

**CAN THE MALTESE CITIZENSHIP (AMENDMENT) ACT, 2013
– ACT No. XV of 2013 – BE THE SUBJECT
OF AN ABROGATIVE REFERENDUM?**

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ABSTRACT

The paper discusses whether the Individual Investor Programme may be the subject of an abrogative referendum. After having analysed the historical development of the 1996 amendments to the Referenda Act which introduced abrogative referendum and after studies Italian law on the subject, the paper concludes that the said Programme falls under 'fiscal legislation' and thus cannot be subject to an abrogative referendum

KEYWORDS: CITIZENSHIP – FISCAL LEGISLATION- ABROGATIVE REFERENDUM

CAN THE MALTESE CITIZENSHIP (AMENDMENT) ACT, 2013 - ACT No. XV of 2013 - BE THE SUBJECT OF AN ABROGATIVE REFERENDUM?

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1. Introduction

In November 2013, a controversy erupted in Malta as to whether an abrogative referendum may be called in order to abrogate the Maltese Citizenship (Amendment) Act, 2013, Act No. XV of 2013. Initially, without having studied the matter in great depth, the author's reaction was that this enactment could be subject to an abrogative referendum.² Nevertheless, when pondering the issue further, it appears that this was not so.

In this paper the question of whether the amendments to the Maltese Citizenship Act,³ made by Act No. XV of 2013,⁴ can be the subject of an abrogative referendum in terms of the Referenda Act, is addressed.⁵ In order to answer this query, the following factors are studied:

- (a) the historical evolution of the provisions in the Referenda Act on the limitations to the holding of an abrogative referendum;
- (b) compare the Maltese provisions on abrogative referenda to Italian law;
- (c) contrast the said limitations in the 1993 White Paper *Il-Bidla Tkompili* (which proposed the enactment of a law regulating abrogative referendum) with the consequential 1995 Bill and 1996 enactment providing for an abrogative referendum;

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² Keith Micallef, 'Abrogative referendum is legal – law expert', *The Times of Malta*, 14 November 2013, 5.

³ Chapter 188 of the Laws of Malta.

⁴ The Maltese Citizenship (Amendment) Act, 2013.

⁵ Chapter 237 of the Laws of Malta.

- (d) distinguish between fiscal legislation and financial legislation;
- (e) discuss whether the Maltese Citizenship (Amendment) Act 2013 constitutes a fiscal law or not;
- (f) whether the line item in the 2013 budget is or is not of a fiscal nature; and
- (g) whether Government expenditure in connection with the Individual Investor Programme falls also under fiscal legislation.

From a study of relevant legislation the author concludes that the Maltese Citizenship Act, both prior to and as amended in 2013, is a fiscal measure and thus cannot be subject of an abrogative referendum once it regulates the 'levying of fees for licences, permits and other acts or services in government offices or departments'⁶ in terms of the Fees Ordinance.

2. The Historical evolution of the Abrogative Referendum Provisions

2.1. The White Paper 'Il-Bidla Tkompli'

The White Paper 'The Change Continues...'⁷ proposed the enactment of an abrogative referendum for Malta.⁸ The salient part related to the limitation of subjecting a law to a referendum reads as follows:-

The Government is proposing the introduction of an abrogative referendum only and it is also limiting the subjects on which a referendum may be held as well as regulating the manner in which it may be called.

The detailed proposition of the Government is as follows:

- a. a referendum may only be requested if it calls for the partial or total abrogation of a law (or any other act having the force of law) passed by the House of Representatives. A request for a referendum cannot be made if it concerns a law or laws which:
- introduce, increase or decrease taxes;
 - in some manner impose a financial burden on the income of the Government of Malta;
 - deal with debts due to or incurred by the Government of Malta;

⁶ Long title to the Fees Ordinance, Chapter 35 of the Laws of Malta.

⁷ *Il-Bidla Tkompli ...*, White Paper published by the Department of Information, Valletta, 11 November 1993.

⁸ *Ibid.*, 24-27.

- propose the ratification or the continual observance by Malta of some international treaty or that require Malta to join some international body;
- grants an amnesty or pardon to some person or persons;
- concerning elections or referenda;
- in any way change some provision of the Constitution of Malta that is entrenched.⁹

2.2. The Bill

Bill Number 139 was published in *The Malta Government Gazette* of 19 September 1995.¹⁰ The Bill was introduced by the Hon. Dr Eddie Fenech Adami, Prime Minister, and read for the first time at the sitting of 17 July 1995. It was a Bill intended to amend the Referenda Act which made provision for abrogative referendum. The Bill established the following restrictions where an abrogative referendum could not be called:

- (a) the Constitution and any regulation made under any provision thereof;
- (b) the European Convention Act;
- (c) any law providing for the matters referred to in paragraphs (a), (b) or (c) of subsection (8) of section 56 of the Constitution;
- (d) the Interpretation Act;
- (e) the General Elections Act, 1991;
- (f) any fiscal legislation;
- (g) any legislation giving effect to any treaty obligation undertaken by Malta; and
- (h) save as provided in section 36B of the Local Councils Act 1993, any bye-law made by any Local Council under the said Act.¹¹

2.3. The Debates in the House of Representatives

⁹ *Ibid.*, 26.

¹⁰ *The Malta Government Gazette*, Issue No. 16,165, 238-258.

¹¹ *Ibid.*, 251.

During the debates in the House of Representatives, only two Members of Parliament spoke. Both referred to 'fiscal legislation'. The speakers were the Hon. Dr Eddie Fenech Adami, Prime Minister, and the Hon. Dr Alfred Sant, Leader of the Opposition.

When the Prime Minister introduced the Bill, he referred to 'fiscal legislation' as follows:-

Mr. Speaker, naturalment meta gejna biex naraw liema ligijiet jistghu jinbidlu b'dan il-mod ridna naraw x'irridu naghmlu ezattament ghall-poplu taghna, ridna naraw li dan il-poter ma jkunx poter li b'xi mod imur kontra principji ohra. Dan il-poter ma tistax tassoggettah ghal referendum popolari. Inti ma tistax tghid li l-pajjiz ghandu bzonn jigbor taxa b'dan il-mod, f'dak l-ammont u minghand dawn in-nies u mbaghad dik il-ligi tghid li tkun soggetta li tigi abrogata billi taghmel referendum popolari. Safejn naf jien kull fejn hemm is-sistema tar-referendum hija haga universalment accettata li proposti fiskali u ta' tassazzjoni m'ghandhomx ikunu soggetti ghal abrogazzjoni permezz ta' referendum...¹²

Subklawsola (f) tal-klawsola li qed naqra titkellem fuq legislazzjoni fiskali li fuqha diga' tkellimt. M'huwiex koncepibbli li fejn tidhol tassazzjoni, fil-forma u fil-*quantum* taghha din tkun soggetta ghall-modifika b'vot popolari.¹³

Dr Alfred Sant afforded us with a definition of 'fiscal legislation'. The Leader of the Opposition, in relevant part, stated as follows:

Veru li – u dan huwa vizzju ta' l-abbozz li ghandna quddiemna – l-Gvern jaghmel limitazzjonijiet kbar fuq kemm jista' jestendi ruhu dan il-principju abrogattiv. F'liema sens? Issemghu – u se nsemmi l-aktar tnejn importanti fil-limitazzjoni totali, *ban* totali, interdizzjoni totali ghal referendum abrogattiv fuq ligi fiskali, jigifieri ligijiet li ghandhom x'jaqsmu ma' taxxi, u *ban* totali, abrogazzjoni totali, interdizzjoni totali fuq xi haga li ghandha x'taqsam ma' impenn li jassumi gvern tal-gurnata fil-qasam internazzjonali, trattati internazzjonali. Bir-rispett kollu smajt il-Prim

¹² Mr. Speaker, when we assessed which laws can be changed in this way we wanted to see exactly what we must do for our people, we wanted to see that this power would not go against other principles. This power cannot be subjected to a referendum. You cannot say that the country needs to collect taxes in this way, by this amount, and from such people, and then say that that law will be abrogated by calling for a referendum. As far as I know, in every country containing a referendum system, it is universally accepted that fiscal proposals and those concerning taxation should never be subjected to abrogation by referendum. House of Representatives, *Debates of the House of Representatives*, Sitting No. 498, Monday, 15 January 1996, 860-861.

¹³ I already commented on sub-clause (f) of the article concerning fiscal legislation. It is not conceivable that the form and quantum of tax law be subjected to amendment by popular vote *Ibid.*, 862.

Ministru jghid li inkien ma hemm referenda li jitrattaw ligijiet finanzjarji kemm biex jabolixxu u kemm biex jirregolaw ligijiet finanzjarji. Il-Prim Ministru ghandu zball, ghax jekk niehdu per ezempju California, fejn il-principju tar-referendum ilu li beda jigi attwat snin shah, insibu li hemmhekk regolarment isiru referenda biex ligijiet li jkunu ghaddew fuq livell ta' stat, belt jew *county*, u li ghandhom x'jaqsmu ma' taxxi bhall-*income tax* jew ma' *property rates*, per ezempju, jigu aboliti. Hemmhekk ikun hemm referenda regolari fejn anzi jipprovaw jaghmlu *capping* kemm jista' gvern jew awtorita' fuq il-livell ta' taxxi. Jghaddu referendi u jkun hemm proposti ta' referendi fejn il-poplu li qieghed jivvota jkollu quddiemu l-proposta li certu dhul ta' taxxi jrid bilfors jigi ndirizzat ghal certi uzi. Il-*property tax* fuq certi affarijiet, per ezempju, tista' tintuza biss ghal skopijiet ta' edukazzjoni u jkun hemm anke proposti biex certi taxxi jigu eliminati kompletament. Jiena semmejt pero' wiehed semplicement ghaliex il-Prim Ministru qal li inkien ma jigri imma dan mhux veru ghaliex anki f'pajjizi bhall-Isvizzera fejn hemm u kemm-il darba jkun hemm referendum fuq taxxi bhall-VAT. Ghalhekk din il-limitazzjoni li qeghda ssir hija limitazzjoni li ma taghmilx sens. Ma jaghmilx sens li tghid li ma tistax taghmel referendum fuq ligi fiskali jew li ghandha x'taqsam ma' taxxa. Jiena nargumenta li din fil-fatt qieghdha ssir ghaliex implicita fil-hsieb tal-Gvern hemm l-gharfien li l-mod kif qed jiddefinixxi r-referendum abrogattiv tmur kontra l-principju tal-mandat elettorali li jkollu partit li tela' biex jiehu l-gvern f'idejh b'vot popolari.¹⁴

¹⁴ It is true that – and this is a defect in the Bill before us – the Government draws great limitations on how far to extend the abrogative principle. In what way? I refer to the two most important total limitations, namely, total ban and total interdiction for an abrogative referendum concerning fiscal laws, which includes those laws that concern taxes, and a total ban, total abrogation, total interdiction about something concerning an obligation which the government of the day takes up on the international level, international treaties. With all due respect, I have heard the Prime Minister say that there has never been a referendum about financial laws, neither to abolish them, nor to regulate them. The Prime Minister is wrong because if you take California, where referenda have been taking place for a significant amount of years, we find that referenda about laws which have been passed at the state, city or county level, and which are related to taxes, such as income tax or property rates, take place regularly. There, referenda take place on a regular basis, so much so, that they try to cap the amount of times that one can take place on matters of taxation. Referenda pass, and proposals for referenda are made, where the people vote on proposals on a certain type of income that has to be directed towards certain specific uses. Property tax on certain things, for example, can be used only for the purposes of education and proposals are also made so that certain taxes would be completely removed. However, I mentioned only one simply because the Prime Minister said that this does not take place, but this is not true because even in countries such as Switzerland, where it is often seen that referenda are organised on matters of taxation, such as VAT. The limitation being proposed, therefore, does not make any sense. It does not make sense to say that referenda about fiscal laws or about laws having to do with taxation cannot be abrogated. I argue that this is in fact taking place because the Government's knowledge about the way abrogative referenda goes against the electoral mandate that a party is given when elected to govern by popular vote.
*Ibid.*866.

Dr Eddie Fenech Adami, winded up the discussion on the Bill and replying to Dr Sant also defined the term 'fiscal legislation' as follows:

Mr Speaker, il-Kap tal-Opposizzjoni ghamel rimarki ohra fejn qal li jidhirli li mhux sewwa li jigu eskluzi ligijiet fiskali mill-possibilita' li jigu abrogati b'referendum u jekk m'iniex sejjer zball semmielna l-kaz ta' California. Jien m'inix espert fuq California u ma nafx x'għidu l-ligijiet ta' California, pero' zgur nista' nghid li fil-maggioranza stragrandi tal-pajjizi moderni fejn hemm id-dritt tar-referendum abrogattiv huma dejjem eskluzi – jew kwazi dejjem – proposti biex jitbidlu l-ligijiet fiskali. Per ezempju, nista' nikkwota artikolu 75 tal-Kostituzzjoni Taljana li jghid li mhux ammess referendum fuq ligijiet tributarji u tal-bilanc, jigifieri fuq ligijiet fiskali, naturalment ghal ragunijiet li huma ovvji ghaliex int ma tistax tissoggetta sistema jew rata ta' tassazzjoni għall-vot popolari ghax allura tkun qieghed mhux tfittex dak li huwa l-gid nazzjonali, almenu mhux necessarjament il-gid nazzjonali, imma facilment ikun hemm manuvrar biex il-ligijiet ikunu jaqblu ghal certi sezzjonijiet li jigu vantaggjati.¹⁵

2.4. Current Legal Restrictions to an Abrogative Referendum

Article 13 of the Referenda Act regulates the abrogative referendum and provides as follows:

13. (1) Any provision of any enactment, whether enacted before or after the coming into force of this Part, and not being an enactment listed in subarticle (2), shall have effect and continue to have effect subject to the provisions of this Part of this Act.

(2) The provisions of this Part of this Act shall not apply to this article and to the following enactments:

¹⁵ Mr Speaker, the Leader of the Opposition made other remarks where he said that it does not seem right to him that fiscal laws would be excluded from the possibility to be subject to an abrogative referendum, and if I am not mistaken he mentioned a case in California. I am not an expert on California and I do not know what Californian law says, but I can say with certainty that in the staggering majority of modern countries where one finds the right to hold an abrogative referendum, proposals to change fiscal laws are always excluded, or almost always excluded. For example I can quote article 75 of the Italian Constitution which states that referenda about fiscal laws and financial laws are not possible, naturally for reasons that are obvious because you cannot subject a system or rate of taxation to a popular vote, because in such cases you would not be safeguarding the national interest, at least not necessarily the national interest. You would be allowing for manoeuvres so that laws would benefit only certain people.
House of Representatives, *Debates of the House of Representatives*, Sitting No. 499, Tuesday, 16 January 1996, 906-907.

- (a) the Constitution and any regulation made under any provision thereof;
- (b) the European Convention Act;
- (c) any law providing for the matters referred to in article 56(8)(a), (b) or (c) of the Constitution;
- (d) the Interpretation Act;
- (e) the General Elections Act;
- (f) any fiscal legislation;
- (g) any legislation giving effect to any treaty obligation undertaken by Malta; and
- (h) save as provided in article 36A of the Local Councils Act, any bye-law made by any local council under the said Act. Cap. 363.

(3) For the purpose of this article, "enactment" means an Act of Parliament and any Act passed by the Legislature of Malta and includes any Code, Ordinance, Proclamation, Order, Rule, Regulation, Bye-law, Notice or other instrument having the force of law in Malta.¹⁶

3. The Italian Constitution

Dr Eddie Fenech Adami referred to article 75 of the Italian Constitution when he was replying to Dr Alfred Sant during the debate on the introduction of an abrogative referendum in Malta. It can be said that the source from where the Maltese provision owes its inspiration is article 75 of the Constitution of Italy which reads as follows:

E' indetto *referendum* popolare per deliberare l'abrogazione, totale o parziale, di una legge o di un atto avente valore di legge, quando lo richiedono cinquecentomila elettori o cinque Consigli regionali.

¹⁶ For a study on the development on the law of referenda in Malta see Maria Carmen Debono, *The Development of the Law on Referenda in Malta*, University of Malta, Faculty of Laws, LL.D. thesis, 2008.

Non e' ammesso il referendum per le leggi tributarie e di bilancio, di amnistia e di indulto, di autorizzazione a ratificare tratti internazionali.¹⁷

There is no doubt that the White Paper was following this model but it cannot be said that the bill stuck to its wording in so far as the exceptions to holding an abrogative referendum are concerned.

4. Comparative exercise between the Italian Constitution, White Paper, Bill and Act provisions on the Abrogative Referendum

Italian Constitution	White Paper <i>The Change Continues</i>	Bill No. 139	Act No. VIII of 1996
<i>leggi tributarie e di bilancio</i> ¹⁸	<p>introduce, increase or decrease taxes;</p> <p>in some manner impose a financial burden on the income of the Government of Malta;</p> <p>deal with debts due to or incurred by the Government of Malta;</p>	any fiscal legislation	any fiscal legislation

The wording of the White Paper cannot be said to have been influenced *ad litteram* by the *leggi tributarie e di bilancio* of the Italian Constitution. On the contrary the influence is Maltese Law. The wording of the 1993 White Paper relating to fiscal measures derives from article 73(a) of the Constitution of Malta which reads as follows:-

Except upon the recommendations of the President signified by a Minister, the House of Representatives shall not –

(a) proceed upon any bill (including any amendment to a bill) that, in the opinion of the person presiding, makes provision for any of the following purposes, that is

¹⁷ A general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty.

¹⁸ Laws regulating taxes and the budget.

to say, for imposing or increasing any tax, for imposing or increasing any charge on the revenues or other funds of Malta or for altering any such charge otherwise than by reducing it, or for compounding or remitting any debt due to Malta;

I now compare the wording of article 73(a) of the Constitution of Malta with the wording of the White Paper from which the following similarities emerge:

Constitution of Malta – Article 73(a)	White Paper
for imposing or increasing any tax	introduce, increase or decrease taxes
for imposing or increasing any charge on the revenues or other funds of Malta or for altering any such charge otherwise than by reducing it	in some manner impose a financial burden on the income of the Government of Malta
or for compounding or remitting any debt due to Malta	deal with debts due to or incurred by the Government of Malta

Although, admittedly the two texts reproduced above are not identical as there are some nuances in meaning, overall it is clear that they are similar to each other and that the White Paper was inspired from the wording of Article 73(a) of the Constitution of Malta then from Italian Constitutional Law. That said, however, both the Bill and the Act, do not refer to these three categories of *leggi tributarie e di bilancio* which are done away with completely and instead a one fold category of ‘fiscal legislation’ is adopted. The question which has to be asked here is whether *leggi tributarie e di bilancio*, the threefold categorisation in the White Paper and the onefold category of ‘fiscal legislation’ in the Bill and Act are similar in meaning or not. For instance, can one say that these three equate to ‘financial legislation’ or are they different wording but still explaining one and the same concept – that of ‘fiscal legislation’? James Otis arrived at the same conclusion: ‘Taxation without representation is tyranny’.¹⁹

Diritto tributario (fiscal law) under Italian Law is just one branch of Financial Law in the same way that fiscal legislation in Malta is one branch of Financial Law. *Diritto tributario* comprises charges, taxes, levies, contributions and other legal forms of monetary impositions which the state charges. A characteristic trait of fiscal legislation is that it is unilateral in character, that is, it is not agreed to with the person who will end up paying the dues but it is imposed upon him or her by law and s/he has no option but to pay the tax,

¹⁹ See <<http://www.britannica.com/EBchecked/topic/434697/James-Otis>>. Last accessed on 30 November 2013.

charge, etc. A famous dictum is ‘no taxation without representation’.²⁰ Lord Camden (Charles Pratt) made the same point in the House of Lords: ‘Taxation and representation are inseparable [...] whatever is a man’s own, is absolutely his own; no man hath a right to take from him without his consent either expressed by himself or representative; whoever attempts to do it, attempts an injury; whoever does it, commits a robbery; he throws down and destroys the distinction between liberty and slavery.’²¹

Leggi di bilancio is a wider term as it deals with balancing the revenues with the expenditure, in our case, we would refer to it as the Appropriation Act which is approved following the discussion of the budget. Hence, in the Italian Constitution it is prohibited to subject to an abrogative referendum both fiscal laws (dealing with government revenue) and financial legislation (dealing with the revenue and expenditure of Government). In so far as the White Paper is concerned, it followed the Italian provision and so does article 73(a) of the Constitution deal with financial rather than fiscal measures mirrors this philosophy. However, the Bill and the Act have departed from financial legislation and instead adopted a narrower meaning – that of fiscal legislation. This therefore brings the author to the distinction between fiscal legislation and financial legislation.

5. Fiscal Legislation versus Financial Legislation

Article 13(1)(f) of the Referenda Act refers to ‘fiscal legislation’ not to ‘financial legislation’ as do, for instance, article 73(a)²² and 102 of the Constitution of Malta. Financial law is a constitutional concept. Indeed Chapter IX of the Constitution is entitled ‘Finance’ and the very first provision in that Chapter – article 102(1) – refers to ‘revenues and other moneys’ whilst article 102(2) refers to expenditure. Article 103(1) refers to both ‘revenues and expenditure’. Expenditure is normally authorised through an Appropriation Act although there are other laws in force, the Constitution for instance being one, which authorise expenditure without the need of an Appropriation Act to appropriate public money. On the other hand, one understands that ‘fiscal legislation’ as used in the Referenda Act is referring more to the collection of money through tax and other fiscal measures rather than comprising in its significance both the revenue and expenditure of the Government for the following reasons:

²⁰ Keith W. Olson, *An Outline of American History*, International Communication Agency, Embassy of the United States of America, 27-29.

²¹ Lord Camden, House of Lords, 7 March 1766.

²² Standing Order 69 of the Standing Orders of the House of Representatives is a carbon copy of article 73(a) of the Constitution.

- (a) when one reads the debates of the House of Representatives one notes that Dr Fenech Adami was always referring to taxes in his speech and also distinguished between tax law and fiscal law, with tax law being a sub-division of fiscal law;²³
- (b) when one reads the debates of the House of Representatives one notes that Dr Alfred Sant defined in his intervention the term ‘fiscal legislation’ as *ligijiet li ghandhomx x’jaqsmu ma’ taxxi*²⁴ giving as examples income tax and property rates. So Dr Sant was using the word ‘tax’ not limitedly to taxation but also to other fiscal laws whereby a revenue is imposed by the state through a law of a fiscal nature;
- (c) when one studies Maltese Law which refers to ‘fiscal law’, the law is referring to tax law and to fiscal law, the latter term being understood as including both tax law in the sense of income tax law and other forms of taxation. In other words, tax law is generally used for direct taxation – income tax – whilst indirect taxation falls, together with tax law, under the general heading of ‘fiscal law’. Fiscal law therefore means, within a Maltese Law perspective, the law relating to direct and indirect methods of taxation and other fiscal measures. Robert Attard classifies income tax, capital gains tax, property transfer tax and duty on documents as giving rise to direct tax revenue whilst import duties, excise duty, eco-contribution and value added tax give rise to indirect forms of taxation.²⁵ But there are other forms of revenue – apart from taxes, whether direct or indirect – which the Government collects such as duties and charges and these come by different names such as levies, contributions, dues, fees, etc. Fiscal legislation is thus referring to revenue the government levies in terms of a law. Excluded therefore from fiscal legislation are donations given to government; money which the Government receives through contractual obligations; or money the Government receives from the European Union or from other states in the world unless these arise from a written law which, for example, is incorporating a bilateral or other form of agreement (treaty; convention; etc.) into Maltese Law. These latter contributions do not fall under fiscal measures but are categorised under financial legislation. Moreover, fiscal legislation does not regulate Government expenditure. This latter aspect falls under ‘financial law’ although it might happen that certain laws – such as the budget might fall both under fiscal law and financial law in so far as the budget contains monies which the government has collected in terms of various laws falling under fiscal law and revenue and expenditure measures falling under financial law. This point is made in article 102(1) of the Constitution which distinguishes between ‘revenues and other

²³ Fiscal law, in turn, being a sub-division of financial law.

²⁴ Laws which have nothing to do with taxes.

²⁵ Robert Attard, *Principles of Tax Law*, Media Centre, Blata l-Bajda, 2008, 1-7.

moneys raised by Malta' (through fiscal measures) and 'revenues and other moneys ... received by Malta' (through donations, etc.);

(d) this interpretation of the meaning of 'fiscal legislation' is further supported by reference, *inter alia*, to the following Maltese laws:

- (i) the Administrative Justice Act which establishes a Fiscal Panel in terms of the Administrative Review Tribunal (Establishment of Panels) Regulations.²⁶ According to these regulations, the Fiscal Panel of the Administrative Review Tribunal has jurisdiction to hear appeals from the following laws: the Income Tax Act;²⁷ the Import Duties Act;²⁸ the Duty on Documents and Transfers Act;²⁹ the Income Tax Management Act;³⁰ the Excise Duty Act;³¹ the Customs and Excise Tax Act;³² and the Value Added Tax Act;³³
- (ii) the Fiscal Exemptions (Institutions of the European Communities) Regulations³⁴ which refers to the Import Duties Act, the Duty on Documents and Transfers Act, Excise Duty Act, the Value Added Tax Act;
- (iii) the Fiscal Exemptions (Institutions of the European Communities) Rules³⁵ which refers to the Income Tax Act and the Motor Vehicles Registration Tax;³⁶
- (iv) the Fiscal Representation (Financial Services Undertakings Exercising a European Right) Regulations³⁷ which refers to the Income Tax Act, the Income Tax Management Act, the Duty on Documents and transfers;
- (v) the Controlled Companies (Procedure For Liquidation) Act,³⁸ article 17, which empowers the competent Minister to 'waive any tax or fiscal liability'. Here the law distinguishes between a tax and a fiscal liability;
- (vi) the Motor Vehicles (Carriage of Goods By Road) Regulations³⁹ lists under the heading 'Fiscal Law', the following laws: Value Added Tax, Motor Vehicle Tax,

²⁶ Subsidiary Legislation 490.04.

²⁷ Chapter 123 of the Laws of Malta.

²⁸ Chapter 337 of the Laws of Malta.

²⁹ Chapter 364 of the Laws of Malta.

³⁰ Chapter 372 of the Laws of Malta.

³¹ Chapter 382 of the Laws of Malta.

³² Chapter 395 of the Laws of Malta.

³³ Chapter 406 of the Laws of Malta.

³⁴ Subsidiary Legislation 337.46.

³⁵ Subsidiary Legislation 123.75.

³⁶ Chapter 368 of the Laws of Malta.

³⁷ Subsidiary Legislation 123.78.

³⁸ Chapter 383 of the Laws of Malta.

³⁹ Subsidiary Legislation 65.19.

- Income Tax and taxes on certain haulage vehicles and tolls and infrastructure user charges;
- (vii) the Notarial Profession and Notarial Archives Act⁴⁰ which refers to 'duties and taxes in terms of fiscal laws'.⁴¹

When one reads articles 73(a), 102 and 103, it is clear that the Constitution is referring to 'financial legislation' rather than 'fiscal legislation'. Unfortunately the Referenda Act does not define the term 'fiscal legislation'. One would tend to distinguish between 'fiscal legislation' as a law relating to government dues imposed by law and financial legislation as a law relating to revenue and expenditure of the Government. Naturally, 'financial legislation' would include within it 'fiscal legislation' but not vice-versa. A distinction has to be made between a fiscal measure and a financial measure. Whilst the latter term includes both revenue and expenditure, the term 'fiscal' has a narrower meaning. Fines or other pecuniary penalties, whether of a criminal or administrative nature, are not considered to be a fiscal measure even though these fines form part of government revenue. On the other hand, fees for licences, permits, permissions, authorisations and for the like nature are of a fiscal nature.

One must bear in mind that the term 'fiscal' derives from the Latin term '*fiscus*'. In Roman Law, the *fiscus* stood for the imperial treasury. Today the nomenclature can be translated as the public treasury. When 'fiscal' is distinguished from 'financial' essentially the former is referring to duties. Duties include taxes, fees, price or cost of licences, *et cetera*, and it is not necessarily limited to taxes. This point is important because the 2013 amendments to the Maltese Citizenship Act concern fees and contributions rather than taxes.

6. The 2013 Amendments to the Maltese Citizenship Act

When the Referenda Act refers to fiscal legislation it is referring to laws which impose a tax, duty, contribution, levy, charge, etc. So is the Maltese Citizenship Act, as amended, in 2013 imposing such a fiscal measure? The individual investor programme is contained as an amendment to the Maltese Citizenship Act. The Maltese Citizenship Act was amended in 2013 by 'providing for any contributions or other fees of whatever nature in respect of the individual investor programme, and providing that the provisions or any of the provisions of the Fees Ordinance shall apply to such fees as if they were fees prescribed thereunder'. This provision makes the Maltese Citizenship Act a law of a fiscal nature, not in its entirety (as essential this is a constitutional law) but in part, that is, in so far as it requires a contribution by way of a fee so that a person may benefit from the individual investor

⁴⁰ Chapter 55 of the Laws of Malta.

⁴¹ Article 94A(19)(a)(i).

programme. The collection of such fee by Government is not in the form of a tax but in the form of a duty – a fee – which is undoubtedly a fiscal measure in its own right because it is imposing a charge upon a person who, when s/he pays such charge and qualifies in terms of law, becomes entitled to benefit from the individual investor programme. The pertinent provision of the Maltese Citizenship Act as amended in 2013 reads as follows:

24.(1) The President of Malta may by regulations make provision generally for carrying into effect the purposes of this Act and in particular ...

(h) for prescribing forms, and providing for the imposition and recovery of fees, in respect of any application made to the Minister or in respect of any registration, or the making of any declaration, or the grant of any certificate, or the taking of any oath of allegiance, authorised to be made, granted or taken by or under this Act, and in respect of supplying a certified or other copy of any notice, certificate, order, declaration or entry, given, granted or made as aforesaid, and for providing for any contributions or other fees of whatever nature in respect of the individual investor programme, and providing that the provisions or any of the provisions of the Fees Ordinance shall apply to such fees as if they were fees prescribed thereunder;

(i) for prescribing the requirements for and administration of the individual investor programme and for the granting of a certificate of naturalisation as a citizen of Malta to an applicant, and spouse and eligible dependants of such applicant, meeting the requirements as may be prescribed.

7. Inclusion of the Individual Investor Programme in the Budget

The argument can be made, *in subsidium*, that the individual investor programme is a fiscal measure because it has been included in the Appropriation Act 2013 which is approved by the House of Representatives following the discussion and approval of the Financial Estimates. Whilst there is no doubt that the budget is surely a financial matter (see Standing Orders of the House of Representatives 71 to 82), the issue here is whether the line item in the financial estimates whereby it is stated that the government will enjoy a revenue of 15 million euro from the fees levied in terms of the individual investor programme is a fiscal measure as well.⁴² The answer is in the negative because the fiscal

⁴² Ministry for Finance, *Budgetary Estimates 2014*, Valletta: Ministry for Finance, 2013, 236, <<http://mfin.gov.mt/en/The-Budget/Pages/The-Budget-2014.aspx>>. Last accessed 30 November 2013. Various stakeholders have voiced concerns with regard to the Individual Investor Programme. See, for instance, Keith Micallef, 'Abrogative Referendum is Legal – law expert', *The Times of Malta*, 14 November 2013; National Council of Women, 'Maltese citizenship is not for sale', available at:

measure is contained in the Maltese Citizenship (Amendment) Act, 2013. The Appropriation Act is more of a financial measure and it is not the Appropriation Act which is imposing the fiscal measure but the Maltese Citizenship (Amendment) Act, 2013. What the Appropriation Act is doing is that it is stating that Government is envisaging to collect 15 million euro during 2014 and that sum, if and once collected, will be appropriated by the Government for those reasons which the subsidiary legislation to be made under the aforesaid 2013 enactment will set out. Thus, the Appropriation Act, though a financial law, is not a fiscal measure in terms of which Parliament is by law imposing a duty for whosoever benefits from the individual investor programme.

8. Does fiscal legislation include expenditure of money?

Fiscal legislation as defined above does not include the expenditure of money. Such a measure falls under financial legislation.

9. Conclusion

Fiscal legislation has to be distinguished from financial legislation. The latter is more encompassing than the former. Whilst financial legislation can include fiscal legislation, the obverse is not correct; whilst fiscal law includes tax law, the contrary is not correct. Fiscal legislation includes all sorts of revenue which the government receives through the operation of a law including fines deriving from a criminal sanction; but it does not include money received by government which does not result from the operation of a law. Fiscal legislation does not refer to government expenditure but financial legislation does. Essentially, fiscal legislation refers both to taxation as well as to any other dues recoverable by the government excluding always revenue accruing from donations received by government or from contractual obligations. Applying the above conclusions to the Maltese Citizenship Act, the provision in that law which allows the payment of a fee for obtaining Maltese citizenship makes that law a fiscal law. Once it is a fiscal law it cannot be subjected to an abrogative referendum as otherwise the Government will lose revenue and that is considered not to be in the public interest of Malta for the government – the Government should not give up any of its revenue as otherwise it will not be in a position to govern. Perhaps the time is ripe, now that the issue has been raised, for Parliament to revisit the Referenda Act and add the matter legislatively in order to:-

www.ncwmalta.com/news?id=135; Alternattiva Demokratika, 'citizenship acquisition law: AD asks for an abrogative referendum', 12 November 2013, available at: <http://www.alternattiva.org/citizenship-acquisition-law/>; 'citizenship: AD calls for referendum; chamber expresses concern', *The Malta Independent*, 12.November 2013, available at: <http://www.independent.com.mt/articles/2013-11-12/news/citizenship-scheme-ad-calls-for-an-abrogative-referendum-3163127810/>

- (a) decide whether it wants to remove fiscal law from amongst the exceptions to an abrogative referendum; or
- (b) whether it wants to retain the term 'fiscal legislation' and, if so, to introduce a definition of the term 'fiscal legislation' in article 2 of Referenda Act as meaning any legislation relating to the revenue of the state which is imposed by law and any legislation authorising expenditure by the state in terms of law.
- (c) whether it wants to extend the term 'fiscal legislation' to 'financial and fiscal legislation', in which case a definition of both 'fiscal legislation' and 'financial legislation' should be afforded in article 2 of the Referenda Act; or
- (d) whether it wants to introduce a definition of the term 'financial legislation' as meaning any legislation relating to the revenue and expenditure of the state which is imposed by law.

Some sort of clarification in the matter is really required and Parliament should intervene to remove legal uncertainty.