Procedural Privileges and Immunities in favour of Government and Public Authorities in the Maltese Constitution .

General

Presumably every Government of any country enjoys certain special powers which the ordinary citizen does not have. This is natural and reasonable. The problem arises as to the extent to which these powers are not reviewable by a court of law. Governments are elected to govern; it is not the task of the Court to meddle and interfere too much with the way Governments administer the country; at the same time under the guise of democratic legitimacy, the courts should not be precluded from investigating administrative action. [1]The golden fine balance has been held by the courts stating in administrative law review actions that they will declare an administrative act as unlawful, but then leave it up to the competent public authority to decide the case afresh in the light of the judgment of nullity of the act.

When it comes to constitutional review , one would expect that there are no exceptions to the rule that the Constitution is supreme. In fact, the Maltese Constitution is littered with provisions exempting particular laws or even sets of laws from the human rights provisions of the Constitution or even from any court scrutiny at all.

Ordinary laws supreme to the Constitution

The original 1974 Constitution had three significant exceptions to the supremacy norm of the Constitution in Malta. The first two were contained in article 48(7) [2]which originally provided that:

[1] The most clear example of such attitude can be seen in the press release dated 5 February 1981 which Government issued on publishing a Bill in 1981)eventually Act No., VIII of 1981) restricting court review : "Government is elected by the people and accountable to them, ; therefore it has to be adjudicated above all by them not be the Courts."

[2] Today art 49 (7)

"Nothing contained in any such law as is specified in the First Schedule to this Constitution and, until the expiration of a period of three years commencing with the appointed day , nothing contained in any other law, made before the appointed day shall be held to be inconsistent with the provisions of sections 34 to 46[3] (inclusive) of this Chapter and, subject as aforesaid , nothing done under the authority of any such law shall be held to be done in contravention of these sections. "

The first provision in the abovementioned sub-article, exempted, for a period of three years all laws passed before national Independence in1964 from the human rights provisions of the Constitution. Presumably this was enacted so as to give Government some lee way to amend any legal provision not in line with the Constitution . Though conceivably this exercise could have been done prior to independence , it is a provision which cannot be deemed to be unreasonable.

What was however more far reaching was the second provision namely that the backbone of Maltese legislation, namely a set of laws, contained in the First Schedule to the Constitution, which comprised the Civil Code, the Criminal Code, the Commercial Code, the Code of Organization and Civil Procedure and Code of Police Laws as they stood on 21 September 1964 could not be declared to be in breach of the human rights chapter …even if some of their provisions were. This exemption of ordinary laws from the supremacy of the Constitution is clearly manifested in the supremacy clause namely article 6, which proclaims the supremacy of the Constitution only "subject to the provisions of sub-article (7) and (9) of article 47…." This immunity was open-ended and did not have any expiry date. In fact, it was only formally abolished by a constitutional amendment in 1991 which came into force in 1993, even though with the incorporation of the European Convention on Human Rights in August 1987, this immunity , as shall be seen , became legally irrelevant .

The final immunity from Chapter IV relates to pre-1962 laws regarding the taking possession of rights over property. Any pre -1962 law could not be declared to be in breach of the right to property contained in article 37 of the Constitution.

[3] Today 33 t o 455 .

This provision still exists and is contained in article 47(9) of the Constitution, even though with the incorporation of the European Convention through Act No. XIV of 1987 (today Ch. 319 of the Laws of Malta) , including article 1 of the First Protocol, this provision has been severely circumscribed.

An analysis of these exceptions to constitutional supremacy in the Constitution as regards Human Rights shows that certain cases which deserved to be acceded to were defeated because of these immunity clauses. In one case, the Constitutional Court actually applied a practice under the Criminal Code to prevail over the constitutional right of the accused to receive a written charge against him.[4] The laws on discrimination against children born out of wedlock, the gender discrimination in the law on family, or the power of the same judges to decide whether to order a new hearing in a civil case were all regularised or better still protected from the constitutional human rights provisions . Similarly, such provisions as the impossibility for a court to grant bail in cases relating to murder charges , or the power of the Attorney General to re-arrest a person acquitted of charges by a Magistrates' Court as a court of criminal inquiry.

One lingering immunity

All these immunities have today been removed from the Constitution; but the one relating to the right to property stubbornly lingers on. Prior to 1987, in spite of the fact that article 37 of the Constitution provided three rights when the State takes away real or personal rights over property , namely the right to adequate compensation , that of contesting any compensation before a independent and impartial court or tribunal, and a right of appeal before the Court of Appeal, these applied only to laws passed *after* independence , It was already debilitating for the dispossessed owner that he could not challenge the very act of expropriation for the right in article 37 referred only to *ex post facto* rights ; once property was

[4] *Police v. Francesco Certo* et (Constitutional Court C)(14 August 1968)

taken away by the State, then one had the three abovementioned rights; to add insult to injury even these three rights were not applicable to the pre-1962 laws which allowed the State to take over private property, namely the Land Acquisition (Public Purpose) Ordinance (Ch. 88) of 1936 and the Housing Act 1949 (Ch. 125) . Consequently by an express provision of the Constitution an ordinary law was allowed to provide , in breach of the Constitution for no "adequate" compensation , for no impartial tribunal (the Land Arbitration Board) , and no appeal to the Court of Appeal.

With the introduction of the European Convention in our law in August 1987 , owners whose property was expropriated , could at last question the public interest element of state action , and challenge the amount of compensation offered ; the floodgates were opened and after years of legal oppression and lack of remedy, most expropriation cases were decided in favour of the private individual on the basis of the Convention , but not the Constitution. It is high time that , in view of Malta's incorporation of the Convention in Maltese law, this anachronistic article 47(9) be deleted.

President's and Prime Minister's actions protected from judicial review

The other ouster clauses disallowing court scrutiny of actions by persons or authorities in the Constitution are the following:

Article 85 of the Constitution, after stating that as a rule the President acts always on the advice of the Government of the day, except in some cases such as the appointment of a Prime Minister , then states in sub-article (2) that :

"where by this Constitution the President is required to act in accordance with the advice of any person or authority , the question whether he has in any case received, or acted in accordance with such advice, shall not be required into in any court. "

This provision gives rise to some interesting possible scenarios.

Does blocked access to court scrutiny mean that if for instance , the President removes the Prime Minister from office [5] , in circumstances not envisaged by the Constitution such as when the Prime Minister still enjoys the confidence of the House of Representatives; or if he were to appoint a member of a commission or authority established by the Constitution, according to his own deliberate judgment rather than the advice of the Prime Minister ; or if the President, in breach of article 76(5) of the Constitution were to dissolve Parliament, without the advice of the Prime Minister, in circumstances not envisaged under the proviso to that sub-article , then such action cannot be reviewed by a court?

The second question which arises is : does this sub-article mean that, arguing *a contrario sensu*- so popular with the courts in interpreting the provisions of the Constitution usually to the detriment of the individual, and based on the maxim *ubi lex voluit dixit*, then in cases where the President is *not required to act* on the advice of any person or authority , namely according to his own deliberate judgment, there is no impediment to court review of the President's actions?

Can for instance a Prime Minister challenge in Court his removal from office under article 76(5), or the refusal of the President to dissolve Parliament when the Head of State feels that it is not in the interests of Malta to order such dissolution and there is the possibility of an alternative government having the support of the House of Representatives. In the recent refusal of the President to remove the Leader of Opposition in July 2020 under article 90(4), could any person have had the right to challenge such decision ?

The objection to this argument is that if the Constitution went out of its way to disallow court scrutiny when the President is to act on the advice of some other person or authority, *multo magis* when he acts alone. However, article 95(2) of the Constitution delineating the jurisdiction of the Constitutional Court allows

[5] See Kevin Aquilina "Power of President to remove Prime Minister" (TOM) (7 and 8 January 2020)

"appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution, other than those which may fall under article 46 of the Constitution" (namely, the human rights provisions).

An argument against this interpretation could find some comfort in article 742A of the Code of Organization and Civil Procedure which does not allow any action against the President when he acts in his official capacity, a provision which was originally contained in the Ecclesiastical Courts (Constitution and Jurisdiction Act)(Chapter 1 of the Laws of Malta) . However, this provision is contained in an ordinary law; how can a provision of ordinary law block access to a court of constitutional jurisdiction when the interpretation of the Constitution is at stake?

A more sinister provision is found in article 86(3) which states that:

(3) Where by this Constitution the Prime Minister is required to perform any function in accordance with the recommendation of, or after consultation with, any person or authority , the question whether he has in any case received , or acted in accordance with such recommendation or whether he has consulted with such person or authority shall not be enquired into in any court .

This means that in the few occasions where by the Constitution the Prime Minister is obliged by the supreme law, to act on the binding advice or recommendation of any other person or authority , that fact is not reviewable by a court of law. The most clear instance where the Prime Minister is bound by the recommendation of any authority is found in art. 110 of the Constitution which provides that the power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister *acting on the recommendation of the Public Service Commission (PSC)* . This important provision whereby the Constitution created a buffer zone between Government and its employees in the form of an independent and autonomous Commission , becomes non-justiciable, allowing full powers to Government in such an important matter as to whether to act on the binding advice of the PSC .

As to the duty to of the Prime Minister to consult the Leader of the Opposition , this exists in the appointment of the members of the Electoral Commission (art. 60 (3), the Public Service Commission (Art 109(2) the Broadcasting Authority (art. 118 (2) the appointment of the Chairman of the Employment Commission (art 120 (2).). The word "consultation " is different from the term "information." A process of consultation presumes some kind of meeting or communication where the merits of a particular candidate are discussed and different options are put on the table. It is perhaps owing to the non-justiciability of this obligation to consult, that the exercise, over the years , has been reduced to mere information, sometime merely by electronic e-mail.

Immunity of Constitutional authorities from court review

There are two other provisions which remove court scrutiny relating to constitutional authorities .

The first is found in article 101A establishing the Commission for the Administration of Justice. Art. 101 A (14) provides that "the question whether the Commission for the Administration of Justice has validly performed any function vested by or under this Constitution shall not be inquired into by any court." This provision introduced in 1994 is a diluted version of a similar provision blocking court review of actions of the Public Service Commission. Article 115 of the Constitution provides that:

115. The question whether-

(a) the Public Service Commission has validly performed any functions vested in it by or under this Constitution;

(b) any member of the Public Service Commission or any public officer or other authority has validly performed any function delegated to such member , public officer or authority in pursuance of the provision of sub-article (1) of article 110 of this Constitution; or

(c) any member of the Public Service Commission or any public officer or other authority has validly performed any other function in relation to the work of the Constitution or in relation to any such function as is referred to in the preceding paragraph,

shall not be enquired into in any court.

There are three landmark judgments relating to this provision.

The first one gave a very expansive interpretation to this article. In *Callus v. Paris*[6] , the Constitutional Court, in relation to an alleged recruitment in the public service done without concurrence or participation of the Public Service Commission in clear breach of the Constitution. Referring to article 115 the Court stated:

"This means that in the view of the Court , it cannot investigate the complaints of appellants that it was only the Public Service Commission which could validly conduct or control the competition process and the Minister of Education or the Director of Education or the Board of Local Examinations could not validly conduct or control the process for such matter related to the workings of the Commission . In this context, the Court is of the opinion that the words "validly performed " includes as well "whether performed".

The apex Court in Malta is here stating that whether the PSC acted according to the Constitution was not subject to constitutional review by the Constitutional Court!

In 1976, however in a case [7]involving disciplinary provision against a public officer, the court of constitutional jurisdiction ruled that this provision did not exempt the Commission from observing its own rules . A similar pronouncement was made years later in two other cases[8] where the Commission did not abide by certain procedural norms enshrined in Regulations it itself had approved in the dismissal of public officers in the public interest .

In the *Doctors*' case [9] where the Commission passed regulations allowing summary dismissal of striking government doctors in State hospital, the Constitutional Court held that it could scrutinize whether regulations passed by the Commission were constitutional or not, in spite of article 115; sadly then

[6] *Anthony Callus et v Dr Antonio Paris et noe*. (CC)(7 July 1966)
[7] *Dr. F. Cassar v. Chairman Public Service Commission* (FH)(12 October 1976)(Mr Justice G. Schembri).
[8] *I. Portelli v. Prime Minister and D. Gatt v. Prime Minister* (CA)(6 September 2010) .
[9] *Prof. V. Griffiths et v. Prime Minister et* (CC)(27 February 1978)

on the merits it decided that such far-reaching regulations were not in breach of the Constitution .

However, the most blatant attempt at blocking court access and scrutiny was made in two human rights cases [10]where disciplinary proceedings for dismissal were taken against two public officers , for having participated in political activity. The persons concerned filed a human rights action alleging political discrimination for is was only public officers who wrote in the opposition newspapers who were being disciplined ; while those who defended and praised government actions in the pro-government press were not so disciplined.

Unbelievably, Government pleaded that article 115 blocked any access to constitutional review by a court of constitutional jurisdiction even in breaches of fundamental human rights . Indeed, the court of first instance[11] surprisingly accepted this argument and rejected the demands of the person alleging discrimination . Thankfully, the Constitutional Court reversed this judgment and ruled that:

" The basic argument in the Court's view , is that if one were accept that a decision of the Public Service Commission (PSV) is never subject to court review, not even if, in the most brazen manner it infringes a fundamental human right, that would amount to an assertion that for the PSC, the Constitution of Malta starts with article 110 and ends with article 115, and that for a civil servant, the rest of the Constitution could have never been enacted ; because such provisions could be voluntarily or involuntarily ignored and such person could never claim any rights or request any remedy. This, however , is not the correct way of interpreting article 115 , nor is it the right way of construing and applying the Constitution …when a matter related to fundamental human rights , where the Constitution permitted derogations it stated so in a categorical manner :in such a way that this Court cannot accept that beyond what is provided for in the Constitution itself in Chapter IV , there is any person or authority for whom such Chapter could not have been promulgated. "[12]

[10] *C. Cacopardo v. Minister for Works et* (CC)9 (25 June 1996) Vol LXX.I.42) (6/86) and *V. Galea v. Chairman PSC et* (CC) (20 February 1987) (136/84) (Vol. LXXI .I.1) .

[11] FH (27 August 1984) : "Had the legislator wanted to protect article 46 and the sub-articles therein contained , he would have certainly expressly done so. There was no need for any reference in article 46 and its sub-articles to article 115 for the simple reason that this article 115 clearly provides that in certain cases therein listed the jurisdiction of any court is excluded ".

[12] (CC)(21 January 1985) (Vol LXIX.I.1)

Does this mean that article 115 has no meaning? Not at all. The article covers ordinary cases decided by the Commission. One cannot refer a matter decided by the Commission within its jurisdiction even if the decision is erroneous. One cannot for instance request review based on whether a witness should have been believed or not by the Commission , or whether decisions regarding discipline or promotion were right, unless of course they were in breach of the procedure set out by law by the Commission itself , or the Constitution particularly Chapter IV. But errors within jurisdiction are so covered .However, when an allegation is made that an abuse , rather than an exercise, has occurred then, the ouster clause does not cover such abuse.

By analogy one can here refer to the *Ansiminic* case[13] decided by the House of Lords . In that case the House of Lords decided that in spite of an express provision of the law precluding court review, where a Commission set up by law had committed a serious error of law affecting jurisdiction , the ouster clause did not cover such errors but only those within jurisdiction . *Multo magis* it might be added in case of abuse of power or breach of fundamental rights.

A Constitutional issue?

Blocking access to a court for review may also raise questions of a breach of the human right to a fair hearing. Ever since the *Golde*r judgment,[14] the European Court of Human Rights has held that what happens prior to a hearing may be of relevance to the question of the fairness of the subsequent hearing. Denying access to a court of law for review or scrutiny therefore may amount to a breach of such right , even though the hearing has not yet started. This trend of thought was followed in the *Frendo* case[15] where the Constitutional Court in Malta annulled a provision of the tax law which imposed a stiff deposit of the contested

[13] *Anisminic Ltd v. Foreign Compensation Commission* (1969) (2. A. C. 147) quoted with approval by a Maltese Court in *Grezzju Ellul v. Joseph Spiteri* (FH)(19 October 2006)(142/02) (Hon. Mr. Justice T. Mallia
[14] *Golder v. United Kingdom(*21 February 1975)(4451/70).
[15] *Anthony Frendo v. Attorney General et* (CC)(30 November 2001).

tax, prior to an appeal being filed contesting such tax. The question however is: does this this also apply when the Constitution itself provides for such exclusion of court scrutiny as in the cases just mentioned ? The issue therefore is: can a provision of the Constitution denying access to a court of law, be in breach of another provision of the Constitution , namely the right to a fair hearing which includes guaranteeing access to a court . In the *Stoner* case,[16] the Constitutional Court ruled that a constitutional provision discriminating between foreign spouses of Maltese nationals on the basis of gender for the purposes of enjoying the right to freedom of movement in Malta , was in breach of the discrimination clause in article 45 of the Constitution.

Be that as it may, such ouster clauses in the Constitution , apart from being possibly challenged under the Constitution in the light of the *Stoner* judgment can certainly be challenged under the European Convention on Human Rights. Although a Maltese Constitutional Court would probably give precedence to a constitutional provision denying access to a court rather than an ordinary law such as the European Convention Act (Chapter 319) is, there is nothing to prevent a case being referred by an individual to the European Court of Human Rights which would exclusively apply the provisions of the Convention and nothing else.

Other provisions which have been used to try and block access to a Court

Another provision which was used by Government in litigation to block court review was that relating to constitutional authorities and commissions , namely the one guaranteeing autonomy by providing that such organ "is not subject to the direction or control by any person or authority." This provision is found in

[16] *Paul Stoner et v. Prime Minister et (*CC) (22 February 1996)(Vol. LXXX.I.85)

relation to the Electoral Commission (art. 60(9) and , the Broadcasting Authority (art.118(8) .

In one case[17] it was argued that such provision prevented court review. The Court ruled that it had no power to review whether the drawing of the boundaries of electoral divisions by the Electoral Commission amounted to blatant gerrymandering, for "any person or authority in art. 60 included also the courts of law. Fortunately this trend was not continued in the court's jurisprudence . This judgment was delivered in spite of the fact that article 124 (1) states that:

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

In fact, in *Chairman PBS Ltd et v. Broadcasting Authority et*[18] , faced with the argument that a court could not review the actions of the Broadcasting Authority since it was an autonomous institution in virtue of article 118 (8) of the Constitution , the Court of Appeal ruled that:

"The Court cannot agree with such submission, ..first of all , in its opinion, article 118 (8) is intended to strengthen the autonomy of the Authority in the exercise of its duties given by the Constitution and the law; in other words this Court understands that that provision of the supreme law of the land is indeed to allow the Authority to perform its duties and functions without any interference. However, this should certainly not mean that the Authority can do what it pleases beyond any control putting the Authority in a position above the supreme law of the land."

Conclusion

These pockets or black holes of non-justiciability or immunity scattered amongst the provisions of the Constitution need to be re-visited and possibly eliminated. What is the use of retaining a protection for pre-1962 laws from the right to property if they can be challenged under the European Convention ? Why block

[17] *Michael Vella noe v. Emmanuel Farrugia noe* (FH)(13 April 1987) Kollezz. Vol. LXXI.III.639)
[18] (CA)(15 January 2003) (711/2002)

Court scrutiny as to whether the Prime Minister acts or consulted another person or authority as he is obliged to do under the Constitution? Why not specify which powers of the President are subject to court review and which are not? The upcoming Convention on Constitutional Reform launched by the President should act as a catalyst for reform regarding such questions, and hopefully a reasonable solution can be put forward for eventual adoption .