 'natural shift' to 'fairness' which coincided with the relaxation of the previous rigidities of the doctrine. In truth, we are referring to the same concepts.

English Law: The GCHQ 'trilogy'
- Lord Diplock in the GCHQ case divided the grounds of judicial review, reflecting the basic principles of AL under three heads:
  1) Illegality;
  2) Irrationality;
  3) Procedural impropriety.
- He also saw a possible extension of these grounds to include 'proportionality'.

Under English law, the principles of judicial review are sometimes referred to in accordance with the GCHQ case (*R v. Minister for the Civil Service ex parte Council of Civil Service Unions (1985)*) concerning **the right to unionisation** and to **industrial action** at a national security facility. In this case, an issue arose whether national security would be endangered if employees at that facility were unionised. This is in the environment of 1985 which was a different political environment to the present one. With that being said, the extent of freedom of industrial relations, freedom which employees in discipline forces may enjoy, is still a relevant issue.

This case is important because in it, the judge, Lord Diplock, tried to define what are the basic principles in Administrative Law, that is, the law which controls the relations between the individual and the administration. He came out with 3 principles: 'illegality', 'irrationality' and 'procedural impropriety'. So, the administration will fall foul of the law if it acts in these ways. This is sometimes referred to as the GCHQ 'Trilogy'.

The judge also saw a possible extension of these grounds to include 'proportionality' and he also hinted at 'legitimate expectations.' This was quite avantgarde in 1985. The House of Lords had always resisted that the principle of proportionality was part of English law as they saw it as a continental principle which applied in the interpretations of the European Court of Human Rights. Then, the Human Rights Act was enacted in the UK in 1988.

Nowadays, it is no longer an issue that the principle of proportionality is also a part of administrative law. lord Diplock in the GCHQ case saw this possible extension even in 1985.

Illegality	Irrationality	Procedural impropriety
*'By **illegality** as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it.'* The decision maker must: 1) Understand correctly the law that regulates his decision-making. 2) Understand correctly that he is competent (legally authorised) to take that decision, 3) Understand correctly the procedure according to which that decision must be taken, and 4) Understand correctly the limits of the powers which have been granted to him. Otherwise, he would be venturing *ultra vires*; cioè, beyond what is authorised by law. The decision maker must also give effect to his powers; he must **apply the law**. If any of these are missing, then one falls foul of the ground of illegality. Again, we come to this notion of discretionary power: if there are 3 options available, and the decision maker chooses the fourth one, he is acting	**Irrationality** is sometimes referred to as 'Wednesbury Unreasonableness', a term his coming from a 1948 case, *Associated Provincial Picture Houses v. Wednesbury Corporation*. This is envisaged in a situation where there is *"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* It is when a person or a public authority takes a decision which genuinely no reasonable person faced with those facts could have come to it. Its basis is something which defies logic. The ground of irrationality raises the question of the extent to which a decision may be tested against substantive principles of Administrative Law such as proportionality, legal certainty and consistency. The ground of 'irrationality' raises the question of the extent to which **the merits of a decision** may be tested in English Courts against 'substantive' principles of Administrative Law such as proportionality, legal certainty and consistency.	One can say there is **procedural impropriety** when a public authority has not observed procedural standards to which public decision makers must adhere in given circumstances. A legitimate expectation can be either substantive or else, it could be a procedural one. These include – • The duty to give a fair hearing, • The rule against bias, • Obligation not to disappoint a legitimate expectation (not to suddenly change tack in a way that your surprise the individual). For example, there is a constant line of decisions granting a permit in certain circumstances, the circumstances have not changed but suddenly someone decides not to grant that permit in those circumstances thereby disappointing a legitimate expectation that in those circumstances the permit would have been granted. In this way, the decision is out of line with previous decision-making).

illegally because that option was not within the law.	Traditionally, proportionality was resisted in the British courts. They used to see it as giving political power to the judiciary where the judiciary should only stop at deciding whether the decision taken was one which a reasonable public authority would have arrived at. Nowadays, this went by the wayside.	

Under 'illegality' one can also classify the notions of:
1) 'Fettering' of discretion i.e., where a decision-maker commits himself beforehand as to how he will exercise his discretion or feels legally bound to decide in a particular way when he isn't,
2) Unlawful delegation (*delegatus non potest delegare*).

Fettering of discretion is when the decision maker commits himself beforehand as to how to exercise his discretion or feels legally bound to decide in a particular way when in fact he isn't. For example, if a company proposes to establish a factory in Malta but they want to impose a condition that a certain regulatory law will only be applied in a certain way to them. Therefore, they want a commitment beforehand from the government that it will interpret the law only in a certain way. This cannot be done. This would be illegal because it falls foul of the principle of fettering of discretion – public authorities must be free to exercise their discretion within the law.

Another situation where you can have fettering of discretion is attributable to a mistake of the public authorities themselves. That is, when the public authority feels that it is legally bound to decide in a certain way, and therefore, that it has no discretion, but in truth it has discretion. If there is discretion and the public authority wrongly interprets the law to conclude that there is no discretion, the decision is illegal because the public authority which was called upon by law to apply its mind to a situation and to exercise discretion has failed to exercise its discretion, therefore, it has fettered its discretionary powers. This is another aspect of illegality.

Another aspect of illegality is **unlawful delegation**. The principle is that administrative decisions can be delegated **within the same entity**. Administrative functions are normally delegated within the same entity otherwise, the public administration would not be able to function. However, if you have an unlawful delegation, cioè, delegating without having the authorisation of law to delegate, then you get into a situation where the exercise of that discretion by the person who has not been lawfully delegated with that authority would also constitute an illegal decision.

The GCHQ Case
***Council of the Civil Service Unions v. Minister for the Civil Service* (1985)**

This was a 1985 decision, taken during the Thatcher administration, a time where there was a lot of industrial unrest in the UK.

The GCHQ had been established in 1947. It was an intelligence agency, but it was different from other intelligence agencies in the sense that **unions were permitted** at the GCHQ whilst in other intelligence agencies, unions had never been permitted. In fact, in March of 1981, there was an industrial action at this institution in which 25% of the staff had taken part.

In May of 1983, a GCHQ officer was convicted under the Official Secrets Act and when asked to refrain from strike action at the GCHQ, unions refused to do so. Probably, this conviction of an officer under the Official Secrets Act might have attracted the attention of other intelligence services from other countries who might have felt insecure dealing/exchanging certain information with the UK because of this particular situation of unionisation at an intelligence agency.

In December 1983, the Government varied the conditions of service of GCHQ officers **prohibiting them from being members of a trade union other than a house union**. So, they still had trade union rights, but they could not join a national union. Moreover, this change in conditions was done on the basis of a verbal instruction by the Prime Minister and the Government argued that there was actually no obligation to put such an instruction in writing.

By means of this verbal instruction, employment at the GCHQ was **put outside the jurisdiction of Employment Tribunals** and as compensation for this (since they lost some rights apart from the right to be a member of a national tribunal), staff were offered an *ex-gratia* payment of £1000 less tax. An overwhelming majority of the employees (98.5%) accepted this offer but 1.5% of the employees resisted it and sought judicial review.

Grounds of Judicial Review
Judicial review was sought on a number of grounds:

1) Illegality – There was illegality because it was claimed that the Government had **no power to vary conditions of employment** and also that there was **a breach of contractual rights of the employees**.

2) Irrationality – It was claimed that the action of the Government was irrational since it went against the International Labour Organisation Convention to limit industrial rights of the employees in this way.

3) Procedural impropriety – **No consultation had taken place before the change in conditions was implemented**.

Government's Defence

Illegality & Irrationality
The Government's defence was that it had a right to change the conditions of these public service employees on the basis of a creature of the British common law, 'The Royal Prerogative.'

'The Royal Prerogative' was defined by Dicey as *"the residue of discretionary power vesting in the Sovereign."* Because Government has a general authority to administer the State, according to this notion, **it did not necessarily depend on the existence of a written law for it to be able to take action in the public interest**. Even in British legal writings there is contestation as to how much the Government, having no legal basis for an action, can rely only on the Royal Prerogative. With that being said, it does crop up in certain situations.

However, this Royal Prerogative argument was obscure and had already been defeated in a case 20 years before, the 1964 case of *ex parte Lain*, where it was argued that **Government had to act according to law,** rendering this prerogative defence not of much use to Government in this case. So, on the face of it, this Royal Prerogative argument on the GCHQ case seemed to be *"doomed by the modern law of Judicial Review."*

Interestingly, this is a similar situation to what we had in the *Lowell v. Caruana* case where it was out of date in the late 1960s to plead *iure imperii*. From this case on, the theory of Government being able to act arbitrarily because of this *iure imperii* function was laid to rest.

Procedural Impropriety
On the point of 'procedural impropriety' and the need for consultation, Government argued that there was no legal obligation to consult and that previous events had shown that this would have been futile. This is the case which is sometimes raised when an act of the administration is an act on procedural grounds. That, had I gone through this procedure, this would not have served any purpose because the position of both parties was so wide apart that the procedure would have become a mere formality which could render no result.

This so-called 'Futility' argument was found unattractive in the First Court since experience had shown that no matter how entrenched a position might be, consultation could always produce a result. In the course of negotiations, a result could be achieved. So, this argument that consultation was completely futile was not seen as a valid defence.

Again, the argument that there was no legal obligation to consult was also rejected by the First Court and the Prime Minister's instruction was quashed only on this ground. It was found that there was a legal obligation to consult and that therefore the decision was invalid, and the Court therefore did not venture into the other grounds of challenge of the decision. This is a principle that a Court does not say than is necessary to decide a case, if it has found a ground which gives rise to the nullity of a decision, then the examination of the case must stop there. It is useless going into other grounds when you have found that that decision cannot stand.

Court of Appeal Decision
The case went to appeal in August of 1984 and the Court of Appeal reversed the judgement of the First Court, deciding unanimously in favour of Government **both on the Royal Prerogative argument and on all the other arguments**. The Government was unanimously successful in this case. Of course, one must ask what led to this reversal.

On appeal, the Government came up with a new argument on this 'Futility' question that it was futile to carry out a consultation process. On the futility of consultation, it was now argued that **consultation would lead to precisely the type of disruption which it was intended to prevent since national security matters would have to be revealed in the consultation process**. So, the Government argued that it is trying to protect national security issues and that if it engages in a consultation process, during that consultation process it will need to justify why it is taking those measures for the protection of national security and to that it would need to reveal its national security concerns. Therefore, this process would defeat the whole purpose of the measure restricting union and industrial rights.

The judges accepted that ***"a reasonable Minister could reasonably consider that such disruption could constitute a threat to national security."*** In other words, it is not unreasonable for a Minister faced with this situation to take this decision not to consult. So, it was not a decision which was irrational; it was not a decision which no reasonable person faced with those facts would take. A reasonable Minister could reasonably consider that such disruption could constitute a threat to national security, so it was within what the Court saw as being permissible within the limits of what a reasonable person could do.

The sequel to that was that full union rights were only restored at GCHQ in 1997. For quite a long time this decision that employees at this particular institution could be members of a house union but not of a national union stood.

This case raised this issue of **'The Royal Prerogative'** which is when there is no written legal basis for the exercise of a particular power, but the Government argues that doing what it did was part of its residual power; that it was implicit in its powers as a sovereign.

Lord Diplock in this case saw no reason why power, the source of which is 'The Royal Prerogative', should be immune from judicial review. He said it could be you have residual power of the sovereign, but it does not mean that if your source of power is 'The Royal Prerogative', that action should not be subject to judicial review in any case like any other decision of Government. The argument that if the Government is acting *iure imperii*, then it was not subject to the Courts was not seen with favour by Lord Diplock. However, this Royal Prerogative issue and whether the Government enjoys residual powers beyond what results from written law crops up from time to time because it is sometimes argued that certain actions are not amenable to the judicial process. That is, certain acts of the Government are non-justiciable, meaning that the Courts cannot intervene in certain types of acts of Government.

Camp X-Ray Case
The GCHQ was cited in a 2002 case. 'The Royal Prerogative' was cited in an application made by a British detainee at what was then known as 'Camp X-ray' claiming that the British Government had failed to put pressure on the US' Government to improve conditions at this place of detention. **The Court rejected the application on the ground that such matters are not amenable to judicial review**. In other words, that you cannot take the Government to Court because, perhaps by matter of political decision, it decided not to put pressure on another government in a particular matter.

In fact, most examples of these non-justiciable administrative acts are normally found in matters concerning foreign affairs and defence. There are certain areas in actions of government that by their very nature do not lend themselves to judicial review. Whether a government, for example, breaks diplomatic relations with another country. These types of decisions are very difficult to include in the powers of judicial review. Here, perhaps is where this famous royal prerogative may come into play.

Maltese Law
One must remember that 'The Royal Prerogative' is a creature of the British common law, and it is also controversial in British legal writings. In general, it is recognised that it exists, but its extent is very much debated and whether it is really a source of particular powers of government.

So, really the equivalent of 'The Royal Prerogative' cannot be assumed to exist today in Maltese Administrative Law but, of course, the question remains open with regard to non-justiciable administrative acts. There may be acts of the administration or areas of Government which do not lend themselves in process to judicial review mainly because they are political in nature and not mere ordinary administrative acts.

General Principles

Administrative Law is seen as being based on 'Substantive' and 'Procedural' principles and these do not only include the grounds of judicial review, but they are wider principles intended to regulate the manner in which the administration abides by the rule of law in conducting its ordinary business. In other words, the principles would form the basis of judicial review challenges, but they are not intended only as grounds for judicial review, they are intended as principles for good administration. In fact, in the Maltese Administrative Justice Act, there is a part titled 'Principles of Good Administration.' Of course, their intention is to have good administration and not to establish grounds of judicial review as such, but the two are of course related.

The 'Substantive' principles of judicial review deal with the quality of a decision and these are **lawfulness** (the legal basis of a decision – sometimes lawfulness does not necessarily mean a basis in written law but still there must be a legal basis in the wider sense), **equality before the law** (decisions respect everybody's equality before the law), **conformity with the purpose of the law** (Duncan v. Prime Minister 1981, better known as the Blue Sisters Case), **proportionality** (sometimes also considered as a general principle of law), **objectivity and impartiality** (the duty of the administration to act in an objective matter, not to be bias in its decisions. The breach of which can bring about the ground of judicial review of abuse of power under article 469A of the COCP), **protection of vested rights** (that an administrative decision does not take away a right which one has already acquired. This differs from legitimate expectations – it means that somebody already has acquired a right and an administrative decision, usually because it is made retroactive, takes away that right), the **principle of openness** (the administration must act in an open manner and must not consider the citizen as some sort of adversary).

On the other hand, the 'Procedural' principles sometimes also come close to the substantive principles, and these two sets of principles can also be seen complementing each other. The administration must be **accessible** (access to public services), it must respect **the right to be heard** (if a person has an interest in a public decision the administration must afford him a right to be heard. It is not obliged to agree with what he says, but it must genuinely consider what that person affected by that decision wishes to say), **representation** (not everybody can put forward his case before the administration himself. A case might involve technical knowledge which the person concerned might not have, and also, putting forward a case sometimes is not within the ordinary skills of an applicant so it is considered that a person has a right also to be represented by someone else in outing forward his case to a public authority), very much related to the right to a fair trial is **the duty to act within a reasonable time** (decisions cannot be allowed to be taken by default. There is a duty not only to act but also to act within a reasonable time – this is a corollary of the right to justice within a reasonable time), **the duty to give reasons for decisions** (sometimes it is considered to be a principle of natural justice – if no reasons are given to you, you might find yourself at a loss how to attack that decision because you do not know for what reason that decision was taken. so, the individual has a right, not only to the decision within reasonable time, but also to be given the reasons why the decision was taken).

Substantive principles:

1. **Lawfulness:**

- The principle requires that administrative authorities should not break the law and that their decisions should have a basis in law;
- Compliance should also be enforceable;
- The law should be sufficiently clear.

The principle of lawfulness requires that first of all, administrative authorities should not break the law, whereby discretion always has to be exercised within the options given within the law itself. Secondly, the decisions which administrative authorities take must have a basis in law. This basis in law need not necessarily be a basis in written law but normally that is what it means. Lawfulness also requires that compliance with the law by public authorities should also be enforceable. Also, lawfulness implies legal certainty. That is, that the law should be sufficiently clear so that an individual knows more or less where he stands with the law, cioè, what it requires of him. Of course, not every situation lends itself to a clear solution or a clear definition which is why we have lawyers giving legal advice, cases in court as well as situations where a Court of appeal overturns a judgement of a lower Court. Disagreement as to the interpretation of the law is not the same thing as having laws which in themselves are not clear. Having laws that are not clear is the key for the exercise of arbitrary power.

2. **Equality before the law:**

- Where cases are objectively the same, their treatment must also be the same;
- Foreseeability of reaction of the administration;
- Principle cannot be invoked to justify an illegal practice;
- Change in policy does not in itself infringe this principle.

This principle implies that where cases are objectively the same their treatment must also be the same. This refers to consistency and certainty of the law. There must be foreseeability of the reaction of the administration. A person has a right to know where he or she stands with regards to the law and to the administration. One interesting point is that this principle cannot be invoked in order to justify an illegal practice. So, for example, you park your car in a place where it is not permissible to park, and consequently you get a ticket yet other people who parked their car in similar places did not get a ticket. In such a case, you cannot claim that the principle of equality before the law means that if others didn't get a parking ticket, you shouldn't either because the principle of equality before the law cannot be invoked to justify something illegal. Such a situation, however, can raise an issue of discrimination.

See *Vassallo et v. Commissioner of Police*. A law had just been passed prohibiting the sticking of political posters to public walls. A group of people were taken to Court after they were caught sticking posters to public walls. They claimed that they had been taken to Court because they sympathised the party in opposition whilst other people indulging in the same activity, campaigning for the party in government were never taken to Court. In the Criminal proceedings they raised this issue. The police defended themselves against this claim saying that they took to court whoever was caught and didn't catch any other people which is why

they were the only people in court. The matter went to the Constitutional Court on this issue as to whether these Criminal proceedings were discriminatory and the Constitutional Court accepted the argument of the Government to the effect that there was no proof that others were caught and not taken to Court but it then also said that although the principle of non-discrimination cannot be cited to justify an illegal practice, if a person, even in a decision whether to prosecute or not, is treated in a discriminatory way he can still go to Court claiming discriminatory treatment. In this case, the court in examining the facts decided that there was no discriminatory treatment as such because there was no proof that other persons with different political views had been caught conducting this activity.

Moving on, the question of change of policy comes into this principle. Change of policy alone does not infringe the principle of equality before the law.

3. **Conformity with the purpose of the law**:

- Administrative powers may be exercised only for the purpose for which they have been given;
- Such an act would be classified as '*ultra vires'* under the British system and as 'detournement de pouvoir' under the French system;
- *Sister Luigi Dunkin v. Prime Minister*.

This is a principle on the basis of which quite a few important judgements were decided even in the Maltese courts, such as the infamous case of *Prime Minister v. Sister Luigi Dunkin (1980)* known as the 'Blue Sisters' case as well as *Frank Pace v. Commissioner of Police et* (1994) which was a case which went to the Court of Appeal and back about 3 times on different issues. Ultimately, the point on which the plaintiff was found to be correct was this question of conformity with the purpose of the law.

So, put simply, this principle means that **administrative powers may be exercised only for the purpose for which they have been given**. So, if the law gives a power to a public official, it is not giving him a *card blanche*, that is, a general authority to use that power as he deems fit, even if he is in good faith. Good faith or not good faith has nothing to do with it. When a public authority is given powers, it is given powers for a **certain purpose** and it must, in the exercise of those powers, stays within those purposes.

For example, if the Planning Authority is given powers on planning matters, it cannot use those powers for police matters unless it is authorised by law to do so. The fundamental principle here is that if a public authority is given a power, then that power should be exercised for the purpose for which it was given. The use of power for purposes different to that for which it was given is something quite common to all systems of Administrative Law as a ground for judicial review, that is, annulment for the administrative act. In the British system this would be called an act *ultra vires*. In fact, even in our article 469A this is the jargon which is used. In the continental system, this same concept of using power for a purpose different to that for which it was given is referred in French as '*detournement de pouvoir*.' That is diverting a power which was given for a particular purpose, for a different purpose.

In *Prime Minister v. Sister Luigi Dunkin* (1980), the situation was that the Government had a policy of increasing the national health service, that is, a policy of nationalisation of the health service. The nuns, known as the blue sisters, who used to run the Zammit Clapp hospital needed a license to run this hospital. The Government had an option that if it wanted to nationalise the hospital, it could pass a law expropriating the hospital and subsequently, pay compensation. There is nothing illegal of nationalisation as such as long as compensation is paid.

However, the Ministry of Health decided to take a shortcut and rather than go for nationalisation through a law, it introduced a condition in the license of this private hospital that **50% of the beds in the hospital were to be made available to Government patients**, that is, national health service patients, subject to determination of the compensation which would be due for this. So, instead of passing a law to enforce this, to expropriate the hospital, the Government chose to change a condition in the license with the reasoning that these people need a license to operate, the medical officer had the power to impose in that license any condition which he deemed fit and so, on the face of it, one might conclude that the Government had a right to change a condition of the hospital license and impose this condition.

The nuns, however, challenged this change in the condition saying that the power given to the minister to impose conditions in the license of a private hospitals/clinics were given to the Chief Government Medical Officer for the purpose of ensuring certain standards of care in that hospital/clinic and that it was beyond the purpose for which that power to impose conditions was given to impose a condition which effectively partially nationalised the hospital. The Court agreed with this argument, even though at that time we did not have a law which regulated the limits of judicial review (these were largely established through various case law). The Court there adopted this principle of conformity with the purpose of the law. It stated that '*any condition may deem fit*' does not mean that they are entitled to act in a way not in conformity with the purpose for which that power was given.

Government abided by what the law said but this general overriding principle of Administrative Law, that power has to be used in conformity with the purpose for which it was given, was overlooked and, in fact, Government ended up losing the case. Therefore, nationalisation could not be introduced through the change of a condition in the license.

In *Frank Pace v. Commissioner of Police & Chairman of the Planning Area Permits Board,* the police were often receiving complaints that the operators of publics service garages were using these garages to carry out repairs to their vehicles which involved nuisance to neighbours (trades which are sometimes referred to as offensive trades which cause a problem with the environment where they are exercised). There were discussions about this between the police and an organisation representing the owners of public service garages and it was agreed that as a condition for the renewal of licenses of public service garages, the owners of the public service garages were to put up a bank guarantee in favour of the Commissioner of Police which would be payable on demand and which the police would be able to withdraw if they are satisfied that the license for the public service garage was being abused. There was this agreement between the Malta Rent-A-Car Association and the police.

Frank Pace, who owned a very small garage, saw this condition of putting up an irrevocable bank guarantee, payable on demand to the Commissioner of Police in order to renew his license as oppressive. Consequently, he challenged this situation claiming that irrespective of the agreements which the Commissioner of Police may have entered into with the Malta Rent-A-Car Association, he had a right not to be subjected to illegal conditions.

Mr Pace lost the case in the First Court. First, there was a report of a judicial referee which held that this condition was not such an onerous condition to meet and therefore under his management powers, the Commissioner of Police was not going beyond the purposes of the law when imposing this requirement of issuing a bank guarantee. Frank Pace asked for additional referees. This is done to evaluate the contested report of the first expert appointed by the Court. These additional referees also agreed with the Government that this condition was not *ultra vires*. The First Court decided accordingly.

Mr Pace appealed its judgement, and he was successful in the Court of Appeal because the Court of Appeal decided on the lines of the Blue Sisters judgement to the effect that the power given to the Commissioner of Police to impose conditions in the licenses of public service garages could not be used in order to bypass, this time, the provisions of the Criminal Law. It said that if you are spray painting or panel beating without a licence that is a Criminal offence. What has to be done in these circumstances is that the person has to be taken to Court and if the Court finds him guilty, then it would impose a punishment. That is the way to go in Criminal matters, that **only a Court can decide upon a breach of the law**. The Court found that the imposition of a condition in a license intended to take a shortcut with the law, intended to solve these issues in a manner were the police could simply punish the person by recalling the bank guarantee but then the person would not go to Court, a sort of out of Court settlement of a Criminal case without a proper legal basis (because there are laws which provide for out of court settlement for minor criminal cases) was *ultra vires*.

The Court held that it is *ultra vires* to impose a condition intended to introduce such an out of Court settlement system and also, at the total discretion of the Commissioner of Police, rather than go through the Courts. It's true that the Commissioner had the power to impose any condition which he deemed fit, but the Court held that this was to regulate the business and not to impose a scheme whereby a person would be punished without being taken to Court.

It is an important substantive principle in Administrative Law because it is linked to the notion of abuse of power which is a very crucial ground of judicial review also found in article 469A of the COCP. Remember that good faith alone does not save the day when it comes to the issue of this principle.

4. **Proportionality**:

- Use of means commensurate to the aims pursued;
- Measures should strike a fair balance between the public and private interests involved;
- Principle applicable where there is no acceptable relationship between the means used and the purpose pursued;

Administrative authorities cannot exercise their discretion as they like but they must weigh the facts and the circumstances of each case and consider the harm which the particular decision will cause to the individual before deciding.

This principle is so important that sometimes it is raised to a general principle of law. Essentially, proportionality means that **the means used in order to achieve a particular aim must be proportionate, must be commensurate, to the aims which are pursued by that particular measure**. So, measures taken by a public authority should strike a fair **balance** between the **public and the private interests involved**. This issue of balance is always very central to public law questions and litigation. It is because of this that this principle is also so important, that you cannot decide things in a one-sided manner. There must be a consideration of this question of balance between public and private interests.

In general, one can say that this principle is mostly applied where there is **no acceptable relationship between the means used and the purpose pursued**. So, the Court will normally demand a **clear breach** of proportionality in order to come to the conclusion that a decision was null because it did not respect this principle.

The problem with the Court finding lack of proportionality in cases where it might not be so clear is that this would take the Court into the field of making administrative decisions. In fact, the principle of proportionality, which is a Continental principle, was resisted in the English Courts for a very long time because they saw it as a principle which gives political power to the judge who is there to interpret and apply the law and not to exercise political power. If this safeguard, this requirement, that an act should not be deemed to be disproportionate unless it is clearly disproportionate, is very debatable, probably the Courts would go on the side of caution and respect the administrative decision. However, if the case is one of clear disproportionality, where there is no acceptable relationship between the means used and the purposes ensued, the court will annul the decision of the public authority.

Proportionality is not a Common Law concept and was only received in English law via the European Convention on Human Rights and the same applies to Malta. But Malta adopted the Convention as part of Maltese domestic law about 13 years before the UK did. The UK passed the Human Rights Act in 1998 bringing it into force in 2000. If one incorporates this Convention into domestic law, one must necessarily embrace the principle of proportionality since it has always been a key principle in the interpretation of the Convention. The closest concept to proportionality in common law countries is that of ‘reasonableness’.

Proportionality is based on two main key factors:
1) A proper relationship between the ends pursued and the means used (the principle of **'ends and means'** and
2) A proper relationship between the cause and the effect (the principle of **'cause and effect'**).

In its origins, this principle asserted that out of the various means available to reach a particular aim, the administrative authorities must choose the most suitable means.

Suitability versus Harm to the Individual
The law itself allows the public authorities various options. According to the original interpretation of this principle, it meant that, in order to follow proportionality, out of the various means available to reach a particular end, the one to be chosen was the means which was most suitable to achieve that particular end. Nowadays, this question of suitability may raise an issue with regards to the protection of the individual because **the means which are most suitable to the administration are not necessarily the ones which cause the least injury to the individual**. So, the administration might find the most suitable means to open new roads to clear the way but doing this might not be taking into proper consideration the injury/damages which this may cause to the individual. So, they are not necessarily conducive to the lesser harm of the individual.

Later, this principle was developed to mean that the means chosen had to be those which were suitable but amongst the means which were suitable, those to be chosen were those which **caused the least harm to the individual**. This principle was developed to mean that **the means used must be proportionate to the end**.

So,
- The most suitable means are not necessarily the ones which cause the least injury to the individual,
- Later on, the idea that the means which caused least harm to the individual was introduced.
- The principle was developed to mean that the means used must be proportionate to the ends.

3 sub-principles:
a. **Suitability** – **in the enforcement of the law, the public authorities can employ only suitable means for the accomplishment of the purposes of the law**. If the means are unsuitable to achieve a particular end, they will fall foul of the principle of proportionality. The suitability of the means must be determined on the basis of objective criteria, an **objective standard**.

   Effects of suitability
   Asking someone to do something which he cannot do according to law, or an order which is impossible to implement is clearly unsuitable and also unproportionate. That is, **an administrative order which is legally or factually impossible to be carried out is unsuitable**. 'Suitability' also implies that **a person cannot be ordered to do something**

which he is not legally competent to do under the law. A public authority cannot give somebody an order which would imply breaching the law.

In the *Observer & Guardian v. UK* (ECHR) (spy catcher case), a former member of the Security Services published his memoirs in a book which breached the Official Secrets Act. This book was not published in the UK but in Australia and the Observer and Guardian newspaper started serialising parts of this book. The public authorities reacted to that by obtaining an injunction in the British Courts to stop the newspapers from publishing parts of this book. The Observer and Guardian newspapers challenged this injunction. They were unsuccessful in the UK but when the matter reached the ECHR, the principle of proportionality came into play. The ECHR asked **whether this could ever be an effective manner** if somebody in the UK wanted to obtain a copy of this book published in Australia. In other words, it asked the question, where there any practical means to stop him somehow acquiring this book?

The ECHR decided that it would be so complicated to try and stop copies of this book entering the country that in practice **this measure of stopping people from reading parts of this book in the newspaper could never achieve its aim**. Therefore, it was a futile injunction. The ECHR decided against the UK Government on this ground of suitability, that the measure was disproportionate because in practice it could never achieve its aim. This principle of suitability as an element of proportionality is very important and, in this case, it meant that even parts of a book which actually violated the law could not be stopped.

b. **Necessity** – very often, necessity means proportionate. This means that out of the several suitable means available for achieving the object of the law, only those should be pursued which, in the case of regulatory measures, **cause least inconvenience to the individual** and, in the case of beneficial measures, cause **minimal loss to the community**. So, if you are imposing a regulatory measure, that is, stopping people from doing what they want in a particular field of activity, for it to be necessary, it must be that measure which causes least inconvenience to the individual in the circumstances of achieving that aim. If on the other hand, it is not a regulatory measure but a beneficial measure, then still the public authority has a duty to cause minimum loss to the community.

In practice, there were cases saying that for example a local authority could not pay salaries to its employees which were clearly much above the going rate for salaries for persons who do that job. In this case, for political reasons, the local authority decided to raise the salaries of its employees to a level which was much higher than the normal market rate for that work. This was challenged and even the British Courts found that that decision was *ultra vires* because it did not take due account of the obligation of the public authority to cause minimum loss to the community in the spending of public funds even in the case of beneficial measures. **Even beneficial measures must find this balance**. If you are over generous, you might be causing undue loss to the community.

For this principle to apply, we must be in the field of **discretionary** power. That is to say, the law must allow for discretion. You must have a situation where the public authority has the authority to choose between various options available to it within the law.

c. **Balance** – **proportionality requires a proper balance between the injury caused to the individual and the gain to the community**.

If a road has to be 10m wide, and in order to build that road you need to expropriate private property, you do not instead of 10m expropriate 25m because the interest of the community is to have a proper road and it is not covered by public interest to over expropriate extra private property. So, this question of balance prohibits those measures the disadvantage of which to the individual outweigh the advantages to the community. The principle here is that **an individual must not be made to suffer an undue prejudice for the benefit of the community**. Of course, every individual has to suffer some prejudice because of the fact that he lives in the community but if there is a case where he has to suffer an extraordinary prejudice, you can do it subject to the obligation of paying compensation, but you cannot exaggerate, that is, you cannot go beyond what is necessary for the good of the community because then that would be placing a disproportionate burden on the individual.

Determining Proportionality
In determining cases of alleged breaches of proportionality, Courts normally give weight to the administrative measure, and they would, as a general rule, interfere only if there is a clear case of disproportionality.

Also, another situation where the Courts on an Administrative Law level would be unlikely to interfere is where **a law clearly requires a particular measure to be taken for a particular purpose** – save for human rights issues. So, where the public authority does not have discretionary power. That if such a measure has to be taken, if such an aim has to be achieved, the law provides that a certain measure has to be taken. So, it's a matter of the public authorities applying the law and not a matter of discretionary power. And as already stated, the principle of proportionality comes into play where there is discretion. Where there is no discretion on an Administrative Law level, then the Courts will not enter into whether the law itself is disproportionate or not. However if that law or that action taken under the law is challenged on a Constitutional level or on a fundamental human rights level, then yes the Courts in deciding the fundamental human rights case will also enter into the question of whether the law itself, which was applied by the public authorities, was proportionate or not, and therefore whether it struck a proper balance, this time in the human rights field, between the interests of the individuals and the public interest.

Practical meaning of Proportionality
The practical meaning of proportionality is that **administrative authorities cannot exercise their discretion as they deem best**, but before exercising their discretion, they must also weigh the facts and the circumstances of each case and must also consider the harm which the particular decision will cause to individuals before the public authorities decide. So, the principle of proportionality comes into play in the decision-making process itself. It is not a question of simply achieving your aim and therefore, this could involve riding off shot over

the interests of the individual, it means that public authorities are obliged by the principle of proportionality to consider both their own aims and also the prejudice which a particular measure which they may take causes to the individual. They are, therefore, obliged to act in a proportionate and balanced manner to achieve the aim. they are not stopped form achieving the aim but there are ways and ways of achieving the aim.

5. **Protection of vested rights (*dritt kweżit)***:
In general, **administrative acts must not be retroactive unless retroactivity is expressly authorised by law or unless retroactivity is to the individual's benefit**.

If somebody has already acquired a right, you cannot take an administrative decision giving it retroactive effect in order to diminish that right or in order to take away that right. With that being said, you can have some cases where an administrative act may be authorised by law to be retroactive although this does not rid the government of the problem of protection of vested rights in the context of protection of property rights. It is always quite problematic to legislate or to take a decision retroactively. So, if retroactivity of an administrative act is authorised by law, then the question asked should be whether this will create problems from the point of view of the Constitution. Cioè, whether or not it is going to create problems with regards to fairness and so on. In principle, if the law authorises a retroactive administrative act, then the first hurdle is passed.

In the Interpretation Act we have a provision about the retroactivity of subsidiary legislation and that provision says that subsidiary legislation may be retroactive, but it cannot be retroactive to a date which predates the Parent Act. So, again, this law sticks to this principle that retroactivity is only allowed if it is authorised by law. This always has to come with a health warning in the sense that if you are taking away rights by making a retractive provision, you are bound to face problems with the fundamental human rights provisions of the Constitution.

Another case where retroactivity is acceptable is when it is to the individual's benefit; where there is nobody who is going to complain about it. Conferring a benefit is also not a totally free activity because if you confer benefits disproportionality and you disproportionality burden the community in order to provide that benefit, then there can be an issue of *ultra vires* but strictly speaking if an act is retroactive and it confers a benefit then you can have a retroactive administrative act.

The concept of 'Acquired' or 'Vested' Rights

- A right of an 'individual nature' which already pertains to a particular reason.
- A tax moratorium, for example, is a concession by the State made for reasons of public utility and does not create an individual right. Its withdrawal before expiry can raise issues of good administration by no of 'vested rights'.
- Same reasoning applies to concessions made by the State e.g., Encroachment Permits on land. However, if there is arbitrariness the courts are likely to intervene.

For a right to be an acquired or a vested right, it must be a right of an individual nature which already pertains to a particular person. So, that particular individual claiming a breach of his vested right should be able to prove that he individually had acquired that right and

that the right is one of an individual nature pertaining to him. For example, if the Government grants a tax moratorium saying that it will not charge tax for a year, that is not a right of an individual nature but a concession by the State made for reasons of public utility. It does not create an individual right in every person who would be subject to tax that that concession will not be lifted before the one year is over because you do not have a right of an individual nature. Of course, if the State withdraws that concession before the one year, it could find itself in legal problems with regards to good administration, fairness, creating a legitimate expectation which has not fulfilled and so on, but it is not a question of taking away a vested right.

A vested right must be a right of an **individual nature pertaining to a particular person**. The same reasoning applies to certain cases where an individual enjoys a concession from the State, a benefit, on tolerance. For example, the encroachment permits on Government land. This type of concession is simply a permit allowing you to stay in a particular place. It does not create an individual right to stay on that land. Of course, this does not mean that simply because you have issued an encroachment permit where an individual is tolerated in occupying a piece of public land, then you can just dismiss that person summarily from that land. If he earns his livelihood from say a kiosk, issues may arise with regards to whether he has been heard, for example. So, it isn't a question of vested rights but can be a question of other things, such as whether the individual was treated fairly or not.

On this point, make reference to *Tanti Carmelo v. Kummissarju tal-Artijiet* (2010). Even if in an agreement there seems to be authorisation for power to be exercised at will, one must always be conscious of the fact that the principles of Administrative Law also govern these types of situations. If an individual can prove that he was not treated fairly, then the Government will have to face the music and provide for that.

Acquisition of a Right

If the existence of a right depends on the materialisation of certain facts those facts need to have materialised before one can say that there is an 'acquired right'. For example, if you are claiming an acquired right to ownership of a property, you cannot say that you intended to buy that property since that does not make you the owner. Unless you have a contract of acquisition of that property, then you have not acquired the right. So, **if the existence of a right depends on whether certain facts have happened or not, those facts must have happened for there to be the acquired right**.

Acquired Rights and Judgments

- A judgement is decided on the basis of the law and the facts at the time when it is delivered. It also concludes a dispute.
- A retroactive law passed after the judgement cannot change the judgement – even if an appeal is pending.
- Merely interpretative laws are considered to be capable of being retroactive – but even here one must establish whether what is labelled as an interpretation is actually a change in the law.

A judgement is decided on the basis of the law and of the facts at the time when that judgement is delivered. So, the law and the facts **at that particular point in time**. The

judgement in the whole legal and Constitutional set up is intended to put an end to a dispute. So, it is not conducive to property, public policy that disputes perpetuate themselves or that they arise again after they have already been decided by a Court.

So, this means that a retroactive law passed after the judgement, so if Parliament passes a law and gives it retroactive effect after the judgement, **cannot change the judgement** even if the judgement is still pending an appeal. This is because you cannot go back to Court and decide the case again on the basis of the new retroactive law. So, in the field of Court judgements, **once a judgement is delivered, it cannot be nullified by means of a retroactive law**.

One point which arises here is that interpretative laws, that is, laws which only interpret other laws, are considered to be capable of being retroactive. So, if a law is not actually changing a previous law but it is only interpreting a pervious law then there it is accepted that that interpretation can be given retroactive effect, however, one must establish whether that law is genuinely an interpretative law or whether it is a law which is actually changing the principal law.

We had this kind of issue with regard to a Venice Commission opinion on administrative sanctions which the Court considers to be of a criminal nature. What happened was that the Government presented a bill in parliament amending the Interpretation Act to define the circumstances when an administrative sanction can be or cannot be defined of being of a criminal nature. The Venice Commission was sceptical about this. It basically said that **if an interpretative law clearly changes the interpretation which the Courts have given to the law or to a particular article in the Constitution, then it is not merely an interpretative law but one which is amending the Constitution**.

The Venice Commission stated that had there been no interpretation by the Courts of article 39(1) of the Constitution and Government passed this law, then it could pass as a merely interpretative law which does not require the two-thirds majority vote in Parliament. But if the Court had already pronounced itself on the interpretation of that article, then in fact that interpretative law, the law amending the Interpretation Act, could be seen as a law amending the Constitution and the Venice Commission said that in such circumstances it would be preferable, form a rule of law point of view, that an amendment to the Constitution is made requiring the necessary qualified majority in Parliament. So, here the opinion of the Venice Commission seemed to imply that if the Court has interpreted the law in a certain way and it has not changed that interpretation, then there may be an issue of acquired right unless that right is taken away in the manner provided by the Constitution for constitutional amendments.

6. **Openness**:

This is the concept of open government, meaning that the **administration has an obligation to give access to information held by public authorities, subject to certain limitations which are justifiable in a democratic society**.

Normally, this role of granting access to information held by public authorities is performed through data protection law which gives the individual a limited right, a right to information

about what date is held about him by public or private authorities but it is not a general right under the **Data Protection Act**. It pertains to the individual to whom the information relates. The type of laws which normally provide for this access to information are **the Freedom of Information laws** which normally are structured in a way which grants a right of access to all Government information in the first place. So, the principle is that the Government is open not the other way round that it is closed and there are certain exceptions.

With that being said, Freedom of Information acts normally go on to establish a number of exceptions to the Governments duty to provide access to information held by public authorities. **The general principle is that all Government information is accessible but then there are quite a number of exceptions**. You can derogate from the principle if there is an objectively justifiable reason to do so. This function is normally fulfilled through freedom of information acts.

Procedural principles:

1. **The duty to respect access to public services**:

So, the concept again is a continuation of the concept of open government in the sense that the administration must not treat the individual as some sort of adversary. **The individual must have a right to make representations to administrative authorities and administrative authorities have a duty to consider those representations**. This can be made subject to reasonable limits, but the general rule is that you cannot be denied this right to make submissions to public authorities.

This principle also means that **the administration must be helpful**. It must not treat the individual as some sort of intruder who has to be kept at bay. One consequence of this is that if an individual makes a request to a public authority which is not competent to deal with that request, but there is another public authority who is competent, the first public authority should ideally refer that request to the competent public authority and must not simply say this has nothing to do with me. The administration has a duty to be helpful.

Also, a corollary of this principle of access to public services is that **administrative procedures should be accessible in the sense that they should not be costly**. They should not be subject to a cost obstacle. So, making the right to make submissions to an administrative authority subject to a fee may be acceptable only if that fee would be something within the reach of ordinary people. Ideally, administrative procedures should not be made subject to a fee. In fact, one of the advantages which is often quoted of administrative procedures over court procedures is this issue of low cost and also, informality and speed. Access to public services must not be hindered by the imposition of prohibitive fees which discourage an individual to make his case with a public authority.

2. **The right to be heard**:
Now, this means that **persons concerned with administrative acts must be given an opportunity to be heard before that administrative act is implemented**.

There are two scenarios: (1) You are yourself concerned, that is, it is your own action. For example, somebody is proposing to withdraw your permit or to impose a new condition in a permit, you are the person directly concerned, (2) There is also a situation of the third party. So, if your neighbour is going to build a structure which is a nuisance to you, you should at least be given the opportunity to make representations with the public authority as to whether it should be allowed. Your private rights and interests are affected by the decision which makes you a person concerned. **Where third parties are impacted, these must also be allowed to make submissions**.

Making a submission does not normally mean doing so more than once. One must be given the opportunity to make your case but once you do so, the administration will decide. However, there are certain circumstances where justice itself requires that an individual should be heard **more than once**. These circumstances particularly refer to situations where an original application was changed in the course of it being considered. So, for example, a person applied for a permit. He saw, in the course of consideration of the permit, that it might be difficult to obtain that permit, however, third parties were already given the right to be heard on their reaction on the issuing of that permit and so, the individual, seeing this resistance and considering that his chances are not very good in obtaining that permit, modifies his application. In such circumstances, those third parties must also be given an opportunity to make submissions for the second time. This an exception to the general rule.

There is also the case of **urgent cases**. Sometimes you cannot wait for this process of hearing everyone before you decide because an urgent decision has to be taken. In that case, it is acceptable if there is a genuine urgent case which calls for a decision with urgency without having time to respect the right of interested parties to be heard. It may be acceptable to proceed to a provisional decision without hearing the interested parties as long as, as soon as possible, that right to be heard is respected. So, the administration might decide to take a decision which intervenes to solve or avoid a bigger problem but, at the same time, that doesn't mean that if the interested parties have not been heard, it is dispensed from respecting the right to be heard. If necessary, if after respecting this right to consider that the original decision be modified, one must modify that decision taken in urgency.

3. **Representation:**
This is **the right to be represented in administrative procedures**. Not everyone can make his own case before the public authorities, and this is not just limited to persons who do not have the necessary background/education to present a case before public authorities. Sometimes, decisions requested from public authorities might be quite technical and a lay man might not be in a position to properly make his case with the public authority.

It is recognised that you do not only have a right to be heard by public authorities, but you also have a right to be represented in administrative procedures by someone who can make your case better than you. For example, engaging a lawyer. **However, this right does not**

necessarily mean that there is a right to legal representation. That is to say, it cannot be said that there is a general right to legal representation before administrative tribunals. The right to representation might also be satisfied by allowing representation but not legal representation.

In the 1970s, in Malta, there were two laws which prohibited legal representation in disciplinary cases before the Public Service Commission and in Industrial Tribunal cases. This law followed similar laws enacted in the UK and the justification put forward for this measure was that if you allow lawyers in procedures, then you are making these procedures which are of an administrative nature, Court-like and that the cases will not be decided on the basis merely of a sense of equity and justice but they may also end up being decided on procedural, legal points which lawyers are likely to raise. So, the move was that you can be represented but that person cannot be a lawyer. Eventually, in the late 80s, these laws were repealed on the basis of the argument that if you have a right to be represented, the best person to represent you is one who has been trained to represent clients. Therefore, a lawyer.

So, the argument which eventually prevailed was that not recognising a right to legal representation might mean that the individual is not given the opportunity to properly defend himself. The tendency of Maltese Case law has been a bit against having these limitations on legal representation. One must also make the point that the right to representation does not necessarily imply a right to legal representation. There may be objective reasons for excluding lawyers from taking on representation in particular situations. This needs to be properly justified.

4. **Acting within a reasonable time**:

An administrative authority must act within reasonable time. Reasonable time limits may also be imposed for the exercise of actions or the filing of complaints in respect of administrative acts. In the same way as there is a right to justice within a reasonable time, in the administrative law field there is also a right to get a reaction from the administration within a reasonable time. So, this means that the administration can also impose reasonable time limits on the right to make submissions to the administration.

Sometimes there are two types of mechanisms used in order to determine a case in a situation where the administration has not taken a decision. These two legal mechanisms which are sometimes used are (1) **the deemed approval** and (2) **the deemed refusal**. The former means that if you have filed an application with a public authority and the public authority hasn't given you an answer after a certain time, then it is deemed that the answer is yes. Normally, this is only used in minor cases. Then you can have the latter and we find this deemed refusal in article 469A of the COCP. What this means is that if you file a request with the public authority and it doesn't take a decision within 2 months, then you can assume that the answer is no and you can proceed to the next step be it an appeal, a procedure of reconsideration and so on. Normally, people prefer to wait in practice then to invoke this deemed refusal.

5. **Giving reasons for decisions:**

This is also considered as a principle of natural justice and as a substantive principle**. It is a fundamental requirement in a State governed by the Rule of Law** that individuals are treated fairly. One of the elements which is indicative of whether the administration has treated individuals fairly is this question of whether reasons were given for decisions.

The important thing about this principle is that giving reasons shows the basis upon which a decision was taken, that is to say, that **power was properly exercised**. So, it explains the decision in the sense that it provides the individual with information about the factual and the legal basis of the decision and the reasoning of the administration in arriving at that decision.

At times there were controversies as what constitutes giving reasons. For example, an individual being told their application was refused on grounds of policy and the public authority stopping there. Formally, there might be a reason given but in such a situation the individual is none the wiser as to what was the real reason why his application was refused. So, **even though formally there is a reason it is difficult to argue that in substance a reason was actually given due to its vagueness**.

This was dealt with by the Court of Appeal in the early 90s regarding a tax case, *Dr Alfred Sant nomine v. Kummissarju tat-Taxxi Interni* (1992). This question as to what constituted giving reasons for decisions, the extent to which the administration must explain itself in order to satisfy the requirement of giving reasons, arose in this case which concerned a company which was partially owned by another company which was partially owned by Government with regard to the duty of the Commissioner for Inland Revenue to give reasons when refusing a declaration of expenditure in tax returns.

In this case, the company had declared an amount of expenses with which the assessor at the Tax Department did not agree. So, he brought part of that amount declared as expenses to tax. The company objected and the question arose whether sufficient reasons had been given. The company, on appeal to the Board of Special Commissioners and, later on, to the Court of Appeal, argued that the way in which the Commissioner had justified his decision to bring these amounts declared as expenses to tax was not sufficient to satisfy the principle that reasons were to be given for decisions.

This Commissioner did not have a specific duty to give reasons under the Income Tax Act at that time. In fact, in the Court of Appeal the Government Tax Department raised two defences: (1) there was no real duty to explain oneself when refusing a tax declaration, and (2) the reasons given, that is that a certain amount of declared expenses were not accepted, were sufficient in any case. The Court of Appeal had rejected the first defence, saying that there was a duty of the Commissioner, when refusing a tax declaration, to give reasons but then went on to accept the second defence raised by Government. **The Court went on to say that what is necessary is that the individual must know why the decision was taken, and there is no duty to give detailed reasons**, or to explain these reasons, therefore. The question was, was there enough information given to the individual so that he would know why the decision was taken against him and so that he would know the basis of that decision which therefore lays the ground for the individual to be able to challenge that

decision either on a question of fact or law? This question of a decision lacking reasons in itself raises a point of law. **The Court stated that the duty to give reasons does not imply a duty to give detailed reasons**.

Another consequence of this duty to give reasons is that, **in general, an administrative act must be notified personally to the person concerned**. So, an administrative decision must be justified to the person concerned and in general if an administrative decision is an individual one, it must be notified personally to the individual. If it is a decision of a general nature affecting many people, on the other hand, it would be enough for public means of notification to be used, such as that in the government gazette.

ADMINISTRATIVE LAW ISSUES

Administrative sanctions (these have become subject to quite a lot of uncertainty); The **revocation of administrative acts** which has given rise to the most important cases in Maltese Administrative Law such as the *John Lowell et ne v. Dr Caruana Caruana ne* (1972) judgement which started from the revocation of a building permit which was already issued and is considered to have put to rest forever the notion of *iure imperii*.

1) **Administrative sanctions**

- Administrative acts which impose a penalty for the infringement of rules;
- Of a punitive nature;
- Must not be retroactive;
- Generally, must respect the guarantees offered by Criminal Law.

The extent to which administrative authorities are allowed to impose administrative penalties under Maltese law has found itself in a particular situation because of the wording of article 39(1) of the Constitution of Malta. In this way, this is not a European Convention on Human Rights problem but a Constitutional problem. There have been various efforts to try and resolve this problem but until now this problem is still with us.

Punitive nature

For a measure taken by the administration to be classifiable as one, it must be an administrative act of a punitive nature. So, **an administrative act which imposes a penalty on the individual/company for the infringement of rules**. This reminds us of Criminal Law because the purpose of Criminal Law is to impose punishments for the infringement of rules. Therefore, we have this parallel situation in the administrative field. What is important to distinguish an administrative sanction from any other ordinary administrative act is the punitive nature of that act. The **purpose is punishment** for not following the rules.

It is important to mention from the outset that an administrative sanction should not be confused with administrative measures which cause inconvenience, or which cause hardship to the individual. For example, if a person's driving license is not renewed because of his state of health, and therefore he is considered to be a bit of a danger on the road, that decision may cause a lot of hardship to that individual but the fact of hardship alone does not make the measure an administrative sanction because the intention of the public authority, in withdrawing the license, was not to punish that person but the intention was

to protect public safety. So, it is not an administrative sanction because there is no punitive purpose/intent.

Decriminalisation: A General Trend
Administrative sanctions result from a rather general trend towards decriminalisation of minor criminal offences. If one goes back 40/50 years, one will find very few administrative sanctions. Along the years, however, the Courts everywhere have increasingly struggled to cope with the workload of criminal cases. Therefore, decriminalisation avoids the Courts being overburdened with cases which are considered to be criminal when in fact, they could easily be dealt with administratively since these are minor criminal offences. In this way, administrative sanctions developed, gaining also the name 'administrative criminal law' out of necessity not to overburden the criminal justice system with many minor criminal offences. This process of depenalisation is something which is always ongoing. If you can avoid taking a case to a criminal trial because the offence is more administrative in nature, then do so.

Basic Guarantees of Criminal Law
This means that the basic principles of Criminal Law must also be applied in the imposition of administrative sanctions because whether you are imposing a criminal sanction or an administrative sanction, this situation still implies that the individual must be treated fairly. **Treating the individual fairly is not only a principle of fair trial in the Criminal Law field but it is also a principle in the administrative law field**. Therefore, generally the process leading to the imposition of administrative sanctions must respect the guarantees which are offered by the criminal law. Perhaps, not the full guarantees of a criminal trial for a serious criminal offence but the basics of criminal law must be respected, for example, the imposition of administrative sanctions **cannot be retroactive**.

When we speak of the basic guarantees of Criminal Law, these are things like **the presumption of innocence**, ***nullum crimen sine lege*** (this principle of Criminal Law reflects the principle of 'lawfulness' in Administrative Law), **the right to make one's defence and cross-examine witnesses for the prosecution** (the rights to challenge the case which is being brought against you - If we go on the Administrative Law level there is this right to be heard. They all mean that an individual must be treated fairly also from the procedural aspect. His right to make submissions to the administration, his right to be heard must be respected) and **the most favourable punishment rule** (when the law changes and the punishment applicable to a particular infringement change, then the most favourable punishment to the accused must be applied). This is an area where the principles of Administrative Law blend into the basic principles and guarantees of the Criminal Law in order to enable admin sanctions to be imposed.

Minor cases
In minor cases, it is acceptable that **simplified procedures** may be adopted. For example, the system adopted with regards to parking tickets under the Commissioner for Administration Justice Act where if you do not contest, you are deemed to have admitted the offence. This seems to be a derogation from the principle of fair trial, but it is acceptable because of the minor nature of the offence and the need to use simplified procedures in the cases of these minor offences. However, simplified the procedure is, the basic rule that the

individual rule must be treated fairly still must be fulfilled. So, these must still respect the requirement of fairness. In view of the minor nature of the offence these become acceptable.

Administrative Sanctions – The Constitution of Malta

There is a problem in Maltese law with administrative sanctions, particularly with hefty administrative fines and not with minor administrative fines. When an administrative fine reaches a certain level in such a way that it imposes a serious hardship on an individual, then the Court may consider that even though the law classifies that sanction as an administrative sanction, the sanction is in fact a sanction of a criminal nature and therefore, it is not just the basic principles of Criminal Law which have to be respected in the imposition of that sanction but the whole defences, the whole set of guarantees of Criminal Law which have to be respected.

This raises a particular problem for regulatory authorities which have the power to impose sanctions in particular sectors. For example, the Malta Communications Authority which regulates the Communications Sector. There are a number of authorities which as a toll of regulation are given this power to impose administrative sanction. If the power given to these authorities is merely to impose the parking ticket type of sanction, the regulation of those administrative authorities would not be effective. It is useless in these sectors to impose minor fines. If there is, say a cartel, and producers have raised the prices of that product and are making much more money that they should on the back of the consumer, the amounts involved would be large and so a sanction is not effective unless it is a hefty one.

The Maltese Constitutional Court, however, has found difficulty with these hefty administrative fines. In two cases, the Constitutional Court decided that hefty administrative fines which place a very significant burden on the person who is subject to them are in fact of a criminal nature and that therefore, all the guarantees of Criminal Law must be in place. All the guarantees of Criminal Law in the Maltese Constitutional set-up include **article 39(1) of the Constitution** which states that when a person is charged with a criminal offence, it is only a Court that can find him guilty and not an administrative tribunal.

Therefore, because of these two decisions *Federation of Estate Agents v. Director General Competition* and *Rosette Thake nominee v. Chief Electoral Commissioner*, this whole power of regulatory authorities in Malta to impose hefty administrative fines has been thrown into uncertainty. There were several attempts to try and resolve this matter, one of which was to change the Interpretation Act which even sought the opinion of the Venice Commission.

Since these two cases have been decided, a number of laws concerning regulatory authorities were amended. The Consumers Affairs and Competition Law was amended in order to make the sanctions being imposed by the Court itself. Again, this leads to delay problems. Other laws were amended in order to grant a full appeal to the Court when a public authority imposes an admin sanction and to provide that the sanction will not be imposed unless it is confirmed by the Court.

2) **Revocation of Administrative Acts**

- Where public interest in revocation outweighs private interest, revocation with a negative effect on private rights may become necessary and may be permissible in certain cases, for example:
  - If initial act unlawful or issued fraudulently;
  - Where the public interest necessitates a change of policy;
  - Change in circumstances.

Another area which often gives rise to quite a lot of litigation in Administrative Law is the revocation of administrative acts, that is when a person is first, for example, given a permit, then there is a **public outcry**, the public authority sees that it shouldn't have issued that permit and it rushes to revoke that permit or perhaps even if it does not rush, it finds ways and means of getting out of the sticky situation in which it would have found itself. This is not the only situation where a public authority may need to revoke a permit. For example, a public authority may have issued a permit on the basis of **misleading information**, and it later discovers that the individual misled the authority and so it proceeds to revoke the permit for that reason.

Also, another situation where revocation might be necessary is **when circumstances change**, that is, for example, a person might have been authorised to operate a farm in an area which was agricultural but eventually, that area does not remain agricultural since buildings are erected and so the continuation of that activity would not be compatible with the nature of the area at that particular time, so it might be necessary for the public authority to revoke such a permit.

Evidently, there are various circumstances which give rise to withdrawal of administrative acts. Of course, they are not circumstances where the individual is going to be pleased because you are taking something back. This is why this area of the law actually gives rise to litigation about which people feel quite strongly.

In fact, there are at least two prominent cases in Maltese administrative law which arose from the revocation of administrative acts:

1) *John Lowell et v. Dr Carmelo Caruana* ne (1972) and
2) *Mary Grech v. Minister responsible for the Development of Infrastructure et* (1993).

1) ***John Lowell et noe v. Dr Carmelo Caruana noe***

This case started in the late 60s where a permit for a building of a block of four flats was issued on the Imsida seafront. At that time, this gave rise to controversy in the sense that this rather modest block of flats was going to be as high as the building of the church and that, therefore, it would ruin the aesthetics of the place. The public authority wanted to get out of this polemic, and in order to do so, they withdrew the permit. When the PA had withdrawn the permit, the development company had already constructed the foundations of the building and had already built about 2 stories. The permit was withdrawn and reissued only for two stories. Of course, the construction company was not happy with this since he stood to lose money, and consequently, he sued the government for a declaration that **the withdrawal of the permit was illegal** and for **damages**. Subsequently, the government raised the defence of iure imperii which applied at that time. In essence, what

this principle means is that you cannot judicially review an act done by the State in exercise of its sovereign powers.

Interestingly, the iure imperii doctrine started being expressed in Maltese case law in the *Paolo Busuttil v. Clement La Primaudaye noe case* (1892) where it was stated by the First Court. At this time, there was still this idea that the individual had a limited right to challenge decisions of the government taken under the governments iure imperii powers. This case became famous because it laid to rest this doctrine of iure imperii. It does not mean that the State does not have iure imperii powers, but when it exercises its powers *iure imperii* it is still subject to judicial review as to how these powers were exercised.

The Court also went into the matter of whether a permit could be withdrawn since plaintiff raised the defence that this was illegal. The Court did not accept the argument of the Government saying that once the permit was issued this created certain rights for the individual and that those rights were not conditional. The Court said that had the permit been issued subject to a condition that it can be withdrawn, then the Government would have been acting within its rights in withdrawing that permit since the individual would have known about it. At that time, this type of condition did not used to be imposed. So, the Court said you have a contractual relationship, you gave a right to the individual by giving him that permit and therefore, you breached his rights when you unilaterally withdrew the permit.

The consequence of this reasoning was that from then on, practically every permit issued with regard to building started to include the condition that the permit can be withdrawn at the discretion of the public authority. Eventually, even this was tested. This condition which started to be imposed regularly eventually proved to have given a bit of a false sense of security because the fact that the public administration inserted this condition that it can withdraw whenever it feels appropriate was not enough to allow the public administration to act arbitrarily. Therefore, the issue that whatever the public administration does is still judicially reviewable still remained. The Court decided that the contractor was also subject to loss of earnings.

The irony of this case was that in the meantime, apartment blocks started becoming more common and it was no longer considered as something which should not be done. This original developer had sold the building knowing that times had changed and permits for more stories would be issued but retained his **litigious right** to sue Government on what happened before. Eventually, the person who acquired this airspace was allowed to build five apartments and not four and there was no difficulty by the early 90s. So, the Government ended up granting a permit for 5 apartments and paying for the loss of profits of the third and fourth apartment which it had not permitted in the late 1960s.

This is an important case because of its contribution to case law, particularly in the sense that it laid to rest this doctrine of iure imperii, and it arose from revocation of administrative acts.

2) ***Mary Grech v. Minister for the Development of Infrastructure***

This case started in 1988 and ended in the Court of Appeal in 1992. Again, this was a case where a person was continuously applying to build up a parapet in order to construct a room and the Planning Areas Permits Board had consistently refused. On one occasion they decided that there was no legal impediment to allow the building of this forecourt and the permit was issued. The forecourt started being built up, there were a lot of protests form the people living in the surroundings and, consequently, the Planning Areas Permits Board withdrew the permit. In the meantime, however, this building was almost ready, at least in shell form. The Court eventually decided that because the revocation was made without respecting the individual's right to be heard, then that revocation was null.

When this permit was issued, it was normal in building permits to have the condition that the public authority can withdraw the permit on its own discretion. So, the Planning Areas Permit Board thought that it had a good basis to rely on and it withdraw the permit. However, the Court held that before withdrawing the permit, the Board was obliged to respect the individual's right to be heard since it considered otherwise to be against the fundamental principles of justice. So, despite having relied on this condition which started being inserted after the *Lowell* judgement, the public administration found itself in a situation where its action was considered to be *ultra vires*.

There is, however, an interesting conclusion in this case in the sense that the claim by the plaintiff was that the action of the public administration be declared *ultra vires* and the public administration should be condemned to pay damages. After finding that the act of the Planning Areas Permits Board was *ultra vires*, the Court said it cannot grant damages automatically because the finding of *ultra vires* only means that the proper procedure was not followed. There is nothing to guarantee that had the proper procedure been followed, the conclusion that would have been reached by the public administration wouldn't have been the same.

So, the Court abstained from granting any damages or from entering into this issue of damages because it stated that the real procedure to follow was that the Court should send back the case to the Board which had to take a decision upon it after following the proper procedure. The condition that the public administration can withdraw a permit at pleasure is not as absolute as it appears, it does not exonerate the public administration from following the principles of natural justice in deciding whether to withdraw the permit and damages to don't necessarily ensue automatically in such cases. The Court saw that *ultra vires* did not necessarily lead to damages; it simply leads to reconsideration.

This was somewhat modified in the *Frank Pace v. Commissioner of Police and Chairman of Planning Authority Board* (2005) case where the Court of Appeal held that *ultra vires* does not necessarily give rise to damages but if one can prove that as a direct result of an *ultra-virus* act, one suffered damage, then the Court will grant the damages. Nowadays, this is the situation. **One has to prove the direct link between the act and damages**. This does not necessarily change the *Mary Grech* decision since it was in practice saying that the cause and link between the damages and the *ultra vires* act is not yet established since there was nothing to show that ha the person been heard the same conclusion would not have been

reached. In truth, the *Frank Pace* decision does not in substance change the reasoning in the *Mary Grech* decision.

Revocation of Administrative Acts

The situations where the revocation of an administrative act can be justified are where first of all, **the public interest in revocation must outweigh the private interest in maintaining the authorisation, the permit**. That is to say, where the public interest in revocation outweighs private interest, revocation with a negative effect on private rights may become necessary and may be permissible in certain cases, for example:

- If initial act unlawful or issued fraudulently;
- Where the public interest necessitates a change of policy;
- Change in circumstances.

So, one must prove that there is **a genuine public interest** to withdraw that permit, that is to say, it cannot be withdrawn arbitrarily. It could be, for example, that a certain decision will affect public health as seen in the past with asbestos. When it was established that this was harmful to health, any authorisation issued couldn't be maintained. Of course, there are other situations where the revocation of an administrative act may be called for. First of all, the situation where the initial administrative act was obtained **unlawfully** or was obtained **fraudulently**. For example, a person presents misleading plans of a building. The other example is the question of change of policy and of change in circumstances. So, there can be various situations and the defence of public interest may necessitate the revocation of an administrative act.

In certain circumstances, it does not mean that if there is a public interest in revocation which outweighs the private interest in maintaining the administrative act, that the Government may not still have to pay compensation. Cioè, Government may, however, still have to pay compensation in certain circumstances. The revocation of an administrative act is, after all, about the termination of a right. In fact, very often an outright termination is a last resort. Normally the public authorities try to find alternative solutions to outright termination such as relocation of an activity. It is more likely that if the holder of the permit has done nothing illegal, but circumstances have arisen where an administrative act from which he used to benefit had to be revoked, then in that case it is likely that the government will have to somehow compensate, either by way of **money** or **remedial action in kind**.

Withdrawal of Authorisations

Another question which arises in this context is that where an act initially was defective, so a permit was issued wrongly, but then a long-time elapse before the public authority takes any action about it. Even if the initial authorisation was defective, if a long-time elapses between the time when the authorisation was given and the time when it was revoked the argument in favour of the individual retaining the authorisation becomes stronger. The more time that passes, the stronger the case of the individual against revocation. The individual has an argument in the sense that there was acquiescence, for example, by the public authority. This is not to say that what was illegal initially is no longer illegal but the lack of action by the public authority will strengthen the argument in favour of the individual that the solution should not be to revoke the administrative act but rather to sanction it.

The public authorities have a duty to act within a reasonable time, so if they tolerated something, and therefore did not revoke the administrative act, for a long time the case of the individual is strengthened.

Ex Tunc or Ex Nunc

There are two ways of revocation, often referred to with the Latin words of **Ex Tunc** (an act is revoked 'from the outset') or **Ex Nunc** (an act is revoked 'from now on'). The former means that an act is revoked retroactively. That is, **as though it never existed**. For example, if an act is found to be fraudulent, the individual would find it difficult to argue that, for example, what he built on the basis of a fraudulently acquired permit should remain there. So, in that case, there would be a strong case to revoke Ex Tunc, cioè, as if that permit was never issued. The latter, on the other hand, would be the revocation Ex Nunc, so, from now on. It is **admitted that you had a permit but from now on, it is going to be revoked**. This means that whatever you did whilst the permit was in force is not illegal. The issue in the Mary Grech v. Minister case was that the permit was not revoked as though it never existed, but rather it was revoked from the time of revocation onwards. So, what was built during the time when the permit was enforced cannot be declared to be illegal. This, unless there is good reason to revoke retroactively such as a permit obtained on the basis of fraud.

So, whether an act is revoked Ex Tunc or Ex Nunc depends on:

- Whether the individual must have been aware of the illegality;
- The weight of the public interest at stake;
- Also, the weight of the public interest which is at stake.

THE INTERACTION BETWEEN ADMINISTRATIVE LAW AND INFORMATION LAW

When it comes to the interaction between Administrative Law and Information Law, the relevant topics here are **(1)** Data Protection, **(2)** The reflection of the principle of Administrative Law in Data Protection Law (the Data Protection Act & the Freedom of Information Act), **(3)** The right of access to information held by public authorities and (4) The Freedom of Information law. These four aspects of Information Law are also relevant to the field of Administrative Law, and they are also examples of how the principles of Administrative Law are applied.

Data Protection
As part of their ordinary tasks, therefore, in the course of their work, **public authorities obtain a huge amount of personal information about individuals**. Sometimes, this information is given to the public authorities by the individual himself who wants to avail himself of a public service. For example, if you need health assistance and go to the public health facilities, you will most likely be asked to give a lot of personal and sensitive information about yourself to the public authority. Indeed, every public authority which deals with the individuals collects personal information about that individual.

It is of utmost importance to stress the fact that public authorities are not free to do what they like with that information; they have **an obligation to respect the right to privacy** and therefore, there must be adequate safeguards about what can be done with that information. There are various principles of Data Protection Law which are in fact practically the same as the principles of Administrative Law.

One must keep in mind that Data Protection Law also places obligations on **private institutions**. So, it does not only apply to Government; it applies to anyone who processes personal information of others as part of their professional activity. The fact that this is not a law which only regulates public authorities, but also applies to the private sector is what distinguishes Data Protection from Freedom of Information which is about the right to access of information held by public authorities. In the case of the latter, this does not apply to the private sector, but only to the public sector. Data Protection applies to both.

Various International Instruments
The origins of Data Protection are often attributed to the student movement, the riots, of 1968 all over Europe. At the time, there was a claim for the State to respect the individual's right to privacy as a safeguard from the State assuming a totalitarian nature. Eventually it picked up and nowadays, there are a number of international legal instruments regulating Data Protection. One of the first is the **1981 Council of Europe Convention** on the Protection of Personal Data. It was followed in 1995 by an **EU directive on Data Protection (95/46/EC)** and, more recently, in 2018, **the EU GDPR Regulation** came into force. This is not a directive, but it is a regulation and therefore, it is applicable throughout the EU in the same manner in all States.

The Concepts of Data Protection Law

- **'Personal data'** refers to any information relating to an **identified** or **identifiable natural person**. The word 'natural person' is very important since Data Protection Law only applies to individuals and not to legal persons. So, it must be an identified or identifiable natural person. This also means that it must be a living individual. A person who passed away is no longer a natural person. So, it does not apply to deceased persons but there is perhaps a possible exception in situations where information about a deceased person can in fact reflect on a living person. This is since this is not only information about a deceased person, but it also reflects on living persons.

  On the one hand, there is the ordinary personal data: your name and surname, residential/e-mail address, telephone number, bank details, CCTV footage, health and other data and on the other hand, there are **special (more protected) categories of data** which are related to the grounds of protection against discrimination. The articles against discrimination normally include the grounds of discrimination (Racial/Ethnic; Religious/Philosophical; Trade Union Membership; Genetic Data; Biometric Data; Health Data; Sex Life/Sexual Orientation). Of course, there is a Protocol to the European Convention on Human Rights which outlines discrimination in general.

  The personal data (information) which throws light on those grounds is considered as a special category of personal data and it is **more protected under the Data Protection Act**. Before the GDPR, this type of information was referred to as 'sensitive personal data.' This are related to the grounds normally found in anti-discrimination provisions. This extra protection is also in itself a means of protecting the individual against discrimination.

- Another category of data which is not personal data is '**anonymous data',** which is when, for example, the name of an individual from a document is removed and so the information is anonymised. Anonymous data is NOT personal data.

- Then, however, there is another category of '**pseudonymous data'**, and this is data which appears to be anonymous, but which can, through the application of a formula, be related to a particular individual. This is considered as personal data because individuals can be identified say, by the application of a formula or key.

Terms in Data Protection Law

1. **'Data Controller'** – the natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purposes and means of the processing of personal data**; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.
   Here, the point must be made that if processing relates to an activity carried on in Europe, that processing is still governed by the general data protection regulation even if the processing is carried outside of Europe.

2. **'Data processor'** – a natural or legal person, public authority, agency or other body which **processes** personal data on behalf of the controller.

3. **'Data processing'** – any operation or set of operations which is performed on personal data or on sets of personal data whether or not by automated means. This includes collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction erasure or destruction.

   When we say that somebody is processing personal data, practically this covers anything which can be done with that data. It does not have to necessarily involve the use of computers.

GDPR – Changing Times since 1991-95
Why this evolution in Data Protection Law?
The GDPR came about as a result of increased Data Protection needs as a result of globalisation, more devices, Data Sharing, Blogging, Tweeting, Profiling, Cloud Storage, and Automated Decisions. Automated decisions are an important development. This is what gave rise to the development of the GDPR.

A Regulation-Applicable to All
Moreover, the GDPR is an EU Regulation (not a Directive), therefore, it is applicable directly and in the same manner in all Member States. EU based establishments are subject to the GDPR even if processing takes place outside the EU.

Proportionality
The principle of proportionality also comes in. Data Protection is not an absolute right but must be balanced with other rights and the tool for balancing rights is this principle. For example, one area where Data Protection has to be balanced out with other rights is the continuous need to find a balance between the right to privacy and the right to freedom of expression which includes the right to receive information. Neither of these rights can be absolute since they are both safeguarded; they complement each other and have to be defined in their application to particular situations, mainly through this principle.

Principles of Data Protection Law
The principles of data protection law are quite similar to the principles of Administrative Law –

- **Lawfulness, Fairness and Transparency** – that when you are processing data, you must process it lawfully, in a fair manner. There are many transparency obligations such as the duty to reveal to the individual what data you are holding about him;

- **Purpose Limitation** – any action must be in conformity with the purpose for which that particular power was granted toa Public Authority;

- **Data Minimization** – you do not keep more data than you need for the particular purpose for which you are storing that data;

- **Data Accuracy**;

- **Storage Limitations** – that you do not keep data for longer than it is actually required. Any organisation has to have rules as to when data which it holds is erased;

- **Integrity and Confidentiality –** of storage of personal data.

Purpose Limitation
Purpose limitation means that data shall be collected for **specified**, **explicit** and **legitimate** purposes and not further processed in a manner which is incompatible with those purposes. This reflects the principle of legality in Administrative Law and also, the principle of conformity with the purpose for which a power was granted.

Data Minimization
The data kept must be **adequate**, **relevant**, and **limited to what is necessary for the purpose**. Again, the principle of proportionality which is very often expressed in terms of necessity; if it's not necessary than it is not proportionate.

Accuracy, Storage Limitation and Integrity
Data which is held should be: accurate, kept up to date where necessary, kept no longer than is necessary, and there must be appropriate security safeguards against for example, hacking or leaks of personal data. That is a duty which a person who is processing that data owes to the people whose data he is keeping.

The GDPR also Defines the Grounds for Data Processing
- Necessary for the performance of a contract;
- Necessary for compliance with a legal obligation;
- To protect the vital interests of the data subject;
- Necessary for a task to be carried out in the public interest;
- For the legitimate interests of the controller (e.g., data is kept for the purpose of prevention of fraud).

Consent
This is very often a condition to keeping personal data and any consent which is given must be **unambiguous**, must be **freely given** and **informed** consent. So, the individual must know what he is consenting to. In the case where an individual is submitting to an automated decision-making process, then the individual must have given 'Explicit Consent.' Silence or failure to opt out cannot be interpreted as consent. The saying sometimes used also in a Civil Law context that silence may amount to consent cannot be used for the purposes of arguing that a person gave his consent for others to process his personal data. Consent must be easy to withdraw. There can be some situation where for example the individual must show reason for withdrawing consent but there cannot be undue obstacles for the individual to withdraw that consent.

Moreover, Consent is NOT a valid legal ground for processing where there is a **clear imbalance** between the data subject and the controller.

Rights of the Data Subject

- Information;
- Access;
- Rectification;
- Erasure;
- Withdrawal of consent;
- Right to know about profiting;
- Right to refuse automated decisions;
- Right to object.

One big problem is this profiling that practically one gives one's consent when wanting to access information on a particular website. That may lead to that data going somewhere else.

Freedom of Expression versus Right to Privacy

Data Protection Law seeks a balance between the Right to Freedom of Expression (Art. 10 ECHR) and the Right to Privacy (Art. 8 ECHR). In any modern society, various organisations need to collect a substantial amount of data but what is important there is **regulation** on what can be done with that personal data which is collected.

ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

From Crown Privilege to Public Interest Immunity

Data protection provides for the right of access to your own personal data but is mainly intended to protect the individual against abuse of information which the State and which private organisations collect about that individual in the course of the exercise of their functions. On the other hand, Freedom of Information is a right to access Government information, subject to certain conditions. There is also the issue regarding the right to ask for Government information in the course of Court proceedings, whether civil or criminal proceedings.

For this discussion, when we are speaking of the Right to Access to Information, we are speaking in the context of Court proceedings.

The Question of Access to Information held by Government in the Context of Proceedings in Court

The traditional notion was that all Government documents are confidential and that a Civil Servant could not be summoned to Court to give evidence on information which he/she obtained through Government documents or through his/her work. This type of situation can be generally referred to as Crown Privilege, that is, anything which has to do with Government is privileged meaning that the Courts cannot order the Government to exhibit a particular document to reveal certain information. This was, in Maltese statutory law, the situation until 1995 where you had two articles of the COCP, Article 590 and Article 637, which dealt with either when one requests documents from a Public Servant who is giving evidence in Court or when one asks a question to a Civil Servant giving evidence to Court.

In practice, these provisions weren't really enforced. In practice, for quite a long time, public authorities did not used to invoke this Crown Privilege except where it was really necessary for national security issues. However, if one goes back, one does find cases where, for example, a journalist was sued for alible because he alleged that there were ways of getting motor vehicles into Malta without paying customs duty. The journalist asked the public administration to produce its files regarding the importation of motor vehicles, this was opposed on the basis of Crown Privilege and the Court upheld it since the law was clear. Nowadays, this would raise serious issues of fair trial.

Eventually, it was in very few cases that the Government invoked this absolute privilege since it was not a good strategy in the Court room. Eventually this notion started to change to a notion of Public Interest Immunity. That is, Government documents were no longer considered to be immune from being exhibited in Court merely because of the fact that they are Government documents, but they would only be protected if they fall under specific categories of documents defined in the law. **Article 637** of the COCP contains a list of which documents are exempt documents. So, it is no longer presumed that all Government documents are protected, but many still are. This principle that everything is accessible subject to a number of exceptions is also reflected in the structure of the Freedom of Information Act.

Crown Privilege

The notion of Crown Privilege referred to a situation where –

1) All documents and information held by Government were considered to be confidential and could not be demanded by or in a Court; and
2) No question could be asked to a witness, the answer to which would entail that that witness would reveal information which derives from Government files.

This was the old British notion which persisted in our law, at least on paper, until 1995. By 1995, Government used to use this privilege very rarely because even the judiciary had become a bit allergic to it and it did not make much sense to invoke this privilege in a Court case unless this was absolutely necessary.

Public Interest Immunity

The 1995 amendments transitioned from this concept of Crown Privilege to the notion of Public Interest Immunity.

Public Interest Immunity refers to a situation where documents and information held by Government are **only protected if they fall within the category of being exempt documents**. So, the presumption was reversed whereby it became that all Government documents are accessible and that questions may be asked to witnesses with regard to information which they obtain from Government files, but if that document falls under one of the headings which define it as an exempt document, then it is protected.

The two sections of the COCP which are relevant to this matter are **article 590(2)** and **article 637(3)** about questions which may be put to witnesses about information resulting from Government documents.

Article 590(2)

> (2) No witness may be compelled to disclose any information derived from or relating to any document to which article 637(3) applies.

Article 637(3)

> (3) It shall not be lawful to demand the production of any document which is held by a public authority and -
>
> (*a*) which is an exempt document under articles 29, 30 or 36(1) or sub-articles (4) or (5) of article 32 of the Freedom of Information Act; or
>
> (*b*) the disclosure of which is prohibited by any other law.
>
> (4) Where a demand is made for the production in court of a document held by a public authority, and the public authority is of the view that sub-article (3)(*a*) applies to that document, the public authority shall reply to the demand as if that demand were a request for disclosure of the document under the Freedom of Information Act; and the provisions of Parts II and IV and of articles 39, 40 and 43 of the Freedom of Information Act shall apply accordingly.
>
> (5) Saving the provisions of article 518 of the Criminal Code it shall not be lawful to demand the production of any *procès-verbal*, record of inquiry, or other document relating to criminal matters, unless such *procès-verbal*, record of inquiry, or document be deposited in the registry.
>
> (6) In this article "public authority" shall have the meaning assigned to it by the Freedom of Information Act.

In Article 637 of the COCP, there is also one of the provisions qualifying an exempt document which states that i**f the Prime Minister issues a certificate saying that a document or even the existence of a document cannot be revealed, then that becomes final**. In this way, the Court has to abide by it. That is the Public Interest Immunity Certificate par excellence. The Government is given the discretion, irrespective of what the Court thinks, that a particular document should not be exhibited and even the existence thereof cannot be revealed. This can be challenged if it is not used without giving due consideration to the right of an individual to a fair trial. It will be challenged to its manner of application in a particular case.

Public Interest Immunity is a rule of evidence relating to the production of documents. However, it has a wider importance since there is a risk of abuse of power if information can be withheld from a Court other than on genuine grounds of public interest. In such a case, there are human rights implications as well as serious Administrative Law implications.

Balance of Competing Interests
Whereas under Crown Privilege the judge could not order the production of Government documents, now post 1995, **the task of the judge under Public Interest Immunity has become more complicated since the judge has to balance the competing interests in deciding whether to order the production of the document**. It will ask itself: there a genuine public interest? Does the claim to keep a document from the Court show itself to be well founded on genuine public interest grounds or not?

The big difference between these two systems is that, ultimately, it is the Court which has to decide. It is not the Government declaring that this information comes from Government files and the matter stops there. Under the system of Public Interest Immunity, the Court decides what does and what doesn't go into the Court file, **except in the case that the Prime Minister issues a Public Interest Immunity Certificate**.

It is interesting to note that even before 1995, judges had found some ways of going round this rule of total protection of Government files. One way by which this was done was that if the Government official goes to Court with the Government file and starts to refer to that file whilst he is giving evidence, then there is a rule that if you give evidence on the basis of notes, or of a document, then you are obliged to exhibit that document. The Courts had held that this also applies to Government files. There would be cases where a witness would start giving evidence on the basis of a file and then when asked to show the file to the other party or to exhibit it in Court, he/she could not claim immunity because the rule that if one gives evidence on the basis of a document, one has to exhibit that document, prevailed. In such cases, the witness himself would have renounced to Government privilege by referring to the file in Court. Of course, experienced Civil Servants then developed the tactic of not taking the file to Court. With the new system of Public Interest Immunity, this is something of the past because unless there is the Public Interest Immunity Certificate issued by the Prime Minister, then it is for the Court to decide whether a Government file is to be exhibited.

When examining a claim not to exhibit a file in Court on the basis of Public Interest Immunity, there are certain fields such as **national security** which appear to justify certain

immunity for the documents and for the information. However, the Court, in any case, unless there is the Public Interest Immunity Certificate, must still be convinced that a claim to immunity is not being advanced merely to avoid the disclosure of **politically embarrassing material**. The Court should be convinced that the claim is well-founded in public interest and not simply an excuse not to reveal something which may be counterproductive which may cause harm to the Government's case, or which may be politically embarrassing. So, the Court has to examine whether the claim to Public Interest Immunity is genuine or not.

Apart from Article 637 and Article 590 of the COCP, there are also a number of specific laws which grant immunity from either production of witnesses, or from asking questions to witnesses, or from revealing certain information pertaining to specific sectors. In particular, this is found in the Security Service Act, in the Prevention of Money Laundering Act, and also in the Malta Financial Services Authority Act. So, there are certain fields such as **national security** which justify Public Interest Immunity; there is a specific law which protects against the production of documents.

There are these sector specific laws but what we are speaking about in the COCP is the general law which applies to all Government information and not to any particular sector of the public administration.

Criminal Trials

It is important to note that Articles 590(2) and 637 are part of the articles of the COCP which are listed in the Criminal Code as also applying to criminal trials. Of course, the raising of such an immunity in a criminal trial raises many **delicate issues of fair trial** since, in criminal trials it is essential that the whole truth needs to emerge owing to the **possibility of imprisonment**. In fact, in some jurisdictions, they prefer to discontinue a prosecution rather than revealing certain information which could put their own informers in danger.

A famous example is the *Matrix Churchill Case* (1993) where a company was charged with illegally exporting machine tools to Iraq. These tools where what is referred to as 'dual use' whereby, they could be used both to make bombs could also be used to make other ordinary objects such as engine blocks. The issue was that in the export license, which was obtained by Matrix Churchill, the tools were described as being "*for general engineering purposes*." Consequentially, the prosecution alleged that the company had **deceived** the Department of Trade and Industry about the nature of the goods by not mentioning the potential military use. In retaliation, the company claimed that within Government, in particular, within the intelligence services, there were documents which showed that **the security services knew what was actually being exported**. When asked to reveal this information within the possession of the security services in order to prove by way of defence that it is true that there was a vague description, but the Government knew exactly what was being exported, the prosecution raised this defence of Public Interest Immunity. It said that is national security information which it cannot reveal. Because of this, a situation arose where a person could have potentially been sent to prison because information was not revealed.

The Matrix Churchill prosecution collapsed, and the case led to a public inquiry known as the **Scott Inquiry** about the use of 'Public Interest Immunity' certificates. The Inquiry concluded that **Ministers were not under a duty to claim Public Interest Immunity each time the national interest was involved** but where under a duty to exercise their **discretion**.

So, on the one hand, the Government had argued that if a Minister knows that there is a public interest genuinely involved, then the Minister is under a duty to issue such a Public Interest Immunity Certificate and on the other hand, the Inquiry said that this is not exactly so. The Inquiry held that Ministers were not under a duty to issue such a certificate at all costs each time the national interest is engaged but must make use of their discretion and firstly carry out an examination as to the effects of the issuing of that certificate, including the effects on the fair trial of an individual.

It also said that **where there was a clear balance in favour of disclosure for the administration of justice, then there was a duty to disclose**. This duty means that either the information is disclosed, or else, if it is felt that the national interests absolutely need to be protected against revealing this information, then the case will be discontinued.

After the Scott Inquiry, new Government guidelines were issued on the use of Public Interest Immunity Certificates basically making this point of when you claim Public Interest Immunity or not and what test the public official should imply.

Two Types of Claims
In general, even if one sees Article 167(3) of the COCP, there are two types of claims to Public Interest Immunity, apart from that Public Interest Immunity Certificate which can be issue by the Prime Minister.

<u>These claims either refer to:</u>
1) The **contents** of a document, or
2) The **class** of documents to which that document belongs.

<u>Contents Claim</u> – might involve material such as plans for military hardware. This is security sensitive information.

An example of a Contents Claim is offered by the case <u>*Duncan v. Cammel Laird & Co* (1942).</u> This case was presented by the widow of a sailor who had drowned when a submarine sunk whilst being tested. She sued the manufactures of the submarine for damages and in order to prove their negligence, the plaintiff sought the discovery of the designs of the submarine's torpedo tubes. The navy did not like this, and the First Lord of the Admiralty submitted an affidavit stating that revealing such plans would assist the enemy. The Court refused to order to manufactures to disclose the designs of those submarine torpedo tubes.

<u>A Class Claim</u> – this would involve documents such as Cabinet documents which are protected in order to protect the confidentiality of deliberations in Cabinet.

Class claims are based on the argument that **certain documents have to be protected in order to ensure the efficient running of the Civil Service**. So, the idea here is that if Civil

Servants were to act in a way that they are always aware that whatever they say, write and do can end up in a Court, then they might not take certain necessary decisions simply to protect themselves. This argument is traditional and has much less support today because the notion today is that Government must act openly; that Public Servants are accountable. As much as possible, the public service must act in a transparent manner. So, this argument that you need Class Claims in order to function efficiently has lost a lot of its validity.

There are other cases where the Courts tend to treat these immunities with more scepticism. The case of *Burmah Oil v. Bank of England* (1980) suggested that the argument that protecting communications between Civil Servants in order to ensure that they would feel free to do their duty properly and without undue pressure had been exaggerated.

Constitutional Conventions

Particularly in the British system, there are two Constitutional conventions which raise a possible obstacle to the disclosure of communications between Ministers and Civil Servants –

1) **Anonymity of Civil Servants** – Civil Servants act on behalf of the Government and in order to do their job well, they must stay **anonymous**. This means that they are not really accountable. Indeed, this concept is no longer compatible with the modern notion of 'Open Government.'

2) **The collective responsibility of the Cabinet which can be breached if documents showing disagreement between Ministers are revealed** – The Cabinet is considered to be collectively responsible, meaning that it speaks with one voice and takes one position. You can disagree in the Cabinet but not in public. So, it is said that if Cabinet documents are made public, this would go against the convention of collective responsibility of Cabinet.

   This second convention still holds. In fact, one of the reasons why a document is considered to be an exempt document under Article 637 of the COCP is if it is a Cabinet document, irrespective of whether that Cabinet document contains sensitive information or not. Because it is a Cabinet document, it is protected. The strongest justification for this is this Constitutional convention of collective responsibility of Cabinet because otherwise, there might be much difference between Cabinet documents and other Civil Service documents.

   UK Courts have expressed themselves several times and expressed doubts several times with regards to this issue of compelling the production of Cabinet papers. In *Cape Limited* (1976), it was stated that "*it is clear that no court will compel the production of Cabinet papers*."

   However, in a slightly later case, *Air Canada v. Secretary of State for Trade* (No2) (1983), it was stated that "*if Cabinet papers were to reveal essential information about the misconduct of a cabinet minister which was a central issue in litigation, it might be appropriate to order that they be revealed. However, it also stated that such an order would be made with great caution and the cabinet papers would still be granted a high degree of protection*" The Court said that it is not completely excluded that even a

Cabinet document might be revealed. However, it also stated that such an order would be made with great caution and such papers would still be granted a high degree of protection.

Relevance of the Document

The document which is sought to be exhibited in Court must meet the first requirement of any demand to exhibit documents in Court which is that **it must constitute relevant proof to prove the case**. Sometimes in Government cases, one gets the 'Fishing Expedition.'

In *Joseph Pirotta et v. Prime Minister* (CC 28/02/1994), plaintiff was alleging that he was not given a license to operate as a panel beater and that other persons were given such a license in circumstances which were similar. He was therefore, alleging discrimination. During the proceedings of the case, plaintiff asked that all police files regarding panel beater licenses to be exhibited in Court. The First Hall had accepted but on appeal, the Court of Appeal said that when you come to Court, you must come knowing what your proof is going to be.

In this way, **one cannot use a Court case to find proof.** In other words, one cannot ask for the exhibition of an entire **file containing a lot of material,** some of which may be relevant and some of which is irrelevant, in order to then choose the relevant from the irrelevant material. In this judgement, the Court had rules against this 'Fishing Expedition' where a party uses the Court case in order to fish for evidence.

Similarly, in *Polizia v. Luca Zammit* (CA 25/09/1925) and *Polizia v. Ettore Dano* (Vol XXVI Pt II p.853), the Court held that when we are speaking of Government documents, there is protection but then there is also the general rule that every document which is demanded in a Court has to constitute relevant proof in order for the persons asking for that document to prove his case.

There is a last limb of this subject which is that of the Freedom of Information Act.

ADMINISTRATIVE LAW REMEDIES

1) **Judicial Review** – the **principal remedy** which is a prerequisite for a democratic system of Administrative Law;

2) **Review by Independent Administrative Tribunals** – this is another review which is akin to judicial review, and which may also qualify as judicial review but is not carried out by courts but by administrative tribunals. Review by tribunals, if it meets the requirements of independence and impartiality, also qualifies as judicial review.

3) **Internal Review by the Administrative Authorities** – this is a more informal remedy by way of internal review by the administrative authorities themselves. So, for example, within the departmental process, there can be a way of seeking, for example, a reconsideration of an administrative decision by asking for the referral of an administrative decision either to another public authority, but that is not common, or else, within the same department to, for example, a hierarchical superior of the person who took the initial decision.

4) **Review of the Ombudsman type** – it is either carried out by the Ombudsman, or by his commissioners, or else you can also have other special systems which apply this type of review within particular branches of Administrative Law.

Every system of law requires the provision of a remedy. There is even an old Latin maxim that ***'ibi ius ibi rimedium'*** meaning that where there is a right or a law there has to be a remedy. AL is not an exception to this, and, in fact, the process of Administrative Law has integrated into it what are known as administrative law remedies, that is remedies which kick in when somebody has **a complaint when somebody is aggrieved by a decision of an administrative authority.** Administrative Law remedies are of various types but of course, the main Administrative Law remedies are the above.

1) **Judicial review**

- Now regulated by Section 496A and 496B of the COCP.
- Administrative acts must be subject to review by the courts **at least as regards their legality**.
- Access to the courts to obtain such review is an essential feature of a democratic society.

This is an essential element even of the Rule of Law because it is part and parcel of the right of access to a Court in order to seek the control of legality of an administrative decision and in our system. Judicial review is mainly regulated by Article 469A of the COCP as well as Article 469B, as of 2020. The former was enacted in 1995 and is about **the general power of the courts to review administrative acts with regard to their legality** while the latter was introduced in 2020 and is specifically focused on the judicial review of decisions **not to prosecute taken by the Attorney General**. So, one is a general power of judicial review whilst the other is concentrated on specific decisions in the field of Criminal Law and that is the *nolle porsequi* (the decision not to prosecute a criminal action).

It is essential for administrative acts to be subject to review by Courts or by tribunals, at least with regard to their legality. This means that **Courts need not have the power to review whether a decision was correct or not on the merits, but they must have the power to decide whether an administrative act was legal or not**. So, normally, in a case of judicial review, the question which would be asked would be that of whether the act is legal or illegal and not whether the decision is correct or not. **The question of whether it was correct or otherwise on the merits is a matter for a Court of Appeal not for a reviewing Court**, that is, not for a Court exercising judicial review.

Judicial review can also be granted in the form of a right of appeal but, strictly speaking, when speaking of judicial review, we are referring to the examination of legality of an administrative act. Access to Courts in order to obtain review is also considered as an essential feature in a democratic society.

Review of Decisions Not to Prosecute
Article 469B grants the right to seek judicial review of decisions not to prosecute. It is mainly based on the situation under British law and the criteria in this article are not the same as those in Article 469A, although one cannot completely avoid overlap.

The criteria in Article 469B are that a decision not to prosecute must be found to be one which was not a choice open to a reasonable prosecutor. So, it is **mainly based on the ground of reasonableness** as interpreted under British law. Indeed, its basis is on British case law on judicial review of decisions not to prosecute taken by the Crown Prosecution Service in the UK. It is a test of reasonableness and when it is found that **a decision not to prosecute was defective**, the Court would **refer back** the case to the Attorney General for the Attorney General to decide on whether to prosecute or not in the light of what has been decided in the judicial review proceedings.

There has not been any case in Malta yet since the enactment of Article 469B.

Non-Justiciable Administrative Acts
- Access to the Courts for the purpose of judicial review is an essential feature of a democratic society.
- However, there are certain areas of administration – the so-called 'non-justiciable' administrative acts or 'acts of State' or 'acts of Government' – which **do not fall within the ambit of judicial review**.
- These exempted areas are found mainly in the fields of foreign affairs and defence. In some countries, relations between the legislature and the executive are not judicially reviewable. This varies from country to country.

While there is the right to judicial review, in every legal system there also exists a set of acts which are **not amendable to judicial review**. That is to say, they do not lend themselves to being judicially reviewed. These are referred to as non-justiciable administrative acts. They are very much the exception and not the rule. They are **limited to certain areas** where it is considered that governmental power does not lend itself to being reviewed in such fields.

So, although access to the Courts for the purpose of judicial review is an essential feature of any democratic society, there are certain areas of the administration which do not fall within the ambit of judicial review. These types of acts are referred to as 'non-justiciable', 'acts of Government' or 'acts of State.' An example would be if a government decides to break diplomatic relations with another country, or else if a government decides to ban imports or exports from a country. These are not judicially reviewable and mostly these exempted areas are found in the fields of **Foreign Affairs and Defence**.

In some legal systems which have particular types of separation of powers, the relations between organs of the State, such as the Legislature and the Executive, may also be non-justiciable. So, what is justiciable and what is not **varies form one jurisdiction to another** and one has to say that before accepting that an administrative act is in this nature non-justiciable, the Courts would apply a rather strict test. They do not easily abandon their jurisdiction to review administrative acts. So, **this is only applicable where it is very clear that the act in question is not amendable to judicial review**.

You will recall that in the GCHQ case, the notion that a power which did not result from a law but from what was deemed the Royal Prerogative (a residual power of the State) was not judicially reviewable was rejected. In this way, even if the source of the power is prerogative, it is still subject to being judicially reviewed. **It is the nature of the power which may make a difference as to whether an administrative act is reviewable or not but not the source of the power as such.** This are very much the exceptional cases.

Control of legality

- A reviewing Court with jurisdiction confined to the **control of legality** does not, in principle, substitute its own evaluation of questions of fact for that of the administrative authorities.
- Nonetheless, even in these areas the Court would still retain jurisdiction to decide whether in the circumstances there was sufficient justification for the act.
- Judicial review of acts involving the exercise of discretionary power is inevitably less stringent than judicial review of acts which involved obligatory measures.

In principle, a reviewing Court with jurisdiction which is confined to the control of legality **does not substitute its own evaluation of facts for that of the administrative authorities**, however this also comes with a number of exceptions. For example, if a decision is manifestly wrong in fact, if there is what in British case law referred to as an **error on the face of the record**; something which springs to the eyes as incorrect. For example, deciding that a building was situated in a particular town when clearly it was not situated in that town. Such a misinterpretation of fact gives rise to a question of error of law. So, even though in principle a reviewing Court does not substitute its own evaluation of the facts for that of administrative authorities, this does not mean that a reviewing Court does not care about the evaluation of facts.

In general, one can summarise this situation as being one where the reviewing Court will not substitute its evaluation of questions of fact made by the administrative authorities unless these are manifestly wrong because **if there is a manifest error, a manifest error raises an issue of law** and is not just a question of interpretation of fact. In fact, in general this

principle that facts are not re-evaluated unless the initial evaluation of facts was manifestly wrong, is also applied in the context of appeals. In this context, from decisions of a First Court, the principle which morally applies with regard to re-evaluation of facts is that the appellate Court will not review the evaluation of facts carried out by the First Court unless that evaluation of facts is manifestly wrong. With that being said, **an appellate Court has full jurisdiction even to review facts**. Remember this. **It is not limited to issue of law unless the appeal granted was an appeal on points of law**.

Even though there is this situation, case law has developed in the direction of only reviewing facts if the first evaluation presents something which is manifestly wrong. When the exercise being carried out by a Court is that of review, that is, control of legality, this principle that only **issues of fact which have a bearing on interpretation of law** would be relevant in the context of such judicial review proceedings applies even more.

Of course, a Court carrying out judicial review would still retain jurisdiction particularly on the ground of the principles of **reasonableness** and **proportionality** to decide whether the circumstances of the decision where sufficient to justify that decision because then that is not a pure matter of fact that also **involves an issue of law**. Whether for example, a decision was irrational in the circumstances. That is, 'Wednesbury Unreasonableness.'

Unreasonableness, irrationality and lack of proportionality are issues of law, so they still come under the **control of legality**. The Court would not be entering into evaluations of fact simply by deciding whether there was sufficient justification for an administrative act to be taken. The important distinction is that in principle, the Court would not consider itself as a Court reviewing facts but again if the decision is not justified because of a wrong evaluation of facts, that would still be encompassed in the exercise of judicial review.

Normally, where an administrative decision involves the exercise of discretion, that is, the public authority has a choice between various ways of reacting to a particular situation all within the law, **the Court will generally respect that discretion** because what one is deciding here is whether the decision was legal or illegal not whether it was right or wrong. So, not whether the judge, had he been in charge of the administrative authority himself, would have come to the same decision.

So, the discretion granted by law to the public authority would be respected by a reviewing Court **as long as it was a discretion exercised within the law**. So, the judicial review of acts which are discretionary is less stringent than the judicial review of situations where it is argued that the public authority was obliged to act in a certain manner. That the public authority had a public duty to intervene, for example, or to take a certain decision. In this second circumstance, the Court has no discretion to be stringent or less stringent, it is a matter of did the public authority have a right to decide the matter in this way or not. That is the **only yes or no answer**. But where there are various possible reactions to a particular request or to a particular situation, then the reviewing Court, even though it is only reviewing legality, will respect the fact that the public authority enjoys certain discretion in the choice of how it reacts to that situation.

Public Duties

- An administrative authority cannot be compelled to exercise a power which is purely discretionary unless a 'public duty' is involved.

In judicial review proceedings, the Court does not make itself the hierarchical superior of the public authority but it is **examining whether the public authority performed its duties within the law or not**. In this context, public duties are also relevant because an administrative authority cannot be compelled to exercise a power which is purely discretionary according to law **unless there is a public duty** which was involved. And a public duty means that there was no discretion to decide how to react to a request. There was a duty to intervene or to refrain from intervening. So, the only situation where a Court can decide that a public authority acted *ultra vires* by, for example, deciding not to intervene, is where **the Court considers that there was a public duty involved in the situation**.

A famous case on this issue of public duty is that of *Padfield v. Minister for Agriculture Fisheries and Food*. The gist of this case was that there was a milk marketing scheme involving farmers from different parts of the country or of the region selling milk to a milk marketing authority and being paid according to a number of criteria including what it costs, costs of transport, and so on. There was a change in circumstances which led to some of these dairy farmers suffering an expense which was not on the cards, that is, not suffered at the time when the scheme was devised. It only affected a small number of these farmers. The authority decided that it had discretion not to intervene, cioè, not to alter the scheme because of this increase in costs for some of the farmers, and this it did not capriciously but because the law said that the minister MAY intervene, so the law didn't oblige the minister to intervene. So, they said the minster may intervene which also means that it may decide not to and therefore, they decided that this change in costs should not be allowed to provoke the remodelling of this scheme.

The farmers who were affected by this challenged the decision claiming that the word 'may' as used in the law actually meant 'shall' because the way the scheme was organised and the fact that there was such a scheme implied that when the formula on the basis of which the scheme was devised was changed, then the minister did not only have discretion whether to intervene or not but had **a public duty** to intervene. The Court in fact agreed with this argument and held that **the minister had acted *ultra vires* buy deciding not to intervene when there was a change in circumstances which called for his intervention**.

So, this is interesting because it is another case where if one reads the law, one will probably give legal advice that there is discretion. But that discretion, even though the law gave it, did not apply in all circumstances. There were some circumstances where 'may' used in the law had to be interpreted as 'shall', given the gravity of the changes in the formula of compensation to these farmers. **So, normally, an administrative authority cannot be compelled to exercise a discretionary power or cannot be found to have acted *ultra vires*, but this has to come with a warning that if the Court considers that there was a public duty to act**, then the decision not to act, not to use discretionary power could also be found to be *ultra vires.*

Different legal traditions

- Legal traditions differ as to which courts or tribunals can carry out judicial review.
- Generally, in countries of the Civil Law tradition, the tribunals effecting judicial review are Administrative Courts with a jurisdiction confined to matters of AL.
- In Common Law countries, judicial review is carried out by the ordinary courts.
- However, both systems admit specialised tribunals which have their jurisdiction limited to specific subject matter.

The main distinction in Europe is that between the French (Civil Law model of Administrative Law) where you have specialised administrative courts, and the British Model (Common Law system) where you do not have specialised administrative courts, but **disputes of an administrative law nature go to the ordinary courts**, as in fact is the system in Malta. It follows the British legal tradition in many ways and it, therefore, does not have specialised administrative courts but disputes with the Government go to the ordinary courts as the same way as disputes with private individuals.

In these areas, <u>which</u> Court carries out judicial review and <u>how</u> differs according to the legal tradition in question. In essence, it does not really make a difference with regard to the reviewing of administrative acts. The British legal scholar Dicey had seen this distinction as something which makes the difference as to whether a country adheres by the Rule of Law or not but in practice, **the Rule of Law prevails irrespective of whether there is a specialised system of administrative courts or whether the ordinary courts decided on Administrative Law disputes**. So, in essence you still get the review of legality of administrative acts.

In both systems, British and French, you still find specialised tribunals which have a jurisdiction which is limited to particular types of administrative acts like tax tribunals, rent tribunals; so, tribunals which are specialised in particular subject matter. That is found in both models. Particularly when the subject matter is very **technical**, these tribunals may be more appropriate to decide certain disputes than courts, be them administrative Courts or ordinary courts. In Malta we have the **Administrative Review Tribunal** which took over the functions of a number of previously existing specialised tribunals including the Tax Tribunal which used to be known as the Board of Special Commissioners on Inland Revenue.

The Administrative Review Tribunal is presided by a member of the judiciary but its composition changes whereby the two experts **change depending on the subject matter** of the case coming before the tribunal because the advantage of these tribunals is their technical expertise and, in this way, the Maltese legislator had found a way of controlling the proliferation of tribunals but at the same time not losing the advantage of having appropriate technical expertise on those tribunals.

Legal Aid

- The State is generally considered to be obliged to provide an adequate system of Legal Aid in order to make judicial review accessible.

Not everybody can afford to go to court. The problem with access is that court proceedings are almost inevitably **formalistic**, **expensive** and sometimes unduly **lengthy**. Not everybody can afford to go to Court to start a Court case against Government in order to seek judicial review. People have a natural reluctance to go to Court but apart from this reluctance, it still costs money to start a case. So, it may be merely symbolic to provide a system of judicial review without a proper system of legal aid which **makes judicial review truly accessible** to citizens who don't have the means to access the Court. In general, it is considered that there is a duty of the State to have an appropriate system of legal aid which can enable people who do not have the means to enforce their rights as well, against the state in order to review decisions of the public authorities as well.

This subject of legal aid is a bottomless pit. You can spend huge amounts on legal aid of the national budget and perhaps still be criticised for not doing enough. Ultimately this is taxpayers' money. One could argue that our system is not enough to really enable everyone to seek judicial review. It is very difficult to draw the line. The ideal system is where the system pays for everyone but that would take away resources from other sectors of State involvement. The test is whether the system of legal aid is not necessarily perfect but whether it plays an important part, whether it is a relevant player in the implementation of the right of the individual to seek judicial review of acts of public authorities.

Review and Appeal

- Judicial review may take the form either of a full appeal or of a simple control of legality.
- Appeal implies review of both matters of fact and matters of law.
- A reviewing court's jurisdiction is usually confined to the control of legality.

There is a difference between review and appeal. **Judicial review may also take the form of an appeal**. You may be granted a right to appeal, therefore, not only to review a decision of a public authority. Strictly speaking, from the right to a fair trial point of view, granting a simple control of legality, if it is properly granted, is enough. And **appeal implies review of both matters of fact and matters of law**. Sometimes the distinction between review and appeal is defined by the question, which is put to the Court in review – is the decision legal or illegal? In appeal, the court asks whether the decision was **correct** or not **even if it was legal**.

So, an appellate Court can overturn a decision even if that decision was legal. Reviewing Court may not overturn a decision if the decision is legal. So, that is the big difference between review and appeal. But of course, if judicial review takes the form of a full appeal, the citizen is being given more than just an examination of legality so really there is nothing wrong.

2) **Review by Administrative Tribunals**

- This type of review could also qualify as judicial review if it:
  1. Takes place before an independent and impartial tribunal established by law.
  2. Involves a fair procedure and a public hearing within a reasonable time.
  3. Is capable of granting an effective remedy.

This can also be considered as a form of judicial review. In fact, article 6 of the ECHR on the right to a fair trial says that,

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

So, review by an independent and impartial tribunal established by law will also meet the criteria. It will also satisfy the criteria of judicial review. Under the Maltese Constitution, it is in criminal matters that you have to go to a Court. This is a difference between article 39 to the Constitution and article 6 of the ECHR.

Article 39 reserves criminal matters to Court and does not admit tribunals, even if they are independent and impartial. In judicial review, which is normally **a civil matter**, review by tribunals will also qualify as judicial review if it takes place before a tribunal which is established by law and which meets the requirements of independence, that is, that it does not secede according to order which it receives from someone and impartiality which is the *nemo iudex in cause propria* principle. Also, if it involves a fair procedure and a public hearing within a reasonable time. So, these are the elements of a fair trial and so, **review by a tribunal established by law can also qualify as a form of judicial review if it meets the criteria of fair trial**. Also, another element is that this procedure must be capable, like judicial review, of **granting an effective remedy**, at least in the form of annulling an administrative act which is found to be illegal.

The only limit with regard to the Maltese Constitution is that criminal matters are reserved to Courts under article 39(1) (refer to the administrative fines imposed by regulatory authorities in Malta. If those fines are deemed to be in fact of a criminal nature, then the Constitutional Court said this is really determining a criminal charge so only a Court can do that)

Provisional Protection

- Provisional protection pending the outcome of a Court case is normally obtained through the **warrant of prohibitory injunction**.
- This would usually be issued where the interest of the individual in obtaining such protection **outweighs the public interest in implementing the administrative act**.
- **Section 873** of the COCP.

Provisional protection which is generally provided in Maltese law through the warrant of prohibitory injunction, ensures that the *status quo* is maintained whilst a Court case is pending. The purpose of this is to protect the claimant against a situation where the judgement will not be capable of being enforced because of something which may be done by the defendant during the pendency of the Court case.

The warrant of prohibitory injunction in fact is not the only provisional warrant which grants provisional protection but normally in the field of disputes between the individual and Government, this is the warrant which is generally used. In the field of private disputes, you also have recourse to the garnishee order which freezes money in a bank or in the hands of third parties, the warrant of seizure which seizes property belonging to the defendant so that it is available to the plaintiff if he is successful in the Court case to get paid out of it, there is also another warrant of seizure of a going concern, warrants of impediment of departure of ships and so on. But the one normally used in disputes between the state and the individual is **the warrant of prohibitory injunction**.

There should be proper criteria for issuing or refusing such a warrant and generally the criterion is where the interest of the individual in obtaining such protection **outweighs the public interest** in implementing the administrative act immediately. So, one has to weight the public interest in an immediate execution of the administrative act against the damages which the individual could suffer if the public administration is allowed to proceed, for example with a project to demolish his house. In cases involving the Government, these are the relevant considerations – weighing the public and private interests involved.

- In some countries, provisional protection results from a rule granting suspensory effects to the procedure challenging an administrative act.
- No system of effective remedy can be complete if it does not provide for provisional protection.
- Before granting provisional protection, the law may require a 'prima facie' case or a case 'likely to be successful.'

Of course, to issue a warrant of prohibitory injunction, there must also be what is known as a *prima facie* case, that is, **the claim must appear to be on the face of it, well-founded**. Sometimes, this is referred to as a claim which has a reasonable chance of success.

In Malta if you file a case against Government and you want provisional protection during that case, you have to file a warrant of prohibitory injunction. In some countries, provisional protection results directly from a rule which gives suspensory effect to the procedure which challenges an administrative act normally before an administrative Court. If an administrative act is still subject to challenge before the Courts, its execution would be suspended automatically. In Malta we do not have this that if you challenge an administrative act, it is automatically suspended. So, **one has to go to the Courts to demand provisional protection**.

- Measures of provisional protection do not pre-judge the final outcome of the case.
- In cases of urgency the Court may also grant provisional protection without hearing the other party. In such cases the other party should however be heard within a short time.
- In general, the Court would also be expected to give reasons.

The Courts sometimes issue provisional protection, that is, the warrant of prohibitory injunction, with **urgency** even without hearing the other party, so, the Government. Sometimes, the Court cannot do this and notify the defendant to see what he has to say as to whether the provisional protection should be granted or otherwise. There have been cases where when a government department is notified with this demand, it proceeded to implement or to start implementing the works. Here a question arises as to loyalty, whether in such circumstances the duty to be loyal to the Court is in fact being respected. So, you don't have an order prohibiting you from going ahead but you know that there is a demand made to a Court in order to obtain an order prohibiting you from going ahead. Sometimes it is argued that as long as there isn't an order than that means that the Court delt it need not grant a provisional protection order and therefore you can go ahead. However, Courts have tended to be critical of public authorities which in such a situation knowing that the matter was taken to Court proceeded just the same with implementing their decision. The Courts never went as far as finding contempt of Court in such a situation since there was no Court order that was breached but there is a problem with this duty to be loyal to the Court and the Court generally have been critical but not applied the sanction of contempt of Court in such a situation.

So, remember that the Court can even issue in situations of urgency provisional protection **without hearing the other party**. Does this breach *the audi in alterem partem* principle? It is justified in situations of urgency if the time taken to respect the right to be heard could mean that one of the parties pre-empts the other and presents the other party with a *fetta compli.* What is done in such cases is that the provisional protection is issued only upon the request and the confirmation of oath of this request of the plaintiff but then as soon as possible, the defendant is heard. Because provisional protection is only issued on the basis of a demand of the plaintiff with the defendant not having a right to be heard, then there would be a problem to the right of a fair trial. This slight derogation to the right of a fair trial in cases of urgency is generally accepted.

Unfortunately, in the Maltese Courts most provisional warrants, other than the warrant of prohibitory injunction, are normally issued upon the responsibility of the person demanding them. So, the plaintiff would confirm his claim on oath and the garnishee order, or the warrant of seizure will be issued. Then there is a procedure where the defendant has a right to demand that the Court will annul the warrant or will modify it if it considers that it is excessive or that security has been given and so on. But initially a warrant other than the warrant of seizure would be issued simply upon the oath of the party demanding it. In practice, case law shows that it is very difficult for a person against whom a warrant of seizure or a garnishee order was issued unjustly to get paid damages. The law provides for this, but interpretations are rather strict, and it is very difficult to obtain damages when you are a victim of this situation. This is perhaps a defect in the way the law on provisional protection is applied.

One important point to mention is that measures of provisional protection do not prejudge the final outcome of the case. So, **the fact that you were successful in obtaining a warrant and that the Court decided that your case is prima facie well-founded, does not mean that you are going to be successful in the final judgement** after the case was heard in its totality and the Court had all the evidence before it. Indeed, this is not the same situation as deciding on provisional protection. So**, it is a principle that the decision of provisional protection does not prejudge the final outcome of the case**. You may win at the level of obtaining a warrant of prohibitory injunction but then eventually lose the case on its merits. They are two different procedures and the criterion for issuing this warrant is not the same criterion on the basis of which a Court decides whether a claim is justified or not on its merits.

In general, a Court would be required to give some **reasons** as to why a claim for provisional protection has been accepted or rejected. In practice, except for the warrant of prohibitory injunction where there is normally a hearing, the Court does not really give reasons at the initial stage. Then the matter is delved into further if the defendant challenges that warrant. So, it could be that with our very summary type of procedure in issuing these garnishee orders and warrants of seizure, that there is some lack of respect for the principle of fair hearing because they are issued only on the demand of the plaintiff and no reasons are given. The solution which seems to be sought is that they are issued in the responsibility of the party demanding this issue.

It is considered to be necessary to have system of provisional protection because otherwise this could affect the effectiveness of the judicial system. If you go to Court and by the time your case is decided, what the government had to do is already done and you are presented with a *fetta complii,* then the judicial system in such cases may not be of much help. So, provisional protection is considered as an essential in Administrative Law remedies.

3) **Internal review by public authorities**

- A review by the administrative authority itself.
- Has the advantages of speed, cost and informality.
- May not be used as a substitute for judicial review.
- **Section 460** of the COCP.

This is a very much less formal type of remedy in the sense that within the administrative authority itself, there would be an internal arbiter, cioè, a reviewer. So, the decision which is given initially by the administrative authority will be subject to being reviewed but 'internally' either within the administrative authority itself or within another administrative authority but without going to a Court or to a tribunal or Ombudsman etc.

There are the advantages of speed, costs and informality but it may **not be used as a substitute for judicial review** since judicial review is a right of access to the Court which results from the right to a fair trial itself. But it can be a way of getting rid of a number of disputes between a public authority and an individual.

Before taking a public authority to Court, there is a duty to file a judicial letter and therefore to give warning of the fact that you are going to file a case. This does not apply to when

there is such internal review, but it only applies to when the individual is seeking judicial review, so, when a Court case is going to be started.

So, the problem which arises here is that under article 469A, **you have 6 months to seek judicial review**. If there is such a system of internal review by public authorities which is not given a proper legal basis, which is just voluntary (you may choose to use it or you may choose to ignore it), then this causes a bit of a dilemma because you have 6 months to start the judicial review case, you have to inform the public authority by means of a judicial act 10 days before you file that case, so in practice these 6 months are circa 5 and a half months. If this internal review is still going on, there is no provision which suspends the 6 month period whilst this internal review is still ongoing unless the specific law providing for the internal review itself makes such a provision, but there is no such a provision in general law, that is, in article 469A, saying that the period of 6 months to file the case is suspended if there is a system of internal review. So, this might cause a dilemma involved in such disputes – do I continue with the system of internal review, or do I file a Court case? This has to be more regulated. So, this relationship between these two types of administrative law remedies is not formally regulated.

Of course, we have a rule that if the way of challenging an administrative act is provided in a specific law than article 469A does do not apply, and you have to go to that specific channel such as in the Customs Ordinance if goods are seized, there is a specific procedure in the Customs Ordinance in order to challenge this and therefore, you do not go to article 469A. But when there are these grey area of internal review without a provision saying that this suspends the 6-month period, then it would be risky not to play safe and not to file the judicial review action not within the 6-month period.

There aren't many instances in Maltese law where this internal review is provided formally. Of course, when it is provided formally it makes sense that it is simply another stage in the proceeding and therefore, the 6-month period would not apply. The problem is where the legislator does not regulate these situations in which case one has to play it safe and go to Court.

4) **Ombudsman type review**

- External review by a person or persons who
  1. Are independent and are preferably elected by Parliament;
  2. Review the lawfulness and fairness of administrative acts;
  3. Have access to Government files;
  4. May act under informal procedures;
  5. May initiate investigations upon their own initiative;
- A general characteristic of this type of review is that decisions of Ombudsman are not directly enforceable;
- Ombudsman reports are, however, influential upon the public service.
- Ombudsman can persuade a Government Department to modify its decision or pay compensation.
- The system can be adopted with relatively simple legislation.
- The office of Ombudsman is entrenched in the Maltese Constitution – article 64A.

This type of review involves an external review by a person who is normally **independent** and **often elected by Parliament**, so a sort of officer of the parliament, as is the case of the Maltese Ombudsman. Moreover, this independent person is not a judge or a public official or a hierarchical superior of judges or of public officials, but he is an independent reviewer of both the lawfulness and the fairness of administrative acts.

So, the Ombudsman does not review only the legality of administrative acts, like judicial review, but **he also goes into other more practical issues**, like the **fairness** and **practicality** of an administrative decision. In fact, because of his wide remit, it is sometimes argued that the Ombudsman type of review is not actually an administrative law remedy but is more a practical remedy in the administrative field. The argument for this is that the Ombudsman is mainly concerned with issues of good administration not with issues of law and that therefore, you cannot call this remedy an administrative law remedy. Of course, the prevalent view is the contrary that the Ombudsman's function is so much related to administrative law, to keeping the administration within the bounds of its powers, that it is an administrative law remedy **even though it is not only concerned with legality**. In fact, sometimes judicial review is also granted through conceding a right of appeal where the right of appeal would not only be concerned with the legality but also with the correctness of a decision. The judge may change a decision in appeal proceedings if he doesn't agree with it, even if it is legal. On the other hand, this is unheard of in judicial review proceedings. If the Court is only reviewing the legality of an act, then if it finds that the act to be legal, it stops there whereby it does not go on to try and change a decision which is legal. So, the prevalent view is that the Ombudsman type of review is actually one of the Administrative Law remedies.

Normally, Ombudsmen have **only powers of inquiry**. They are the only powers they need because what is the concern of the Ombudsman is to be able to investigate a claim properly in order to decide whether the administration dealt with the complainant in a correct manner. For this reason, it is one of the characteristics of Ombudsman type review that Ombudsmen have access to Government files in order to be able to obtain proper knowledge of the facts of a case.

Also, it is a characteristic of the Ombudsman type review that he acts under **informal procedures**. This makes it more accessible; you don't pay fees; the procedure is initiated by a simple letter and so on. There isn't the formality which one would find in a Court.

So, it is an easier type of remedy for the citizen to access but then the downside is that decisions of the Ombudsman, unlike Court judgements, **ARE NOT DIRECTLY ENFORCEABLE**. This person merely gives advice how to resolve a problem and is not someone like a judge who decides whether an act of the administration is legal or not and that decision is final. The Ombudsman sort of mediates, giving advice. Of course, this does not mean that his reports are meaningless. There is no minister and no head of a government department who would rather not avoid being criticised by the Ombudsman. The **moral authority** carried by the Ombudsman's reports, in fact, helps to resolve problems and puts a certain **political or moral pressure** on the public administration to change its decision, or perhaps to pay compensation, in certain situations, in order to resolve the unfairness or the bad administration which the Ombudsman would have pointed out in his report.

The Ombudsman does not file a report to parliament at the initial stages, the report to parliament is the last resort. Whilst the procedure is going on, the Ombudsman tries to mediate or give hints of what can be done in order to as much has possible resolve the issue without the need of the dispute forming the object of a critical report between Parliament. In fact, very often the avoidance of a critical report before Parliament is the carrot which is used by the Ombudsman to give an incentive to the government department to be practical about resolving the issue, if he feels it is appropriate to do.

Another characteristic which distinguishes the Ombudsman type review from judicial review is that the Ombudsman **may initiate investigations upon his own initiative**. So, this is totally different from a Court case. No judge can give a judgement unless someone has filed a Court case before him. The Ombudsman can, if he gets to know about something which is of public concern, initiate investigations himself without the need of a complaint.

The Ombudsman is in fact the commissioner who has the duty to investigate complaints of individuals and report them to Parliament. **His only powers are those of inquiry, he does not give enforceable orders except orders in the course his of inquiry**. He may, for example, demand that a government department produces the relative file. That is an order, but an order related to the implementation of a power of inquiry.

He is not an appellate body; you go to him to complain about the way in which you were treated and not to appeal. His effectiveness derives from the power to focus public attention and the attention of parliament on the complaints of citizens. So, his authority derives from his moral power and his political influence. No one enjoys being criticised by the Ombudsman.

An advantage of this type of remedy is that it can be enacted by relatively simple legislation. You do not necessarily have to amend the Constitution in order to have an Ombudsman. In fact, in Malta, the Ombudsman was only eventually included in the Constitution. Initially, it was an ordinary piece of legislation, not a Constitutional provision. However, nowadays, the office of Ombudsman is found in the Constitution in article 64A. In 2020 as part of the constitutional reforms, the office of Ombudsman and article 64A was also entrenched in the Constitution, that is, one needs a 2/3rds majority in order to amend it or remove it.

History on the Ombudsman

- Sweden was the first country which had the office of Ombudsman under one form or another for about 180 years.
- This institution eventually attracted the attention of other countries and spread all over the world.
- The first ‘common law’ country to adopt an Ombudsman was New Zealand in 1962.
- The British Government at first rejected the institution on alleged incompatibility with the doctrine of Ministerial responsibility and that it gave rise to undue interference with the public administration.

In the UK, there was some resistance to the introduction of this office. There were a number of arguments which were fielded against the introduction of this office.

Arguments against

- It was argued that it was only the Minister who was responsible to Parliament for what is done in his departments.
- Given that civil servants did not bear direct responsibility to Parliament, it would be wrong for an Ombudsman to examine the workings of civil servants behind the Minister's back.
- In a State governed by the Rule of Law, the protection afforded by the Courts should be enough.

The British Government, at first, rejected this institution because it considered it to be incompatible with the doctrine of ministerial responsibility and that it gave rise to undue interference by this third party with the public administration. So, the first reaction was in the negative whereby it is only the minister who is responsible to Parliament, and you cannot have someone else interfering with the public administration. Moreover, another argument based on constitutional civil service theory, that given that civil servants did not bear direct responsibility to parliament, but it was the minister who is responsible to parliament, it would be wrong for an Ombudsman to examine the workings of civil servants without the minister being involved. Another argument which was brought forward was that in a state which is government by the rule of law, the Courts should be able to provide sufficient protection to the citizens against abuse of power.

Arguments in favour

- The defensive mechanisms of the civil service made it impossible for a MP to find out what had really happened through the system of PQs alone.
- PQs could be answered in a defensive or evasive manner in order to hide irregularities or injustices.
- Arguing that the protection of the Courts is enough lacks realism. In practice, one must also find a balance between resolution of disputes by judicial decision and resolution. By mediation.

The arguments in favour of the institution of Ombudsman, which eventually prevailed, were that the defensive mechanisms of the civil service made it practically impossible for a Member of Parliament to find out what had really happened through the system of parliamentary questions alone. MPs always had the possibility to table PQs but the problem here was that it was up to the Minister how to reply to a parliamentary question who normally relied on the civil service and the end result is that if there was something which was politically embarrassing, a PQ could end up being answered in a defensive or evasive way in order to hide irregularities or injustices or facts which might be politically embarrassing. Also, another counterargument with regard to the protection of the Courts is that arguing that the protection of the Courts is enough, is not realistic. In practice, a balance must be found between the resolution of disputes through Court judgements and also, the resolution of other disputes through mediation. This is where the more informal administrative law remedies come into play. It was argued that a system must consist of a mix of remedies.

Eventually, those in favour of having an Ombudsman in the UK prevailed and the Parliamentary Commissioner Act was enacted. The UK, despite its previous resistance to the

institution of Ombudsman, was the first large country to adopt this office. In the UK, like in Malta, the Ombudsman is an agent in Parliament who helps to investigate complaints and unlike the New Zealand Act of 1962, the 1967 UK Act went a step further and gave the Ombudsman the power to investigate and criticise decisions taken by ministers even when they are personally involved in the decision-taking. Also, as is the situation in Malta, the Ombudsman in the UK investigates action taken in the exercise of administrative functions however, he is not a substitute for the Courts.

The French 'Mediateur'

- Introduced in 1973, the *Mediateur* is viewed as a contributor to the peaceful resolution of conflicts between the Administration and the citizen. He mediates, as his name suggests.
- The *Mediateur* is nominated by the Government (Council of Ministers), so by Government, and not by Parliament.
- He is not considered as an officer investigating complaints on behalf of Parliament.
- He receives complaints about Government Departments, public corporations and all organisations which perform a public service. The latter is none big difference between our system and the French system. Organisations which perform a public service are not necessarily government departments and government entities. Even a private organisation can perform a public service, for example, the football association which organises the football leagues. It is considered under the French system to be performing a public service, and therefore, in some case it would also be subject to the jurisdiction of the administrative Courts, and it is also subject, therefore, to the jurisdiction of the *Mediateur*. So, you do not necessarily have to be a government entity to fall within the jurisdiction of the *Mediateur* under the French system.
- He is an independent institution, he is not considered as a hierarchal superior of judges or of public officers, but he has the power to make recommendations for the solution of a problem and also has the function of making an Annual Report to the President of the Republic.
- He has more power to give orders than the Maltese Ombudsman, for example, he may also order disciplinary proceedings to be taken against public officers. Also, he may order a public authority to comply with a final Court judgement which it has not yet complied with.
- His decisions, like that of the Ombudsman, are not subject to being challenged in Court (one exception in our case is if the Ombudsman expresses himself about something which does not fall within his powers – *ultra vires* under the general residual powers of the Court to control legality and not under article 469A) and are not considered by the Conseil d'Etat (the highest administrative Court in France) to be decisions of an administrative character.
- In practice the *Mediateur* solves many problems which very often, the Administration lands itself in because of bureaucracy.

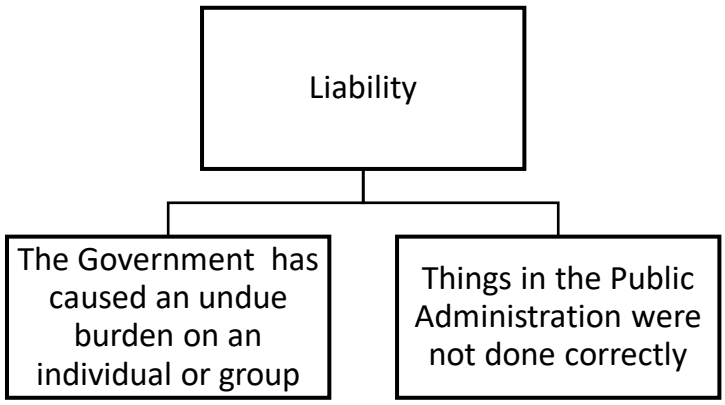
Malta's Ombudsman

- The Ombudsman Act (Act XXI of 1995) came into force on the 15th of November 1995).
- The institution was given increased recognition and strengthened over the years. First of all, by being included but not entrenched into the Constitution and finally, by being entrenched in the Constitution in 2020.

In conclusion, there are ways of putting forward one's case, without being administrative law remedies. These are not legal remedies that lead to a particular end, and this is why these other means of complaint against the administration, however effective they may be, cannot qualify as administrative law remedies because they are not related directly to AL and they do not necessarily lead to the grant or denial of a remedy.

THE QUESTION OF GOVERNMENTAL LIABILITY

This refers to liability of the Government for tort or to make good for maladministration (actions in the administration which went wrong). Another term which is quite in common use to describe this concept is the term '**reparation**', that is, because you have a situation where either the Government in the exercise of its public interest functions has caused an undue burden on an individual or group and therefore, should pay compensation, or else, you have a situation where things in the Public Administration were not done correctly and as a result, an individual suffered damages. So, in both cases, there is a good, accepted argument that the Government must somehow **repair these damages**, hence 'reparation'.



To go back in time, the UK gave the famous judgement *R v. Secretary of State for Transport ex parte Factortame Ltd* (1991). In this case, the British Government tried to stop mostly Spanish fishermen from registering their boat in the UK in order to be able to fish against the UK fishing quota when the UK was part of the EU. This was held to be in violation of EU Law. The matter first went to the British Courts in 1991. In that case, the Court held that *"English law does not recognise a general right to indemnity by reason of damage suffered through invalid administrative action."* This implies that the plaintiff has to rely on the law of tort (a private law concept). Indeed, the words are well chosen, whereby the Court is speaking of a general right to indemnity and is not saying that invalid administration can, under no circumstances, give rise to a right of indemnity. The Court is speaking in general terms. This was a big issue in this case, and it ended up also being decided by the ECJ as to in what circumstances reparation is due when a State does not conform with EU law.

If there is no general right to indemnity, specifically linked to *ultra vires* (invalid administrative action), then this implies that the plaintiff has to rely on the ordinary Civil Law of tort. This notion of the overlap between private law (Civil Law), and public law (Administrative and Constitutional Law), in this field of Governmental Liability is particularly relevant and causes a dilemma in a number of systems. In the Maltese system, we seem to have settled for **granting reparation for damages on the basis of Civil Law**. An action can be declared *ultra vires*, but then if damages were suffered as a result of that action, then the damages are granted on the basis of the relevant sections of tort of the Civil Code. This is not the same everywhere, that is, not every jurisdiction has this automatic switch to the private law of tort.

Public Law wrong v. Actionable Damage
The dilemma can be expressed in these terms that you can have on the one hand, actions which are termed **public law wrongs**, but not every public law wrong is automatically an actionable damage. In Maltese case law, particularly in a 2005 Court of Appeal judgement, *Frank Pace v. Commissioner of Police*, it was held that **a public law wrong, that is, an *ultra vires* action by the State, does not automatically give rise to the payment of damages but if damages were actually caused as a result of that *ultra vires* action, then damages will be due**.

A public law wrong, if it gives rise to damages, will also give rise to an actionable damage. In the UK, the situation is different. For example, in *Mercury Energy Limited v. Electricity Corporation of New Zealand* (1994), it was held that a public law wrong is only subject to judicial review. In other words, if a public authority acts *ultra vires*, that gives rise only to an action of judicial review but not to an action for damages. If there is an actionable damage, this would give rise to a pecuniary remedy and that has to be provided specifically by law, either because the action in itself breaches the law of tort or because there is another specific law which provides for damages in such situations.

The legislator, both in Malta and in the UK, intervened in this matter. For example, in the UK Supreme Court Act (1981), there is section 31(4) about the question of damages in judicial review.

"**31(4)**. *On an application for judicial review the High Court may award damages to the claimant if…*
(a) he has joined with his application a claim for damages arising from any matter to which the application relates; and

(b) the court is satisfied that if a claim had been made in an action begun by the claimant at the time of making his application, he would have been awarded damages."

In the application for judicial review, you can also introduce a claim for damages as a result of the claimed *ultra vires* action. This is the procedural aspect found in article 31(4)(a). On the other hand, 31(4)(b) is the substantive aspect. It is linking this notion. It is not saying that every public law wrong is automatically an actionable damage, but it is saying that if the facts of a public law wrong also present the characteristics of an actionable damage, something which gives rise to the payment of damages, then the Court may grant those damages in the same action. So, there is no need to file two separate Court cases. The section is not saying that each time there is an *ultra vires* action, this automatically gives rise to damages, if damages are caused.

In Malta, when article 469A was introduced, this was already a bit of an issue. That is to say, can the Courts automatically grant damages when there is an *ultra vires* action? Even in 1995, the settled attitude of the Courts was **to grant damages for *ultra vires* action because *ultra vires* action was considered as an illegal act**, and under Civil Law, an illegal act gives rise to damages. The Court used to and still argues that an *ultra vires* act is an illegal act so, it gives rise to damages under the law of tort in the Civil Code. In 1995, the Maltese legislator tried to regulate this, not very successfully, in order to try and determine the

circumstances where a public law wrong (*ultra vires* action) may give rise to the payment of damages.

Our situation, considering **every act *ultra vires* gives rise to the payment of damages**, is rather unique since it is not found in other systems, such as the French system. There are always criteria which filter the passage from finding that an act was *ultra vires* to saying that the act gives rise to the payment of damages. Our Courts are the most generous in this respect. However, the other side to this is that this position might not be so mindful of the use of public resources. So, there is also this 'public resources consideration' which comes into play.

Article 469A(5)
In 1995, the legislator, as part of article 469A of the COCP, introduced article 469A(5). We are referring to Civil Law and not recognising a separate source for the payment of damages in a separate actionable damage in a public law wrong. You can also include a claim for damages in tort or quasi-tort arising out of the administrative act.

> (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.

In the first part, there is reference to tort and quasi tort which bring with it the consequences of proving **cause and effect**, proving that there was a wrong (the Court determines this), and foreseeability of the damage etc. One has to satisfy the requirements of the law of tort.

"The said damages…" = This is the **limitation** which the legislator tried to impose. This is the really operative part. In this second paragraph, which places the limitations, it is said that damages shall not be awarded by the Court. So, it is the law of tort but subject to certain limitations and therefore, **it is not an outright application of the law of tort**. Moreover, it **presumes that the administrative act was found to be *ultra vires* and annulled**.

<u>In order to be awarded damages, according to this sub-article, one must prove –</u>

1) **Bad faith** – It can be either **intentional** bad faith – you know you are doing wrong and persist in that wrong – or **reckless** bad faith – implementing a decision with recklessness (wilful blindness) as to whether that decision is illegal or not, or

2) **Unreasonably** – Something which no reasonable person faced with that situation would have done, or

3) **Where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power** – An example which is sometimes put forward is if a

person applies to demolish a building and he is not granted permission to demolish that building for wrong reasons. The decision to refuse the permit is therefore annulled, but if that building is one which could not have been demolished in any case, say because it is a historical building, then it would be a situation where the thing requested by plaintiff could have lawfully and reasonably been refused under any other power. So, when there is **more than one possible reason** for refusing a permit and the permit was refused for the wrong reason, or perhaps was refused because of failure to follow the proper procedure.

On this point, one can make reference to *Mary Grech v. Minister responsible for the Development of the Infrastructure et* (1993) where the permit was withdrawn wrongly since it was withdrawn without respecting her right to be heard. The Court held that this does not mean that had her right been respected, the permit could not have been withdrawn just the same. So, here the Court can refuse damages, as it did in the *Mary Grech case* where what was requested could have lawfully and reasonably been refused under any other article. Moreover, procedural impropriety is implied.

In any case, the Courts did not appear to be very comfortable with this sub-article and, in fact, it has rarely, if ever, been applied to refuse damages. In fact, the last pronouncement was the *Frank Pace v. Commissioner of Police*.

Interestingly, there were judgements of the Court which went round this sub-article by saying that **an illegal act is also an unreasonable act** because it is unreasonable for the public authority to act illegally. This is a bit of a stretched argument. It was used in order to justify the granting of damages in a case *Carmelo Dingli et v. Comptroller of Customs et* (27/03/2009). In this case, **the Court equated unreasonableness with illegality** which aren't exactly the same thing since acting *ultra vires* may not necessarily include unreasonableness. It may involve, for example, a wrong evaluation of fact which isn't necessarily unreasonable.

In fact, this case dealt with a consignment of ham which was imported at a time when there were import restrictions whereby since ham was produced locally, one could not import it from abroad. This firm imported a consignment which it claimed to be a product similar to ham but was not ham. Ultimately, there was disagreement between the Court expert and the experts of the Department of Agriculture who had advised the Department of Customs to withhold this consignment. The Court expert said this is not what is technically called chopped ham, therefore saying that this product can be imported. In the meantime, the firm claimed that the product had deteriorated and as a result, it had to be sold at a very low price, so the importer suffered damages.

The Court, in deciding to grant the damages, decided that since the evaluation made by the Agriculture Department was not correct and since therefore, the decision to withhold the product was illegal, this was also unreasonable, and therefore, it said the criteria of 469A(5) are met, and damages were awarded. This interpretation shows how entrenched our Civil Law principles are. Our Courts have traditionally found it rather difficult to embrace the notion of a separate regime of damages in public law and they have generally stuck to the notion that **damage should be regulated by the law of tort according to established**

principles on damages on Civil Law. Of course, this is in favour of the party who has suffered damages, but as a consequence, public resources argument can be overlooked.

The fact is that when damages are suffered as a result of *ultra vires* action, the individual is very likely to be compensated in damages.

Statutory Duty – Judicial Reluctance

This contrasts with the system found in the UK. For example, in *T v. Surrey County Council* (1994), the judge identified *"a considerable reluctance on the part of the courts to impose upon local authorities' liability for breach of statutory duty other than that expressly imposed in the statute."* When there is a duty which is not fulfilled, somebody could argue that as a result of that breach of statutory duty, he suffered damages. In this case, the Court is identifying this trend in British case law to move with a certain reluctance to grant damages simply for breach of statutory duty, unless there is a law which provides for the payment of such damages in such a situation. So, unless there is a law which provides that if the public authority fails to fulfil a particular duty, then damages are due, then the Courts would handle this with a certain reluctant attitude, meaning that they would not easily give damages in default of a law providing for those damages.

It depends on what 'breach of statutory duty' really means. It does not mean every wrong committed by a public authority but when a public authority is obliged to act in a certain way and it decides not to act in that way, for example, by misinterpreting its powers. For example, by deciding it has no power to act, when it has such power. In general, in the UK Courts, this is not considered as a fact which alone should give rise to a payment of damages.

The Court often requires proof of bad faith. This issue of bad faith and an explanation of bad faith came to the fore in one case, *R Cruikshank Ltd v. Chief Constable of Kent County Constabularly* (2002).

The implications of 'Tort'

Basing Governmental Liability on 'tort' implies that there is a corresponding 'right' of the victim to compensation where the damage was –

1) **Foreseeable**;
2) **Causally connected**;

The 'tort based' approach however ignores the strain which such claims may place on public resources.

Everything has its consequences and basing Governmental Liability on the Civil notion of tort implies that the individual who was at the receiving end, that is, the victim of *ultra vires* administrative action, **has a corresponding right** because in Civil Law, if one person is obliged to pay, then there is another person who has a right to receive payment. So, you are adopting the tort-based approach implying also t**he recognition of a right on the part of the aggrieved party**. So, it is not just mere compensation but **recognition of a right** by the aggrieved party to be paid compensation/damages if the damage was **foreseeable** and **causally connected**. So, these are the principles of the Civil law of tort. The tort-based

approach seems to bypass the strain which such claims may make on public resources – if you are very generous with the individual who has suffered *ultra vires* action, you are placing a bigger burden on the public funds.

The limits of Judicial Review

Speaking of the limits of judicial review in this context, judicial review is seen as a means of granting the opportunity to the Courts to declare that something done in the Public Administration has gone wrong and to annul the particular administrative act. In theory, judicial review does not go beyond an examination of legality leading ultimately to annulment of the administrative act.

This does not automatically imply a right to be paid damages unless this is provided for in the law. A claim in tort, as distinct from judicial review, however, requires not only proof of an administrative wrong, of *ultra vires* action, but also **proof of actual damages** and also, this comes with the principles of the Civil Law of tort in the sense that **the damages must have been foreseeable** and **there must be a cause-and-effect relationship** between the action and the damage suffered. Here, the latest position of the Maltese Courts tallies with this concept in the sense that judicial review only discusses legality or otherwise of the administrative act, but then, if damages were caused and the elements of foreseeability and cause and effect are met, then the Court will grant the damages.

So even though **these two concepts of tort and judicial review are separate**, the Court found a way of marrying these two concepts in such a way that if in judicial review it finds that there was an illegal act, then the law of tort triggers in and the Court will ask whether the requirements of the law of tort have been met. In fact, *Frank Pace v. Commissioner of Police et* (18/11/1994) was about the disclosure of a garage where a couple of cars used to be carried out and so the owner was claiming a large number of damages. However, the Court eventually considered that like anyone who suffers damages, **the plaintiff was also obliged to minimise those damages** (in Civil Law the fact that you have suffered damages as the result of the wrong action of someone else **places upon you a burden to keep those damages to a minimum**). The Court held that since all this litigation was ultimately about a £600 guarantee, the plaintiff could have minimised his damages by issuing this guarantee, keeping the issue to a value of £600 and not closing his garage and going out of his business because of this issue. So, the Court then also applied the principles of the law of tort in full, **even when they are to the detriment of the individual**.

So, these two concepts of judicial review and tort are separate but when there is a finding of *ultra vires*, then the law of tort can kick in and, in the Maltese system, it is a foregone conclusion that it will kick in unless the *ultra vires* is found on procedural grounds, but even there, damages could be suffered, so it is not excluded either. The *Mary Grech* judgement put some breaks on this, but you cannot say that under any circumstance, the law of tort is excluded.

"Tort" versus "A Claim in Public Law"

There is a difference between a tort and a claim for compensation in public law which our jurisprudence/case law does not seem to recognise much except perhaps in the Constitution. So, there is a difference in principle between these two sources of

compensation – **tort** is one thing, but it could be that **public law itself also provides for compensation**. For example, the law of expropriation of property. You cannot have expropriation of property without compensation. Another example is constitutional 'redress' under Chapter IV of the Constitution. The Constitution does not speak of 'damages' but of 'redress' (to redress a wrong). So, it is a concept which is different from the Civil Law concept of tort.

This was discussed by the Privy council in the UK in an appeal from a case originating from Trinidad and Tobago, *Ramesh Lawrence Maharay v. Attorney General of Trinidad and Tobago* (No 2)(1979). The Constitution of Trinidad and Tobago uses the word 'redress' in actions for compensation under the Constitution. In that decision, the Privy Council held that the 'right to redress' under the Constitution of Trinidad and Tobago did not give rise to liability of the State 'in tort', but **liability 'in public law.'** The Privy Council upheld this distinction. Indeed, the fact that you have a claim in public law, which can lead to the payment of money, does not mean that you have a claim in tort. The Constitution gives you a claim under a separate legal regime which is a claim in public law.

Article 46(1) of the Constitution of Malta grants the right to file an action for redress under Chapter IV of the Constitution. It also refers to 'redress' and not the words 'damages', or 'liability'. So, the compensation which is granted under the Constitution is not compensation in tort, but **it is a separate type of compensation** (it is not compensation in Civil Law) under public law.

Historical development of State liability

- From Medieval period until the late 18th century the issue of State liability was dominated both in England and in France by the notion of Monarchical liability with the basic principle being 'the King can do no wrong'.
- In practice, this meant that there was very little room for what was termed as 'suing the King in His own courts'.

We must go back from the Medieval period until the late 18th century. The issue of State Liability was dominated both in England and in France by the notion of liability of the King, that is, monarchical liability. Liability did not go very far under that principle because the basic principle of the system was that the King can do no wrong. In practice, this meant that **there was very little room for Governmental Liability** whereby even the Courts were considered as Courts of the King and therefore, there were very few opportunities to sue the King in his own Courts.

Exceptions to immunity

There were still some exceptions to this general immunity of the King/State. For example, an action to regain wrongfully ceased property was recognised in England and also in France. Also, wrongs based on property were also an exception to this immunity of the King in France and the 18th century, local authorities were already awarding compensation for damages which were caused by public works. This notion, therefore, that if an individual suffers damages or has to carry a burden as a result of public works, he should not carry that burden alone, was already starting to be recognised in France in the 18th century.

The Conseil d'Etat

- In France in 1872, the Conseil D'Etat gained status as an independent judicial body and it could therefore make inroads into the notion of lack of responsibility (irresponsibility) of the State.

A huge development in the French system happened in 1872 where the *Counseil d'Etat* gained status as an independent judicial body, so independent of Government, and it could, therefore, make inroads into what was known as the theory of *irresponsabilité*, that is, lack of responsibility of the State, meaning that it is very difficult to find the State responsible for damages.

The establishment of the *Counseil d'Etat* as an independent body was an important step to open the way for developments in the direction of granting compensation to individuals who suffered damages as a result of public works or of wrong administration.

The situation in England pre-1945

- In England the concept of State immunity in tort continued to prevail in the 19th Century and practically until the end of the Second World War. The Courts were also reluctant to apply the doctrine of 'Vicarious Liability' to the Crown.
- The Public Authorities Protection Act 1893 was (purportedly) enacted to avoid excess litigation and state claims. It placed a short time limit (six months) on civil actions against public authorities and made rules on the award of costs in order to discourage people from suing the Government.

In England, it is sometimes stated that Administrative Law really caught up after the War in 1945, with the advent of the Welfare State whereby there was more involvement of the State in provision of health services, social security, nationalisation of certain major industries and so on. However, saying that Administrative Law started in 1945 in England is not exactly correct. Either way, it gained much more importance after that date because of the new policies of the Government at that time.

In England the concept of State Liability in tort continued to prevail in the 19th century and particularly until the end of WWII. The Courts were always reluctant to apply the doctrine of Various Liability of the Crown, that is, liability for the Crown for faults committed by civil servants. This was a theory which could be applied but the Courts expressed a certain reluctance in applying it. In fact, in 1893, there was the Public Authority's Protection Act which was presented as an act enacted to avoid excess litigation and ill-founded claims being made against the State. The way they did it was that they placed a short time limit on civil actions against public authorities and made rules on the awards of costs in order to discourage people from suing Government. This act was really a step backwards. There were some exceptions where the State would be liable, but the general legal environment in the 19th century was against State Liability. Even the exceptions that there were, were limited and arose mainly from case law not from the legislator actually recognising a right to compensation in the law.

England – some exceptions

- There were still some exceptions provided by law, but the general legal environment was against State liability.
- These exceptions were limited and arose mostly from case law.
- One example was the notion that public authorities could only be held liable for not avoiding causing further damage.

One example of this limitation was the notion that public authorities could only be held liable, not for causing damage, but for not avoiding causing further damage when damage was caused. If you knew that damage was caused and you continued to cause damage, then you would be liable.

Modern liability

The major development in the UK with regard to State Liability was the Crown Proceedings Act (1947) which recognised liability of the Crown in a number of situations including vicarious liability, that is, liability of the State for actions of civil servants. In France, there were a number of developments through the Conseil d'Etat case law, some of which also hit us quite close to home in Malta with regard to theories of when the State can be liable. One important case was that of *Blanco* (08/02/1873).

Agnes Blanco was injured by a wagon owned by the public sector tobacco administration. The French *"Tribunal des Conflicts"* held that the Administrative Courts had jurisdiction to hear **actions brought against the state 'for damages caused by persons which the state employs in the public service**.' So, the Blanco judgement in 1873 recognised the **Vicarious Liability** of the State, that it is not a question of the State saying it is the employee who caused the harm, so sue him. In this way, it made an inroad to Governmental Liability.

The Tribunal rejected the application of the rules on liability for delict in the *Code Civil* and established that the rules on administrative liability were of a special character. This brings us to the argument of the distinction between private law and public law. The Tribunal said that the State is answerable for the actions of its employees, but the rules on liability under Civil Law do not apply because here we are dealing with a special, separate regime of administrative liability which has a special character and therefore, has its own special rules.

The is a particular characteristic but arises in other systems. This notion of whether Governmental Liability should be ordinary liability under Civil Law or whether it should be a special kind of liability under public law. Here, one can make reference to the Privy Council deciding in the case of Trinidad and Tobago where Constitutional redress was held to be part of a separate regime of alibility under public law, not a redress of a Civil Law nature.

We have never had such a pronouncement in the Maltese Courts which are very much tied to Civil Law in matters of liability, of tort, whereby **as soon as it is held that the State is liable, then the rules applicable are the rules of Civil Law**. So, there has never been this type of development. There may have been an attempt by the legislator to somehow modify the applications of the rules of civil law by enacting article 469A(5) of the COCP.

Iure Imperii* versus *Iure Gestionis

- In the aftermath of the Blanco case, State Liability was hedged and a whole range of Governmental acts (*'actes d'autorite'* – *'actes iure imperii'*) were declared to be non-justiciable – as in the case of the Busuttil v. La Primaudaye judgement in Malta (First Hall).
- The remaining acts (*'actes de gestion'* – *'actes iure gestionis'*) could give rise to liability in damages.
- This theory was later abandoned in the 1905 Conseil D'Etat decision in the case of *Tommaso Grecco*.

In the aftermath of the *Blanco* judgement, state liability was hedged and there was a sort of reaction towards the *Blanco* judgement. The tendency was to restrict state liability and then, a whole range of Governmental acts turned act *jure imperii*; were declared to be non-justiciable. This reminds us of the 1892 decision in the Maltese Courts in *Paolo Busuttil v. Clement La Primaudaye* (1894) which applied this theory that acts *iure imperii* do not give rise to liability of the State but only acts *iure gestionis* give rise to such liability and if damages were caused as a result of the execution of an act *iure imperii*, then one could sue the Government employee who was responsible personally but one could not sue the State. This was the theory of Mr Justice Chappelle based on the developments in French and also, in Italian Administrative Law which were on the same lines at that time. **Only acts *iure gestionis* could give rise to liability in damages** under this theory.

The theory was soon abandoned by the *Counseil d'Etat* in the *Tommaso Grecco* judgement. This did away with the notion that the State could not be sued for acts which are *iure imperii*.

Immunity Today

Nowadays, the fields of Immunity of State action are very limited, both in the French and English system.

In France, limitations (non-justiciable administrative acts) are found in the field of **international relations** because of the set-up of the French Constitution, the relation between the Executive and Parliament under the French Constitution, and also, measures taken to protect French nationals and their property abroad. This is the field of **foreign affairs**, **defence** and also, this particular **constitutional set up of relations between the Executive and Parliament** which is considered to not be subject to the intervention of the judiciary.

In the UK, there are some limitations which result from the law, some of which are traditional such as the immunity of the post office for failure to deliver letters or for delay in delivering letters. It was considered that the postal service was such an essential service, that if you brought about a situation where every letter has to be registered, then this would harm the proper working or the efficiency of the postal service, so, if there is a contract between the post office and the person sending the letter then there can be liability but for ordinary letters, this is not so. Another issue which arose on Governmental Liability more recently, was that concerning soldiers who suffered injury under battle conditions as a result of 'friendly fire', that is, somebody on their own side makes a mistake

and fires on troops which are on the same side. It was held in a case *Mulcaly v. Ministry of Defence* (1996) that these types of damages are also covered by immunity, but this immunity does not apply to routine operations, it only applies if there are real battle conditions.

EU Law

- Under the principles of the *Francovich* judgement, the State is liable when there is a:
  1) Sufficiently serious infringement of an EU law,
  2) Which is intended to confer rights upon individuals.

Sometimes, States fail to abide by EU Law and **the most common occurrence of this is when States do not implement an EU Directive**, that is, they do not transpose an EU Directive into national law. The issue arises where you may have persons who would have been entitled to a remedy had that particular Directive been implemented but who end up not having a remedy under domestic law because of this failure of the State to implement an EU Directive in breach of EU Law.

The Franvocich Critera (1991)

This question arose in a famous judgement *Frankovich v. Italy* (1991) which went into the situations where a State can be liable for damages towards an individual for failure to implement EU Law.

This judgement sets up a number of conditions –

1) The infringement of EU Law must be **sufficiently serious**, that is, it must not be a minor matter.
2) The EU Law must be one which is intended to **confer rights on individuals**. So, it must not be a law which simply, for example, regulates the State, cioè, the behaviour of Government, but it must be a law which the Court considers conferring rights to the individual.
3) The **causal link** between the breach of EU Law and the damages which are suffered.

The Factortame Criteria (1996)

Individuals suffering a loss as a result of a breach of EU Law are entitled to reparation if –

1) The rule of EU Law is intended to confer rights upon them;
2) The breach is sufficiently serious;
3) There is a direct causal link between the breach and the damages sustained by the individuals.

The *Frankovich* notion became very relevant in the UK when there was the famous Factortame litigation. Factortame was about an incident where the British Government did not allow Spanish fishermen to register their boats in the UK in order to be able to fish against the UK quota within the EU community. This was in breach of EU Law and therefore, these fishermen sued for damages. The UK Courts said that under English law, there is no general right to be compensated for *ultra vires* acts of the administration. The matter then continued to the ECJ and in 1996, the ECJ stated that individuals **suffering a loss as a result of a breach of EU law** are **entitled to reparation** if the rule of EU Law is intended to confer rights upon them, the breach is sufficiently serious, and there is a direct causal link between

the breach and the damages sustained by individuals. This question of causality is one of the main elements in damages and in tort. If you are suing someone for damages, you are not only obliged to prove that you have suffered damages but that **you have suffered damages as a direct result of the tort committed by the other party**.

In order to establish what is a serious breach, what does the Court rely on? (Factortame judgement)

1) **Whether the infringement and the damage caused was intentional or voluntary**;

That is, the State knew that it would incur damages, but it persisted in its path, nonetheless. The weighs in favour of the fact that the breach was serious.

2) **Whether any error of law was excusable or inexcusable**;

The second element would be whether any error of law, as you know, breach of the law very often depends on error of the law. The Court would consider whether any error of law was excusable – was it manifest, was the law interpreted in a way in which no serious lawyer would interpret it, or were there fine points involved about which genuine and properly prepared lawyers can disagree? So, is the error of law excusable or inexcusable?

3) **Whether the position taken by an EU institution contributed towards the breach**;

An error of law can also be made excusable if the position taken by institutions of the EU itself, contributed towards the breach. If the State was made to believe that its interpretation of law was not incorrect by some communication made with the institutions of the EU, then again, that is another factor which has to be taken into account in determining whether a breach is serious or not.

4) **Whether the State adopted or retained national measures or practices contrary to EU Law**.

Breach clearly becomes serious when the State defies the EU institutions, that knowing that what it is doing is contrary to EU law, it persists in that breach.

Those are the factors which the ECJ would consider when determining whether the State should not only be found to have infringed EU law but should also be held liable in damages towards the individual who suffered damages as a result of the breach.

Council of Europe Recommendation R(84)15

- Contemplates both 'fault' liability of the State and 'no fault' liability.
- 'No fault' liability is appropriate when it is not fair that an individual be made to carry the cost of public interest action alone or with a small number of others.

Compensation

- Where an administrative act causes exceptional harm to an individual, the balance between public interest and private rights is disrupted. So, there is also a problem of proportionality here.

- The law itself may grant a right to compensation – as in the case of expropriation of property;
- Or the matter may be left to the Courts.

On this question of State Liability there is also a Council of Europe Recommendation dating back to 1984 which contemplates two types of liability of the State: 'fault' and 'no fault' liability, saying that **the State must be liable when it is at fault**, that is, fault liability of the State, but then there should also be liability of the State **when the liability does not result from illegal acts but from legal acts**.

'No fault' liability is considered to be appropriate when it is not fair that an individual should be made to carry the cost of a public interest action alone or with a small number of others. This is recognised in any system of Administrative Law, that there must be also, in certain circumstances such as when there is a disproportionate burden on an individual or on small number of individuals, **compensation for prejudices or damages caused legally**. So, not necessarily damage caused illegally.

So, **the State must compensate both when it is at fault and when its actions cause a disproportionate burden**. This is so in cases where there is *de facto* appropriation, that is, where property is rendered worthless as a result of public works or caused to diminish hugely in value.

Incidentally, this was the case in a local judgement *Hon. Dominic Mintoff et al v. The Hon. Prime Minister et al* (30/04/1996) concerning the Delimara power station. The Court, basing itself on case law of the ECHR, in particular *Lopez Ostra v. Spain* (26/02/1990), decided that there was a case of *de facto* expropriation and that therefore, compensation was due or rather that the fact that compensation was not paid, constituted a breach of the owner's rights.

So, sometimes, **even where there isn't a formal expropriation**, the circumstances can be such that a Court will hold that there is a *de facto* expropriation. These are not inconveniences which everyone has to accept because of the fact that we live in society, but they are excessive and carried and suffered by a small group or by an individual. In such cases, this notion of **'no fault' liability** of the State kicks in.

Compensation as a 'Way Out'

- The possibility to pay compensation also provides a way out from certain problems:
- For example, a substantive legitimate expectation cannot be honoured for reasons of public interest. Payment of compensation could be the price to pay for upholding the action of the State;
- This is done in the context of EU Law;
- *CNTA v. Commission* (1975)

Compensation, even though public administrators are always rather wary of this notion of paying compensation, often provides a 'way out' for the administration from certain problems. So, arguing about very strict rules of Governmental Liability may sometimes mean that the administration will find itself in a situation where it has no 'way out'. The payment

of compensation can also a 'way out' for the administration from certain situations/problems.

For example, the case where a person has a substantive legitimate expectation, that is, he had a legitimate expectation not only limited to procedural grounds, that is not only that he would be heard, but that he would be treated in a certain way. So, a legitimate expectation to receive a particular treatment. But for reasons of public interest, that substantive legitimate expectation cannot be honoured. So, the State finds itself in a situation of conflict. It has created a legitimate expectation that the person will be treated in a particular way, and, at the same time, an overriding reason of public interest has arisen whereby this legitimate expectation can no longer be honoured. Payment of compensation, in such situations, could be the price to pay for upholding the public interest reason of the State to pursue the public interest objective. So, at the same time, the State compensates the individual whose legitimate expectation could not be honoured.

This is also resorted to as a 'way out' by the ECJ, as came to the fore in *CNTA v. Commission* (1975). When you cannot compensate in kind, because the situation has changed, then you have to pay compensation/damages in order to somehow, remedy the situation. Normally, when no solution is found, the person suffering a prejudice, resorts to a Constitutional action in Maltese law under the right to property. This was also the position taken by the Maltese Court where there was a situation where a farm had originally been built in agricultural surroundings, and so it was no nuisance. Clearly the owner of the farm had a legitimate expectation that his license would be renewed. Eventually, however, building permits were issued in the area, and therefore, this meant that the activity of the farm was not advisable because it was then a nuisance and cause health hazards to the people nearby. It could not continue.

The Court resolved this in this way. Normally, in these situations, that an activity will cease in a certain place, the first option of the public administration is to find a practical solution, a solution in kind, that of relocation. In this case it was difficult to find a place for **relocation** of the farm and therefore, the matter ended up before the Court. the Court came to the practical solution that such an activity could not go on in a residential area but, at the same time, the publica administration failed to respect the expectation of the person managing the farm, that his license would not be suddenly discontinued. So, the person was considered by the Court to be suffering damages because of a public interest reason and the way out found by the Court in its Constitutional jurisdiction (has a very wide margin of discretion as to how to grant constitutional redress) was the payment of compensation.

Constitutional redress in the Maltese Courts

- The Maltese Courts tend to follow the approach of the European Court of Human Rights in using compensation as a form of redress for human rights violations.

The most common form of Constitutional redress is the payment of monetary compensation.

Governmental Liability Recap

- Liability under our system is **tort-based** and one also has to establish a causal link between the damage suffered and the act of the administration;
- One must have to prove that **physical damage** or **financial loss** was suffered;
- Section 469A(5) COCP.

Special Systems of Liability

- There may be some areas where special systems of liability exist in order to protect 'public utilities' (e.g., postal services under the Post Office Act).
- However, this does not mean that there can be a total exemption of liability in these fields.

There may be some area where special systems of lability exist in order to protect essential services. However, this does not mean that there can be a total exemption of liability in these fields under any circumstances.

Employees

- Government employees are civilly responsible for their actions;
- However, actions **taken in the course of their duties** usually also give rise to Governmental Liability;
- A special problem arises when an official ostensibly acts as a public servant but is in fact acting in his or her own interest.

So, nowadays, this principle of **Vicarious Liability** is well established. The Government cannot raise the defence of sue the employees and not me. This is only accepted in exceptional circumstances.

There is this notion which raises a special problem when an official ostensibly acts as a public servant but is in fact acting to promote his own private interests. In the French system they have the distinction between '*faute de service'*, that is when the public service has done wrong and damages have been caused, and '*faute personale*' which is a fault personally attributable to the employee. In the latter case, it is the employee who has to make good for the damages and not the State. These are exceptional circumstances.

Last time, we left off with the issue of responsibility of State employees. State employees are liable towards third parties for tort committed in the course of their duties. In fact, if one goes to the classical case of *Paolo Busittil v. Clement La Primaudaye* (15/02/1894), even a case which held that the State could not be sued for acts *iure imperii*, held that if the employees carrying out the search in that case were negligent, then they would be sued personally for their fault.

So, there is this issue of the **fault of the employee** and the **fault of the service**, that is, when the employee can be deemed to be responsible for a fault, and when you can say the fault might have been also caused by the service, respectively. So, the fault might have been part and parcel of doing that job, that sometimes things go wrong when carrying out certain duties. On this point, the question that arises is, can we say here that it should be only the

employee who should be answerable and that the State should be immune from liability towards third parties who suffered damages as a result of the public service not working?

It would be unfair to the person who has suffered damages to sue the employee personally not knowing whether the employee is in a position to pay the damages. So, **the State has to carry a certain responsibility** and also a certain responsibility to pay damages. It cannot always say 'well this is the fault of the employee'. That would be unfair to the citizen and also, not completely very fair to the employee because very often you have an **accumulation of fault** and therefore, it is not just the employee making a mistake but a number of factors contributing to that particular accident/fact happening.

In the Continental system, in particular the French system, they go to great lengths not to exonerate the State when the employee has caused damage. Of course, if the damage was caused because of something completely unrelated to their work, then the employee would answer just like any other citizen would. But, if there is a connection, and sometimes even a farfetched connection, between the service and the damages, then even if it is clear that the employee did personally contribute or perhaps was the main cause of the damage, the French Administrative Courts normally find the State liable to reimburse the damages caused to the individual and then it is a matter for the Government to sue the employee either for all or part of the amount, or else to take disciplinary action.

Governmental liability is independent from **disciplinary** and **criminal liability** of Government employees, where the employee answers personally and it is not the administration who answers for him. In Malta, the furthest which we go is that when, for example, a driver of a government vehicle gets involved in criminal proceedings because of an accident which happened in the course of his duty, then the Government normally reimburses him reasonable expenses which that driver would have incurred because of his involvement in those criminal proceedings but that is where it stops. The Government cannot reimburse a fine to the driver say, because he drove his vehicle negligently. So, **criminal and disciplinary liability are 'personal'** whereby the employee answers personally for that.

This question of what a 'fault of the service' is and what is a 'personal fault' of the employee arises in **Civil proceedings**, so ordinary proceedings for the payment of damages, and also sometimes in **Constitutional proceedings**. However, Constitutional proceedings, that is, proceedings on the basis of an alleged breach of Fundamental Human Rights, of their very nature are proceedings against the State. So, the furthest that the Constitutional Court has gone in these cases where a Constitutional case is filed against the State and also against the employee considered to have caused the damages, is applying the notion of joint and several liability.

For example, we had this situation in cases filed in the early 1980s about claims of ill-treatment of persons in detention by police officers. In those cases, the plaintiff sued the Commissioner of Police as the Head of the Department (as the Government) but also sued the individual officers concerned. The Government, on its part, gave the defence that it employs its employees to do their duty and not to go beyond what is required of them by their duty or to exceed their powers and if they did so, they become personally responsible. However, the Court, in its final judgement, did not accept this argument completely because

the Constitutional action is one against the State and also, these people would not have been ill-treated had they not been arrested in the course of a police investigation. So, there is a connection between the service and the damages which are suffered.

In these cases, the Constitutional Court almost consistently found **joint and several liability** between the Commissioner of Police representing the Government and the individual officers, in such a way that the claimant could claim all the amount from the Government, but then joint and several liability works in a way that if one of the parties makes a payment which also covers the liability of the other parties, then the government is free to sue that employee for one half of the amount paid in damages. Whether the Government decides to do that or not is the Government's decision. So, joint and several liability was the situation.

It could also take **disciplinary action** against the officers involved and there could also be a case of Criminal liability, but that is separate from Civil or Constitutional Governmental Liability. One has to come back to the point that Constitutional redress is a form of Governmental Liability, but it is a redress under public law and not Civil Law liability. So, perhaps, this notion of joint and several liability between the Government and the individual could sit a bit uncomfortably in the context of public law redress. However, it was restored to as a practical solution to this problem.

Examples of a Personal Fault and a Fault of the Service
From these, one sees the extent to which the French Administrative Courts go in order to make sure that the individual, where the Government was somehow involved, actually gets paid from the Government.

In *Societe de Tramway de Roubaix Tourciong* (1953), a number of undisciplined soldiers were refusing to pay the tole on public transport run by this company. The transport company, seeing that this was becoming a problem, sued the administration for failure to supervise these employees, who were actually soldiers, correctly. This case ended up in the *Counseil d'Etat*, and it held that the administration was liable (that the fault was that of the administration) because of **failure to supervise its employees correctly**. On the face of it, one would say if these soldiers were undisciplined and refusing to pay, it is something which they should be responsible for. But the Administrative Court held that there was a duty to supervise employees correctly and so, the administration was liable to pay.

In *Feutry*, decided by the *Tribunal di Confli* in 1908, a mentally ill patient escaped from a mental hospital and set fire to some stacks of hay in a field. Again, the local authority which was responsible for this hospital was held liable to indemnify the owner of the field for **failure to control the situation in the hospital**. This is more understandable because anybody who has the care of a minor or of a person who is not capable of taking care of himself becomes **vicariously liable** under Civil Law for the damages caused by that person. But in this case, the fault was found with the local authority for failing to have the hospital properly organised in a way that persons who are ill cannot easily escape. Probably, if this case were to arise in Malta, and were to be pursued purely on a Civil Law basis, the result would be the same because the hospital has the care of the person, the person cannot take care of himself and so, the result would be that the hospital would be found to be liable for lack of proper supervision.

However, this notion of a 'fault of the service' draws upon an analogy (private law and public law are separate but influence each other and come close at times) from the rules of liability under the Civil Code. For example, under the French Civil Code, in the same way as under the Maltese Civil Code, a person is responsible to compensate for damages resulting from his fault. So, likewise, when there is a fault of the administration, it should also be held liable to compensate for damages resulting from its fault and the fault can also be a failure/defect in the operation of the public service in question. That is the fault which the administration may commit because ultimately the actual mistake would always be attributable to some employee/officer. But if the organisation fails, if there is a defect in its operation of the public service, this gives rise to this notion of a fault of the service which then by analogy with Civil Law attracts the liability of the Government/public administration for fault.

Of course, it is more common that the fault can be imputed to the fault of a particular officer, but you do not stop there, is the fault of the public officer a fault which is attributable to him personally irrespective of the service or does it reflect a malfunctioning of the service? This distinction between 'fault of the service' and 'personal fault' in French Administrative Law is attributed to the Tribunal decision in *Pelletier* (30/07/1873) which was about the seizure of a newspaper in a municipality and the publisher of the newspaper sued the municipality for damages. The municipality said this was the fault of the officer who decided to seize the newspaper; it was his personal fault and not that of the administration. The Tribunal held that it was a fault also of the administration and it said that personal fault happens when there is a personal fault on the part of the official which is not linked to the public service. It only stays as a personal fault when it is a fault of an official which however is not linked to the public service and there, the official may be sued personally. It becomes a fault of the service when it is committed by an official but is linked to the service.

So, this distinction resembles also a distinction which is also made in English law between 'acts of an employee in the course of his employment' and 'acts of an employee which are not in the course of his employment.' It is accepted that when performing certain public functions, one can also commit mistakes. These could be mistakes which are committed **consciously**, that is, coming close to bad faith, or else they could be decisions which are **disproportionate**, illegal. In that case when an employee makes a mistake in the course of doing his duties, so where there is a link between the public service and the fault of the employee, then that becomes a 'fault of the service', without prejudice to any disciplinary action which it might take against the employee. However, when the act of the employee has nothing to do or is very far from the duties of the employee in the course of his employment, then in that case, it becomes a 'personal fault' since it has nothing to do with the service. These cases where the public administration is found to be completely not liable are rather rare. Case law favours compensating the victim, and this is why there is this case law favouring the finding of a fault of the service and a reluctance to consider a fault to be purely a personal fault of the employee.

One case which shows the extent to which this case law goes, is the *Anquet case* (1911). A person went to a post office, when he came to leave, he found the main door closed, he realised that there was a door which was only accessible to employees, and he went to exit the post office through this door. He found a couple of bad-tempered employees who

assaulted him and in fact, also broke his leg. The case ultimately went to the *Counseil d'Etat* and it held that this situation presented two distinct faults –

1) The door of the post office which was used by the public was closed before the time when it had to be closed. This was considered a fault of the service,
2) The unwarranted violence on the customer was, however, a personal fault.

The State was held liable for the whole amount because the violence would not have happened had the door not been closed before time. So, the State had to pay and then, it could sue these employees later. This was a cumulation of a number of types of faults – fault of the service and personal fault. But the Court did not divide responsibility, it said the violence would not have happened had the door been closed before, so, the State had to pay. This case is rather far-fetched but still, this spirit of compensating the victim leads to a situation where if there is some sort of connection between something which went wrong in the service and damages, then the State must compensate.

Another case of this notion of contributary negligence (when for damages to happen, there would have been contribution by a number of factors some attributable personally to the employee others to the service) is the *Lemmonier case* (1918). In this case, there was a local commune who was holding its annual feast. One of the attractions in this feast was a shooting competition where participants would shoot at moving objects. This was a bit dangerous in the sense that a number of passers-by on the other side of a bank of a river close to this competition complained to the mayor that they had been just missed by bullets fired in the course of this entertainment. Eventually, a person who was walking was actually hit by a bullet. This injury also happened despite the fact that the mayor was warned that there were people who were lucky not to be hit.

A Civil Court of Appeal held that the mayor was personally liable because this was his personal fault that he knew the situation to be dangerous and still allowed it to proceed. However, the case also went to the *Counseil d'Etat* which held that given that the fair was organised by the local authority, it also had jurisdiction on the case and it found, its judgement, that then facts of the case presented elements both of a personal fault of the mayor and of a fault of the service because the service had provided the conditions for the commission of the fault since the service had organised this fair. So, the fault of the service cannot be detached/separated from the fault of the mayor. Therefore, it was held that the government had to make good.

Later on, this solution of finding the public administration liable to pay the whole amount but then leaving it up to the public administration to sue was starting to be doubted as to whether it was the right solution and it was accepted in two cases *Delville* and *Laruelle* (1951), it was held that the administration could sue the official also before the administrative courts; this was an issue of administrative blame. Of course, this only applies in systems with separate courts. In Malta one can only go to the ordinary Civil Court. But even the blame was considered to be an Administrative Law matter.

The former case involved an accident whilst driving a government lorry which was partly caused because of the state of drunkenness of the driver, but also partly caused because the

lorry had defective breaks. The driver was sued by the person suffering damage for the whole amount and he was condemned to pay the whole amount, however, the driver then sued the administration to reimburse him 50% of the amount which had been found liable to pay.

There are some activities where it is recognised that these activities are particularly delicate or particularly difficult and therefore, in order to find that there was fault, one also needs to find gross negligence so, situations where any mistake is not enough, anything which goes wrong is not enough, but you must prove that there was gross negligence, something more than an ordinary mistake which a careful person would not have committed. This is particularly so in the medical field. It is not enough to prove that a mistake was made but one needs to prove that it was a type of mistake which no careful professional would have committed or in the case of medical negligence, something which no careful surgeon would have ever committed. So, not living up to the standards of the profession. Even, for example, in determining whether the police were negligent, it is recognised that police work in certain circumstances is difficult, so it's not enough to prove that something went wrong, that somebody made a mistake, but you must prove that there was this element of gross negligence in order to hold that the police should be held liable in tort.

The requirements of Governmental liability
The Elements of an Action for Damages

What are the situations in which the Government will be held liable? What do you need to prove in a Court when alleging that the State should be held liable?

This particular topic concentrates on cases where there is an allegation of tort on the part of the State which is outside the Constitutional context of breach of fundamental rights because in breach of fundamental rights, the Court, under our system, has a very wide discretion as to what sort of redress to grant. So, even though it might generally be guided by the principles of Civil Law, in those cases we are not in the field of Civil Law, whilst in the cases we are going to speak about, they are very much regulated by the rules of Civil Law. In our case, Governmental Liability is liability under the Civil Code. This particular topic overlaps with the law of tort in Civil Law but of course, it concerns the rules by which Government can be held liable.

Liability flows from Responsibility

- Governmental Liability flows from responsibility.
- Damage must have been suffered and
- It must be the direct consequence of the fact which caused the damage.

For there to be liability, there must be **responsibility**. Someone must be responsible for the fault for which he is being sued to pay damages. In fact, even in an ordinary Civil case, for example, on a motor vehicle collision, the first claim normally made is that Mr X was responsible for the accident, that the damages suffered by plaintiff were the result of the responsibility of the tort committed by the defendant. So, in the same vein, Governmental Liability flows from responsibility.

A second element is that the **damage must have been suffered**. So, if you are walking on a pavement and someone is over speeding in the street, loses control of the car and gets on the pavement but doesn't hit you, there may be criminal lability on the part of the driver but if he has caused no damage to you, you cannot sue for damages. If damage was not suffered, there is no claim for damages which may be filed.

Another element is that there must be a **direct cause and effect** link between the tort committed by the defendant and the damage suffered. This is very important in the law of tort and liability – it is referred to as causality, that is, the cause-and-effect link between the trot and the damage which was suffered.

Damage-Purpose

- Damages are intended to make good for damage suffered and not to punish.
- Governmental Liability is of the same nature as liability which arises between private individuals. Under the Maltese legal system, it is governed by the Civil Code. Governmental Liability is Civil Liability for damages.
- It is not disciplinary or criminal liability although this does not mean that a government official cannot be held criminally liable for act committed by him or her in the exercise of official functions.

Damages are intended to make good for the damage suffered. In our law, we do not have the notion of punitive damages as one has, for example, in the USA where a Court might award more damages than were actually suffered to punish defendant. For example, a company for putting a defective product on the market. In our case, and in the case of most of Europe, the rule is that **damages are intended to make good for the damage suffered**, not to punish. Here, we are in the field of Civil Law.

Governmental Liability is of the same nature as liability which arises between private individuals, it is a Civil Law liability under Maltese law. It is governed by the Civil Code, and it is ordinary Civil Liability. When we speak of Governmental Liability, this is what we mean – Civil Liability of the Government or of its employees. It does not exclude, however, criminal or disciplinary liability of the employee. So, it could be that the Government has to pay damages as a result of the negligence of its employee, and then the Government will take disciplinary action against that employee or else, if the act violates the Criminal Law, then criminal proceedings might also be taken against the person committing the criminal offence, the tort. If the tort is also a Criminal offence, it may give rise to Criminal proceedings against the person who committed that particular act. But this does not eliminate Civil Liability in tort.

Different Criterion from that Applicable in Criminal or Disciplinary Proceedings

- Disciplinary or criminal responsibility and punishment are based on the gravity of the violation of the rules concerned and not on the extent of the damages.
- Civil Liability is based on the extent of the damages.

One difference which exists between civil liability and disciplinary or criminal Liability is that the criterion differs between the two. Disciplinary or criminal responsibility or punishment are based on the gravity of the violation of the rules concerned and not on the extent of the

damages. So, strictly speaking the extent of the damages, even though a Court might take it into consideration in awarding punishment, is not a measure of the Criminal Law. The measure of the Criminal Law and of disciplinary proceedings is the gravity of the violation of the rules concerned. The question asked would be, is it a small violation or was it a very grave violation? This is what normally makes the big difference in punishment and not how many damages suffered. One may make a small mistake but cause a lot of damages. That does not mean that he should be punished more severely than he deserves for that small mistake in the criminal or disciplinary field.

In the Civil Law field, the situation is different. The situation here is based on the extent of the damages, that is, on the amount of the damages which the plaintiff has suffered, irrespective of whether the breach was a very serious breach of the law or was a minor breach of the law. If it was the breach which caused the damages, then the defendant will have to pay.

Proof

- It is the victim who has to prove that damages were suffered – the burden of proof lies with the party making the claim.
- In order to give rise to liability, the damage must be certain.

One rule with regard to procedure is that it is the victim who has to prove that the damages were suffered. So, in Maltese jargon we say '*min jallega jrid jipprova*,' that is, if you are alleging that something happened and that this was the fault of the defendant, it is you as the plaintiff who has to prove that you have suffered damages and that the damages were suffered as a result of the responsibility of the defendant.

Apart from this question of burden of proof, another rule is that the damage must have actually been suffered. So, the rule of certainty of the damage. The damage has to be proven and it must be actual damage, it cannot be based on speculative reasoning, for example.

Certainty of Damage

- 'Certainty' does not mean that the damage must be 'actual.' It can also consist of loss of future earnings (*lucrum cessans*).
- Damage is not considered as certain if its materialisation depends on a fact which may or may not happen in the future.

Certainty does not mean that the damage must have already been suffered at the time when the Court case is commenced. If, for example, you have suffered a physical disability as a result of an accident, it is clear that you will continue to suffer the consequences for a long time. That does not make the damage uncertain. So, **certain damage does not translate to actual damage which has already been suffered** because damage can also consist of **loss of future earnings**. In fact, the criteria upon which our Civil Code grants damages are the **actual expenses** which you incurred as a result of the damages, and the **loss of future earnings**.

The problem with certainty of the damage is that damage may not be certain if it will only materialise if a certain fact happens in the future. So, you can have situations where future damages may or may not materialise depending on the way things go in the future and that gives rise to a problem with regard to whether that kind of damage is certain or not, or at least whether it is certain to the extent that a Court can consider it to be certain on the basis of probabilities, and therefore, award damages on that basis.

Debatable Certainty

- A child is killed in an accident and the parents claim compensation, in part, for the maintenance which they would have received from the child when the child would have grown up. Is this damage certain? Is it certain that the parents would have found themselves in a state of need to the extent that they would have to require maintenance from the child? Is it certain that the child would have lived so long? Is it so certain that the child would have been rich enough to maintain his parents?
- The Maltese Courts have not always considered this type of damage 'uncertain'.

An example which is often raised is that of a child being killed in a traffic accident and the parents claim compensation arguing in part that had the child grown up, he would have been able to support his parents if his parents ended up in need in their old age. Here, the parents could not be supported by the child at the time of the accident since the child was very young, but they are arguing that when the child grew up, they could have the reassurance of being able to look to the child for support if they get into a situation of need.

The question which this particular situation raises is, is that kind of damage certain? Is it certain that the parents would have found themselves in a state of need to the extent that they would have required to be maintained by the child? Is it certain that the child would have lived so long? Is it certain that the child would have had the means to support them?

Until about 15/20 years ago, the Maltese Courts in cases such as this where a baby dies in a traffic accident, did not calculate the loss of future earnings of that child in the same way as they would calculate it had he been an adult or a teenager. So, they would not go into how much this child would have probably earned had he lived because being very young, they considered that the damage was not capable of being considered as certain damage and so, what the Court would do is that it would fix a sum on a **best of judgement basis** and award that sum as damages to the parents. Usually, it used to be a moderate sum and would not have compensated for loss of earnings for a lifetime.

However, recently there were cases where the Courts started seeing this differently and started granting damages on the basis of loss of earnings of the child if he had lived a normal lifetime, less an amount which the child would have spent in order to maintain himself. So, nowadays, the argument that the future loss of earnings of a child is so uncertain that a Court cannot award it is no longer valid in the context of Maltese case law.

The Maltese Courts have also sometimes considered that the fact that the parents are the heir of the child means that they are entitled to what the child would be entitled to, had the child not died. So, various arguments can be brought forward to calculate the number of damages. There are a number of possibilities on determining loss of future earnings. You

can never do this in an exact manner but then there are situations that give rise to more difficulty in this filed, when the damage is too remote and depends on a number off acts which may or may not happen.

Loss of Chance

- Where the loss is a 'loss of chance' one cannot exclude that the loss of a chance can lead to payment of damages but the chance must be proven to be a serious chance.
- Example: a racehorse is killed in an accident.

Another problematic situation with regard to this question of certainty of damage is that of loss of chance. For example, suppose a racehorse is killed in an accident. The purpose of owning a racehorse is often a business, that this horse might render earnings to its owner. Can the owner say this horse was going to win a number of very important races and so, I have to be given what I would have earned had the horse not been killed? One cannot exclude that loss of a chance can lead to the payment of damages, because it would be a real damage if there was a real probability that this horse would have rendered a lot of earnings. In that case, they are no longer uncertain damages, at least on the basis of the Civil Law criterion of probability. However, for loss of chance to give rise to the payment of damages it must be proven at least there **was a serious chance**. That on a basis of probabilities, it was probable that these earnings were going to materialise at some point.

Unsuccessful Sterilisation or Wrongly Denied Abortion

- An interesting fact which arose before French Administrative Courts concerned situations where the alleged source of damages consisted of the birth of a child.
- Can it be an acceptable legal basis for a claim for damages?
- In one case the mother had been wrongly refused an abortion and in the other case the mother had had a sterilisation operation and notwithstanding a child was born.

There are also those situations which raise a problem about the granting of damages which is both legal and moral. This is an example of a case where **a moral issue becomes also a legal consideration**.

These cases had arisen before French Administrative Courts, the case where the alleged source of the damage consists in the birth of a human being. For example, when there is an unsuccessful sterilisation, that is, a person undergoes a sterilisation operation not to have more children but unknown to her, the operation is not successful, and a child is born. Or else, in countries where abortion is legal, where you have a wrongly denied abortion. So, it is considered, for example, that the mother is not eligible for abortion but then a Court to which this matter is referred finds that in truth she was entitled to have an abortion but in the meantime a child is born.

This raises the issue; can you really say that the birth of a human being in itself can be the cause of Civil damages? When this case arose in the French Administrative Courts, in particular in the French Conseil d'Etat in *Madmoiselle R'* (02/07/1982) and in the Administrative Court of Strasbourg in *Hospices Civils de Colmar* (21/04/1994), it was decided that for ethical reasons, the birth of a human being cannot be considered as a fact which gives rise to the right of the parent. However, they left a bit of a door open, saying that this

is so unless she proves exceptional circumstances. So, if the Court considers that the reason for claiming damages is not the birth alone but there are also other exceptional circumstances, then the Court allowed for the possibility that damages may be granted. But if the damages are being claimed on the basis of the birth alone, then the Administrative Courts decided that for ethical reasons, one cannot go so far as to consider the birth of a human being in itself as a fact giving rise to damages.

There was a case before the Maltese Courts with regard to unsuccessful serialisation. The couple sued the surgeon but also sued the Government because the operation was carried out in a government hospital. This issue of whether a person can claim damages because of the birth of a human being was raised. The Court decided the case without having to go into this big ethical issue since it was proven that sterilisation operations are not always guaranteed success and there is always a percentage of people who undergo this operation but who still have children. The Court dismissed the case of the plaintiff on this basis. The fact that the Court did not enter into the moral aspect issue could either mean that it did not consider it as valid, because it went into the merits of the case, but it could also be that it saw that this was a very thorny moral and ethical issue and it avoided it by deciding the case on the ordinary Civil Law of negligence governing medical negligence. So, we do not have a Maltese Court pronouncement on this issue, of whether a human being can be a source of claiming damages.

The Cause-and-Effect Relationship

- Damages are due if there is a 'direct' causal relationship between the fact in respect of which damage is demanded and the damage. Therefore, one must also take into account whether extraneous causes influenced the damage.
- A fact is not considered as the cause of a damage simply because in the absence of that fact the damage would not have happened.

One of the very important elements in the law of tort and of liability is the cause-and-effect relationship. Damages are due only if there is a direct causal relationship between the fact in respect of which the damage is demanded and the damage. In other words, the damage must result from the act committed by the defendant. So, because of this, one must also consider whether there were other **extraneous circumstances** which influenced the damage, apart from the act of the defendant. One rule here is that a fact is not considered to be the cause of a damage simply because in the absence of that fact, the damage would not have happened. An example of this is if somebody is driving and gets distracted by something, and because of that distraction he does not keep a proper lookout and is involved in an accident himself. He cannot argue that the distraction was the cause of the damage. It's true that had there not been the distraction, the accident would probably not have happened but that does make the distraction the cause of the accident. The cause in such a case would be the failure of the person to maintain proper control of his vehicle and to keep a proper lookout.

Proof of Causality

- Adequate causality must be proved, and the cause of damage is attributed to the fact which, taking all relevant circumstances into account, played a partiucalr role in provoking the damage – *il-causa prossima tal-inċident.*

- Sometimes, the fact that some time has elapsed between the fault of the administration and the damage may mean that it becomes difficult to prove a direct cause and effect relationship. E.g., the police wrongly issue a permit to carry a weapon, but the weapon is only misused three years later.

Adequate causality must be proved and the cause of the damage then, is attributed to the fact which, taking all relevant circumstances into account, played a particular role in provoking the damage. In a Maltese case law, we say *'il-causa prossima tal-incident'* – that is, the fact that is close to the causing of the incident which contributed/played a particular role in provoking that damage.

Sometimes, a lapse of time between a particular fact and the suffering of damages may also break this chain of causality. For example, the fact that sometime may have elapsed between the fault of the administration and the damage, may mean that it becomes either difficult or impossible to prove a direct cause and effect relationship. For example, if the police wrongly issued a permit to carry a gun to a person who should not have been issued that permit, but the weapon is only misused a number of years later. Can you argue that the real cause was something that happened the number of years before? The lapse of time between the two events may break the chain of causality.

Extraneous Causes

- There are a number of other factors which may mitigate or even eliminate liability:
  1) The behaviour of the victim himself – but this normally has to constitute a tort.
  2) The tort committed by a third party – although sometimes even the non-tortuous behaviour of third party can be said to have contributed to an accident.
  3) 'Force Majeure'.

A number of other situations may also break this cause-and-effect link, or they may mitigate the responsibility of the person causing the damage and a number of situations include, for example, the behaviour of the victim himself but normally the behaviour of the victim must be such as to constitute a tort, or else the behaviour of a third party which may or may not constitute a tort. Sometimes, if a third-party behaviour is non tortuous it can also be said to have contributed to an accident in order to reduce the responsibility of the principal person who is being sued. The third extraneous cause would be that of force majeure.

Force majeure

<u>3 characteristics:</u>

1) There must be a fact which is **extraneous to the defendant**; it must not be something which the defendant committed himself. You cannot do something yourself, place yourself in particular danger and argue that you could not do anything about it because of the situation you were in. That is not force majeure. Force majeure is extraneous to the person who is being sued for damages;

2) It cannot be resisted. The effects of force majeure must be **irresistible**;

3) It must **not be capable of being foreseen**. This does not mean it was not foreseen but it means that with the proper degree of care, one would have foreseen this damage.

Example: there was a case involving people lighting a bonfire on the seashore and to their surprise, the fire spread over the water and destroyed a boat. The problem was that there was petrol on the surface of the water. These people were sued for damages by the owner of the boat, and they argued that it is not something which is foreseeable that in lighting their bonfire the fire would spread over the water and destroy the boat. They argued this notion that there was no negligence because the damage was not foreseeable. However, the Court of Appeal held that while it is true that the damage was not foreseen, otherwise it would have been wilful, it was nevertheless foreseeable to a person lighting a fire that there might be circumstances where that fire would spread. So, they were found to be responsible for the payment of damages.

Force majeure is very often pleaded in cases of natural phenomena. With that being said, even the behaviours of the victim himself or of a third party may cause an emergency situation which may be regarded as force majeure. **If the victim himself or a third party does something which is so unpredictable that it placed the person who ultimately caused the damages in an impossible situation**, then that situation can also be considered as giving rise to the defence of force majeure. So, that you faced me with something sudden which was in no way predictable.

Storms and Heavy Rainfall

- Storms and rainwater give rise to quite a lot of debate as to what constitutes force majeure.
- In the Court case *Carmelo Micallef v. Direttur tax-Xogħolijiet* (2001), it was decided that Government was responsible for damages caused through the flooding of a farm at Marsa as a result of heavy rainfall. Government had constructed a road (about 15 years before) at a higher level than the previous one and this gave rise to flooding when there was a 'ten-year storm' despite the drainage arrangements installed in order to prevent the flooding.

As already stated, normally, force majeure is pleaded in cases where persons claim damages as a result of damage to their property caused by natural or atmospheric phenomena such as heavy rainfall. But there could also be other situations where force majeure is pleaded including even the behaviour of the victim or of a third party who created an unforceeable, sudden emergency. Storms and heavy rainfall are the main principal cases where this issue of force majeure arises, where there isn't an ordinary storm but something which is called the 15-year storm. The question arises, when damages are claimed, did that particular storm constitute force majeure?

Carmelo Micallef v. Direttur tax-Xogħolijiet (2001) concerned a situation where plaintiff owned a farm which was above street level. In 1976, the Marsa Road was constructed, but it was constructed at a higher level than this farm. The engineers in charge of the project provided channels for the drainage of rainwater since it was foreseen that the farm would start receiving more rainwater than previously. At one point, there was a heavy storm, and the issue arose regarding the question of force majeure, that is, was this storm so heavy that you cannot expect Government to build roads and incur the expenditure in building those roads in a way that also provides that no damage will be caused by this very rare storm? The Court still found Government responsible mainly because **a 10-year storm is not**

something without precedent. So, the Court held that a 10-year storm is forceable and therefore, in constructing a road, Government also has to take into account these rather rare storms. The owner of the farm was not granted the full amount of damages which he claimed because the Court also found that he had not taken all reasonable precautions. But the principle was that the fact that a storm only happens roughly every 10 years did not constitute force majeure.

Other Conseil D'Etat Decisions
Indeed, cases concerning storms do not arise only in Malta.

For example, there is a 1963 French Administrative Law case, where it was decided that heavy rainfall had, because of its unforseeability and intensity, presented the characteristics of force majeure. So, in this case, the French Court decided that the storm was unforeseeable and very intense and there were the elements of force majeure. However, this is the rare occasion when the Court decided that a storm constituted force majeure. In other Conseil d'Etat cases it was decided that if heavy rainfall was not unprecedented, then this defence would not be accepted. If it happened before, then the defence of force majeure would not be applicable.

In a 1967 case, *Ville de Royan*, it was decided that even though a storm which happened in 1957 was very heavy, the fact that a similar storm had happened in 1935 excluded force majeure. So, these judgements are very much on the same lines as the judgement of the Maltese Court saying the defence of force majeure is not applicable in the case of something which does not happen often, but which happens.

The state of the Conseil d'Etat case law at present is to the effect that to qualify as force majeure, an event has to be practically without precedent when all the relevant circumstances are taken into consideration. So, an event has to be not without precedent but practically without precedent to constitute force majeure.

Casus
- The difference between force majeure and casus (każ fortuwitu) is that the latter, although it is also unforeseeable and irresistible, is **not extraneous to the behaviour of the defendant**. It is not, therefore, an extraneous cause but it exonerates the defendant from liability because he would not have committed the tort had the event not happened.
- This defence of casus does not apply in cases where the law stipulates strict liability such as in a number of instances concerning environmental damage.
- Casus is also sometimes described as the 'unknown cause'.

Another situation which differs slightly from force majeure is that of casus. It is something which was **not foreseeable**, and which just happened and created a **situation of emergency**.

The difference between the two is that casus, although it is also unforeseeable and irresistible, is **not extraneous to the behaviour of the defendant**. It is not an extraneous cause, but it exonerates the defendant from liability because he would not have committed the tort had the event not happened.

For example, a person driving a car who suddenly gets a heart attack and loses control. For casus to apply, they would also look into the medical history of that person. If he had a heart condition and was not prudent in continuing to drive, then it would not be a case of casus because it was foreseeable that given his health condition, he could find himself in a situation where something happens, and he loses control. However, if that is not the case, if it is something really unforeseeable, then the defence of casus would apply in the sense that **damages were caused through an act of the defendant, but the defendant had no control** because of this fortuitous vent.

In cases where the law imposes a regime of **strict liability**, such as in the environmental field, if one undertakes certain activities, like operating a power station, which **of its every nature gives rise to certain dangers** and however, if an accident happens it might be difficult to pinpoint who did something wrong in this whole elaborate system. So, environmental law, very often has recourse to this regime of strict liability.

In other words, if you are operating this kind of activity which is a dangerous activity and something goes wrong and somebody suffers damages, then **the plaintiff need not be in a position to pinpoint what exactly went wrong and who is at fault**. The operator of that facility is strictly liable for the damage which occurred, of course, as long as he can prove that there is a cause-and-effect relationship between the malfunction which happened in that facility and the damages which he has suffered.

So, in that case, when there is strict liability, it stands to reason that you cannot say this was something which just went wrong totally unforeseeable. That defence is not acceptable because the activity, of its very nature, is dangerous, and i**t is foreseeable that things which might not have been foreseen could happen as a result of that activity**. This also comes close to the case of the people lighting the bonfire in force majeure. Even though not applying a strict liability regime but the normal rules of negligence, the Court considered that the results of the dangerous activity were foreseeable even though the people concerned had not foreseen them and even though it was remote to foresee such a consequence.

Casus is also sometimes referred to as the 'unknown cause' where something went wrong but you cannot exactly identify what went wrong. If there is no regime of strict liability, the defence of the 'unknown cause' and the defence of casus will probably succeed. But **if there is a regime of strict liability, this defence is not applicable**.

Contribution

- The behaviour of a third party or even force majeure do not necessarily operate to exonerate the defendant completely. It may also be a case of **simply reducing the degree of responsibility**.
- In some cases, the acts of administration might have aggravated the effects of force majeure – for example where the effects of exceptionally heavy rainfall have been aggravated by a defective drainage system.
- When damage is caused by the acts of more than one contributor each will be responsible for the damage caused by him unless a regime of joint and several liability applies.

In damages you also have the situation of contribution where the behaviour of various persons has either **caused the damages** or **contributed to the increase of the damages**. The behaviour of the party or even force majeure do not necessarily exonerate the defendant completely, it may also be a case of simply reducing the responsibility of the defendant by considering that there was an element of casus, or of force majeure, but still the defendant contributed as well to the damages.

Again, this brings us to the *Carmelo Micallef v. Direttur tax-Xogħolijiet* case where the owner of the farm, knowing that the farm was susceptible to rainwater, left his stock on the floor, so it would be damaged immediately as soon as rainwater seeped in. In that case, the Court, although it conceded damages under other headings, did not deem that he was entitled to damages for loss of these stocks because **he himself had contributed**. Despite this situation, the plaintiff himself had contributed to the increase in the amount of damages and therefore, he had to bear the costs of that increase in damages himself.

Even the administration might be liable in this way. In some cases, it may be that the acts of the administration might have aggravated the effects of force majeure. So, the acts would have increased the damages. For example, a defective drainage system, or the failure to maintain it. It may be that there was force majeure but still the acts of the administration, or the failure of it, might have increased the amount of damages.

The rule is that where a Court considers that damage is caused by acts of more than one contributor, then **each person will be responsible for the damage caused by him**. So, the Court will **split responsibility**. This is quite common in traffic accidents where the Court will say the responsibility for the accident lies as to 2/3rd with the defendant and 1/3rd with the plaintiff.

However, this does not replay when there is a regime of **joint and several liability**, such as when damages are caused in the course of various people committing a criminal offence together. In that case, they become jointly and severally liable towards the injured party and the result is that the injured party can sue anyone of them for the whole amount. Of course, then the person sued for the whole amount has a right of recourse, that is, he/she can sue the other persons involved for their share. The bottom line is that the victim can get paid everything from anyone of the parties. When one of the parties is the State, then the likelihood is that the victim is going to claim the money from the State because there is more of a guarantee that he/she will get paid. Then it is up to the State to sue the other persons who were held jointly and severally liable with it.

There also certain situations which **prejudice the deposition of the victim to be able to claim damages**.

(1) Victim Acting Illegally

- This exception flows from the Roman Law maxim *'nemo auditur propriam suam turpitudinem allegans.'* One cannot base a claim against others on one's own fault.
- In *Bugeja v. Manager Water Works Department u Kummissarju tal-Puluzija* (Court of Appeal 1995), a motorcyclist using the wrong side of the road when the other side had

been closed because of public works could not recover damages from Government suffered as a result of a collision.
- In *Dr Adrian Vassallo v. Kummissarju tal-Pulużija*, Government was held partly liable in similar circumstances because of insufficient road signage – although in this case there was no question of the defendant acting illegally but a question of 'proper look out'.
- Illegal occupation of public land or illegal access to public facilities could also give rise to this exception.

The first is where the victim is doing something illegal himself. He might not be in a position to claim damages as a result of the fact that he was doing something **illegal** at the time when the accident happened, that is, when the cause of damages happened. Or else, where the victim had himself **accepted to take a certain risk**. Then the element of self-imposed damage might crop up, that is, when damages are the result of an inherent risk which the victim chose to take. So, in these situations, the victim's chances of being granted damages are either **eliminated or reduced**.

With respect to when the victim acts illegally, this exception flows from the Roman Law maxim that you cannot base an action for damages against a third party on your own illegality. If you are in the wrong, you cannot base an action on your illegal act/fraud/fault.

In *Bugeja v. Manager Water Works Department u Kummissarju tal-Puluzija* (Court of Appeal 1995), at one point, a main road was divided by a central strip and the waterworks department needed to carry out works and therefore, it needed to dig up the road. So, what they did was that they informed the police station that they needed to close part of the road and a policeman was sent where the works were being carried out and whilst the works were being carried out, the other side of the road apparently started being used as a two-way. Plaintiff Bugeja was driving his scooter, he came to his side of the road which was closed because of these works, he was not given any direction what to do, he went to the other side of the road, and was involved in a head on collision with an oncoming vehicle. He had suffered a degree of disability.

The First Court had found the manager of the waterworks and the Commissioner of Police responsible for this accident. However, on appeal, the Court of Appeal decided that Mr Bugeja was himself responsible for the accident because **the fact that you find your side of the road blocked, does not entitle you to go to the wrong side of the road**. Legally, this was decided on the basis that you cannot base an action for damages on your own illegal act, that when confronted with this situation that his side of the road was blocked, the motorcyclist was not entitled to go and drive on the other side of the road. So, in this case the Court decide that it was the plaintiff himself, because **he was doing an illegal act at the time of the accident**, who had actually caused the accident and therefore, he could not base an action for damages on his own illegal actions and got no damages at all.

This situation where there is a road or there are two tunnels both used in different directions has, over the years, given rise to a number of cases claiming damages either form the police or from other public authorities.

Dr Adrian Vassallo v. Kummissarju tal-Pulużija concerned a similar situation. This was a case where there was maintenance being carried out in the Kirkop tunnels and owing to this, one of them was closed and the other tunnel started being used as a two-way. The police had provided by sending a policeman on the spot to direct traffic. It happened that this policeman who was on the spot noticed a driver who was committing a contravention, stopped him, and during the time taken for him to sort it out, another vehicle passed. The driver did not realise that the tunnel was being used two-way and he was involved in a head on collision with another vehicle coming out of the tunnel, being driven against the one-way which is normally applicable, but the tunnel was being used two-way.

In this case, the Court apportioned damages, it said that plaintiff had borne no responsibility but the other driver who thought that he was driving correctly, had failed to keep a proper lookout because there was evidence that whilst this other driver was driving to the tunnel, there were other vehicles which emerged from the tunnel which were going against the normal flow of traffic and which this other driver was supposed to have noticed. The fact that this driver had not taken note led the Court to consider this driver as being responsible for 2/3rds of the damages caused in the accident. The Court, however, also found the police responsible for 1/3rd of the damages because the manner in which the police chose to regulate this dangerous situation was inadequate.

Nowadays, these cases aren't very common because over the years, the culture has changed that when these situations have to happen, normally you get proper signage or proper division of that carriageway in order to prevent drivers being tricked by this situation.

Doing something illegal could also include **illegal occupation of public land** or **illegal access to public facilities**. For example, you enter a government property illegally, and something happens which causes you damages. This will most likely prejudice your situation by reducing the amount of damages you receive, but this is not necessarily so. If there was a situation where the operator of a facility had to take account that people could be by accident passing-by there, then he may not necessarily get off the hook simply because those people were trespassing, but it would be a factor which would be taken into account. So, it all depends on the circumstances of the case.

Causality still Required for Defence of Illegality to Succeed

Of course, where there is no causal relationship between the illegality of the act and the damage, the defence based on the victim's illegality will not apply. So, it is not a question of the victim doing something illegal. **The fact that there is illegality committed on the part of the victim, in order to be relevant, must also be in a context of a cause-and-effect relationship between that illegality and the damages which have been suffered**. So, the illegality must be something which also contributed/caused the accident. It must not be any illegality.

For example, the fact that somebody is driving against a one-way system will probably render that person responsible if he causes an accident. Now, let's say he was stationary at the time, and somebody else crashes into it. You cannot say that the cause of the accident was the contravention of driving against a one-way system. **Illegality enough does not make**

you 100% responsible. You have to show that there was a cause-and-effect relationship between the illegality and the damage.

(2) Precarious Benefit

Another situation where it may not be possible to successfully claim damages is when a person is **enjoying a benefit from the administration which is of its very nature precarious**. So, on tolerance. An example of this would be an encroachment permit. The Lands Authority grants permission to persons conducting various activities on the basis of an encroachment permit which is a permit to encroach on public property, but it does not grant a property right over that property and one of the normal standard conditions of an encroachment permit is that the person is benefiting from that permit on tolerance and **can be told to leave that land at any time**. So, the benefit being derived by the operator of that business on encroached land is of itself precarious. So, he should not be in a position to claim damages if that encroachment permit is withdrawn because **he knew he is only there for as long as he is tolerated**.

It does not mean that if the encroachment permit was withdrawn in way where there was another breach of rights, that person cannot claim damages on the basis of that breach of rights, or for example, if there is a legitimate expectation.

In *Tanti v. Direttur tax-Xogħlijiet* (FH), a number of kiosks had to be temporarily or permanently removed and they were all there on a basis of an encroachment permit and so, the Lands Authority withdrew it for plaintiff because his kiosk had no place where it was according to these new plans. Mr Tanti went to Court asking the Court to use a warrant of prohibitory injunction and the Court granted that warrant. Probably the Court did this as a result of the fact that it considered that taking without trying to come to an agreement with the person concerned was too drastic an action. The Court still considered the other elements involved, even though the benefit was precarious. Eventually, the parties came to an arrangement on relocation.

(3) Activities Subject to Government Permit

- Where a business is of its nature 'risky' and, for example, depends on the issue of export permits the management of the business should know that there is always a risk of export permits being refused or withdrawn.
- In general, when one engages in activities which depend on permits being issued by public authorities one has to take proper account of the possibility that the permits will not be issued.
- Damages may only be due if the permits are denied illegally.

Also, when the victim has accepted a certain degree of risk. For example, if you went to live next to an airport or next to a busy road, you have accepted certain nuisances. It is not a question that the nuisances arose later. Or else, when you are in a business which of itself, is liable to be affected by certain government actions for example, if you are in the business of dealing with military equipment, it is foreseeable that there might be situations where your license to export military equipment to certain countries might be withdrawn because the business itself is of that nature. In that case, one problem which the person whose license

has been revoked would have in claiming damages is that he himself accepted a certain degree of risk.

Also, where certain businesses are subject to the granting of government permits, like export permits or import permits, the management of the business should know that there is always a risk that such permit would not be granted or would be withdrawn.

DELEGATED LEGISLATION

There is delegated legislation when the administration itself, normally a Minister**, issues regulations which have the force of law** as **AUTHORISED BY THE PARENT ACT**. So, the act on the basis of which delegated legislation is issued is called the parent act/primary law. In that act, you have an article which normally says *"the minister may make regulations for the better carrying out of the provisions of this act and without prejudice to the generality of the foregoing, such regulations may provide for…"* And then you have a list for what the regulations may provide for.

Any regulations issued under that article are subordinate legislation because they are subordinate to the Parent Act. They are also referred to as delegated legislation because they are issued on the basis of **a delegation of power given in the act itself by Parliament to the minister to make regulations**.

The Ideal versus the Practical

- In an ideal State, legislative power must be exercised only by legislators who are accountable to the electorate.
- But in practice the Executive exercises many legislative and even judicial powers.

In an ideal state, legislative power must be exercised only by the legislator who are the **persons accountable to the electorate**. The legislature enacts laws; it is not the Executive which does so, but when you have this delegated legislation, the **Executive is issuing regulations which have the force of law** and in practice, the executive exercises many legislative powers. **Not each and every instrument which has the force of law ends up going through Parliament**. Delegated legislation is exhorted to quite extensively.

The simple meaning of delegated legislation is *"**when the function of legislation is entrusted to organs other than the legislature by the legislature itself**, the legislation made by such organs is called delegated legislation."* Normally, it is to a minister that the power to make regulations is delegated but you can have cases where a power to make regulations is also delegated to **some other public authority**. Of course, it **always has to be delegated to a public authority and not a private person** but there are cases, where for example certain public corporations are given the power to make regulations in the sphere of their operation. So, it is not necessarily a minister but normally, it is a minister who is delegated to make these regulations.

Other Legal Jargon

- Delegated legislation is also known as 'subordinate legislation' because the law-making power is 'subordinate' to the authority of the legislature.
- The statute enacted by the legislature conferring legislative power on the executive is known as the 'parent act' or the 'primary law' (regulations are then the secondary law issued under it).
- This differs from a 'principal' law or an 'amending' law.

This differs from when we speak of a principal law and an amending act. This has nothing to do with delegated legislation. 'Principal law' is the law as it was passed for the first time by

Parliament without subsequent amendments. If that principal law needs to be amended, then Parliament will pass another act which is then known as an '**amending act'** but this question of principal law and amending act does not come into the picture of delegated legislation.

Reasons for Existence and Growth

- Because of the radical change in the philosophy as to the role to be played by the State its functions have increased and delegated legislation has become essential and inevitable.
- There are a number of principal factors responsible for the growth of delegated legislation.

There are various reasons for the existence of delegated legislation. In an ideal state, delegated legislation should not exist but then it would be impossible to carry out many functions of Government. So, because of the radical change in the philosophy as to the role to be played by the state, **the functions of the state have increased a lot** and delegated legislation in a modern state has become both essential and inevitable. There are a number of principal factors which are responsible for the growth of delegated legislation.

1) Pressure on Parliamentary Time

The first reason is that in simple words, **it is impossible for Parliament to pass itself each and every instrument which needs to have the force of law**. So, this question of pressure on parliamentary time is one of the main reasons for the **need** to have delegated legislation and also, for the **growth** of delegated legislation. In fact, Carr in his book Delegated Legislation (1921), described delegated legislation as *"a growing child called upon to relieve the parent of the strain of overwork and capable of attending to **minor matters**, while the parent manages the **main business**."*

Whether whatever goes into regulations are really minor matters nowadays is quite debatable but what is necessary is that **the main framework of the law will be established in the Parent Act**, then other matters are left for delegated legislation. **The truth is that if Parliament were not willing to delegate law-making power, it would be unable to pass the kind and the quality and the quantity of legislation which a modern State** and also, modern public opinion **requires**. Even public opinion requires that things should be regulated. So, if you do not have the capacity in parliament to enact all this, recourse has to made to other forms of legislation, principally, delegated legislation.

2) Technicality

The second reason for requiring delegated legislation is that some aspects of the law are particularly technical and therefore, this power to enact technical legislation should be conferred on technical entities which are better placed to deal with such technical problems. For example, **approval of medicines**, **constriction materials**, **technical standards in telecommunications** and so on. These are technical matters which do not lend themselves to the process of parliamentary debate.

3) Flexibility

Another reason is to maintain certain flexibility. In order to amend a law, one needs to go through all the stages of Parliament, and one needs to fit in that bill into the parliamentary agenda, one has to agree on when the committee stage will be held and so on. Even in urgent situations, it is still not a process which can be done immediately. At times, **when one enacts a law, it is impossible to foresee all future contingencies**, that is, to predict the sort of situations which the implementation of that law will be encountering in the future. Before the future perhaps used to be 20 years' time while nowadays with the rapid development in technology, the future may be 2 months after.

So, it is always advisable to **maintain a certain degree of flexibility** in order to be able to deal with **unforeseen situations that demand quick action,** and **that flexibility is normally maintained through the power to make regulations**. So, regulations are also a good tool to enable the executive to react to a development which was not foreseen at the time when the bill was originally enacted into law.

4) Experiment

Another use of delegated legislation, perhaps less common, is experiment. This refers to **when there is a system which you are not sure about**. It might seem like a good idea to try but things can also go wrong, and you might eventually decide that you have to change it or do without it. Because it can easily be changed, delegated legislation can also be used in order to experiment; to try out new systems. If things do not work as it was foreseen, you can easily change the situations without having to go through the parliamentary process.

5) Complexity of Modern Administration

Also, the complexity of modern administration often leads to the necessity to give more legislative powers to the Executive, that we are not speaking here of straightforward situations which can be regulated in the Parent Act, but particularly in fields like regulation of certain activities such as communications or social security or tax. These are areas which present complex situations and therefore, **the very complexity of these areas of administration gives rise to the necessity to be able to react quickly**, to be able to provide in regulations rather than in the principal law about such situations. **The complexity itself might also overlap with the issue of technicality**, that the complexity might itself require a certain technically in the regulations which is not suitable for the process of parliamentary debate but more suitable for regulations.

Limits of delegation/Problems of Excessive Delegation: Constitutionality

However, despite all the possible benefits of delegated legislation, the essential legislative functions cannot be delegated. So, **a delegation of power to a minister to enact regulations always has to be well-defined**. You cannot have a sort of blanket delegation for the minister to do whatever he deems appropriate because that would then encounter the problem of **unconstitutionality** because according to the Constitution, legislation has to be passed by Parliament. **Parliament is not free to delegate all its legislative powers to the Executive since it is the Constitution itself that requires Parliament to perform the legislative function**.

Parliament can delegate to a limited extent, but it cannot delegate its essential legislative functions which still have to be performed by Parliament. therefore, the parameters of the delegation have to be properly understood. Otherwise, Parliament would be abdicating its constitutional role. It cannot delegate in a vague manner. Therefore, the authority given to the minister has to be not focused specifically but rather well defined in the sense that the parameters of that delegation are properly understood.

Abdication

Parliament cannot effectively abdicate its legislative power. Here, we are getting into the problems of delegated legislation that **you can have delegated legislation, but you cannot have the delegation worded in such a way that effectively Parliament is abdicating its legislative power,** which is also a form of control on the Executive; it has to delegate in **clear terms**. But delegation in itself is not considered as abdication. Abdication would happen if the power to legislate by delegated legislation is delegated in a **vague** manner where effectively the minister doesn't need to go to Parliament for anything else in that particular area of legislation. As long as delegation is **reasonably well-defined** it does not constitute abdication.

Two Tests

A law which is challenged on the ground of excessive delegation has to be subjected to two tests –

1) **Whether that law delegates essential legislative functions**. So, whether that law is delegating a function which is so essential to Parliament that by means of that delegation, Parliament if effectively abdicating its constitutional function;

2) Whether the legislature has enunciated its policy and principles for the guidance of the Executive thereby defining the delegated power.

With respect to the first test, there are certain Constitutional powers, the exercise of which is regulated in the Constitution itself. It is clear that that type of function cannot be delegated.

Normally, administrative functions can be delegated **within a government department**. For example, a law regulating powers of the police would normally constantly refer to the Commissioner of the Police or a law regulating social security would refer to the Director General of Social Security, but this does not mean that he has to do everything. **It is accepted that he is working within a framework of a department and within that department, administrative functions may be delegated**. It's not the same, for example, for judicial functions. A judicial function cannot be delegated to somebody else. The law says that it if the Court has to decide a case, it cannot delegate that function to another institution.

So, there are limits, even Constitutional limits, to what types of functions can be delegated and what types of functions cannot be delegated. One can recall the debate regarding administrative fines where it was held by the Courts that the power to determine a criminal offence cannot be delegated to a body other than the Courts themselves. It is the same thing with the question of essential legislative functions. Parliament cannot, for examoke, by

law set up another body and say that in certain fields it will legislature. That is delegation of an essential legislative function which would not be legal.

The long and short of this is that **you can delegate but you cannot go beyond certain limits** – it cannot be a 'carte blanche'. Particularly, beyond these two tests.

Functions which are Commonly Delegated

There are a number of functions which are commonly delegated –

1) **Commencement** – this refers to the bringing of a law into force. It is quite common for Parliament to leave it to the Executive to decide when an Act will be brought into force. It is very frequent that one of the first articles of a law, normally sub-article (2) of article 1 would say that '*this law shall come into force of such date as the minister may by order in the Government Gazette appoint*' and different dates may also be appointed for different provisions or purposes of the law. It is not always the case that when a law is passed by Parliament, the administration is ready for it. **You might need some time in order to adjust**. Or for example, if it is a law which affects the operation of the Courts, it might be wiser to bring such a law into force upon the commencement of the following forensic year, as otherwise it would be disruptive.

   So, there may be many reasons why a law is not brought into force immediately as soon as it passed by Parliament and published in the Government Gazette. **If there isn't this commencement provision, then it comes into force immediately as soon as the President gives his consent, and the law is published in the Government Gazette**. But the country and the administration might not be ready for such a step at that time and so, you need a commencement provision. Or else, for example, the coming into force of a law may be phased in (gradually) by bringing some provisions of the law in and other later on.

   This is quite a common use of delegated legislation – the commencement provision. The danger of this is that the administration might forget bits and pieces of law and never bring them into force and if one conducts an exercise with regard to the laws passed by Parliament in Malta over the years which were only in part brought into force, one will also find a number of laws, or articles in particular laws which never came into force. The problem is that if you have a law which has been passed in the past and was never brought into force, it looks bad. It might be proof of the fact that the legislature might have acted too quickly in enacting such a law.

2) **Suppling Details** – If the legislative policy is established by the Legislature, the Legislature often leaves the ancillary function of supplying the details to the Executive. In general, this is quite a common type of model in legislating nowadays that you have **the general framework which the law wants to introduce in the principal act**, the act passed by Parliament, but then you leave as much as possible of the details to delegated legislation. This also gives a certain degree of flexibility which may be required, particularly when certain regulation of a particular field is new, so it ties into this model of having the general framework in the principal act and leaving the ancillary function of supplying details to regulations to be made by the Executive.

3) **Inclusion** – the legislature may pass an Act and make it applicable to certain activities or classes of persons (even in the commencement provision of an act, normally it is also stated that an act can be brought into force for certain purpose and for certain provisions) but in the same act it may also choose to empower the executive to extend the application of the act to different classes of persons or spheres of activities.

   For example, the original Data Protection Act. The Data Protection originally did not cover security matters (police, armed forces, security service etc). This was also in line with the Council of Europe Convention at that time, that Data Protection did not cover police matters. However, it was on the cards in the direction of also providing for Data Protection with regard to the police. So, in that law, there was a provision **empowering the minister to extend the application of the Data Protection Act by means of regulations in order to include subject matter which was not originally included in the act**, that is security and police matters. In fact, soon after, there were regulations issued on the basis of this power of inclusion to regulate Data Protection with regard to information collected by the police.

4) **Exclusion** – Together with this, there is the power of exclusion. **There are some laws which empower the Executive to grant an exemption from their operation**. Powers of exemption may be subject to conditions and are also common in fiscal legislation (it is quite common to find a power being given to the minister to grant an exemption from a particular tax in certain situations. Sometimes, this power is general, but the modern tendency is to have it more defined. This is to ensure **accountability**).

5) **Suspension** – this is very rare. A law may authorise the Government to suspend its application in certain circumstances by regulation.

6) **International Obligations** – a law may confer power on the Executive to issue regulations/take measures in order to comply with an international obligation of the country. There was such a power in the **Broadcasting Act of 1990** which was taken from a similar article in the British Broadcasting Act at the time. Since there can be differences between the domestic law and an international convention, it may be necessary to have in the Parent Act, **a law which enables the making of regulations which allows the country, notwithstanding the slightly different regulation in the domestic field, to implement an international obligation**. This is a controversial issue, but it appears that there is no unconstitutional delegation in such circumstances as the legislative policy to comply with international obligations would have been laid down by the Legislature.

7) **Definition of Punishments** – A law might allow punishments for offences to be defined in subsidiary legislation. This is for breaches of the regulations or of the law. However, in this sphere **there would be excessive delegation if the parameters of these punishments are not defined**. Usually, the parent will act that the Minister will provide punishment for breach of those regulations up to a certain amount. You cannot have this delegation open ended. The parameters of the punishment be fixed in the Parent Act and then within those parameters, the regulation will provide. The constitutional limits on delegation require the parameters of the punishments to be laid down in the Parent Act.

Henry VIII Clauses
Power is sometimes given to Government to modify the provisions of existing statutes mainly for the purpose of removing difficulties. To ensure that the laws do not obstruct each other. These clauses are sometimes also referred to as 'removal of difficulties' clauses.

In other words, sometimes there are clauses which enable the Minister to amend either the Parent Act or other laws. These clauses are referred to as Henry VIII Clauses.

There are two types of clauses –
1) **'**Narrow**'** ROM Clauses;
2) 'Wide" ROM Clauses – when the power to amend the Parent Act is given in wide terms. This has been heavily criticised in general. In the UK there were 3 famous Henry VIII clauses.

'Narrow' ROM clauses
A narrow clause empowers the removal of difficulties consistent with the provisions of the parent act. *"if any difficulty arises in giving effect to the provisions of this Act, the Minister may by order do anything not inconsistent with such provisions which appears to him to be necessary or expedient for the purpose of removing the difficulty"* (India, Section 128 of the States Reorganisation Act, 1956).

According to the **Committee on Ministers Powers (UK 1932)**, such clause is not objectionable since the sole purpose of Parliament in enacting such a provision is 'to enable minor adjustments of its own handiworks to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local.' The device is generally a 'draftsman's insurance policy just in case he has overlooked something (Sir Cecil Carr – Delegated Legislation).

'Wide' ROM clauses
Another type of 'removal of difficulties' clause is very wide and authorises the Government in the name of removal of difficulties to modify the parent act or any other act. This second type of provision has been heavily criticised by jurists and has been nicknamed the 'Henry VII Clause' in order to indicate executive autocracy of which the English King of the 16th Century is regarded as the impersonation.

The Committee on Ministers Powers in 1932 was very critical of Henry VII clauses. However, nowadays Henry VII clauses are considered necessary in certain situations. Sometimes, you need them.

Three famous Henry VIII Clauses (UK)
- In the Human Rights Act – for the purpose of bringing a law into line with the European Convention on Human Rights – the Minister can directly amend that law;
- In the European Communities Act – for the purposes of implementing an EU obligation;
- In the Regulatory Reform Act – for the purpose of doing away with 'red tape'.

Malta-European Union Act

In Malta we have similar Henry VIII clauses, particularly in the European Union Act, in article 4 which enables the Prime Minister to ensure compliance with EU Obligations, even by amending a principal law through regulations. Of course, there is a procedure, but they are still regulations.

In the European Convention Act, article 6A can be seen as a Henry VIII clause, enabling the Prime Minister to amend a law to secure compliance with a judgement of the ECHR.

"6A. Where by a final judgment in a case against Malta the European Court of Human Rights finds that any instrument having the force of law in Malta or any provision thereof is inconsistent with the Human Rights and Fundamental Freedoms, the Prime Minister may, within the period of six months from the date that the judgment becomes final and to the extent necessary in his opinion to remove the inconsistency, make regulations deleting any suchinstrument or provision found to be inconsistent as aforesaid."

- delegated legislation is not challengeable by judicial review in the same way as ordinary administrative decisions.

JUDICIAL REVIEW

Judicial review is the principal Administrative Law remedy; it is essential in a state governed by the principle of legality and of the rule of law. Now, we will go into more detail particularly on the specific grounds of judicial review and on the definitions which apply in judicial review.

The Need for Judicial Review
Authorities exercising public power issue a large number of administrative acts which influence all areas of political, economic, social and cultural life. So, these acts influence our lives.

- **Life in society would become impossible** if such decisions were to be allowed to be taken arbitrarily with no limits or controls – perhaps, the words impossible is strong but obviously, the individual needs to be guided by the law; needs to have an idea where he stands with the public administration and what is permissible and what isn't.

- Arbitrary power can also **distort the principles of democracy** since the public authorities could be distorting the will of Parliament by acting against the letter or spirit of the law – if Parliament intended something, then public authorities are supposed to follow it. By exercising their power arbitrarily, public authorities may not be following what Parliament intended and this goes back to the issue of democracy; that after all, **Parliament is elected by the people to make laws** and not the public authorities which implement those laws.

- A State which does not abide by the principle of legality does not act in accordance with **the rule of law**.

- Democratic countries have developed various systems to control administrative acts – it is considered **part and parcel of the rule of law and of democracy**, therefore, to have a system of judicial review of administrative acts.

Aims of Controls on the Administration
1) To ensure that **the Administration acts within the law**, including the Constitution and fiscal laws – fighting waste and inefficiency is also an aspect of administrative control which is carried out by Auditors General or by Courts of Auditors more, but also of interest to the Courts in the context of legality. This latter aspect of administrative control is not carried out by Courts, it is of interest if it infringes the principle of legality, so, it breaches the law, but even if it does not breach the law but is still inefficient administration or wasteful administration, it is likely to be censored by institutions such as Auditors General or in other systems, there are Courts of Auditors which perform this same fiscal and financial control over the Administration. It is another form of administrative control but isn't judicial review.

2) To try to **ensure the efficiency of the Administration** by achieving the best results at the least cost – this is more a function of auditors. However, it can also raise an issue of *ultra vires* if the administration, for example, buys a service at a much higher rate than the

going rate payable for that service. There were some cases, even in the UK, where it was held that for example, a local authority which increased the wages of its employees to rates much higher than the going rate for such employment simply for political reasons was held to have acted *ultra vires* because the local authority was obliged to find a balance between compensating its employees properly and also safeguarding public funds. If that balance was too distorted, then an issue of legality and an issue of *ultra vires* would also arise.

3) To ensure that **power is not abused** and that **decisions are appropriate** and are not taken on the basis of irrelevant considerations – power must not be abused. It is one of the main purposes of judicial review **to place controls on abuse of power**.

The Particular Nature of Judicial Review

- There are control systems of various types (Ombudsman, Auditors, internal controls, political controls, criminal investigations, independent supervisory authorities).
- Judicial Review occupies a place apart from the various other forms of control since it is concerned mainly with the control of legality of administrative acts.

Judicial review has a particular nature. There are control systems on public authorities of various types. There are internal controls such as the Internal Audit Department within Government, political controls which refer to criticism in Parliament, PQs and media, then if something touches upon criminal law there are criminal investigations etc.

However, judicial review occupies a place apart from the various other forms of control since **it is concerned mainly with the control of legality of administrative acts**. For example, the Ombudsman is concerned with legality, but he goes further than that since he is also concerned with general fairness of administrative acts. So, if something is done according to law but is unfair, it is more likely that one would get redress under the Ombudsman type remedy than under judicial review since the main focus and concern of the latter is legality of administrative action.

Discretionary Power

- The question as to the extent of control which the judge can exercise on the use of discretionary power is central to judicial review.
- The right of the administration to choose between several possible solutions is sometimes interpreted as also allowing the administration to make mistakes as long as it acts within its jurisdiction.
- However, interpreting the right to make mistakes too generously would reduce judicial review to a mere examination of formalities.
- The theories of 'reasonableness', 'proportionality', 'legitimate expectation' and 'manifest error' represent judicial techniques to control the abuse of administrative action.

Administrative action often involves the exercise of discretionary power and one question with judicial review is the extent of control which the judge can exercise on the use of discretionary power. This is a central issue; to what extent does the judge control the public administrator to whom the law gave a certain degree of discretion? So, the right of the

administration to choose between several possible solutions, of course, they must all be solutions within the law.

This discretionary power, the right of the administration to choose between several solutions, is sometimes interpreted as implying that the administration should also be allowed to make mistakes as long as it acts within its jurisdiction. This is supported by the fact that **judicial review deals with whether a decision is legal or not**, not with whether it is correct or not. So, between these two questions there seems to be a bit of a margin which would allow the administration also to make some mistakes as long as it stays within its jurisdiction. Of course, there are strict limits to what extent the administration can also be allowed to make mistakes and still not fall foul of the principle of legality. Because interpreting the right to make mistakes too generously would reduce judicial review to a mere examination of formalities and this would, for example, almost eliminate the very important ground of judicial review which is the ground of abuse of power; taking decisions for improper motives or on the basis of irrelevant considerations.

To fill in this margin between not only examining formalities but at the same time, allowing the administration proper discretion within its jurisdiction, several theories have emerged in different systems of Administrative Law which aim at finding this balance between allowing the administration also perhaps to commit some error within its jurisdiction. But at the same time, not allowing it too much freedom so, not reducing judicial review to a mere examination of formalities which would then, in practice, give the green light to a lot of abuse of power.

These theories include the theory of '**reasonableness**', '**proportionality**', '**legitimate expectation**', and the notion of '**manifest error**'. The latter is where the Courts will not intervene unless the error is manifest, unless the error is an error which even a person who is not a technical expert in the matter under review recognising. This is mostly of the French Administrative Courts and is also adopted in our Import Duties Act, that when you have technical evaluations, it is not a matter of whether the expert appointed by the Court disagrees with the expert appointed by the public authority in coming to its decision, but there has to be this element that the error must also be manifest. So, it is not just a question of disagreement between experts in matters where complicated technical evaluations are involved. You may easily have a situation where technical experts, both being in good faith, disagree about the end result. This is where the theory of manifest error comes in useful.

So, these are theories which are there to fill in this gap, to provide in these situations where **the administration has made a mistake but stayed within its jurisdiction**.

A Fundamental Question by the Judge

A fundamental question which the judge would ask in such situations is, **has the administration sacrificed a more important interest in favour of a less important one in coming to its decision?** This of course, recalls very much the principle of proportionality where you are balancing various interests. Was this balancing exercise conducted properly, have you given too much importance to a fact which is not so important in such a way that it prevails over what should have really been the relevant consideration in getting to that decision?

If the administration hasn't sacrificed a more important interest in favour of a less important one, then the judge will be less likely to intervene, that is, to annul the decision of the public authority. But if the judge considers that what is less important was given more importance than what should have been more important, then the judge will be called upon to intervene in a case of judicial review in order to re-establish a proper balance between the general interest and the rights of the individual which is another very central issue to Public Law and also, to judicial law and Administrative Law.

The Illegality of Administrative Acts

Ultra vires administrative acts, that is, administrative acts which are taken beyond the powers of the person who decided, constitute an illegality sometimes also called a **juridical irregularity**. They mean the same thing, that the public administration is going beyond what it is permitted to do by law. An important principle here in cases of judicial review is that the legality of an act has to be evaluated **according to the laws in force and the circumstances prevailing at the time <u>when the act was done</u>**. So, that is what is relevant with regard to time factor, what was the law/circumstances at the time when the decision was taken? It is not an exercise which concerns itself with what happened later, with changes in law or circumstances which happened later. The legality of the act crystalises with the situation at the time of the taking of the decision.

Consequences of Illegality

What are the consequences where the Court finds that an administrative act was illegal?

<u>When faced with an action for judicial review, the Courts –</u>

1) Must **annul** an administrative act which is illegal – it cannot let it survive;

2) Cannot annul an administrative act **unless it is illegal** – this brings us back to the nature of judicial review, the difference between review and appeal, that the question here is, was the administrative act **legal** or not, and not had the judge been the public authority, would he have taken the same decision. So, not whether it was in the opinion of the judge correct or not but **whether the decision exceeds the bounds of what is legal**.

History

In the absence of constitutional review, the English Courts developed, through common laws, a review based on respecting the will of Parliament and not allowing the Executive or any branch of Government to surpass the boundaries, express or presumed, laid down by Parliament through legislation.

The rules relating to judicial review in Malta are intimately linked with the application of English common law in our legal system. The Maltese courts have affirmed the right, at their own discretion, **to apply English rules of common law whenever the Maltese system has a *lacuna* in public law**, particularly administrative and constitutional law. Even after Independence, Maltese jurisprudence has affirmed this judge-made rule based on pre-judicial discretion; for there is no obligation of any Maltese court of law to apply British common law.

This doctrine and source of Maltese public law is extremely relevant to the subject of judicial review for the simple reason that until 1995, there was no law in Malta providing for judicial review of administrative action; consequentially, the rules on judicial review based on English common law were applied. Even after the insertion in the COCP of a chapter on judicial review, English common law remains relevant as a source of interpretation of the grounds of review now statutorily recognised in Maltese law and in some cases as a direct source.

Cassar Desain v. Forbes (CA 07/01/1935) was the first judgement to pronounce the English public law doctrine. Chief Justice Sir Arturo Mercieca said, *"Save any differences that may be due to diversity of place and circumstances, and in the absence of any statutory provisions to the contrary, it is by the principles of the public law of England that the relations and dealings between the Crown and its subjects are governed in Malta."*

This case related to the **construction of a military aerodrome in Hal-Far as a consequence of which adjacent agricultural land was flooded causing damage to the owners**; therefore, this case related more to governmental liability than judicial review. However, the court also stated that in conquered or ceded countries that have already laws of their own, these laws remain in force until changed by competent authority: and **the common law of England as such has no authority therein**, *"English public law applied in Malta, but the common law of England was not the common law of Malta."* In fact, the Court refused to apply an special privileges in favour of the Crown such as the immunity from court proceedings relating to damages arising from acts of state found in common law and applied instead the norms contained in the Civil Code.

A clearer definition of the doctrine that English public law applies in cases of a *lacuna* is found in *A.M Callus v. Hon Dr. Antonio Paris noe et* (CA 28/02/1969), *Mintoff v. Borg Olivier* (CC 05/11/1970) and *Lowell v. Caruana*.

This gave rise to the legal basis for judicial review of administrative action in Malta. As the common law grounds of review were amplified by the English courts**, they became applicable to Malta through jurisprudence**; **not automatically or *per force*, but by the discretionary powers of the Maltese courts to apply them**.

In fact, the presumed intention in English common law aforementioned was the reason why in Malta an attempt was made, through Act No. VIII of 1981, to limit judicial review. The legislator simply enacted a law whereby **the courts could review only actions done in breach of an express provision of the law**; an apparently innocuous provision, which, however, excluded review on the basis of the presumed intention of Parliament.

Codification in Malta – Act VIII of 1981

As already stated, until 1981, judicial review was exclusively a judge-made exercise **on the basis of the general power of the Court to control legality**. In the absence of any statutory provision, the Maltese courts availed themselves of the residual power of jurisdiction given to the Civil Court by the COCP; for Article 32 used to provide that the Civil Court First Hall *"shall take cognisance of all causes of a civil…nature…in regard to which it has not otherwise been provided for in this Code or any other law."* In Malta we have no Administrative Courts,

so these claims against the Government would be considered as Civil claims and therefore, they were considered to fall within the general power of the Civil Courts to determine issues of legality. Moreover, this article, along with the English common law norms on judicial review of administrative action, would provide the legal backbone for court scrutiny of the actions of the Executive until and even beyond 1995.

Prior to 1981, decisions varied in the sense that some took the view that as long as the administration acted within its formal powers, then the Court could not intervene, so this would eliminate grounds such as 'reasonableness', 'abuse of power' or 'irrelevant considerations'. Other decisions, however, followed British law and also the principle of reasonableness and fairness, culminating in the *Prime Minister v. Sister Luigi Dunkin noe* (FH 26/06/1980) which annulled an unreasonable condition attached to a private hospital license on the basis of English common law grounds of review.

Of course, the older decisions tended to invoke the theory of *iure imperii*, particularly in *Paolo Busuttil v. Clement La Primaudaye* in the First Hall, meaning that the State is not actionable, particularly in damages, where the act involved police or common powers of the State.

So, there were these 3 types of routes which judicial review and Governmental Liability took before 1981. After the *Blue Sisters* decision in 1980, the Government sought to codify the principles of judicial review and by means of Act VIII of 1981, the principles of judicial review were codified in the COCP in an article about jurisdiction of the Civil Courts. This article **limited judicial review only to breaches of express substantive or procedural legal provisions.**

This could have followed from the fact that judicial review was actually carried out by the Courts before **on the basis of the general jurisdiction of the Civil Courts** to deal with Civil cases. That is, to control legality. So, the 1981 amendments codifying judicial review were introduced as a limitation of jurisdiction; they were **jurisdictional articles** which stated that the Court doesn't have jurisdiction to go further than that. In fact, even in article 469A there is a slight discrepancy in the chapeau between the English version and the Maltese version. The latter uses the word *'they shall have jurisdiction'* while the English version uses the words *'they shall be entitled'*. In truth, it conveys the same message that unless on these specific grounds, the Courts may not intervene.

"THE FIRST STATUTORY INTERVENTION ON JUDICIAL REVIEW WAS NOT TO GIVE IT A SOLID LEGAL FOOTING BUT TO LIMIT ITS APPLICATION. IT WAS INDEED A KNEE JERK REACTION TO THE EMBARASSMENT SUFFERED BY GOVERNMENT IN THE BLUE SISTERS CASE – Dr Tonio Borg

So, the law as enacted in 1981 was **the first codification of judicial review in Maltese law** and this was done by means of article 742(2) COCP which is an article about jurisdiction. There were two sub-articles which were mainly introduced.

Article 742(2)

"No court in Malta shall have jurisdiction to enquire into the validity of any act or other thing done by the Government or by any authority established by the Constitution or by any person holding a public office [civil servant] *in the exercise of their public functions or declare any such act or thing null or invalid or without effect, except and unless:*

(a) Such act or thing is ultra vires; or
(b) Such act or thing is clearly in violation of an explicit provision of a written law; or
(c) The due form or procedure has not been followed in a material respect and substantial prejudice has ensured from such non-observance…."

There is no definition of 'administrative act' as such but from the wording of this sub-article, you derive what is an administrative act. In other words, the term 'administrative act' was not used in Act VIII of 1981 but it can be derived from the wording of the amendments to article 742. So, you have sort of an indirect definition of an administrative act to which this article would apply. One will also note the exclusivity of this article, that unless there are these conditions, the Courts may not exercise judicial review.

With respect to sub-article (b), the administration must have explicitly violated the law. The Court could not come to a conclusion that the administration violated the law, for example, on the basis of the purpose of the statute or irrelevant considerations etc. **There must be something clearly laid down** and the administration violated that written law.

With respect to sub-article (c), this refers 'procedural *ultra vires*', that is, errors of form or procedure, which are not followed in a material respect, so important, significant error of form or procedure. **It is not enough that you find some sort of error of form or procedure, but you must prove that this was a material error and that it actually caused prejudice**.

Article 469A is less detailed on this aspect and it therefore leaves room for debate as to whether the procedural requirements which are also a condition in article 469A have to be material and causing substantial prejudice. Of course, logically, they should; you should not be allowed to annul an administrative act, for example, because of a typing error or because of a spelling mistake or something of the sort. If one looks at the case law of foreign administrative Courts, this is the type of interpretation which is always given to form and procedure, that it has to be something which **made or could have made a difference**.

In this way, what is lacking in sub-article (c) is this *'could have made a difference'*. You must prove that substantial prejudice has ensued not that it could have ensued. For example, in the case that a person was not heard, you cannot really say that had he been heard, the result would have been the same. So, under this article there is more leeway for the Government to say you have to prove not only that you weren't heard but that you suffered substantial prejudice because of the fact that you weren't heard. Whereas nowadays, the tendency is that if there is a fundamental defect of natural justice in coming to an administrative act, then that would be considered to be a sufficient procedural defect to annul the decision. **You would not go on then to examine whether substantial prejudice has actually ensued from that defect** because the individual had the right to be heard in any

case. So, in a way this limits the examination of procedural requirements much more than today's article 469A.

Proviso to article 742(2) – definition of *ultra vires*
"…Provided that an act or thing which is within the general or special powers of a person or authority shall not be deemed to be ultra vires ***unless the act or thing is clearly and explicitly prohibited or excluded by a written law****."*

With respect to 'general powers', these are such as that of the police to maintain law and order. So, it doesn't have to be a specific power referring to a specific type of circumstance.

Ultra vires is narrowed down a lot to exclude these notions of irrelevant considerations, non-conformity with the purpose of the statute. **These notions which the Court would itself deduce from the circumstances of the case but not from written law**. Here, the legislator said that **unless the public authority violated written law**, then the Court cannot intervene. If it true that this article was a reaction to the ***Blue Sisters*** decision, then it makes sense because in that decision, formally the Minister of Health was entitled to impose any condition which he considers appropriate in the licenses of private hospitals or clinics, but the Court argued that the purpose of that article was not to allow the Minister to introduce partial nationalisation by the back door. Consequentially, it held that the condition was *ultra vires*. In this light, the legislator here is very much narrowing down the definition of *ultra vires* to exclude any issues concerning, for example, non-conformity with the purpose of the statute. So, unless the public authority explicitly violates the law, then the administrative act cannot be annulled because it is not considered as *ultra vires*.

This is the position which had also been taken by some older case law in Administrative Law. In fact, Article 742 was actually defended by Government at that time on the basis of the argument that the article reflected previous case law on judicial review. It is true that there were cases which reflected the position here in article 742. Of course, by 1980, those cases had been superseded.

So, this Act was in force between January 1981 and October 1995. It gives us a perspective on the development of judicial review in so far as it started being codified. Before, it was dependant on decisions of the Courts.

One element which is quite particular to the articles introduced by Act VIII of 1981 was the definition of *ultra vires*. We find this both in article 742(2) and 742(3).

Proviso to Article 742(3)
"*Provided that an act or thing shall be deemed to be within the power of a person or authority to do or to refrain from doing unless it is clearly and explicitly provided in a written law that the act or thing shall or shall not be done."*

Basically, to be acting *ultra vires*, one must be clearly violating the law. This takes away the whole field of discretionary power from the danger of being *ultra vires* because unless the law clearly states that you can or cannot do something, then it would not, under this proviso, be considered as *ultra vires*.

Ultra vires was limited to –
Substantive – *'an act or thing that is clearly and explicitly prohibited or excluded by any written law'/ 'it is clearly and explicitly provided in a written law that the act or thing shall or shall not be done.'*
Procedural – 'due form or procedure had not been followed in a material respect and substantial prejudice had ensued from such non-observance.

Judgements which took this line of reasoning
(That the Courts can only scrutinise the **formal legality** of an executive decision but cannot discuss its appropriateness or fairness).

- *Boselli v. Roupel* (1912);
- *Busutill v. Mallia* (1925);
- *Mallia Tabone v. Stivala* (1925);
- *Muscat Azzopardi v. Stivala* (1926);
- *Borg v. Tabone* (1962);
- *Denaro v. Tabone* (1962);

The provisions in act VIII of 1981 where basically defended by the Government saying that this is not something new; this is also a situation which results from several judgements of the Courts and in fact, it is true that if one goes into the previous case law on judicial review, one finds that **the early cases limited judicial review to examinations of competence and formality**. There are a number of old cases and some even not so old, which were based on the reasoning that **the Court can only scrutinise the formal legality of an executive decision but cannot discuss its appropriateness or fairness**. This was the situation, which was prevalent before WWII, but which persisted. Later on, the jurisprudence started taking different twists, but you find judgements based on this notion that judicial review is about examination of competence and formality and not about whether a decision is fair, appropriate, or for what reason it was taken. These judgements are found even until the 60s.

Judgements which did not take the formalistic line

- *Pace v. Anastasi Pace* (1946);
- *AB v. Commissioner for Inland Revenue* (1956);

The other side of the coin was that in 1981, there were also other judgements, even quite old, which took a different view and which, for example, based themselves on the notion of fairness and of reasonableness, referring extensively to British Common Law. So, the argument that article 742 reflected case law is only partially correct because **the case law was quite mixed**.

Article 742(4)
"Where any act or other thing done by the Government or by any authority established by the Constitution or by any person holding a public office in the exercise of their public functions, has been revoked or cancelled or has ceased to have effect or to be operative, no court in Malta shall have jurisdiction to enquire into the validity thereof or to declare it null or invalid or without effect."

There was another amendment to article 742 which is the article about jurisdiction of the Civil Courts in the COCP. This is indirectly the definition of 'administrative act' which one finds not as a definition but embedded in these amendments. This is a strange provision because it seems to imply that **if the Government withdraws an administrative act, then no Court can go into the question of whether that administrative act was legal or not or whether it was *ultra vires* or not**. It's well and good if the administrative act is withdrawn retroactively, so, as if it was never enacted, because in that case nobody can claim that he has any interest to challenge that act anymore (*Ex Tunc*). However, the problem is if an administrative act is withdrawn *Ex Nunc*, so from the time when it is actually withdrawn, and therefore, there may have been things done on the basis of that administrative act before it was withdrawn which would have the force of law.

So, this sub-article really depends on how it is interpreted as to whether it can be considered as breaching vested rights. If a person, on the basis of an administrative act which was subsequently withdrawn, has suffered a breach of his vested rights, and this sub-article would be interpreted in way that he can do nothing about it, then that would be a problem with legal certainty and with the question of acquired rights. However, if it were to be interpreted with regard only to administrative acts which have been withdrawn in the sense annulled, as though they have never existed, then this article, saving some exceptional circumstances, could survive the vested rights test.

Article 742(6) – A Safety Valve?
"The provisions of this section shall be without prejudice to any jurisdiction explicitly conferred by the Constitution."

The amendment also included a provision which could be seen as a 'safety valve' to try and prevent these sub-articles being challenged on the ground of unconstitutionality. If a person has a constitutional right, or a fundamental human right safeguarded by the Constitution, then that right is not being prejudiced; that right prevails over what was provided in the sub-articles of article 742. So, the legislator provided that if the actual meaning of this article led to a breach of a fundamental human right, then this article gives way because the jurisdiction explicitly conferred by the Constitution takes precedence over the provisions of article 742.

The Court's Reaction
That was the legal, codified situation which prevailed between 1981 and 1995. The 'codified situation' because one cannot really say that the Courts were particularly fond of the provisions of Act XIII of 1981. The courts reacted ingeniously to bypass such ouster legislation. In *Anthony Ellul Sullivan v. Lino Vassallo noe* (CA 26/06/1987), the Court interpreted the express provision of the law to include the requirement of giving reasons even though the law did not expressly cater for such a need. Also, in *Mary Grech v. Minister for the Development for the Infrastructure*, the Court applied the rules of natural justice where there was serious prejudice to vested rights, even though such rules were not expressly laid down in written law. So, these judgements were delivered whilst this act was still in force.

So, if seen in the light of how the Courts behaved after the enactment of Act VIII, one can say that with regard to those cases which actually went to the Court, you cannot see a radical change in case law except in very few cases which might have gone the same, way even if Act VIII was not in force.

For example, in *Anglu Fenech ne v. The Hon. Prime Minister et* (1990), the issue was: could a particular person who had worked for an employer's association for a very long time be appointed as an independent member of a board which was composed of representatives of trade unions and representatives of employers' associations? The unions said that this person is not independent since he comes from a background of being a long-time employee of the employer's association.

The Court decided that on the basis of article 742, it did not have jurisdiction to enter into this question. One could argue that perhaps had article 742 not been in force, the Court could have either decided the Minister appointing a person as a member of the board was something where the Minister had a large discretion, or the Court could have gone further examining whether in the circumstances that discretion of the Minister was exercised reasonably. So, again, there could have been a different outcome to this case had article 742 not been in force but this is not a foregone conclusion. It could well be that a Court would have held that in such a subjective judgement, unless the judgement of the Minister is manifestly unreasonable, then the Court will respect that judgement. So, it is not necessarily the case that the judgement would have gone the other way had article 742 not been in force at the time.

One can argue that the provision might have scared off people with claims from bringing them forward before the Court. If there is a provision which is strict on the jurisdiction of the Court to exercise judicial review, it could be that there were people who had a claim but were legally advised not to pursue it because **the law did not really give them much of a chance of success** in that situation.

With all this being said, generally, the Court continued with their attitude that when they felt that a situation was unfair, such as unreasonable, they would still either disregard the article or find another way as to pigeonhole the facts of the case within the article and decide as they deem best.

Act XXV of 1995 – Article 469A

In October 1995 article 469A was enacted. This article is basically still in our statute book today, with minor amendments. One can describe it in general as being based on the French notions of judicial review, therefore, a **French skeleton** that is based on the **four grounds of judicial review** which one finds in French law which are also adopted in EU Administrative Law, that is (1) incompetence, (2) defect of form or procedure, (3) abuse of power, and (4) violation of the law. However, **the jargon used in article 469A is more British** in the sense that our system of Administrative Law looked to British common law for so long that this is the language which our Courts and legal drafters spoke. So, generally it can be described as an article with **a French Skelton but with British legal jargon** on judicial review.

The new provisions provide that an action under article 469A is one of last resort and if a remedy is available under any law, that remedy has to be resorted to first.

The Notion of the 'Administrative Act' in Maltese Law

> "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;

Article 469A, unlike the previous article 742 which had a definition of administrative act imbedded in it, includes a specific definition of administrative act. Indeed, **the answer to the question of what is reviewable, hinges mainly on the definition of 'administrative act'**.

The word 'includes' could be open to discussion, whether it is a comprehensive or indicative list. One notices that one criticism which can be developed against this definition is that it is restricted to what is defined as a public authority and what is defined as a public authority could not encompass any person exercising a public function.

The difficulty lies in the fact, however, that no definition of *"measure intended for internal organisation or administration"* is found in the article itself, and therefore one has to rely on recent jurisprudence to get a glimpse of what the purport of these words is.

An example would be a circular giving advice within a department on the interpretation of a statute. In *Edward Paul Tanti v. Administrative Secretary in the Office of the Prime Minister* (CA 07/10/2005), the Court gave examples, *"…but refers only, as the word "internal" indicates, to organisational and administrative issues within the authority such as the allocation of duties, time schedules, and working methods within the said authority."*

The Administrative Act Comparative Law: German Law

German Law is quite a source of EU Law and of the case law of the European Courts of Justice. For example, the notion of legitimate expectation originally comes from German Law. The German Administrative Law defines an administrative act as, *"includes any prescription, decision or other measure of public authority taken by an administrative authority in order to **regulate a specific case** in the **public law domain** and intended to produce direct legal effects outside the administration."*

"…to regulate a…case…"

This means that an administrative act must be a legally binding decision of the administration which produces legal consequences such as the creation of rights and duties.

It cannot be a decision which does not produce simply a statement of intent. Our law doesn't go so far, meaning that it is not explicitly included in the Maltese definition. One can use this as an argument that an administrative act should be something which takes a legally binding decision. Again, it has not been tested in the Maltese Courts. Normally, people who challenge administrative acts do so because their legitimate interests are affected but in German law and case law, they are specific that it must be a legally binding decision.

"…in the public law domain…"

This means that only measures in the field of public law can be administrative acts. measures taken in the field of private law (such as the sale of public land) are not administrative acts even if they are also regulated by specific laws applicable to such acts when made by Government. Again, this issue is not regulated in the Maltese definition.

In Maltese law, perhaps we are not specific enough and so there have been cases where article 469A has been applied to situations which appear to be purely Civil Law issues, not in the domain of Public Law. Perhaps, article 742 was clearer in this effect. This applies to a certain extent in Malta, because the sale of Government land, for example, is specifically regulated in another act and one can argue that it is in the domain of Public Law.

'A Specific Case'

- Administrative acts are distinguished from legislative acts of the administration (regulations) in that the former are necessarily individual whilst the latter concern an indeterminate number of persons and deal with situations in the abstract.
- An administrative act is one which regulates a concrete and individual situation.
- Some administrative acts are concrete but not individual (e.g., banning a demonstration) but they are still distinguishable from legislative acts in that they regulate a situation with reference to a particular moment in time whilst regulations are of an indefinite duration.
- Maltese case law distinguishes between the administrative and the legislative act.

This distinguishes administrative acts from legislative acts of the legislation, such as regulations. In fact, our Court of Appeal held that article 469A does not apply to issues of *ultra vires* of regulations since even though they are issued by the administration, they are legislative acts.

An administrative act regulates a specific case, it relates to a specific person, whilst a legislative act concerns an indeterminate number of persons and deals with situations *in abstracto* and not *in concreto*, so, in general, laying down general rules and not deciding on a specific case. That is not the purpose of regulations. On the other hand, an administrative act regulates an individual situation. Some administrative acts are concrete but not individual. For example, the banning of a demonstration affects many people. However, there is still a distinction. In practice, it would still be seen as an individual act and certainly not a legislative act.

In the ***Borg case***, the regulations that introduced the EAW made it clear that legislative acts cannot be challenged under 469A but under article 116 of the Constitution.

Administrative Authority

The action must be taken by a public authority. This is a common feature in every system of Administrative Law, that **judicial review applies to administrative authorities**. German law defines an administrative authority as including all services which perform public administration tasks.

Maltese law, however, differs a bit with regard to the way in which such authorities are defined.

> "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.

The definition of public authority in Maltese law tends to refer to the type of public authority, not to the type of decision taken. This isn't the same when compared to, for example, the notion in German and French Administrative Law which tend to refer to the type of decision taken and not to who took it. This, perhaps, could also cause some confusion when a public authority which is listed in the definition of public authority in article 469A takes a decision which does not pertain to the field of public law, but for example, recognition of a tenement, which is governed by the field of private law.

However, because **the definition of public authority refers to the institution which took the decision**, and not the nature of the decision, the Courts can also get the impression and decide that any decision taken by that public authority, irrespective of the issue of whether it was a decision which pertains to the public law field or the private law field, is reviewable under article 469A. On the other hand, this is not in line with the spirit of article 469. Indeed, if one only reads the definition of public authority, it is one thing, but if one goes further and sees the object behind article 469A, it is clear from these grounds that they **refer to decision taken in the field of public law**. However, there have been some judgements were article 469A has been applied beyond the scope of public law.

German law, on the other hand, defines an administrative act **as including all services which perform public administration tasks**. So, whatever the nature of the entity, it comes under the definition of administrative authority if it performs a public administration task. So, one

is looking at the **nature of the task performed**, and not at the institution which took that decision.

What is the difference between a 'body corporate established by law' and a 'body corporate established under a law'?
Remember, that in administrative law we are challenging public authorities, ministers, departments, body corporates established by law, in some cases those established under a law and so on. Essentially, the government.

A body corporate established by law refers to a body that is established by an Act of Parliament. It is **a public corporation established by an Act of Parliament**. So, bodies corporate established by law can only be created by an instrument having the force of law. For a body corporate to be established *by law* – and not merely *under law* – there has to be either

(a) An Act of Parliament specifically establishing such entity. For example, the Planning Authority is established by the Development Planning Act, Chapter 552 of the Laws of Malta, and the Lands Authority, Chapter 563 of the Laws of Malta; or
(b) An order by the Prime Minister under the Public Administration Act whereby, through a legal notice, such public corporation is created in the form of an agency. Similar powers are given to the Prime Minister under the Education Act 2019 to set up such entities relating education in Malta.

Employees of such entities are not considered as public officers. Moreover, this category is subject to judicial review under article 469A of the COCP, along with the Public Service.

On the other hand, in so far as a body corporate established under a law are concerned, **the involvement of Government is not necessary**. It could be that government is involved, for example, in the Gozo Channel which is a company set up under the Commercial Code, where Government has total control. Indeed, one can safely say that Gozo Channel Company Limited is a corporate body established under a law where incidentally there is governmental involvement. Not each and every body corporate established under a law, cioè the Commercial Code, has to necessarily involve the government.

So, there do exist Government-controlled commercial partnerships and other entities. These are commercial partnerships regularly registered under the Companies Act with the only difference being that the majority shareholder is the Government of Malta, or a body corporate established by law. For example, AirMalta. They are not a body corporate established by law **because there is no law establishing AirMalta**. They are, of course, regulated under the law of Malta, like any other private commercial company, but not established by a specific law or instrument having the force of law. Most companies of this kind have been wound up following a vigorous privatisation process in the 90s, however some still exist.

There are judgements to the effect that even this category of public entities are subject to judicial review under article 469A, such as *Hotel Cerviola Ltd v. Malta Shipyards Ltd* (FH 2007). As already stated, a body corporate established by law, contrary to under law, is mentioned in article 469A. Notwithstanding the fact, at least prima facie, that article 469A

gives us the impression that a 'public authority' is only concerned with a body corporate established by law, the abovementioned judgement indicates that body corporates established under a law also fall within the parameters of articles 469A.

Indeed, the Court held that,
"Lli izda dan ma jfissirx lanqas li s-socjeta' intimata hekk kif kontrollata mill-Gvern ma taqax taht id-disposizzjonijiet ta' l-artikolu 469 A tal-Kap 12, anzi din il-Qorti thoss li l- istess disposizzjonijiet ghadhom u ghandhom japplikaw ghas-socjeta' intimata u dan anke fl-isfond tal-ligi vigenti nkluz il- Kap 466 tal-Ligijiet ta' Malta u l-mod kif giet kostitwita s-socjeta' intimata, li giet mahluqa taht il-ligi dwar il-kumpaniji hawn citata u wara r-ristrutturar tad-dockyard kif provdut fl-istess Att. B'hekk din it-tieni eccezzjoni qed tigi michuda."

Similarly, in *Grech Mario Kaptan v. Gozo Channel Company Ltd* (et - 27/4/10 - primawla (90/2009), the Court held,
"Gozo Channel Company Limited ma twaqqfitx b'ligi imma bl- istatut li gie registrat mar-Registru tal-Kumpanniji u bil- hrug tac-certifikat ta' registrazzjoni. Min-naha l-ohra ghalkemm il-kumpannija hi mmexxija minn bord ta' diretturi, fir-realta' hi kontrollata mill-Gvern u taqa' taht ir- responsabbilta' tal-Ministru tal-Finanzi."

"Il-fatt li l-Gvern ikun ghazel li jopera permezz ta' kumpannija u mhux korp kostitwit b'ligi, ma ghandux ifisser li b'daqshekk dik il-kumpannija li tkun qeghda taqdi funzjoni pubblika m'ghandix tkun soggetta ghal stharrig taht l-Artikolu 469A tal-Kap. 12 fejn twettaq "eghmil amministrattiv". Hu fatt maghruf li "The actions of public corporations are judicially reviewable in the same way as those of other bodies, where they have powers of a public law character. Thus the Independent Television Commission's licensing decisions are subject to judicial review, and a decision of British Coal, before privatisation to close certain coal mines was successfully challenged." (Administrative Law, 10 Edizzjoni H.W.R. Wade, u C.F. Forsyth, 2009 pagna 123). Il-qorti ma tara l-ebda raguni ghalfejn dan l-istess ragunament m'ghandux japplika fil- kaz ta' kumpannija tal-Gvern bhas-socjeta konvenuta."

So, even though **the definition says body corporate established by law, notwithstanding so, it would appear that according to court judgements, body corporates established under a law where government has control, are likewise captured by article 469A**. Dr Tonio Borg is against this. It is interesting to note that he was the Minister who drafted it, and therefore is the best source of intention.

Private Persons and Entities
Under both the Maltese system and under other systems, private persons or entities cannot, in principle, issue administrative acts because of the ground of **incompetence**. They do not enjoy competence under public law to do so. In fact, the Maltese definition of public authority doesn't cover private persons at all.

However, it could be debatable in other systems where a private entity performs functions of a public nature. This is rather common. For example, regulatory authorities in certain fields which are private in nature, but they perform a task which is of a public nature. Those are considered to be subject to judicial review because they are exercising a function in the

nature of public law. But private persons, purely in their private capacity, cannot issue an administrative act, and therefore, they **cannot be subject to judicial review**.

Effects Outside the Administration

- Only acts which give rise to rights and obligations for citizens are administrative acts since they produce effects outside the public administration;
- This contrasts with the "internal administrative law" of the public administration which only regulates relations within the administration itself;
- Maltese law and German law take a similar approach on this point.

Another element in order to identify an administrative act is that **it must have effects outside the administration**. It must not be something which regulates the administration internally and its effects stop there. **Judicial review is not concerned with the internal organisation of public authorities**, but it is concerned with decisions of public authorities which have effects outside the public administration. So, only **acts which gives rise to rights and obligations for citizens** are administrative acts since they produce effects outside the public administration. This contrasts with internal administrative law which is the internal law of the public service. Taking a decision under that internal law which has no effects outside the public administration does not normally give rise to judicial review.

Here, both Maltese law and for example, German law have a similar approach on this point.

Mesures D'Ordre Interieur

In fact, under French law, there is this notion of *mesures d'ordre interierur* which are excluded from judicial review. Traditionally, in France these acts, even if they included some sort of a decision, where considered to be exempt from judicial review. Eventually, the Courts started limiting the scope of these acts. The tendency, even in the Maltese Courts, is **to apply this exception in a limited manner**. In fact, in France there were a number of *Counseil D'etat* decisions which reversed the previous case law to the effect that measures taken to maintain order in prisons were *mesures d'ordre interierur*. The Courts eventually rejected this notion since they have an effect on the rights of prisoners. Even though they appear as a measure of pure internal organisation within the prison, they cannot be said to be measures which has no effects outside the administration, because it effects the rights of prisoners.

However, the general rule is that **circulars** and **directives** issued within the Civil Service are internal measures which do not fall under judicial review as they do not, in fact, impose any regulation outside the public service.

The Deemed Refusal or the "Tacti Negative Act"

> 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;

In article 469A, we have the notion of the deemed refusal, that is, if you write to a public authority and within 2 months you do not receive a positive or a negative reply, you are **entitled to assume that the reply is in the negative** and therefore, to proceed to the next step in order to challenge that negative decision.

In practice, lawyers and people who have dealing with the administration, almost never quote this deemed refusal. Generally, people prefer to wait to have an actual decision and not only a deemed decision. But in the law, you are entitled to consider, if 2 months have passed with no reply, that there is a rejection and therefore, proceed to the next step of challenging that decision.

The question is, if there is a deemed refusal, can the public authority subsequently take the decision? Or does it become deprived of that authority? In truth, many decisions are taken after 2 months, and the normal course of action is followed, so there is a sort of usage.

One of the effects is that when the public administration fails to act, **that failure to act seizes to be a failure** because the law itself provides what happens when there is a failure to act – **it becomes a tacit rejection**. So, that lack of action seizes to be a failure, but automatically, by virtue of the law, becomes a tacit rejection. In a way, this changes the classification of the lack of action of the public authority in a number of circumstances.

The Administrative Act in France

French Administrative Law defines an administrative act as *"a legal act taken unilaterally by a public administrative authority which creates rights or obligations for third parties."* Again, this notion of having effects outside the administration.

A legal act

- Act must be made with the intention of producing legal effects modifying a previously existing legal situation.
- Material acts (e.g., public works such as surfacing of a road, dredging of a part) are not 'legal acts' since they do not change a legal situation. They only give rise to obligations in an indirect manner (damages caused by delay or bad workmanship in executing works).
- Only acts which include a decision are legally considered as administrative acts which are subject to judicial review.

A legal act is an act which observes the principle of legality, which has a basis in law, and which must be made with the intention of producing legal effects which somehow modify

the previous legal situation. So, it is an act which **has effect on the rights and obligations of persons outside the administration**.

'Material acts' of the administration, such as public works servicing a road, are not legal acts, but material acts, since **they do not change the legal situation**. They only give rise to obligations in an indirect manner for example, if construction is done badly and gives rise to damages. But the construction as such is not a legal act. The tort of constructing the road badly could give rise to liability but not the material act as such, that is not an administrative act. So, you cannot seek judicial review for the building of a road, for example.

Not administrative acts
What is not an administrative act? Our case law is inexistent, but one can use these arguments from other systems to come to some sort of a conclusion as to what is an act of an administrative nature.

- **Merely declaratory acts** – for example, the issuing a copy of a birth certificate is not considered as an administrative act as such. It doesn't change a legal situation or make new rights; it is just a question of providing a service.

- **Preparatory acts which precede a decision** – in the French system, preparatory acts which precede a decision are not considered as administrative acts, it is only the final decision which is considered as an administrative act. This went so far as to a decision being taken that concerning the shortlisting of candidates for the assignment of radio frequencies whereby the short listing as such was not considered as an administrative act because it was merely a perpetrator act and was not the decision to assign the frequency to one company and not to another. This wouldn't really apply to Malta.

- **Giving information or making an announcement does not constitute an administrative act** – again, the mere giving of information or making an announcement does not in itself constitute an administrative act.

- **'Model decisions' issued from one public authority to another** – same thing where there are model decisions which are issued from one public authority to another. Giving the elements of what a decision ought to contain. By merely issuing teose 'model decisions' within the public administration, no rights are actually affected. Rights will be affected when the model decisions are actually adopted and applied but that is a step further.

- Act which necessarily follow a decision (notification) of an administrative act are not administrative acts in their own right. So, you challenge the decision, and not the notification.

- Acts in the field of private law (Such as administering the belonging of children who are subject to a care order or residents in a care home) – in the French and the German Administrative Law system, they are not acts of public administration. And therefore, actions contesting, for example, the manner in which a minor's property was administered pertains to the field of private law. In fact, normally in Maltese law such a

decision would also pertain to the field of private law. Such actions are filed as ordinary civil cases but the way the definition of 'administrative acts' and public authority are worded could perhaps leave the door open to adventurism or a misunderstanding to have these acts actually form the subject of judicial review.

The six-month rule

> (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.

Originally, as promulgated in 1995, there wasn't this qualification under article (1)(b), it was all judicial review, including judicial review on the basis of unconstitutionality which was subject to the 6-month rule. But there was an argument put forward by lawyers that if the Constitution itself does not impose a time limit for human rights actions, then Parliament cannot by ordinary law do so. So, Government arranged this.

"…when the interested person…" – In judicial review, we don't have an *actio popolaris*. So, you must have an interest; there must be juridical interest to file an action for judicial review.

"…could have become aware" is contentious. It refers to a situation where it was almost so obvious from the circumstances that the person was aware or he was notified that he can, for example, enter a website and become aware, that the 6-months start passing from when he could have become aware. So, in the absence of actual proof that he was actually made aware, that is to say, that he was actually notified of the decision.

Inapplicability of 469A

> (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.

There are circumstances where article 469A does not apply. These are stated in sub-article (4). The reasoning at the time when article 469A was enacted was that it should not provide a double-remedy, that as much as possible, it shouldn't create confusion with other remedies, in a way that it also creates confusion about the certainty of decisions taken under specific laws. The idea is that if, for example, the Customs Ordinance provides a particular way in which one can challenge a particular seizure of goods effected under this Ordinance, then it is the Customs Ordinance which applies and not article 469A. **If the specific law provides a way in which you can challenge that particular administrative act, you cannot use 469A**. Another example is the Planning Laws which contain specific procedures, tax laws, licencing laws and so on. In those cases, those remedies remain, and they **exclude the applicability of 469A**.

In this way, **article 469A remains the residual catch-all** for all administrative acts where the law does not provide specific remedy by mode of contestation of that administrative act.

One question which could arise is if you challenge an administrative act on grounds of unconstitutionality, does article 46 of the Constitution which provides a specific remedy against a breach of fundamental human rights, exclude article 469A? If you are arguing that an act breaches fundamental rights, the breach of fundamental rights is specifically provided in the Constitution and the remedy is also specifically provided for, so, if one were to accept this argument, one would be led to conclude that **the unconstitutionality provided for in article 469A is really only the unconstitutionality which does not involve a breach of fundamental rights**. So, if an administrative act does not breach fundamental rights, but somehow breaches another provision of the Constitution.

Damages

> (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.

Article 469A also gets into the issue of Governmental Liability. Here, we are referring to civil law notions of tort and quasi-tort. However, this provision imposes another requirement – (1) **bad faith**, (2) **unreasonableness** (not a notion of civil law, of private law, but of public law), or (3) **where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power**.

The latter requirement is when the public authority says no for one particular reason and that was found to be wrong, but your permit could have been denied for another reason. Therefore, damages would not be due. This comes very close to the conclusion in the *Mary Grech* case where the Court held the fact that administrative act was annulled for procedural reasons did not automatically give rise to damages because it could be that even if those requirements were fulfilled, the permit would still have been withdrawn for good reason.

GROUNDS OF REVIEW

> **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:

Again, it is a jurisdictional article ('may enquire'). Does 'may' mean that the Court may, notwithstanding that the elements of judicial review under article 469A exist, still decline to exercise judicial review? Could the Court say that it considers that this is not a matter that lends itself to judicial review and is therefore, an act of state?

This is an open question – whether 'may' opens up a window in order for the Court to refuse to exercise judicial review where it considers that a particular administrative act does not lend itself to judicial review, that is a non-justiciable administrative act. The words used in the Maltese version which ultimately prevails refers to jurisdiction. The 'may enquire' is translated as *'ikollhom ġurisdizzjoni'* which again, means that the Court is entitled, it has jurisdiction to exercise judicial review, but it is not necessarily stopped from saying that this administrative act does not lend itself to judicial review.

In truth, **the tendency of the Courts is to exercise their powers**, not to refrain from exercising their powers. So, it is unlikely that a Court would say that an action which comes within the definition of administrative act is non-justiciable. We have never had such a case under article 469A, so it remains for lawyers to debate if this point were to arise.

A. **Unconstitutionality**

> (*a*) where the administrative act is in violation of the Constitution;

The unconstitutionality referred to in article 469A(1)(a) is **unconstitutionality of an administrative act**, of a particular decision, and not of a law which does not come under article 469A. One must remember that article 469A says *"saving as is otherwise provided by law."* As regards fundamental human rights, the unconstitutionality of Government actions is primarily regulated by Chapter IV of the Constitution. If one excludes actions based on breaches of fundamental human rights, where therefore a specific remedy is provided, the scope of application of article 469A(1)(a) would be limited to actions which violate the Constitution but not fundamental human rights – a limited scope indeed which would mostly be already covered by the grounds of article 469A(1)(b).

The Court, in *Christopher Hall v. Director Social Accommodation* (CC 18/09/2009), ruled that this provision does not allow plaintiff to file a human rights action along with that of judicial review.

The Court held,
*"In other words – and the Court hopes that this question is resolved once and for all – appellants could have initiated ordinary law proceedings for judicial review under sub-article 1(a) of article 469A of Chapter 12, and allege a breach of their fundamental rights protected by the Constitution, for that sub-article refers to breaches of the Constitution by an administrative act that (i**) does not amount to a violation or alleged violation of the fundamental rights** as protected by articles 33 to 45 of the said Constitution and that (ii) according to the same Constitution may be reviewed by the ordinary courts; and in virtue of the same argument – that is to say that one must keep the constitutional and civil competences separate and distinct – the words 'is in any other way contrary to law' in sub-article (1)(b)(iv) of article 469A refer to any law other than the provision of the Convention as incorporated in Chapter 319."*

Since practically all constitutional actions are related to human rights, this jurisprudence of the Maltese courts has rendered this provision useless and devoid of any practical meaning.

One can argue that this ground is not really needed since in any case, there is the final safeguard of the violation of the law. The legislator wanted to make the point that this article **does not prejudice issues of unconstitutionality of administrative acts**. The difference here is that unconstitutionality is itself being made a ground of judicial review. So, one can go to the First Hall of the Civil Court arguing that a particular administrative act is *ultra vires*, that it should be annulled because it is unconstitutional.

An issue arose after the introduction of this provision, to the effect that article 469A includes a time limit to bring the action of 6 months, while the Constitution and the rules of practice and procedure which apply to actions filed under chapter IV of the Constitution do not include time limits. Some lawyers lobbied with the Minister at the time, saying that this 6-month time limit infringes the Constitution because if the Constitution itself does not place a time limit on fundamental human right actions, how can the legislator impose a 6-month time limit through an ordinary law such as article 469A. The case was never taken to Court, but the Government conceded this argument and sometime after it was enacted, article 469A(1)(a) was exempted from this 6-month time limit.

This question of time limits in filing Constitutional actions is quite a sticky question in Maltese Constitutional Law. The fact that the Constitution imposes no time limit can be seen as no time limit can be imposed by ordinary law, but it can also be seen that as long as the Government is not effectively denying the right, as long as it is allowing a reasonable time limit to exercise an action, then a time limit should be imposed. Indeed, time limits are important for legal security; for people to know where they stand.

The situation of having no prior vetting of laws for constitutionality and combined with the fact that there are no time limits to file a human rights action, brings about a situation where anybody can come along with a claim which is quite dated.

This issue was taken on board once in a case *Perit Joseph Barbara v. Prim Ministru*, where there was a claim going back many years and the Government fielded the defence of

prescription. The First Court decided that the prescription applicable to Constitutional cases applying the Civil Code was 30 years. **The Constitutional Court disagreed saying that there is no prescription in human rights cases but there is the safeguard that if a person takes too long to file a human rights case, then this may be considered as frivolous or vexatious**. This question of unconstitutionality, therefore, stays in article 469A. Probably it does not apply to a purely human rights action because of the *"saving as otherwise provided"* and the 6-month time limit does not apply to an action for judicial review based on this ground.

B. ***Ultra Vires***

> (*b*) when the administrative act is *ultra vires* on any of the following grounds:

We have the definition of an *ultra vires* administrative action. There are these 4 paragraphs which lay out the situation in which an act can be deemed to be *ultra vires*. It is done by way of defining *ultra vires* and of course, it is British legal jargon.

Understating *'Ultra Vires'*
Judicial review remains the cornerstone of the subject. Indeed, the *ultra vires* doctrine which **the English Courts have developed, based on common law**, and adopted in Malta both prior and post 1995, is based on the doctrine of **supremacy of Parliament**. That is to say, when Parliament grants discretion, it is presumed that such power is exercised in a reasonable and proportionate way, and when an executive decision is made affecting the rights of the citizen, then certain procedural norms of fairness, commonly known as rules of natural justice, have to be observed, such as hearing both sides *(audi alteram partem*).

Needless to say, an action by Government in breach of an express provision of the law is declared *ultra vires* in virtue of such doctrine of parliamentary supremacy, a doctrine which, **though within the confines of the supreme Maltese Constitution**, still applies in Malta. Nevertheless, even when there are no norms expressly laid down in a statute, the grounds of review on abuse of power and procedural impropriety are **presumed** to have been inserted in every statutory provision which grants such judicial or executive power to the Executive. The same applies to judicial review of the legislative power granted by Parliament to the Executive, so that any subsidiary legislation will not run counter to the provisions of the enabling section in the parent act, unless expressly authorised to do so.

A more accepted theory nowadays to legally justify the *ultra vires* doctrine is that of **the rule of law**.

In *Chairman Public Broadcasting Services Ltd et v. Broadcasting Authority* (CA 15/01/2003), the Court held, *"these powers and this discretion of the Broadcasting Authority, however, need to be exercised within the limits of the general principles on which the rule of law in a democratic society as understood in today's Europe is based."*

In *Dr Joseph Said Pullicino et v. Minister for Home Affairs et* (FH 01/10/2015), the Court held, *"in a democratic society which embraces the rule of law based on the principles of the supremacy of the law, equality before the law and accountability according to law, its just*

application and the separation of powers of the State, ***no one has the right, not even the Executive*** *in a situation like the current on where you have two different provisions under two different laws enacted at different times, and which may appear to be inconsistent with each other,* ***to take the law in one's hands and insist on one's own interpretation of such laws****."*

For linking such doctrine exclusively to parliamentary supremacy leaves out those decisions which Government takes not in virtue of any statute, but in virtue of its constitutional inherent power to govern.

1) **Incompetence**

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

- The defect which arises when a decision is taken by a person who did not have the legal authority to take it.
- It is the gravest defect: Public Officers only have those powers which are granted to them by law – they cannot exercise public authority beyond those limits.
- If a decision is taken by a person who was not authorised to take it, this cannot be remedied after the decision is challenged by a 'covering approval' of the competent authority.

The defect arises when a decision is taken by a person who did not have the legal authority to take that decision. It is considered, however, as the gravest defect which an administrative act can have because it is almost as if someone is usurping public authority. It is a principle that **public officers only have those powers granted to them by law**. The exercise of public authority, which is vitiated by incompetence also raises, therefore, a public order issue that **public authority should be exercised by the persons who are legally authorised to exercise it**.

Moreover, if a decision is taken by a person not authorised to take it, it cannot be remedied after by having the decision covered by some sort of later approval. This is a matter of legality.

<u>Forms of Incompetence</u>

1) <u>The decision maker was not a public officer. However, the third party in good faith may be protected in the case where a person was a *de facto* public officer</u>

The decision maker is not a Public Officer. What if he appears to be one but there is some defect in his appointment? Should the third party in good faith who dealt with him suffer because of that? No. The general principle of law protecting the third party in good faith comes into play whereby the third party in good faith will probably be protected in the case where a person acted as a *de facto* public officer. This could be a situation where the appointment was defective, but the person still acted in the office before the appointment was annulled.

The issue of a defective appointment, the third party in good faith would be protected, even under civil law, there is this notion of an apparent mandate. Even in the case of public procurement regulations, there was a decision by the Court of Appeal *Dr Louis Vella et v. Dirrettur tal-Lottu Pubbliku*, it was argued by the Government that the director of public lotto was not authorised to do what he did. The Court of Appeal decided that this was a matter for Government to put its house in order; that the third party could still enforce that agreement because the rules of procurement where also to a large extent internal rules for the Government. The Court of Appeal held that where there is a situation where the director appeared to have authority to enter into the agreement, the agreement would not be annulled.

2) Person assumed public functions during a time of emergency when the public service was not functioning

This could also be a situation which arises in circumstances of emergency, where in an emergency, someone who is not actually a public officer takes charge of certain public functions in the interests of the state.

3) **The public officer clearly acted beyond his powers**

For example, I ask the local council mayor to lend me a sum of money. I have a genuine need, and it is urgent. The mayor analyses my case, sees it is genuine and decides to lend me the money. Morally, this may be a good action but from a legal standpoint, is it? Remember that actions of local councils amount to administrative actions and here we are speaking of the lawfulness of administrative actions. There is no provision at law which permits the mayor to distribute funds to individual. It may be morally correct, but the law specifically states how the mayor can disperse the allocates funds so the minute he decides to perform an act that he is not allowed to perform by law, then we have a problem.

4) **The public officer misinterprets his powers and takes a decision which could only be taken by the Legislature or by the Judiciary or the public officer interprets his power as providing him with discretion whether to act or not when in fact there is no such discretion but a 'public duty' to act**

In *Guido Abela et v. Walter Bonello noe* (FH 07/02/1942), the Governor attempted to **interpret** his powers under the Malta Defence Regulations 1939, allowing him to detain any person for security reasons in any place he may deem fit, as applying also to a foreign land. The Court ruled that such action was *ultra vires* since the powers to detain were territorial in nature.

5) **An administrative authority takes a decision which pertains to another administrative authority** (most common form of incompetence)

Acting in good faith but you were not legally authorised to take that decision. The Government in general has that power but not the particular who took that decision.

These situations could also give rise to the ground of incompetence apart from the ground of violation of the law. Keep in mind that there can be an act which breaches numerous grounds. It only takes one ground to amount to ultra vires.

6) **Usurping Powers of Another Authority**

This issue raises this ground of incompetence. A person who is obliged to act on the recommendation of a committee takes a decision and implements it without such recommendation. Again, he is not competence to act unless on the recommendation of that authority.

Or else, that decision can pertain to another authority, *rationae materiae*, *ratione loci*, and *ratione temporis*.

Rationae materiae – because of the subject matter (relationship between two Departments or Ministries). A subject matter pertains to one department or to one ministry and not to another. So, the one to whom the subject matter does not pertain is *incompetent ration materie*. It is not within his field of legal competence to take decisions about that particular subject.

Ratione loci – because of the place to which the decision refers (two local Councils). This mostly could arise in issues involving local councils; if it takes a decision which affects the area of another local council, that falls under this ground. It is competent to take decisions within its own area, but not competent to take a decision regarding another area. That is another form of usurpation of powers of another authority

Ratione temporis – because of the time when the decision is taken (person's appointment was about to expire or time window for taking a decision is fixed). This arises because of the time at which the decision was taken – either a premature decision, or a decision out of time.

A person can have a specific time frame to take a decision after that time frame, his authority lapses. So, in that case if a decision is taken out of time, it could also be subject to the ground of incompetence, *ratione temporis*, you had that power but only if you acted within a time frame. Outside it, you are no longer competent to take that decision.

For example, a person is obliged to consult a board before taking a decision and he skips that phase, so, he does not consult the board and just issues the decision directly. In such a case, **the person was not competent at that time before he consulted the board to take the decision**. So, there is a question of incompetence also *ratione temporis*. He becomes competence to take the decision after he has consulted the board. So, if he takes a premature decision by skipping that phase, then he is not competent at that point in time to take the decision.

The same thing applies if you require a complaint in order to act. For example, the tax authority requires an objection in order to revise a tax assessment. If it revises without receiving an objection, unless another element of the law covers it, there would be incompetence *ratione temporis* because it only becomes competent after that particular objection has been received. It cannot anticipate that stage.

7) **Hierarchy and illegal delegation**

There is also incompetence **where an official takes a decision which should have been taken by his hierarchical superior** or **where authority is delegated to a subordinate officer illegally**.

For example, if certain decisions, say within the context of the police, (??) if the law specifically provides for a particular person of a particular rank to take the decision. This is particular and not any administrative rule. Then the delegation to a subordinate becomes illegal and subject to this defect.

8) **Hierarchical superior takes decision of subordinate**

A decision taken by a hierarchical superior who takes over the powers of a subordinate officer may also be vitiated by incompetence **if the superior only had power to review a decision taken** and not to usurp the power of the subordinate. So, this may also be vitiated by the ground of incompetence if the superior was only meant to review the decision and not to take that decision in the first place. That is another question, if your function is of reviewing the decisions of your subordinates, taking over the decisions of your subordinates and assuming them yourself, abdicating to your function of review, could give rise to this defect of incompetence.

9) **Incompetence resulting from a wrong interpretation of law about the extent of 'competence' of the officer**

Incompetence can result where the extent of the legal competence of the Government department or of the officer concerned is wrongly interpreted. So, **one assumes that he/she has the legal competence to take a decision by interpreting the law wrongly**. That decision could be attacked on the ground of violation of the law, but it could also be liable to the defect of incompetence.

10) **Guidelines**

- Can the use of discretionary power be subjected to or substituted by guidelines?

One particular issue arises when you have guidelines and so, there is a person who is legally entitled to take a decision, but **he is issued with guidelines as to how to take that decision given particular different sets of circumstances**. The question arises, is that person acting legally, or is he abandoning his legal competence when he acts on the basis of guidelines? So, exercising his discretion but being faithful to the guidelines which were given to him by somebody else, such as his superior.

Guidelines are often justified by the administration for providing for **uniformity of criteria** and **legal certainty**. One needs some consistency between the decisions of the various officers taken on the basis of similar facts. This is for principles such as legitimate expectation and legal certainty. It is for the purpose of avoiding a situation where people in the same situation receive different outcomes, depending on the officer you dealt with. In the field of public administration, when you have different officers deciding similar points, one way of trying to ensure that there will not be a huge variation between decisions depending on the person who took the decision is the issuing of guidelines. So, guidelines are normally justified as provided certainty of the law and uniformity of criteria to avoid having very different decisions in similar cases.

However, **the person taking the decision must still exercise his discretion with reference to the particular facts of the case**. In other words, he still has the duty to consider the case and the facts of the case on their own merits whereby this cannot be abandoned in favour of following guidelines. At least, when there are guidelines there must be exercise of discretion in order to see whether the facts of the case actually fit in to what is provided in the guidelines. The officer is still considering the case on its own merits.

In conclusion, guidelines are acceptable as long as they do not eliminate the exercise of discretion, where such duty exists, at least to the extent of examining whether a particular situation property and fairly fits into the guidelines.

11) **Consultation between departments**

Another issue which could lead to a claim of incompetence is when there is **consultation between various departments**. If a department which has to exercise the discretion, so which is legally competent, relies on the advice of another department to the extent that the actual decision ends up being taken by the consultee. This can give rise to a question of **illegal delegation**. It is important that **the public authority to which the law gives the power exercises that power itself**. However, this does not in principle exclude consultation between different public authorities. A public authority can consult but he cannot render his function as simply one where he takes instructions from others as to how to decide. Otherwise, the public authority to which the law is giving that power, would not be exercising that power itself, and that would give rise to the problem of the ground of incompetence. This doesn't mean that you cannot consult, in fact some laws oblige public authorities to consult other before coming to a final decision bhut a final decision must be taken upon the individual judgement of the person legally competent to take that decision.

Public interest

In Malta, most cases dealt with under this ground of review refer to acts that are statutorily required to be performed "in the public interest" but are not so executed.

In *Giuseppe Sciberras v. Housing Secretary* (FH 21/07/1073), the Court annulled a **requisition order** that had been issued in order to neutralise the effects of an eviction order issued by the competent judicial organ and protect the evicted tenant. This was not considered to be in the public interest.

In *Anthony Ellul Sullivan noe et v. Lino Vassallo noe* (FH 02/06/1983), the Judge stated that, even though there was no express provision requiring the Minister responsible for shipping to give the reasons for a ship's cancellation, such duty emerged from the fact that the law required that the ship-owner be given *"adequate opportunity"*, under the Merchant Shipping Act 1973, to make representations. Not giving reasons meant that **the Minister did not give an "adequate" opportunity to make representations**.

Other cases

(1) *Maria Victoria Borg v. Mayor Pieta Local Council* (CA 19/05/2009) – a resident's parking scheme issued by a local council without legal authority.

(2) *Gioacchino sive Jack Bugeja v. Commissioner of Land* (CA 30/09/2016) – expropriation of a private quarry to allow quarry owners in Gozo, including competitors of the applicant, to dispose of building waste.

(3) *Isabella Zanian Desira v. Medical Council* (FH 14/02/2017) – endorsement of warrants for medical doctors by the Medical Council.

(4) *All for Property Ltd v. Comptroller of Customs* (CA 16/12/2019) – the confiscation by customs of a harmless energy drink merely on the basis of the name of the drink.
(5) *Elton Taliana v. Commissioner of Police* (CA 20/07/2020) – acts performed by a Police Board which was not constituted according to law.

(6) *Grazio Pace v. Vivian de Gray noe* (CA 25/04/1969) – suspending licenses or permits which had not yet expired.

(7) *David Harding v. Lawrence Farrugia noe* (CA 09/02/1987) – admission to the University.

2) **Principles of Natural Justice/Mandatory Procedural Requirements**

> (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

A. Principles of Natural Justice

The principles of natural justice are a very wide field in British Administrative Law. They open up a whole field of fairness, reasonableness and so on. So, this reference to the principles of natural justice makes this sub-paragraph wide indeed.

The rules of natural justice emerged from English common law as a means of ensuring that bodies or persons who exercise a judicial function observe the **minimum requirements of a fair procedure**.

These rules were deemed for a long time to apply only to judicial or quasi-judicial organs or tribunals but were extended to **cover any action performed by a public authority** or person acting in an official capacity which affected the rights of the ordinary citizen. In Malta, it was only in 1992 that these rules were declared applicable also to public officers, in the *Dr Alfred Sant* case.

Nowhere in article 469A is there a definition of what constitutes the rules of natural justice. Presumably the legislator assumed that the common law norms defining natural justice in legal terms, which had been applied for decades ever since the landmark judgement of *Sammut v. Mc Cance* (1946), *"The ordinary courts have limited review over the decisions of the Emergency Compensation Board, in the sense that they may examine whether there is anything ultra vires in the Board's decisions, or whether there has occurred any violation of*

the rules of natural justice", and now codified in article 469A Ch.12 of the Laws of Malta, were to be applied.

Although article 469A does not define the rules of natural justice, it is pertinent to point out that in 2007 the Administrative Justice Act was enacted. This Act, besides establishing the ART, it also laid dwon the so-called "principles of good administratvie behaviour in **article 3(2)(a)** of the **Administrative Justice Act**. These principally apply to all administrative tribunals listed in a Schedule to the Act, but can be applied by analogoy to decisions made by entities and public officers affecting the rights of the ordinary citizens.

It is also interesting to note that **such rules are to be observed whenever decisions affecting rights are taken** and this **irrespective of whether they are expressly mentioned**. This was confirmed in *Midi Plc v. Malta Transport Authority* (FH 16/11/2017).

One may ask, is there truly a *lacuna*? The Administrative Justice Act (Ch. 490) in article 3(1) under the title '*Administrative Tribunals'* provides that such tribunals have to respect and apply the principles of 'good administrative behaviour', which are then listed in detail in sub-article (2). One may object that these principles in Chapter 490 apply only to tribunals and not to public authorities as defined in articles 469A, and secondly that the principles of natural justice go beyond the two Latin precepts mentioned in the law (*nemo iudex in causa propria* & *audi alteram partem*).

1) ***Nemo iudex in causa sua***

Nemo in propria causa iudex, esse debet, i.e., no one should be made a judge in his own case. It is popularly known as **the rule against bias**. Bias means an operative prejudice, whether conscious or unconscious, as a result of some preconceived opinion or predisposition, in relation to a party or an issue. It suggests anything which tends a person to decide a case other than on the basis of evidence.

The rule against bias seeks to achieve is that when decisions are taken, these are taken in a way that is fair and impartial. Indeed, it strikes against those factors which may improperly influence a judge against arriving at a decision in a particular case. This rule is based on the premises that it is against the human psychology to decide a case against his own interest. The basic objective of this rule is to ensure public confidence in the impartiality of the administrative adjudicatory process

In the Administrative Law context, this would apply to the actions performed by a public authority or person acting in an official capacity, but it is important to note that the application of this principle is more widespread than that, applying also to the courts and tribunals.

When a conflict arises, the person who is entrusted with the decision has to abstain. Other situations of **conflict of interest** could arise when, for example, a judge or magistrate finds him/herself in a situation as specified in the law, such judge or magistrate is duty bound to absist. Not all instances are written in the law, but they still would constitute conflict. Note that financial bias is one possible type of conflict of interest but there are different levels of bias. This is the rule against **bias**. Bias can be one that is **deliberate** (on purpose) or else it

could be **unconscious** (not all situations that amount to bias are deliberate. The bias could be unconscious with no bad faith. That being said, one must judge from the perspective of the reasonable onlooker).

This rule against bias is also a principle of fair trial found in article 39 of the Constitution and article 6 of the ECHR. It means nobody should be allowed to be a judge in his own cause but in fact, it dictates a proper regulation of possible bias and appearance of bias. **Bias doesn't necessarily need to be proven** – you cannot say that because a case was decided by the claimant's uncle, he necessarily showed bias. He might have actually decided against the claimant but the fact that he decided it raises an appearance of bias and that is enough in these issues. So, all you have to prove is that there is a situation where a reasonable person would understand that the person deciding the case is likely to be bias. You don't actually have to prove that he was influenced but that the situation is likely to influence the decision-maker in coming to his decision.

How can bias manifest itself?

(1) **Family relationships**

(2) **Financial/pecuniary interest** (this could take different forms – I can't be in a position to judge where that decision would further our mutual interests) – any financial interest howsoever small it may be is bound to vitiate the administrative action.

(3) **Personal interest/antagonism**

(4) **Prior judgement/assessment** (if you already passed a judgement, it doesn't make sense to engage yourself in another judgement – when it comes to constitutional aspects, the right to assess of a court is a fundamental right. Everything that has to do with the constitutional rights has no time bar/prescription. This is with the exception of judicial review, article 469A). SOMEONE HAS ALREADY EXPRESSED HIMSELF,

(5) **Professional bias** (there could be an issue where there is a problem with professional bias – the fact that someone can judge you who is in the same profession can cause problems)/**Professional rivalry** (when you have a professional who is a judging the case of his rival – in this case, one cannot be objective due to professional rivalry).

(6) **Political bias**.

Practical example: I am an architect and I go to the planning authority. One of the members who will ultimately decide my applications happens to be my business partner. He is a silent partner; therefore, it is not in the public domain. Is there a problem with him not abstaining and continuing to hear his application? Regardless of the decision, regardless of the fact that my business partner might sign against me because he feels morally obliged to do so, one has to avoid conflict of interest. So, in this case, my business partner creates this conflict

and even though the law could be silent on the matter, this is a fundamental principle. The principles of natural justice need not be written to take effect.

2) **The duty to give reasons**

This principle refers to the fact that **public authorities cannot merely take decisions**, but in so doing, they have to give reasons as to why such a decision was taken. This **provides the individual with the factual and legal basis of the decision and the reasoning of the administration in arriving at that decision**.

It can be said that this principle owes its existence in Malta to the case *Dr Alfred Sant 162ominee v. Commissioner of Inland Revenue* (1992) in which the Court of Appeal included within the ambit of the rule of natural justice the requirement that a decision on tax matters by the Inland Revenue Commissioner had to contain the reasons justifying such assessment. Perhaps this was one of the first judgements where the principles of natural justice were made applicable to public officers, rather than administrative tribunals only.

This is important for two reasons: (1) firstly, because by virtue of giving reasons, a public authority cannot take decisions arbitrarily owing to this element of **transparency**. So, it shows whether power was properly exercised. (2) Secondly, and most importantly, is that only by way of giving reasons can the person affected by the decision **challenge** it. For example, you apply to the Planning Authority for a permit, and they have refused your application without giving any reasons as to why they reached that conclusion. In that scenario, you are left helpless as you have nothing on which to challenge that decision. So, public authorities have to support their position.

In this respect, a question arises as to what constitutes giving reasons since even though formally there may be a reason, if such decision is vague, it can be argued that in substance no such reasons were actually given. In such cases, the person affected by the administrative decision may still be left without not knowing the reasons why, and therefore, not able to challenge the decision.

Decisions must not be taken arbitrarily. In general, this is not considered to apply to each and every type of administrative decision, but the principle is that **the more serious the consequences on the individual of an administrative decision, the more onerous the duty to give reasons for that decision thereby justifying the decision, reasons explain why the decision was taken**. If that decision were later to come under the scrutiny of a Court, the Court could be able to properly analyse whether the decision was taken for the correct reasons or for irrelevant reasons. In fact, especially when there is only an appeal on a point of law, the question of giving of reasons becomes particularly important because the court which is receiving the appeal has to be in a position to decide in the first place whether the decision was taken on a point of fact or of law. If it was taken purely on a point of fact, the appeal might not be applicable at all. **In order to grant the aggrieved person redress, this question of absence of reasons, failure to give reasons, is considered as a defect in a decision which raises A POINT OF LAW**. The failure itself is a legal issue, that the person deciding did not abide by the principles of natural justice.

In *Liquigas (Malta) Ltd v. Office for Competition* (CA 20/10/2020), the CoA stated, *"It is still necessary that anyone who is to answer to a complaint – as Liquigas had to do – has to know with precision for what it has to answer…Liquigas was not given the opportunity to reply to what was said in those meetings once they were held in its absence. This failure was certainly of prejudice to the right of Liquigas to prepare and present its defence and on its own is enough to justify the decision of the Tribunal to revoke the decision."*

Practical example: Applications come out for me to enter university and you receive the call to register to enter university. There is this student who applied and on the 30th of September, the day before university starts, he receives an email stating that he is not eligible for the course. The duty to give reasons is fundamental. This is one of the three principles of natural justice. Even though the regulations are clear, a simple email stating that one is not eligible stating no reason whatsoever, is unlawful. An authority can't just say yes or no, it has to support its position.

3) ***Audi alteram partem***

Both parties to a case must be heard. So, **all persons concerned** with a given administrative act must be given **the opportunity to be heard before that administrative act is implemented**. Indeed, when it comes to administrative acts, there are situations where only one person is concerned, however there are also situations where third parties are also impacted, and in those scenarios, those third parties must also be given the right to make their submissions. For example, your neighbour is going to build a structure which is a nuisance to you. In that case, owing to the fact that you, as a third party, are being impacted by your neighbour's actions, you are given the right to be heard by the competent public authority before that administrative act is implemented.

In this way, a public authority or person acting in an official capacity will fall foul of this principle if, after hearing one party concerned with the administrative act, decides whether or not to implement that act. This applies even if the public authority thinks that he has heard all he needs to know in order to make his decision. Moreover, generally each party makes their submission once, but there are certain circumstances where justice itself requires that a person should be heard more than once. This usually applies when an original application was changed whilst it was being considered. Also, it is important to note that there do exist some exceptions to this principle, such as in urgent cases, whereby there is no time for the process of hearing everyone before the decision can be taken owing to its urgency. So, it may be acceptable in such cases to proceed to a provisional decision without hearing the interested parties, so long as the right to be heard is respected as soon as possible.

Normally, the right to be heard is given before the decision is taken, it is only in cases of urgency that one might take a decision first and then respect the right to be heard later. The rule is that even in prior deliberations, unless there is discretion of the Court, the rules of natural justice must be followed even when the act is in the course of being matured. So, before the decision is taken.

Practical example: I am an architect and I make an application on behalf of my client and there is a third client objector objecting to my application (any planning application can be

challenged by anyone). We are both admitted to a board to decide whether to grant or refuse the application. We are given a date to go before the planning board who is entrusted with deciding the application and it is my turn to speak. I manage to convince the board completely, meaning they are confident that the third party has no reason whatsoever to object. Subsequently, the third party does not speak, and the board moves on to decide.

It is irrelevant whether the third party would have convinced the board or not, everyone has a right to speak and be heard. Whoever is deciding has to ensure that both parties are given the same level of treatment. That is to say, there has to be an equal opportunity to both parties.

<u>In conclusion, the following scenarios constitute 'unlawful' action:</u>
1. Performing a task not authorized by law;
2. Deciding despite having a **conflict of interest**;
3. Failing to **motivate** a decision;
4. Treating one party different from the other.

This reference to 'natural justice' in article 469A can be seen as opening the door into Maltese AL to practically the whole body of English common law on judicial review. It is a very wide ground. It differs from what mandatory procedural requirements because these must actually result from the law but the principles of natural justice as they are in 469A, thrown there generically and openly, really incorporate the bulk of British common law on judicial review and on the notion of fairness into Maltese Administrative Law.

B. <u>Procedural requirements</u>

Apart from these principles, it is also a defect of *ultra vires* if mandatory procedural requirements were not followed. An administrative act may be subjected by the law or by regulations to certain elements of formality (formalism) with reference to –
1) **The procedure according to which the act was to be taken**; or
2) **The form which the literal text of the act has to tak**e; those certain things have to be stated in the decision.

Article 469A(1)(b)(ii) does not make reference to form but this may be covered by reference to 'mandatory procedural requirements'. For example, if one sees French Administrative Law, the defect of form is singled out. In our law we don't have a specific reference to the defect of 'form', but we do have a reference to failure to abide by 'mandatory procedural requirements'. So, **if a law imposes a particular form on the literal text of a decision, one may still argue and it is likely that it would be accepted**, that that type of formal defect would be caught in the general net of a mandatory procedural requirement. Because the form also becomes, when it is mandated, a procedural requirement of the decision.

<u>The importance of form & procedure</u>

Formalism, generally, has a bad name in legal circles. It is said to lead to injustices. However, procedure is still essential because lack of procedure, lack of regulation of procedure could lead to decisions being taken upon the whim of the person deciding, not according to a formal process which could also lead to decisions being taken arbitrarily. The

famous legal philosopher Ihering stated that "form is the twin sister of freedom." Failure to adhere to a mandatory form of procedure in fact, demonstrates a lack of proper understand of the law by a public authority.

Procedure guarantees –

- **That the matter is properly examined and understood**,
- **That publicity is given** – the right to a fair trial, in fact, implies the right to a public trial and trials which are not held in public are the rare exception and not the rule. Publicity is one of the guarantees of fair trial – that everyone can see that things were done in a proper manner and fairly.
- **Procedure ensures that time limits are respected and that reasons are given for the decision** – so, it ensures a more complete examination of the case, and it aims at a fair decision.

Dangers of formalism

Of course, there are dangers of formalism. You can have annulment of administrative acts because of insignificant defects of form or procedure, and this could be an obstacle to good administration. Because of this, a distinction has to be made between what are defects of form and procedure which have **substance** and what are defects which are **not substantial** defects and which, therefore, can be ignored. For example, there is case law that what is known as the *lapsus calami*, that is a slip of the pen, a typo, should not give rise to the annulment of a case. As long as the person reading that document understands what was said, the typo should not have any consequence. Because it is not a substantial defect. There are other forms, besides a typo.

Distinguishing between formal defects

Substantial formalities have to be distinguished from formal requirements which are incidental in nature.

Criteria –

1) The purpose –

- For what purpose did the legislator require this procedure?
- Does the requirements guarantee the rights of the individual?
- Or is it merely a procedural requirement internal to the public authority?
- Is the requirement capable of changing the manner in which the matter is decided?

If the purpose of the procedure is to guarantee the rights of the parties, then it is substantial and is not something which can be overridden. Is it substantial or merely incidental? Does it hit at the core of the procedure by which that decision was taken or is it something merely peripheral? For example, is the requirement one which guarantees the rights of the individual or merely a procedural requirement **internal to the public authority**? Also, is the requirement capable of changing the manner in which the matter was decided? For example, **if you only hear one party to a case, it is likely that you will decide the case in favour of that party, unless he says nonsense**. So, your failure to hear both parties was a defect which is capable of changing the manner in which the matter is decided because you would have also heard the other side of the picture and agreed with the second party and not with the first. So, **lack of respect of what are known as 'rights of defence' are always**

substantial because they are there to guarantee that cases are properly decided, and in their absence, you cannot say that a case was actually decided properly.

2) The circumstances which gave rise to the defect

- Where there exceptional circumstances such as urgency or an exceptional circumstance which made adherence to procedure very difficult?

It is accepted that in situations of urgency, for example, one is normally forgiven for not holding a full hearing, but not for holding an unfair hearing. This was dealt with when doing the warrant of prohibitory injunction where the case isn't delved into prior to issuing the warrant.

- Does the applicant himself obstruct the implementation of the proper procedure such as by not giving his correct address?

Was the person who is complaining of this lack of proper procedure actually the person who obstructed the implementation of that procedure? For example, he failed to give a proper address. If he himself gave that address, he cannot argue that it was sent to the wrong person, and he never received it.

- Was there 'impossibility' to adhere to the requirements of the law?

Such as you are obliged to consult a body and that body is not constituted. No one can be held to do the impossible. However, there are limits as well even to this. Because **if it was the administration itself which gave rise to that impossibility, then the administration cannot plead impossibility as a defence**. We had some constitutional cases in the early 80s concerning broadcasting and the broadcasting authority at that time, was not constituted. When the government was sued on account of something which happened in public broadcasting and about which no control could be exercised because it was not constituted, the Court did not accept the defence that the Government could not do anything because the authority was not constituted. It considered the lack of constitution as something which pertains to the administration itself and therefore, could not be pleaded to substantiate a defence of impossibility.

One distinction between the grounds of incompetence and the ground of defect of form of procedure is that normally a formal defect can be remedied while the former cannot. In fact, laws of procedure normally include articles which grant opportunities to remedy formal defects. The legal system looks at formalism in a very sceptical way so, if it is a formal defect which has not given rise to lack of, for example, of respect for rights of defence or to a situation where the potentially the decision was not taken correctly, then that defect is normally considered to be remediable. Even if it was substantial, generally, one can either remedy it at a later stage, or more likely, the case is sent back for the defect to be remedied, for the case to be heard according to the proper form and procedure.

"Mandatory"

'Mandatory procedural requirements' refers to those requirements which are obligatory.

This ground of review hinges on the interpretation of the word "mandatory". One has to make a distinction between "mandatory" and "directory" norms.

469A(1)(b)(ii) says 'mandatory' procedural requirements. So, this may leave little room for deciding that non observance of a mandatory requirement, that is a requirement that is mandated by the law itself, does not give rise to the nullity of the act itself. However, one can argue that even though there is the use of such words, there is still some elbow room for the court to say it is true that this procedural requirement is mandated by the law but given that it is not of a substantial nature and given that the chapeau of article 469A uses the word 'may' I am not going to annul a whole process on the basis of this requirement. It remains an open question. For example, if a defect in practice had no effect on the final decision, why should the court annul the entire decision because of that defect.

In *Dominic Mintoff v. Dr George Borg Olivier 167ominee* (CC 22/01/1971), plaintiff argued that a bill amending the Constitution had not been validly approved by the House of Representatives owing to procedural irregularities in breach of the Standing Orders of the House. The Constitutional Court, while acknowledging some irregularities had been committed, concluded that they were not of such gravity as to invalidate the law itself.

However, in *Paul Mercieca noe v. Commissioner of Inland Revenue* (FH 17/10/1986), the rule whereby the Commissioner of Inland Revenue was obliged to consider "such further returns, books or evidence, if any, as may be produced before or obtained by him" prior to the issuing of an *ex officio* tax assessment was **mandatory**.

In *Dr Frank Portelli v. Dr Josella Farrugia noe et* (FH 25/04/2014), in a disciplinary case instituted against Dr Portelli before the Medical Council, the fact that, in breach of the law, the proceedings lasted more than 2 years to be concluded, invalidated the Council's decision since such term was deemed to be mandatory.

Does 'mandatory' mean that they have to expressly result from the law or has the Court got more discretion here to say that the law does not mandate these procedures, but they are so essential to fairness, that they should have been followed? The latter scenario was the case in *Mary Grech v. Minister responsible for the Development of the Infrastructure et* (1993) (Article 469A had not yet been enacted). So, **it would appear that there is room for discretion of the judge to go beyond**.

C. **Abuse of Power**

> (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

Abuse of power is probably the biggest difference between article 469A and the previous article 742. With regard to the latter, one could argue that in general, article 742 recognised incompetence, procedural defects and violation of the law but it expressly excluded this ground. In fact, the development of this ground of review took some time to happen in Malta. It was indeed as a knee-jerk reaction to a judgement on one of the politically sensitive judgements in Malta (*Blue Sisters case*) that the Government passed through Parliament Act No. VIII of 1981 restricting, indeed abolishing, this ground of review.

So, **this ground is the most elusive of the grounds of judicial review**, it is the big difference between article 469A and article 742 because it goes into the real reason why a decision was taken, not only whether the decision was formally in order, not only whether the public authority was competent to take that decision, but whether there was an ulterior motive.

So, abuse of power is defined as an act that it is done for improper purposes, or on the basis of irrelevant considerations (matters which should not have been relevant).

This is by far the most interesting part of judicial review. It is the ground which grants most lee way and discretion to the courts to review executive decisions. It is the ground of review which is also most liable to misinterpretation, indeed to abuse. This is the slippery ground on which decisions can be taken by the judiciary which are in effect a substitution of administrative discretion; for **a too wide an interpretation of such ground of review, results in the courts deciding the appropriateness rather than the lawfulness of an administrative act**.

Contrary to popular belief, this ground of review is based on law not on whim and fancy. Indeed, in *Reginald Fava pro et noe v. Superintendent for Public Health et* (2010), the court held that *"the interpretation of what is equitable and reasonable may be subjective. However, the difficulty is more apparent than real. The rights of the citizen are guaranteed by our Constitution. At the same time, justice, equity and reasonableness are principles which should inspire its interpretation. In normal circumstances, reasonableness should qualify the exercise of any executive discretion even when the law does not mention, or expressly so qualify, such discretion."* It has a **legal foundation** and has to be **interpreted in a legal way**.

This ground of review also contains its own problems of construction and interpretation. The question immediately springs to mind as to whether all the forms of misuse of power under English common law have been included under the heading as contained in article 469A(b)(iii). Grounds such as bad faith, unreasonableness, and so on can fall under the general ground of abuse of power as defined by article 469A.

The development of this ground of review has constituted an interesting jurisprudence which reveals an ever-increasing audacity of the courts to interfere even in highly political sensitive cases, provided of course there are legal grounds to do so. To quote Lady Haley in the second Miller case: *"Although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."*

It is interesting to note that the notions of improper purpose, relevant considerations as well as reasonableness are all interlinked and intertwined. Indeed, everything links to the fact that every law is promulgated for a specific purpose, and therefore, in the case that that Act of Parliament confers powers on a public authority, it stands to reason that such powers must be exercised in line with that same purpose. In this way, the powers granted to public authorities are not powers to do whatever that public authority deems to be appropriate, but they must fall within the parameters of the purpose of the Parent Act.

Similarly, when speaking about 'relevant considerations', a consideration can only be deemed relevant insofar as it's taking into account leads the public authority to exercise its discretion within the limits of the purpose of the parent act that granted it that discretion to begin with. The perfect case to explain the point being made her is that which is commonly referred to as the Blue Sisters Case. In this case, in imposing a condition which he deemed fit, the Minister not only exercised his discretion in a way that was exterior to the purposes of the Parent Act, but at one and the same time, he took into account irrelevant considerations, in particular, financial motives. Indeed, in this same case, the administrative act was also deemed to be unreasonable.

A. Improper Purpose

Every law that is promulgated is done so with a purpose. For example, Chapter 563 of the Laws of Malta is a law primarily, if not solely, intended to ensure the good management of public land, the purpose of Chapter 552 of the Laws of Malta is to ensure the sustainable management of development, the Local Council Act is to better the locality in the public interest, and so on.

Similarly, powers conferred by Parliament to public authorities for a specific purpose. It is, thus, sensible to argue that authorities may exercise such powers only in furtherance of that purpose. It is acknowledged, however, that a power could be exercised by an authority for a purpose which is different from what Parliament would have envisaged. When this happens, the act of the authority will continue to stand for as long as no challenge is brought before the courts or a quasi-judicial body and declared unlawful.

There is a key difference between **performing an act that you are not authorised to perform** because the law does not allow it and **the exercise of power for an improper purpose**. While an act that you are not authorised to preform cannot be performed *a priori*, in the case of the exercise of power for an improper purpose you have the power to exercise that act, but **it is exercised for something which is not correct**. So, Transport Malta has the power to install signs but there could be situations where a sign is installed for an improper reason and not for the common good. For example, the Local Council seeks

approval from Transport Malta to instal a one-way sign to benefit a shop and not another. The difference between performing an act that you are not authorised to perform and exercising a power for an improper purpose is that in the former you can never exercise the power, it is *ab initio*, whereas in the latter, there is the power, but that power is exercised for an improper purpose, in this example that of an unfair advantage. There are ramifications.

In this way, the purpose of legislation must first and foremost be located. As a start, the purpose of a statute is to be inferred from **the meaning borne by the words** used in the legislation itself, regardless of any intention that the lawmakers might have had when debating the law in Parliament. Another thing to keep in mind is that the language is to bear its **ordinary meaning** in the general context of what the statute intends to achieve.

Moreover, the 'purpose' of a statute may not derive from one single legal disposition since the legislator's intentions may take different dimensions when you read through different laws.

When locating the purpose of a statute, one should also take cognizance of any 'obvious material matter' which any reasonable man is bound to be conscious of, notwithstanding the law being silent on such matter.

Ultimately, it is good to note that there could be situations in which an administrative decision rests on a number of purposes, some of which are proper and some of which are not. In such case, it would appear that when the powers which are exercised for proper purposes are lawful and those for improper purposes are subsidiary and merely consequential, the decision is still considered to be lawful.

Levels of improper purpose –

1) Taking into consideration irrelevant issues,
2) When you ought to take some important consideration and you do not take it, and
3) The last is the fettering of discretion which is when you are rigid/inflexible with the policy (the Oxygen case).

Essentially, we have a situation where a law has been enacted, so there is no issue with the law per se, but **there is an issue with the application of that particular law**, notwithstanding the law being valid, the fact that the law was promulgated within the ambit of the proper channels, we have a problem due to the wrong application of that law. The wrong application being the use of that law for an extraneous/irrelevant/improper purpose. A purpose which goes beyond the aim of the act. **Laws have to be used within the purposes laid down in that particular act**.

Case law

(1) **Prime Minister v. Sister Luigi Dunkin (1980) – The Blue Sisters case**

This case broke the barriers of lack of clarity and uncertainty and clearly laid down the rules deriving from English common law relating to the unreasonable exercise of discretion.

Facts

- Mrs Emilia Clapp donated to the Government of Malta a hospital on the condition that attached to the donation deed to the effect that "the hospital shall be enjoyed exclusively and in perpetuity by the Nursing Sisters of the Institute called "Little Company of Mary" who were obliged to use the premises as a hospital.
- According to the deed, in case the nuns did no longer use the premises as a hospital or left Malta, then the hospital reverted back to Government in full ownership.
- In 1977 Government included a new provision in the Medical and Kindred Professions Ordinance whereby *"no premise could be used for hospital purposes without a permit issued by a Health Minister."*
- Such Minister could impose **"any such condition as he may deem fit"** in granting such permit.
- When the nuns applied for a permit, this was issued however, a condition was imposed to the effect that the hospital had to make available to Government at least 50% of the facilities and beds at the hospital for the care of patients under the National Health Scheme.
- The Blue Sister refused and consequently, the Government evicted them form the hospital.

Was this condition fair?

- The court ruled against Government, arguing that **the condition was unreasonable** in the light of the reasonableness test enshrined in English common law, and that the condition, if abided by, would put the nuns in a situation of breach of their obligations under the donation deed which required them to exclusively run the hospital.
- Quoting Wade, the court said that the inquiry into the reasonableness of the exercise of the discretion had to be done ***"having regard to the Act and its scope and object in conferring a discretion upon the Minister rather than the use of adjectives."*** This meant that the review of discretion on reasonableness had to be a legal matter, not based on general opinions or whims of the court, but having regard to the general scope, letter and spirit of the law.
- The court concluded that, *"the main aim of this Act which granted discretionary powers to the Minister to issue licenses…was so that the Minister in question does not issue licenses or allow permits to be used…before he ensures that the standard of medical care or service provided would be of good and high quality."* So, the aim was to safeguard the protection of public health in Malta, an aim which the condition imposed by the Minister had no relation to.
- So, it was concluded that the Prime Minister abused of his powers where he relied on a law to meet his political motives. This gave rise to a legal problem because government could not rely on a law that was unrelated to the actual intentions of the government of the day.
- Discretion is when you have a number of choices, and all these choices are prima facie legal. To *'impose any condition as he may deem fit*.' Although the law said, "*any*

condition", in line with the principles of common law, such condition had to be reasonable. In the case that the government was going to take 50% of the facilities and beds of the hospital, the Blue Sisters would have gone bankrupt. So, the court acknowledged the existence of the provision in the law but stated that the way it was applied was unreasonable.

B. Unreasonableness

The notion and test of reasonableness is part and parcel of common law tradition.

The question that immediately springs to mind is whether all the forms of misuse of power under English common law have been included under the heading as contained in article 469A(b)(iii). The Bill attached to the 1993 White Paper entitled *Justice within a Reasonable Time* reveals that this ground of review includes notion, apart from the ones expressly contained in the present law, such as **an exercise of a discretionary power in bad faith**; or **an exercise of a personal discretionary power at the discretion or behest of another person** or **in accordance with a rule or policy without regard to the merits of the particular case**; or that is **so unreasonable that no reasonable person could have so exercised the power**, or in any other way constitutes abuse of power.

So, even though the word 'reasonableness' is not mentioned in article 469A, it is obvious that the grounds actually mentioned, namely "improper" purpose **(*għanijiet mhux xierqa*)** or taking irrelevant considerations **(*kunsiderazzjonijiet irrelevanti*)** into account, include other notions, such as fraud, corruption, unreasonableness, arbitrariness and legitimate expectation.

The most famous dictum regarding reasonableness & its meaning was that of Lord Diplock in the Wednesbury case who stated that an unreasonable decision would be ***"so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."***

In *Dr Daniel Grixti Soler et v. Public Service Commission et* (2015), Mr Justice Micallef said, *"The measure of reasonableness has to be an **objective** one linked with the circumstances of fact in which such decision is taken…"*

In the famous case *Roberts v. Hopwood* (1925) **(the Poplar case)**, Lord Wrenbury said in his judgement, "*a discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he liked but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."*

With respect to the **threshold of reasonableness,** the courts of law have not always required a high threshold for unreasonableness to be determined. In his understanding of reasonableness, De Smith includes decisions taken in bad faith, or based on considerations which have been accorded manifestly inappropriate weight or strictly irrational decisions namely decisions which are apparently illogical or arbitrary or supported by inadequate evidence or by inadequate or incomprehensible reasons.

It is important to keep in mind that the rule and test of reasonableness depends on a legal, not political, analysis, and such an analysis would depend on the main thrust of the statute, which grants a discretion to the public authority. In fact, in the *Blue Sisters* case, the Court delved into the intention of the legislator when enacting the law, and the thrust of the law as resulting from its provisions.

The development by the Maltese Courts of this ground of review was, to say the least, **extra cautious**. Despite the fact that in judicial review we are only speaking of points of law, when the case deals with unreasonableness and irrationality, although they may seem to be points of fact, they are seen as points of law. The fact that in judicial review the Court will only assess points of law and that it cannot substitute its discretion with that of the public authority only means that if an act is deemed unreasonable by a Court of law, the latter, once it annuls such act, cannot, for instance, order a promotion to be given to a person who has been unreasonably discriminated against, but it annuls the promotion exercise and sends the case back to the drawing board to be tackled anew by the public authority **in the light of the judgement of the Court**.

Are 'irrationality' and 'unreasonableness' interchangeable?
These two concepts are **not** interchangeable. With that being said, it is very common for courts and practitioners to use these two terms interchangeably. Both are tantamount to unlawful behaviour.

When something is irrational, **it does not make sense because the statements do not follow**. That is to say, factually, it cannot make sense. It is when you have two assertions, and the latter does not assert the former such as saying you're going to the Vatican in Valletta. Irrationality is more of an objective test because saying that the Vatican is in Valletta won't make sense under any circumstances, regardless of what one may think.

Unreasonableness, on the other hand, is when **one makes assertions which when you see the reasons behind such assertions, they do not make sense.** What is reasonable and what is not is very often subjective. There are certain elements deemed to be universally accepted but when it comes to moral judgement there always is an element of **subjectivity**. Unreasonableness is more of a **subjective test** because giving an instruction to students not to wear green is unreasonable by normal standards.

Both cases involve an element of lack of sense. An individual may not make sense in a number of different ways. In the case that a government action is either unreasonable or irrational, the effected individual has the right to challenge such action.

Case law
(1) **Associated Provincial Picture Houses Ltd v. Wednesbury Corp (1948) (The Wednesbury Case)**
In this case, the element of unreasonableness came to the fore, so much so that it is often referred to as 'Wednesbury unreasonableness'. This is an English law case that sets out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on judicial review, known as Wednesbury unreasonableness.

Facts

- In 1947, Associated Provincial Picture Houses was granted a license by the Wednesbury Corporation in Staffordshire to operate a cinema **on condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays** (this condition had spiritual connotations).
- Under the Cinematograph Act 1909, cinemas could be open from Mondays to Saturdays but not on Sundays. With that being said, the Sunday Entertainments Act 1932 legalised opening cinemas on Sundays by the local licensing authorities subject to specified conditions and *'subject to such conditions as the authority may think fit to impose'.*
- The defendants imposed the following condition in their licence: *"No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not."*

- The plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires.
- Associated Provincial Picture Houses sought a declaration that **Wednesbury's condition was unacceptable** and **outside the power of the Corporation to impose. Plaintiff's argument** was that the imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation.

Was the condition imposed reasonable?

- In this case, the court concluded that the licensing authorities acted in a reasonable manner, keeping in mind that in the past, the prevailing moral belief was that Sunday was dedicated to God.
- **The Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it**. To have the right to intervene, the court would have to conclude that:
  - In making the decision, the defendant **took into account factors that ought not to have been taken into account**, or
  - The defendant **failed to take into account factors that ought to have been taken into account**, or
  - The decision **was so unreasonable that no reasonable authority would ever consider imposing it**.
- The court held that the decision did not fall under any of these categories and consequently, the claim failed.
- So, in the eyes of the court **it was reasonable for the public authority to be concerned with the moral and spiritual wellbeing of children** when exercising its discretion as to whether to permit a cinema to be open on Sunday. Therefore, this decision was considered to be lawful.

Interestingly, in this case Lord Greene defined 'unreasonableness' as ***"something so absurd that no sensible person could ever dream that it lay within the powers of the authority".*** Here the subjective element comes onto play since what may be absurd for one person may not be absurd for another. With that being said, **certain things are commonly understood to be absurd**. If the decision taken by the public authority is within the limits of its

discretion, then the court generally does not intervene unless that decision is so absurd. Over here, the Wednesbury Corporation had the authority to do what it did. We have entered into a realm where the decision is on the basis of whether this is so absurd as to overturn the law or not. This raises the question **what is absurd and what is not?**

To recapitulate,

1) Notwithstanding the fact that there was a challenge because the cinema felt aggrieved because according to them, this condition made no sense, Lord Greene said the decision of the Wednesbury Corporation was within the discretion, the reasonable bounds. **Lord Greene said that for one to say a decision is unreasonable, the test adopted was that the decision is so absurd that no sensible person would ever dream that it lay within the power of the authority.** This is the threshold that is adopted by the Courts. It is a conservative one.
2) The decision of the Court was that it is reasonable to impose conditions in the interest of children since the pertinent law allowed for this, '*as it deems fit*.'

(2) **Council of Civil Service Unions v. Minister for the Civil Service (1984) (GCHQ case)**
This case dealt with the subjective test of **unreasonableness.**

Facts

- In the 1980's, with the United Kingdom under the Conservative government led by Margaret Thatcher, it was ruled that **any and all employees of the Government Communications Headquarters (GCHQ) were prohibited from joining any trade union**.
- This decision was justified based on the **potential threat to national security**, and **enforced using an Order of Council** which is an exercise of the Royal Prerogative Power.
- Consequently, by limiting access, or completely refusing access to trade unions to employees, certain individuals affected were not able to rely on certain employment legislative provisions or be represented by a Union.
- The court case was raised by the Council of Civil Service Unions, bringing the matter to court via judicial review.

Was this prohibition fair?

- At first instance the case was heard at the High Court of Justice, where it was ruled that the Order was invalid.
- After the decision being overturned on appeal at the Court of Appeal, the case was heard on appeal at the House of Lords which ruled that the exercise of the Royal Prerogative was capable of being subject to judicial review.
- The importance of the case is found in the departure from the unwillingness of the courts to judicially review prerogative powers.
- Lord Diplock found that where a person's 'private rights or legitimate expectations' are effected by the execution of the prerogative power, then that execution of power should be amenable to review.
- Lord Fraser and Lord Brightman came to the same conclusion based on the view that where the prerogative power was delegated from the monarch, the exercise of that power could be reviewed via judicial review.
- Lord Roskill stated:

"If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so **as to affect the rights of the citizen**, I am unable to see, subject to what I shall say later, that there is any logical reason **why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory**."

- So, following the GCHQ case, it was found that prerogative powers (bar for national security reasons) can be judicially reviewed for legality

Here, we see Lord Diplock's take on what is the standard of what is reasonable or not. Here there is the mention of 'irrationality'. The debate starts whether there is a difference between irrationality and unreasonableness. The tendency is that the Court use these terms interchangeably. Even though one can argue that these are questions of fact, as opposed to of law, for one to say whether something is rational or not, or reasonable or not, one needs to examine the facts. Judicial review is nearing closer to facts in this case. Appeal and judicial review – appeal we speak of points of law and facts and in judicial review points of law only. The Court of Appeal, when we say questions of fact it means that you can see facts in a different way, you can change them. It can change the decision. The court of judicial review can see aspects of law only and not of fact. In judicial review because you only have points of fact, you cannot substitute the discretion of the public authority where facts are involved. In an appeal, you can change the discretion of the facts as seen in the First Hall.

(3) **Nottingham Shier County Council v. Secretary of State for the Environment (1986)**
There are cases were prima facie the decision is very unreasonable, but the English court decided it was very reasonable.

Facts

- The Secretary of State issued guidelines to local authorities under statutory authority stating that local authorities would **suffer financial penalties if they overspent their budgets**.
- The local authorities thought that this was unfair, but the government wanted to ensure that local authorities complied with spending targets. The statute also required that the guidance was approved by the House of Commons, which it was.

Was this guideline fair?

- It was held by Lord Scarman that the courts will not "*intervene on the ground of "unreasonableness" to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limit of public expenditure by local authorities and the incidence of the tax burden as between taxpayers… Unless and until a statute provides otherwise, it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for judges…*"
- This means that the court would not consider it unreasonable **because the House of Commons have agreed to it**. It makes it almost like quasi-law, rather than it just being the Secretary of State's decision – if the House of Commons has agreed to this guidance, then why should the courts interfere?

- So, it is said to be **Super Wednesbury because the courts are less willing to interfere because it has the mandate of the House of Commons**.
- It is not just the Secretary of State making a decision on his own; he is backed up by the House of Commons. And if the whole House of Commons, or the majority agrees, then who is the court to disagree?
- Lord Scarman went as far as to say that he would not even consider the case in detail unless and until there was a 'prima facie' (on the fact of it) case shown holding that the Secretary of State acted in bad faith.
- The constitutional reason given by Lord Scarman therefore was: *"it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister".*
- Essentially he is saying it is not just the Secretary of State here – it is me against the Secretary of State and the legislature. How can I overrule both of them when they both agree? This is essentially reflecting the separation of powers.

(4) **R v. Ministry of Defence, Exp Smith (1996)**

This case deals with irrational behaviour by Sir Thomas Bingham.

Facts:

- At the time, the policy which governed homosexuals in the British armed forces was: *'The Ministry of Defence's policy is that **homosexuality is incompatible with service in the Armed Forces**. Service personnel who are **known to be homosexual** or who **engage in homosexual activity** are administratively discharged from the Armed Forces.'*
- As this statement makes plain, proof of homosexual activity was not needed – a reliable admission of homosexual orientation was enough.
- Where homosexual orientation or activity was clear, the service authorities gave themselves no choice but to discharge the member involved without regard to the member's service record or character or the consequences of discharge to the member personally.
- As a result, 4 appellants were **administratively discharged from the armed forces because they were homosexuals**. None of them had committed any offence against the general criminal law, nor any offence against the special law governing his or her service. None of them had committed any homosexual act on service premises nor (save in one instance, said to be unwitting) any act involving another member of the service. All of them had shown the qualities required of loyal and efficient service personnel. All of them had looked forward to long service careers, now denied them. Their lives and livelihoods have been grossly disrupted by their involuntary discharge.

Was the policy fair?

- The 4 appellants argued that the policy was irrational. Their challenge is, and is only, to the blanket, non-discretionary, unspecific nature of the existing policy.
- Sir Thomas Bingham said that in this case, the threshold of irrationality is a high one, and in this case, it was not crossed. So, it was concluded that not allowing homosexuals to serve their country is not irrational.

(5) **Re Duffy (FC) (Northern Ireland) (2008)**
This is a case where the claim for irrationality was successful by Lord Bingham.

Facts
- In 1988, the Public Processions (Northern Ireland) Act was enacted. This established a Parades Commission to attempt to resolve disputes about public processions, and it could impose conditions on those organising or taking part in proposed public processions or public meetings and could issue procedural rules and guidelines. Moreover, The Secretary of State appointed commissioners, on application.
- The claimant sought judicial review of a decision to appoint two new members to the parades commission.
- Two new appointments had been members of Protestant loyalists organizations and had been in dispute with rival Catholic organizations. They had not resigned from these bodies or announce their views
- The two people appointed "*had both been very prominent and committed proponents of the loyalist parade from Drumcree along the Garvaghy Road to Portadown. When appointed neither had resigned from the bodies to which they belonged and neither gave any recorded indication that he had changed his allegiance*."
- The claimant complained that letters inviting proposals for membership were sent to protestant organisations, but none went to nationalist groups including the residents association which he represented in a catholic area.

Held
- The request succeeded.
- No Secretary of State could reasonably have confirmed the appointments made.
- The people appointed were so committed to one side of the community that they could not act with sufficient independence.
- Lord Bingham held that "*No reasonable person, knowing of the two appointees backgrounds and activities, could have supposed that either would bring an objective or impartial judgement to bear on problems raised by the parades*."

C. Taking Irrelevant Considerations into account or Ignoring Relevant ones

The definition of abuse of power in this article consists of either taking irrelevant considerations into account or ignoring relevant considerations.

It is evident that **there are some considerations e.g. political motives, personal gain, discriminatory treatment, breach of rights, which are altogether impermissible**; but there are others which the public authority is entitled to consider or not to consider; it is only when the public authority takes into account considerations which it was not entitled to consider that the action is unlawful. **Public authorities are required to exclude from their mind any factor, or factors, that are 'irrelevant' to the scope of the pertinent legislation under which they are operating**.

Also, in exercising its discretion, a body must be seen to take into account all relevant considerations and not be swayed in its decision-making by irrelevant ones. In this way, one way of 'acting for an improper purpose' is when the public authority fails to take into

account all relevant mandatory considerations that are either (1) **statutorily expressed** or those that (2) **should have been 'materially obvious' for any reasonable decision maker not to ignore despite the law being silent**. In the latter scenario, there is no hard and fast rule. Although the law provides no definition of 'material considerations', the answer to it is to determine whether the consideration in question fits within the purpose and objectives set out in the Parent Act under which the public authority is exercising power.

In *R. v. Somerset County Council* (1995), 3 types of considerations were identified:

1) Considerations that must be taken into account and which are therefore mandatory;
2) Considerations that must not be taken into account and which are therefore prohibited; and
3) Discretionary considerations that a decision-maker may have regard to, in which case the court will only intervene if it believes the decision-maker has acted unreasonably.

Case law

(1) **Wheeler and others v Leicester City Council [1985] 2 All ER 1106 (HL)**

- Wheeler v Leicester City Council is an Administrative Law case **involving judicial review.**

Facts

- Leicester City Council allowed a rugby club to use the council-owned training facilities. Mr. Wheeler was a member of the club.
- The English Rugby Football Union decided to send a touring team to South Africa, selecting three members of the club at the time of racist apartheid in South Africa
- Before the tour, the council asked the club several questions whether they supported government's opposition to the tour, whether it would press players not to participate in the tour, etc.
- The local rugby club failed to denounce apartheid and did not seek to dissuade three of its players touring with the national side (the Nationalist Party was an all-white government) even though **the Council opposed sporting links with South Africa**.
- The Leicester Council boycotted the tournament as a political stance against the apartheid. After the tour, **the council banned the use of recreation ground for training** on the basis of the Open Spaces Act 1906 and the Public Health Act 1925, which both gave it specific powers to determine who should be entitled to use recreation ground and on what terms.
- Consequently, the members of the club applied for judicial review of the ban.

Was the ban fair?

- Wheeler challenged the decision of Leicester City Council under the Race Relations Act (1976) to prohibit the rugby club of which Wheeler was a member from using particular council-owned training facilities.
- He argued that this was a **politically motivated decision** since at the time, refusal to play in South Africa was a way of putting **political pressure** on the apartheid regime.
- The House acknowledged that under the Race Relations Act (1976) the council did have power to consider the best interests of race relations in its decision-making process.
- However, **since the club did not breach any laws or rights, it was unfair to penalise it for not condemning the tour publicly**.

- The fact that players of the rugby team merely failed to show indirect political support for the campaign against apartheid because they were willing to play rugby in South Africa **was an irrelevant consideration to take into account**.
- The Council could not rely on the 1976 Act which **had different purposes**, but had other discretions and powers, and '**persuasion, however powerful, must not be allowed to cross that line where it moves into the field of illegitimate pressure coupled with the threat of sanctions.'**
- The House held that action by the council constituted **procedural impropriety** and therefore, the ban was quashed. The court held that such ban is a misuse of power as 'the club had done nothing wrong'. the club did not breach any laws or rights.
- 'A body exercising public functions must not act on grounds collateral to the objective to be achieved and/or for **improper motives**. So, the council had **an ulterior motive, unrelated to the law**. Improper use is precisely this; using a law for to attain an ulterior motive unrelated to that law.
- **A public body has an overarching duty to act fairly** when seeking to achieve its objectives in exercising its public functions and, **by seeking to use those powers to punish someone who had not acted in any way which could properly justify such punishment, it misused its powers** and, thus, acted unlawfully and Wednesbury unreasonably.'

(2) **Ann Summers Ltd v. Jobcentre Plus (2003)**

Facts

- The plaintiff sold sex toys.
- Defendant, Job Centre Plus, is an executive agency of the Department for Work and Pensions and has a job brokering role. That is to say, it assists persons to select, train for, obtain and retain employment suitable for their ages and capacities as well as it assists persons to obtain suitable employees.
- In 2001, plaintiff entered a period of major expansion. Consequently, it sought Job centres plus to help recruit salesgirls.
- Indeed, at the time there already existed a ban which prevented Ann Summers advertising its vacancies in Jobcentre Plus recruitment centres or Job centres. So, the Chief Executive Officer of Ann Summers wrote to the Minister.
- Jobcentre replied saying that it will not touch upon an illegal subject (sex exploitation) and for this reason, it decided that it will not help.
- In so doing, it concluded that their approach of not handling vacancies associated with the sex or personal services industry remained appropriate.
- So, they refused to promote sex exploitation.

Was this fair?

- Plaintiff sought judicial review of the respondent's decision not to allow the applicant to advertise jobs in job centres.
- When they ended up in Court, Mr Justice Newman decided that this decision was **unreasonable**. Lord Newman maintained that it was discriminatory.
- Newman held that respondent **had lost sight of its statutory duty to provide a facility to those seeking work, and those looking for employees**. It had concentrated instead

on those who might object to employment with the applicant. The basis of the ban was irrational.
- It appeared to have paid no regard to the potential benefit which jobseekers could obtain from employment with the claimant.
- The trade was legitimate and therefore, **you cannot justify your decision with reasons of embarrassment** and so on.
- Sometimes, even if morally you are convinced, legal purpose is superior.
- From this case the point that one cannot discriminate comes to the fore, also, you cannot make use of irrelevant reasons to arrive at where you want to arrive. The question of embarrassment is not catered for in the law and therefore, it is irrelevant.

Irrationality and unreasonableness are both subjective. This came to the fore particularly in the Ann Summers and Ministry of Defence cases.

(3) **R (DSD & Anor) v. The Parole Board of England and Wales (2018)**

Facts
- Mr John Warboys had been convicted of serious sexual offences and given an indeterminate sentence for public protection.
- He was later released by the Parlole Board after making an excuse that his violence was triggered by a breakup of a relationship in 2004.
- This release was challenged by a number of victims on the basis that the Parole Board failed to undertake further inquiry into the circumstances of Mr Worboys conduct.
- The victims claimed that the Board had evidently **ignored** the fact that nearly 80 victims had come forward and given stories about attacks from Mr Worboys before 2004.

Held
- The case was remitted to the Parole Board for fresh determination before a differently constituted panel because the Board had failed to have any regard to his previous conduct.
- Although there was nothing in the law to suggest that previous reports had to be taken into account, the High Court improvised a new doctrine in the sense that anything that was obviously material to the outcome of the decision must have had been taken into account.

D. Fettering of discretion

A way in which a public authority can act for an improper purpose is when that public authority **adopts policies that preclude it from considering the merits of a particular case**. It should be remembered that policies are designed to strike a compromise between unregulated discretion and rigid rules. While it is true that policies are required to be applied with uniformity in order to save time and promote certainty, public authorities are nonetheless **expected to pay regard to the merits of the individual case and listen to anyone with something new to say**.

When an authority is given discretion, it cannot bind itself as to the way in which this discretion will be exercised either by internal policies or obligations to others. Even though

an authority may establish internal guidelines, it should be prepared to make exceptions on the basis of every individual case.

In this way, the decision maker is committing himself beforehand as to how to exercise his discretion.

(1) **British Oxygen Co Ltd v Minister of Technology (1971)**
This case brings the notion of **'fettering of discretion'** to the fore.

Facts
- The Industrial Development Act (1966) gave the Minister of Technology discretionary power to issue **grants to industrial plants**.
- The Minister made a policy of not reimbursing products under £25. So, the policy stated that it would give grants to sellers of cylinders, on the condition that the cylinders cost more than 25£.
- British Oxygen Co Ltd applied for grants for their gas cylinders which cost £20 each; their application was refused
- British Oxygen Co Ltd claimed that it should be given a grant, considering the £30M it had spent on gas cylinders.
- Consequently, British Oxygen Co Ltd applied for judicial review on the grounds that it was unreasonable to disregard the application simply because the cylinders were under £25 each.

Was the £25 rule within the scope of the Minister's discretion? Did laying down the £25 rule amount to an illegal fetter on the Minister's statutory discretion?
- The House of Lords accepted that the department was entitled to make a rule or policy, if it was prepared to listen to arguments for the exercise of individual discretion.
- Lord Reid held that an unlimited discretion can only be subject to review on substantive grounds for bad faith and *Wednesbury* unreasonableness – bad faith refers to acting with improper purpose, under the ground of review of illegality –
  "There are two general grounds on which the exercise of an unqualified discretion can be attacked. **It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion.** But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him."

- *"The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application."* There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. **What the authority must not do is to refuse to listen at all**.
- A Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always **willing to listen to anyone with something new to say.**
- Indeed, Lord Rein held that the circumstances in which discretions are exercised vary enormously and the general rule is that anyone who has to exercise a statutory discretion must not shut his ears to an application.

- The reasoning behind this judgement is that there could be times when, if applied rigidly, discretionary powers would undermine the statutory objectives.

Conclusion
In order to ensure that the discretionary power conferred to a public authority is exercised limitedly for the purposes of the Parent Act and nothing else, the decision maker must seek to ensure that:

1) No explicitly or implied legal provisions that are materially obvious in the context of what is being assessed are ignored from the decision equation;
2) Irrelevant considerations driven by some extraneous interests are completely left out from the decision equation.
3) Avoid the blind application of policies without paying regard to the individual case taken in the context of the purpose of the Act under which the policy was enacted.

E. Legitimate Expectation

When someone expects that something happens. We are speaking of expectations. Someone genuinely feels that he/she has a right to something in particular.

In some very rare cases, the courts wilfully or unwittingly have applied the legitimate expectation doctrine that exists under English common law following the well-known case *R v. North and East Devon Health Authority ex parte Coughlan* (1999). In that case, regarding a promise made to a woman with severe disability that she would remain accommodated in a particular institution following her transfer from a previous facility, the Court of Appeal was of the view that for the authorities to frustrate Coughlan's legitimate expectation was so unfair that such action amounted to an abuse of power. Furthermore, there was no overriding **public interest considerations** to justify the authorities' decision. A court in the UK, in both procedural and substantive application of the doctrine, is empowered to examine whether there existed a legitimate expectation and whether there were sufficiently grave reasons to depart from one's expected obligations.

In the case *Socjeta Filarmonika La Stella v. Commissioner of Police* (1997), the refusal of a permit for the discharging of light fireworks from the Gozo citadel a few days before the celebration of a town feast was deemed to be invalid since the permit had always been issued in the past and the applicant had abided by all conditions imposed by the relative law and regulations.

The court stated that,
"The rule of law requires and presupposes that an individual should know a priori his position regarding a state of facts through laws and regulations which are clear on the relative matter, and not be suddenly faced by all kinds of conditions which he could have not foreseen before, as happened in this case."

In *Portanier Developments Ltd v. Architect v. Cassar noe* (2021), the doctrine was expressly recognised as applicable, but was not classified under any part of article 469A.

The Court said,
"Our Courts have considered that legitimate expectation arises out of a legal situation so long as it is proven that a party had a right to the matter which was refused to it. Besides, for an expectation to be legitimate, it must be one whose execution does not infringe the fundamental rights of another. Nor can there be such a legitimate expectation in situations where the law is broken and then a person requests that he be protected in such an illegal state."

Even though legitimate expectation is not expressly stated as one of the grounds of review, it has been stated that it can easily be pigeonholed under the ground of review of ignoring relevant considerations.

The doctrine is however still not settled in Maltese jurisprudence. As has been seen, in the few occasions when it has been invoked, either there was no reference to article 469A or, in those few cases where it was, there was no indication under which part of article 469A the doctrine fell. The doctrine has implications both as regards procedural and substantive *ultra vires.* It remains to be seen how the Maltese courts will further develop this ground of review as part of article 469A, and to what extent the notion would, if at all, be extended.

Exceptions to this notion (when a legitimate expectation can be frustrated) –

(1) **Public interest –** The legitimate expectation is frustrated in the interest of the public. For example, when health is involved, there is priority because there is public interest. You could have a legitimate expectation to go to a restaurant without a mask, for example, because that's how it's always been, but all of a sudden this has to change.

(2) **Illegality –** there can also be a situation where one thinks they have a legitimate expectation, and this is frustrated owing to the fact that it is based on **illegality.** Say the authority promised you something but did not have the power to promise you those things. So, in spite of this expectation, the expectation cannot be considered to be legitimate. For example, if the Local Council send you a letter saying that it knows you're financially stable so come pick up money. You have an expectation, but you cannot ground an expectation on an illegality. So, this is an expectation grounded on unlawful behaviour/illegal disposition of the law where the authority is not authorised to act in that way. This expectation is only legitimate to you but not legitimate in the bigger picture.

F. When the administrative act is otherwise contrary to law

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

This is a **catch-all ground** which catches an administrative act which violates the law but cannot be classified under the other grounds.