

Diploma in Law

Lecture 16: Claims against the Government

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**Diploma in Law
(Malta)**

Doctrines of State Immunity and Sovereign Immunity

In general, the doctrines of state immunity and sovereign immunity are legal principles that protect governments and sovereign states from being sued or subjected to legal proceedings in foreign courts. These doctrines are based on the principle of sovereign equality and the idea that a state should not be subject to the jurisdiction of another state's courts without its consent. While I can provide a general explanation, it's important to note that the specific application and exceptions to these doctrines may vary across jurisdictions, including in Malta.

- State Immunity: State immunity refers to the immunity enjoyed by a foreign state from being sued in the courts of another state. It generally means that a state cannot be brought before the courts of another state without its consent. The doctrine of state immunity is based on the principle that states are independent entities with the right to govern themselves and should be protected from interference by other states' legal systems.
- Sovereign Immunity: Sovereign immunity is a similar concept to state immunity but applies to the immunity of the government itself or its agencies within its own jurisdiction. It grants protection to the government against being sued in its own courts. Like state immunity, the doctrine of sovereign immunity is grounded in the idea that the government should be shielded from legal proceedings that could disrupt its functioning and exercise of sovereign powers.

While state immunity and sovereign immunity generally shield governments from legal actions, there are exceptions to these doctrines that may allow individuals or entities to bring claims against the government.



Jurisprudence

Court judgements and rulings are also an important source of procedural law. Our Courts have played a major role in establishing certain principles relating to civil procedure.

In this context, it can be added that the practice of our Courts has affected the civil procedure. The Government of Malta is protected, to a certain extent, from civil action by the aggrieved citizen.

What follows is an examination of court judgements in light of **Section 460** of the **COCP**, and this should serve as an example of the important role which the Maltese Courts have had over the years.

By virtue of **Section 460**, the Government of Malta or public officers acting in their official capacity are, to a certain extent, protected from civil action by an aggrieved citizen.

Section 460 of the **COCP** lays down in what manner a private party, aggrieved by the Government of Malta or any officer representing it, may institute such legal action. Thus we are chiefly concerned with the dispositions of Article 460 of the COCP that determines in what manner a private party may legally bring such action, when aggrieved by the Government of Malta or any other officer thus representing it.

An example of a landmark judgment that has turned out to be a source of civil procedure is that of **Sullivan vs. Customs Comptroller**, where it was affirmed that there is no doubt that the defendant is being sued as a person occupying a public office and not personally, thus in accordance to Maltese law, the plaintiff may file a writ of summons against him, except after the lapse of ten days from the service of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated. The fact that the Registrar allowed the filing of the writ of summons does not validate the said writ because the nullity imposed by law cannot be removed. One cannot take advantage from a wrong application of the law by the Registrar.



Sub-title VI of the COCP: Of Causes of the Government

Article 460 (1) of the COCP states that there are certain restrictions on starting legal proceedings against the government, government authorities, or public officials in Malta:

1. You need to wait for ten days: Before you can file a lawsuit or take any legal action against the government, a government authority, or a public official in their official capacity, you have to wait for at least ten days.
2. Send a written notice: During these ten days, you need to serve a written notice, called a judicial letter or a protest, to the government, the authority, or the official you intend to sue. This notice should clearly state the right you are claiming or the demand you are making.
3. Commence proceedings after ten days: Only after the ten-day period has passed and you have provided the written notice, you can then proceed to file your legal claim or initiate the proceedings against the government, authority, or official.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

Sub-article (2) of Article 460, however, specifies certain situations where the waiting period and written notice requirement do not apply:

1. Actions for redress under the Constitution: The waiting period and written notice requirement mentioned earlier do not apply to legal actions seeking redress or remedies under Article 46 of the Constitution of Malta. These are cases where individuals are seeking to address violations of their constitutional rights.
2. Warrants of prohibitory injunction: The waiting period and written notice requirement are also not applicable when seeking a warrant for a prohibitory injunction. This means that if there is a need to urgently stop someone from doing something, legal action can be taken immediately without the ten-day waiting period.
3. Actions for the correction of acts of civil status: When there is a need to correct civil status-related matters, such as errors in birth certificates or marriage certificates, the waiting period and written notice requirement are not applicable. Immediate legal action can be taken to rectify these issues.
4. Actions to be heard with urgency: In cases where there is an urgent need to have the matter heard quickly, the waiting period and written notice requirement do not apply. This allows for expedited legal proceedings.
5. Referrals of disputes to arbitration: If a dispute is referred to arbitration, which is an alternative method of resolving legal disputes, the waiting period and written notice requirement are not applicable. The specific procedures and time limits set forth in the arbitration process will govern instead.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

Sub-article (3) of Article 460 states that if there is a court order in place to stop the government from taking certain actions in a case, that case will be given priority and dealt with urgently by the court. This ensures that legal matters involving the government and prohibitory injunctions are addressed promptly. Therefore:

- **Warrant of prohibitory injunction:** If there is a court-issued warrant for a prohibitory injunction, which is an order to prevent someone from doing a certain action, in force related to a case against the government, it has a special effect.
- **Heard with urgency:** When there is such a warrant in force, the court will prioritise and give special attention to these cases. They will be heard and dealt with more quickly than other cases.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

Articles 461, 462 and 463 of the COCP outline the procedures for the collection of fines and the forfeiture of goods through civil processes in Malta. The Attorney General is responsible for initiating the relevant legal proceedings by submitting applications to the appropriate courts. The applications are directed against the person who has possession of the goods that are subject to forfeiture.

Article 461 COCP: If there is a fine (multa) that needs to be collected through a civil process, the Attorney General (a legal representative of the government) will initiate the collection procedure in either the Civil Court, First Hall, or the Court of Magistrates (Gozo) in its superior jurisdiction, depending on the circumstances. This is done through an application made to the court.

Article 462 COCP: In cases where goods are seized and can be forfeited according to the law, the Attorney General will also initiate the forfeiture process in either the Civil Court, First Hall, or the Court of Magistrates (Gozo) in its superior jurisdiction. This is done by filing an application with the court, requesting that the specific goods in question be officially declared forfeited.

Article 463 COCP: The application mentioned in the previous article (Article 462) is directed against the person who has possession of the goods that have been seized. The application seeks a legal declaration that the goods should be forfeited to the government.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

Article 464 COCP:

- If the goods that are subject to forfeiture are not in the possession of any specific person, the application for forfeiture will be directed against the advocate and the legal procurator next in line as curators on the rota. These curators will represent the unknown owner of the goods. The curators mentioned above will act on behalf of the owner of the goods since the owner's identity is unknown.
- A copy of the application for forfeiture will be posted at the entrance of the court building at least two days before the scheduled hearing. This allows any interested person to become aware of the action and have an opportunity to appear at the trial to contest the forfeiture.

Article 465 COCP:

- Any person who has an interest in the matter, even if they were not officially summoned, has the right to appear at the trial of the action.
- This person can raise objections or arguments against the demand for forfeiture mentioned in Article 462 COCP.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

PROCEEDINGS FOR DEBTS DUE TO THE GOVERNMENT

Article 466 COCP describes the legal process for a government department or a representative of a corporate body to sue someone who owes them money. It outlines the steps that need to be followed.

Here's a simplified breakdown:

1. If the head of a government department or a person representing a corporate body authorised by law to collect debts wants to sue someone for money owed to the government or the corporate body, they need to make a sworn statement (declaration) to a registrar, judge, or magistrate. The declaration should include details about the debt and the debtor, and confirm that the debt is indeed owed.
2. The declaration must be served to the debtor through a legal process. Once served, the declaration has the same effect as a final judgment by a court, unless the debtor opposes the claim within 20 days. The debtor can oppose the claim by filing an application asking the court to declare the claim unfounded.
3. If the debtor files an application to oppose the claim, a copy of the application must be served to the head of the department within 20 days. The head of the department then has the right to respond within the same 20-day period. The court will schedule a hearing date for the application after this 20-day period.
4. In urgent cases, either the creditor (the one owed money) or the debtor can request the court to shorten the time limits mentioned in this process. The court can do so by issuing a decree, which must be served to the other party involved.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

OPPOSITION TO PROCEEDINGS UNDER ARTICLE 466

Article 467 COCP states that if someone obtains a legal document (referred to as an "executive title") to collect a debt from someone else, and the debtor doesn't oppose it, that document can be rescinded (canceled) under certain circumstances.

Here's a more detailed explanation:

- If the debtor receives a document called an "executive warrant" or any other official document that refers to the legal document (executive title) obtained by the creditor, and the debtor wasn't aware of the earlier document (declaration) that was served to them, they have the right to request the court to rescind the executive title. The debtor has to file this request (application) within twenty days from the first time they receive the executive warrant or any other document related to it.
- The court will consider the debtor's request and decide whether to rescind the executive title. They will examine whether the debtor genuinely didn't know about the earlier document (declaration) and had no opportunity to oppose it within the allowed time period. Additionally, the court will assess whether the claim made in the declaration is without merit, meaning it doesn't have a valid basis.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) OPPOSITION TO PROCEEDINGS UNDER ARTICLE 466

It's important to note that, apart from the circumstances mentioned in the previous slide, no other opposition by the debtor can prevent the execution of the executive title or stop any actions taken based on it. In other words, unless the debtor meets the specific conditions outlined in this article, the legal process initiated by the creditor can continue, and the debtor will have to comply with the resulting consequences.

In summary, if someone owes money and a creditor obtains a legal document to collect that debt, the debtor has a limited time to oppose it. However, if the debtor wasn't aware of the initial document and can prove that the claim is unfounded, they can request the court to cancel the legal document. Any other form of opposition by the debtor won't halt the enforcement of the legal process unless it falls within the conditions specified in this article.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

In this particular case, the Court made a significant ruling that clarified the legal obligations of claimants when filing a lawsuit against Government entities. The general requirement for claimants to provide prior warning to Government entities, as stipulated in Article 460 of the Code of Organisation and Civil Procedure (COCP), does not apply when the lawsuit involves the judicial review of administrative actions taken by the Government, as outlined in Article 469A of the COCP.

This case centres on the intricate interplay between two key articles within the COCP, namely Article 460 and Article 469A.

The Court's decision brings clarity to the relationship between these two provisions and provides important guidance for future cases involving administrative actions of the Government.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

BACKGROUND TO THE LAW

Article 460 COCP provides that no judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded against the Government, or against any authority established by the Maltese Constitution, other than the Electoral Commission or even against any person holding a public office in his official capacity (the “Government”), except after the expiration of 10 days from the effective service against the Government, of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated. This provision aims to serve as a mechanism whereby the Government is notified of any intended lawsuits and warrants with the intention of avoiding them amicably.

However, the same article provides an exemption to the above procedure which states that said procedure shall not apply when there are other provisions in the law which provides for another procedure that needs to be abided by. Other specific exemptions stipulated in the article include (i) actions for redress under Article 46 of the Constitution; (ii) warrants of prohibitory injunction; (iii) actions for the correction of acts of civil status; (iv) actions to be heard with urgency; or (v) referrals of disputes to arbitration.

Article 469A COCP, on the other hand, provides the procedure for the judicial review of administrative actions. This article provides that the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null or without effect in a number of cases and subject to exceptions provided for within Maltese law. This action for judicial review must be filed within a time period of 6 months from the date of the administrative act and this time period may not be extended or renewed unilaterally by the claimant.

From a quick review of both articles, and at face value, the action for judicial review in terms of Article 469A COCP is not one of the exceptions provided for in Article 460 COCP. This suggests that prior to proceeding with a lawsuit for the judicial review of an administrative action one would need to first notify the Government 10 days prior to filing the lawsuit as explained above. To date, this was the position consistently taken by our Courts.

The Court, in this case, disagreed with this position, as shall be explained in the coming slides.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

THE FACTS

The plaintiffs, Paul Gauci and E&G Properties Limited, are the owners of a building complex in St. Julian's and were conducting demolition works on a part of the mentioned property. During the course of these works, the plaintiffs were notified by the defendants, Superintendence of Cultural Heritage, that a Conservation and Protection Order (the "Order") was issued requiring the plaintiffs to cease the demolition works on the property.

Following this decision, the plaintiffs challenged the Order and filed a lawsuit for a judicial review of the defendant's decision to issue the Order on the basis that it was ultra vires. The plaintiffs did file a judicial letter in terms of Article 460 COCP hoping to notify the defendants of their intention to challenge the Order, however, the plaintiffs failed to effectively serve that judicial letter on the defendant in time.

The Court was asked to determine whether in this instance (1) there exists the requirement of prior notice to the Government as a matter of Maltese public policy; and (2) whether the dispositions of Article 460 COCP applies to Article 469A COCP.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

THE JUDGEMENT

Regarding first point on public policy, the Court noted that there is no definition of public policy at law. The Court provided that public policy embodies a number of ethical and political principles, and accordingly the observance and execution of such principles is indispensable for the existence of judicial order and the fulfilment of its essential aim. The Court also noted that the notion of public policy is dynamic, ever changing according to the necessity of times. Therefore, a principle which is deemed to constitute public policy in the present might not necessarily constitute such in the future.

The Court also considered the rationale behind the manner in which the legislator drafted the bill of laws which introduced Article 460 COCP in 1981. As per the parliamentary debate, the scope of Article 460 is that of allowing the Government to amend any wrongful position that it might have taken with regards to its citizens and thereby avoiding any potential proceedings. Whilst being an efficient remedy, this is also a privilege which the Government enjoys whereby it is placed on 'alert' and will have enough time to try and seek a resolution prior to the commencements of any potential proceedings.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

(cont'd) THE JUDGEMENT

The principles emerging out of Article 460 COCP certainly form an integral part of the Maltese public policy, the Court held. However, such principle only applies within limits. The provisions in Article 460 COCP cannot be used in an absolute manner as this would create an imbalance towards other fundamental principles, such as the judicial review remedy in terms of Article 469A COCP, which safeguards public policy. Article 742 COCP, the Court pointed out, obliges our Courts to preside and decide proceedings without any form of distinction or privilege.

On the second point of applicability, the Court held that Article 460 COCP should be interpreted restrictively. It also observed how the 1993 Commission, tasked with recommending changes in civil procedure, criticised harshly the rule set out in Article 460 COCP and unsuccessfully advocated for its removal. The 1993 Commission found that the situation in Malta treats the Government as an unequal litigant and this may even on certain occasions result in the violation of the fair hearing rule. Although the 1993 Commission understood the rationale behind the rule of prior notice, it held that the manner in which it is currently used has led to a situation where if one does not make a prior notification before commencing an action against the Government, it would lead to a nullity of the lawsuit subsequently filed. Such nullity may be invoked not only by the Government, but by the other defendants who are also party to the lawsuit.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

(cont'd) Paul Gauci in his own name and on behalf of the company E & G Properties Limited vs Superintendent of Cultural Heritage on behalf of the Superintendence of Cultural Heritage, 9 July, 2019, Civil Court (First Hall)

(cont'd) THE JUDGEMENT

The Court firmly declared that whilst there is no doubt that Article 460 COCP is still a norm of public policy; it is time that this norm is assessed so as to take into account other norms of public policy, such as that of equality of litigants before our Courts. Furthermore, the Court held that Article 460 COCP might constitute a breach of fundamental rights due to the litigation privilege granted to the Government.

The Court made reference to a European Court of Human Rights judgment, **Platakou v Greece**, whereby the European Court held that:

“where there was a procedural rule that time ceased to run against the state during a judicial vacation, the Court found that the applicant had suffered inequality of arms since her application, rejected as out of time, would not have been deemed outside the time limit if the same rule had applied to her”



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

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(cont'd) THE JUDGEMENT

With regards to the relationship between the two articles, the Court held that Article 469A COCP establishes a judicial procedure for the review of an administrative action which is different to that provided for under Article 460 COCP.

The Court considered in detail previous judgments given on the same matter however disagreed with the approach previously taken. This is because Article 469A COCP establishes a period of 6 months for such a lawsuit to be instituted and which period cannot be extended or renewed unilaterally by the private claimant. As Article 469A COCP is regulated by a separate procedure, it falls outside the scope of Article 460 COCP, the Court reasoned. The exception in the latter Article stipulates that Article 469A COCP shall not apply when other dispositions of the law regulate a particular procedure.



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

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ANY THOUGHTS ABOUT THE JUDGEMENT?



(cont'd) Sub-title VI of the COCP: Of Causes of the Government

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CONCLUDING THOUGHTS

Whilst the Court as presided, is not the first to have taken this unorthodox approach, it still remains that this is not the position customarily adopted by our Courts in such instances. The Court prior to taking its decision noted a shift in the reasoning being adopted by several judges which have chosen to abandon the previous position and interpret Article 460 COCP and 469A COCP as being separate and autonomous.

Over the years, different and opposing views on the relationship between Article 460 COCP and 469A COCP were taken. The legislator should take cue from this latest judgment delivered by our Court to assess whether an amendment of Article 460 COCP is appropriate to avoid discrepancies in interpretation and application in the future.





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