Analysing the Procedural Obstacles in a Human Rights Case in Malta

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This article by **Jacob Gatt** was previously submitted as an assignment for PBL5028 and is being published with the author's permission. The article analyses the relevant procedural grounds in a human rights case in Malta, which led to the unjustifiable outcome of the individual not having full access to remedial action. The article begins by examining the notion of juridical interest. Afterwards, it addresses how ordinary remedies are exhausted and analyses the reference and retrial procedures in Malta. The author concludes by stipulating that, although Malta has a strong framework to protect human rights, these procedural pitfalls undermine said framework as they act as barriers to justice.

TAGS: Constitutional Law, Administrative Law, Public Law, Human Rights, Juridical Interest, Procedural Obstacles, European Convention on Human Rights

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1. Introduction

Following the enshrinement of the European Convention on Human Rights (ECHR) in Maltese law, a Maltese individual today is allowed a further remedy when claiming that his human rights have been infringed.[1] Therefore, the aggrieved party may claim a violation of his rights on the basis of not only the Constitution of Malta, but also on the basis of the ECHR, potentially in one and the same action.

Moreover, these cases make up the majority of constitutional cases in Malta, and it is for this reason that it must be ensured that the aggrieved party is not stifled by any procedural obstacles when claiming a breach of his human rights.

Unfortunately, this has been the case in many instances, where, not through the legislator's fault, but rather the approach and interpretation that the local courts have taken in light of the procedural provisions safeguarding such an action, have led to the dismissal of several claims. These rejections on procedural grounds have led to the unjustifiable outcome of the individual not having full access to remedial action, due to the arguable stubbornness and rigidness of the courts' application.

2.1 Juridical Interest

At the outset, it is manifest, that the notion of juridical interest is not only the most controversial, but equally the biggest and most common obstacle in the way of an aggrieved person's attempt at filing a human rights case under Maltese law.

This notion originates from Civil law, and in our legal system it is a prerequisite, that before starting proceedings before a court, the applicant must prove juridical interest, in that there must be a tangible benefit to him, following a violation of his right.[2]

Nevertheless, while juridical interest serves a crucial function in Civil law disputes in preventing frivolous litigation and ensuring legal certainty, this does not mean that the same threshold of interest should be applied across all the realms of law.

2.2 Juridical Interest in Public Law

The direct applicability by the courts of the high threshold applied in Civil law to the public law realm would risk leading to a situation where no individual would actually fit within the parameters of having legal standing to file a human rights case. Naturally, such a scenario would heavily undermine the power of the Constitution, as no individual would

[1] Stephanie Mallia, 'The Right to an independent and impartial court or adjudicating authority as guaranteed under Article 39 of the Maltese constitution and Article 6 of the European Convention on human rights' (Master 's dissertation, University of Malta 2016).

2 Tonio Borg, ‘Judicial Interest in Constitutional Proceedings', (Online Law Journal, 17 February 2017), <https://www.ghsl.org/lawjournal/juridical-interest-in-constitutional-proceedings/> accessed 1 May 2026

be rendered to have the sufficient interest at law to institute a human rights claim. Moreover, there exist three categories of constitutional proceedings, and as held the majority of cases fall in that category where there is a breach of human rights under Article 46 of the Constitution, which lays down the parameters of juridical interest, in the words 'in relation to him'.[3]

ln regard to this article, one ought to make reference to the second category of constitutional proceedings which refer to cases where a law is challenged as infringing the Constitution for reasons other than human rights, found under Article 116.

At this juncture, it is necessary to draw reference to this article because it stipulates that 'such an action shall not be required to show any personal interest in support of his action'[4] and the courts have interpreted this provision a contrario sensu, in that if the claim does not fall under this category, and hence by exclusion is a human rights action, juridical interest is required on part of the applicant.[5]

The above was reiterated in the case of *Said vs Azzopardi*:

"Ħlief għal azzjonijiet dwar drittijiet fondamentali, ma huwiex meħtieġ illi attur f'azzjoni dwar invalidità ta' liġi - actio popularis - juri interess ġuridiku fl-azzjoni; a contrario sensu, dak 1-interess huwa meħtieġ f'azzjonijiet dwar drittijiet fondamentali bħal ma huwa meħtieġ l-azzjonijiet ċivili kollha".[6]

Hence, in the above, we see one of the various cases wherein not only did the Court reason that juridical interest is necessary on the basis of this a contrario sensu interpretation, but even further expressly placed the threshold of juridical interest in claims of fundamental rights on the same footing as that applicable in Civil law actions.

Through this procedural hurdle, the courts are adopting an overly rigid interpretation on the requirement of juridical interest, with the unfortunate outcome that in some cases it is interpreted so narrowly, that a provision of what is supposed to be the supreme law of Malta ends up being limitedly operative.[7]

2.2.1 Juridical Interest as interpreted by the Maltese Courts vs ECtHR

Considering the European Court of Human Rights' (ECtHR's) interpretation of juridical interest, it is all the more apparent how narrowly the Maltese courts have interpreted this notion in constitutional cases concerning human rights claims.[8]

When one looks at what the Convention stipulates, Article 34 refers to 'any person, nongovernmental organisation or group of individuals claiming to be the **victim** of a

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[3] Constitution, Article 46(1)
[4] ibid, Article 116
[5] Tonio Borg, *A Commentary on the Constitution of Maita* (1st edn, Kite Malta 2016).
[6] 159/1997/2 *Michelina xebba Said u Maria xebba Said vs Estelle Azzopardi,* Court of Appeal, 21 October 2014.
[7] Borg (n 2)
[8] Frances Camilleri-Cassar, 'Procedural Obstacles in a Human Rights Action under Article 46 of the Constitution of Malta' (2021) 31 Id-Dritt 137.

violation'.[9] A comparison between this article and Article 46(1) of the Constitution would suggest that the word 'victim' requires a higher threshold of interest over what our Constitution stipulates in the words 'in relation to him'. Yet, our courts have managed to interpret the legislator's words in the constitution as to require the necessity of direct, personal and actual interest, as opposed to the much liberal approach taken in favour of the individual by the European courts.

This local interpretation naturally has a bearing on an applicant in Malta who would not have the means to challenge a law potentially in breach of his rights due to this restrictive approach.[10]

Probably the most liberal interpretation the ECtHR has given to 'victim' under juridical interest was in *Klass and Others vs Germany*, where it held the following:

"Each of the applicants is entitled to "claim to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance"[11]

Here, the ECtHR reasoned that one is still a victim in this scenario, and hence an individual has juridical interest in a case even when there is merely a reasonable risk that that person becomes subjected to secret surveillance, and hence become a 'victim' in the future.

In the same vein, in the case *Kosaite-Cypiene and others v Lithuania*, the ECtHR recognised that the applicant was still deemed to be a 'victim' and had personal interest based on the potential risk of prejudice by such measure.[12]

It is in this light that the procedural obstacles in filing a human rights case in Malta become evident that, in the case aforementioned, it would be very unlikely, when considering the local approach, that an applicant would be deemed to have personal interest and successfully challenge such a law which may potentially infringe his rights.

Nevertheless, this liberal interpretation of juridical interest and of this potentiality of being a victim was, albeit only at first instance, acknowledged in the case of *Anna Mallia vs Judicial Appointments Committee*. Here, the lower court rightly so and in line with the previous ECtHR rulings on the matter, drew this fine distinction between juridical interest in the civil realm and in constitutional matters, and the even wider interpretation of including potential infringements of human rights to the party:

"Hemm differenzi bejn l-interess ġuridiku kif definit fid-dritt ċivili u l-victim status kif magħruf mill-Qorti ta' Strasburgu. Interess ġuridiku jrid ikun dirett. Il-victim status jista' jkun kemm dirett kif ukoll indirett. L-interess ġuridiku jrid ikun attwali. Il-victim status jista' wkoll ikun potenzjali."[13]

Here, the Court hence argued that one cannot exclude that the claimant would be a nominee

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[9] European Convention for the Protection of Human Rights (ECHR), Article 34

[10] Graziella Schembri, 'Procedural Pitfalls in Filing a Human Rights Case in Malta and before the European Court of Human Rights' (Online Law Journal, 2 September 2023), <https://www.ghsl.org/lawjournal/procedural-pitfalls-in-filing-a-human-rights-case-in-malta-and-before-the-european-court-of-human-rights/> accessed 1 May 2026

[11] *Klass and Others v Germany* App No 5029/71 (ECtHR, 6 September 1978).

[12] *Kosaite-Cypiene and others v Lithuania* App No 69489/12 (ECtHR, 4 June 2019).

[13] 234/2021 *Avukat Mallia Anna vs Il-Kumitat dwar il-Ħatriet tal-Ġudikatura et* Civil Court, First Hall (Constitutional section) 2 December 2021.

in the future, and hence on the ECtHR understanding of the potential victim, she was rightly recognised to have locus standi, although unfortunately this admissibility was ultimately not upheld in appeal.

Despite that this judgement acknowledged the distinction of the notion of juridical interest in the civil realm to the status of victim in an action of human rights infringement, from the reasoning of the higher courts, it is still manifest that our courts are yet to adopt the level of liberty which the ECtHR has given in this regard:

"il-fatt li l-attriċi ma ressqitx talba biex tikkonkorri għas-sejħa partikolari jkompli jżid in-nuqqas ta' stat ta' "vittma" tagħha f'dak il-proċess li sar biex wassal għal għażla tal-ġudikanti l-ġodda."[14]

This extract in particular can be compared and contrasted to the reasoning adopted in *Kosaite-Cypiene and others v Lithuania*. ln the latter judgement, the applicant was simply a person who fits in the wide category of women of child bearing age who could have been the future subject to a prejudicial provision of law. Applying by analogy the case of the constitutional court herein, the applicant was a person who did in fact fall under the category of possible applicants who could be in the future subject to adversity, yet the Constitutional Court argued that on the basis that she was eligible and merely decided this time round not to apply, rendered her request to be remote and hypothetical.[15]

One can therefore conclude that it is not an issue with the drafting of the Constitution, or that it requires amending, since the way it is drafted, one can argue, is even wider and less stringent than what the Convention stipulates. It is rather the necessity to follow this liberal application of the law, in light of social developments towards a more inclusive understanding of a person having interest in these circumstances.

2.2.2 Inspiration from Administrative Law?

It is noteworthy to look at developments taking place in Administrative law, which although distinct from Constitutional law, may nonetheless serve as a comparative insight for human right actions and provide inspiration through its liberal perspective of the notion of legal interest.

BirdLife Malta et vs L-Awtorità tal-Artijiet was one of the judgements where the Court held that NGOs have juridical interest despite not being as such an aggrieved person as per the previous interpretation given by the Maltese courts. So here the Court widened its interpretation from the civil realm, in fact it held:

"jekk ma jkunux organizzazzjonijiet u għaqdiet bħall-appellanti li joggezzjonaw għal deċiżjonijiet li jwasslu għal ftehim tax-xorta li l-Awtorità appellata laħqet mal-FKNK, aktarx li l-ebda individwu jew grupp ta' individwi waħedhom, ma jaslu jipproponu azzjoni, bħal din, u għalhekk huma għaqdiet u organizzazzjonijiet bħal dawn li għandhom jingħataw għarfien, locus standi u rikonoxximent tal-interess ġuridiku li għandu jkollhom f'azzjonijiet ta' din ix-xorta"[16]

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[14] 234/2021/1 *Avukat Mallia Anna vs Il-Kumitat dwar il-Ħatriet tal-Ġudikatura et* Constitutional Court, 26 January 2024.

[15] ibid

[16] 91/2020/1 *BirdLife Malta, Moviment Graffiti, Din l-Art Ħelwa, Friends of the Earth Malta, Flimkien għal Ambjent Aħjar, Dr Edward Mallia v. L-Awtorità tal-Artijiet,* Court of Appeal (Inferior) 14 July 2021.

Hence our courts in the administrative realm seem to have made inroads to a more liberal, EU-like interpretation of judicial interest, am approach which could hopefully be similarly applied to the realm of Constitutional law.

Moreover, given that the ECtHR has given such a wide interpretation to the word 'victim', the local courts ought to align themselves with such an approach, particularly since a judgment remains susceptible to appeal at ECtHR level. Nevertheless, such transition is yet to materialise within local jurisprudence.

3. Exhaustion of Ordinary Remedies

The proviso to Article 46(1) stipulates that the court has discretion that if "adequate" means of redress for the contravention were available and not referred to, then it may decline to take cognisance of the matter.[17] This proviso, unfortunately, has been applied as a 'filtering mechanism' for courts of constitutional jurisdiction not to be saturated with cases which could be dealt with effectively by the ordinary courts.[18]

Furthermore, it appears that the court has a sort of 'double discretion' here, in the sense that even if there is an adequate remedy, the court can still acknowledge this, and yet refuse to decline to hear the case and instead continues to bear it.[19]

Moreover, the definition of this alternative ordinary remedy was defined in *Vella vs Kummissarju tal-Pulizija et*,[20] which held that it must be shown that there is another remedy which is **'accessible, satisfactory, effective and adequate for address the grievance'**. Nevertheless, what is deemed to fall under this definition, and hence be regarded as an "adequate" remedy has been heavily contested in our courts. As an unfortunate consequence, many times certain ordinary remedies have been deemed to be adequate, despite in practice failing to provide effective or comprehensive relief as that afforded under a court of constitutional jurisdiction.

Particular reliance has been placed on Article 469A of the Code of Organization and Civil Procedure (COCP), in that judicial review has been considered to constitute an adequate remedy for claimants pursuing a constitutional cause.[21] Prima facie, one can understand and appreciate the application of this remedial article to the breach of an individual's human rights, yet, when the effect of such remedy is assessed, certain shortcomings emerge. Article 469A states that its effect is simply to 'declare such act null, invalid or without effect',[22] and hence consequently the remedy stops there, and does not further entice that public authority which is in breach to perform any particular action, similar to the effect emanating from an order of a court having constitutional jurisdiction. Fortunately, our courts have acknowledged that this 469A remedy is not quite 'complete' when compared to that emanating from a court of constitutional jurisdiction.

Nevertheless, this is not to say that this proviso has ceased to operate as a procedural gatekeeping mechanism which the courts have exercised, in order to limit the volume of constitutional cases brought before them.

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[17] Constitution (n 3).
[18] Borg (n 5), 262.
[19] ibid
[20] *Vella vs Kummissarju tal-Pulizija et,* Constitutional Court 5th April 1991 Vol. LXXXV.i.106.
[21] Borg (n 5), 265.
[22] Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A

4. Reference Procedure

There are two methods in which an individual may file a human rights case, namely by application or through the reference procedure.[23] Article 46(3) of the Constitution stipulates that the reference of the case to the Civil Court, First Hall or the Constitutional Court shall take place 'unless in its opinion the raising of the question is merely frivolous or vexatious'.[24]

Naturally this authority vested in a court lacking constitutional jurisdiction to render a human rights claim to be 'frivolous or vexatious' constitutes a significant obstacle and stifles the effective protection to one's human rights. It is therefore difficult to reconcile how a right so fundamental to the individual may be dismissed by a court which lacks the competence to decide on the matter.

This obstacle is deemed even greater on the basis of the Court's conclusions in *Nicholas Ellul vs Commissioner of Police,* where the Court held that:

"When the court of first instance rejects the reference because the issue raised results to be merely frivolous and vexatious, then that party cannot access the procedure of an application"[25]

Accordingly, a magistrate with no constitutional powers will be responsible for deciding whether an individual will be permanently barred from filing a human rights action, merely on his inclination that the issue is 'merely frivolous and vexatious'.

Moreover, in a more recent case in *Dr. Anthony P Farrugia vs Financial Intelligence Analysis Unit*, the Court affirmed the stance in the *Nicholas Ellul* judgement, in that it held that it is evident that the legislator did not intend to warrant a right of appeal when the issue would have been deemed to be frivolous and vexatious, and that therefore one cannot subsequently submit an identical application by opening a constitutional case.[26]

Although the appealability following the reference procedure is clear, there has been much debate also on whether one can bypass the reference procedure by directly filing an application to a court of constitutional jurisdiction. This point was delved in some depth in *Glenn Beddingfield vs Commissioner of Police*, where it was held that these two procedures are not limitations to each other, but rather work parallel to one another,[27] so much so that Article 46(1) stipulates "without prejudice to any other action with respect to the same matter that is lawfully available".[28]

Nevertheless, as held in the aforementioned case,[29] the issue was not on the filing of a case in front of a court with constitutional jurisdiction as an appeal to the rejection of the inferior courts on frivolous and vexatious grounds. Therefore, it is submitted that it still remains improbable, in view of recent jurisprudence, that a separate action filed with a

[23] Camilleri Cassar (n 8)
[24] Constitution, Article 46(3)
[25] *Nicholas Ellul vs Commissioner of Police,* Constitutional Court 22 May 1991 Vol. LXXV.i. 240.
[26] 372/2021/1 *Dr. Anthony P Farrugia vs Financial Intelligence Analysis Unit,* Constitutional Court 25 October 2023.
[27] 721/199 9/2 *Glenn Bedingfield vs Kummissarju tal-Pulizija et,* Constitutional Court 7th April 2003.
[28] Constitution (n 3)
[29] *Bedingfield* (n 27)

court of constitutional jurisdiction following a rejection of reference be allowed. Nonetheless, it remains that in light of the *Bedingfield* case, the requirement of first acquiring a reference does not appear to be mandatory, which therefore implies that in turn one can file a constitutional application directly. ln such a case, the applicant would be avoiding the procedural risk that upon the issue being deemed to be merely frivolous and vexatious, the matter would come to a halt, and the individual would be unable to avail of any further constitutional remedy.[30]

5. Retrial in Human Rights Cases

The institute of retrial is an extraordinary remedy which has been utilised as a tool for the claimant of a human right, infringement to apply for the reassessment of a constitutional case by reopening proceedings.[31]

Nevertheless, this institute also highlights the limits of our legal system to order a retrial of a constitutional case, and potentially shows the need to be more liberal to allow such reassessment when the requirements of such an institute have been satisfied under our law.

Retrial is regulated by Article 811 of the COCP which is also applicable to human rights actions.[32] This emanates from Article 7 of Subsidiary Legislation 12.09 which expressly states that the provisions of the COCP shall *mutatis mutandis* apply before the Civil Court, First Hall, and the Constitutional Court.[33]

So for a long time, on the basis of the aforementioned, there was a string of judgements where despite the case being confirmed, the individual was allowed the opportunity of retrial.

However, in two cases decided in parallel, of *Carmel Cacopardo vs Ministru tax-Xogħlijiet* and *Joseph Galea nae vs Ministru tax-Xogħlijiet*, the Constitutional Court decided that the retrial procedure was not applicable to human rights cases, since this was not expressly stipulated in the COCP.[34] Therefore as a result, one could not order a new hearing in these matters, despite that in older jurisprudence this was accepted.

Moreover, the unfortunate result emanating from the questionable reasoning from these cases, is that this same reasoning has been reiterated in recent judgements, as seen in *Phoenix Payments Ltd vs L-FIAU*. Here the Court, making reference to the aforementioned cases, confirmed this restrictive approach, in that there can be no retrial from a sentence of the Constitutional Court, since the law does not **expressly** stipulate this.[35]

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[30] Borg (n 5), 258

[31] Aneta Cennanovà, 'Retrial before the Constitutional Court as a result of a judgment of the European Court of Human Rights' *(Czech Centre for Human Rights and Democracy,* 15 February 2026) <https://www.humanrightscentre.org/blog/retrial-constitutional-court-result-judgment-european-court-human-rights> 1 May 2026

[32] Borg (n 5), 260

[33] Court Practise and Procedure and Good Order Rules, S.L. 12.09, Article 7.

[34] Borg (n 5)

[35] 51/2022/3 *Phoenix Payments Limited vs Il-Karp Għall-Analiżi ta' Informazzjoni Finanzjarja et*, Constitutional Court 8th July 2025.

This approach is difficult to reconcile, especially when considering that the institute of retrial can be made use of in regard to other ordinary matters, yet the courts seem to draw the line when speaking of a matter directly affecting the fundamental rights of the individual.

Moreover, this is yet another facility provided by law, which has been stripped away from the individual. This concern is further compounded by the court's approach stemming from the two judgements, which as underlined by Prof. Tonio Borg, were decided on tenuous grounds,[36] and somehow the provision found in the subsidiary legislation has been interpreted to mean that retrial is to be applied except for in human right matters.

Furthermore, the Court's reasoning in the aforementioned case of *Phoenix Payments Ltd* is also contentious:

"jekk min ikun qiegħed jallega ksur tal-jeddijiet fundamentali tiegħu ma jkunx qiegħed jaqbel mal-mod ta' kif il-Qorti Kostituzzjonali tkun qatgħet il-kawża tiegħu, dak li jkun m'għandux għalfejn idur għal proċedura ta' ritrattazzjoni biex jipprova jbiddel dik is-sentenza, imma jekk irid huwa jista' jinqeda bir-rimedju tal-petizzjoni quddiem l-organi ġudizzjarji tal-Kunsill tal-Ewropa"[37]

Accordingly, it is not to say that indeed the ECtHR does not present a critical safeguard to the aggrieved party to ensure the protection of human rights. However, viewing it as a substitute and excluding the possibility of a retrial on this ground is arguably limiting the victim's access to justice by forcing an individual to resort to a more onerous procedure.

6. Conclusion

In conclusion, despite that our law provides a strong framework of protection to breaches of an individual's human rights, the procedural hurdles surrounding such actions have heavily undermined their effectiveness in practice.

All of the above, among others, have acted as barriers for justice in what is intended to constitute the most accessible means of redress. Moreover, the issue does not lie with the drafting of the law, since as seen, even wider terms than what are found in the ECHR, have yet been curtailed in scope due to rigid judicial interpretation.

ln view of the more 'rights-oriented' approach undertaken by the ECtHR, Maltese courts ought to shift towards a more expansive interpretation as to ensure the protection of human rights, and the accessibility to its means of redress - and to avoid domestic judgements ultimately being found incompatible before the Strasbourg Court.

[36] Borg (n 5)
[37] *Phoenix Payments Limited* (n 35)



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