Pázmány Law Review
III. 2015. • 191–207

ARTICLES

WOMEN'S RIGHTS IN REFERENDUMS

László Komáromi
Pázmány Péter Catholic University

1. Introduction[1]

Nowadays when women's equality to men before the law cannot be questioned in Western societies, it may seem strange that in times when natural and unalienable human rights were first declared by state constitutions this equality was not at all self-evident. This appears in writings from times of the French Bourgeois Revolution which argue for equal rights of men and women. In 1790, the French philosopher and political scientist Nicolas de Condorcet (1743–1794) justified this equality with men's and women's equal sensibility and susceptibility to produce ideas on moral issues and the ability to reason about such ideas.[2] However, the realization of this principle in political life required a long and painful battle. Olympe de Gouges (1748–1793), French writer and political activist, author of the pamphlet known as "Declaration of the Rights of Woman and the Female Citizen" of 1791, still tried without success to get the National Assembly to decree female rights. In her Declaration, she extended the rights ensured by the 1789 "Declaration of the Rights of Man and of the Citizen" to women as well.[3] At the same time in England, the British feminist Mary Wollstonecraft (1759–1797) argued for equal rights of women in her essay "A Vindication of the Rights of Woman" (1792). She emphasised the importance of rational education of women which would enable them to contribute

[1] Written version of a paper presented at the XIXth European Forum of Young Legal Historians, 15–18 May 2013, Lille and Ghent.

[2] *"Or, les droits des hommes résultent uniquement de ce qu'ils sont des êtres sensibles, susceptibles d'acquérir des idées morales, et de raisonner sur ces idées; ainsi les femmes ayant ces même qualités, ont nécessairement des droits égaux."* Nicolas de Condorcet: Sur l'admission des femmes au droit de cité. *Journal de la Société de 1789*, 3 July 1790, Nr. V.

[3] The pamphlet was originally addressed to Queen Marie Antoinette and bore the title "Les Droits de la Femme". For an English translation see John R. Cole: *Between the Queen and the cabby: Olympe de Gouges's Rights of Woman*. Montreal, McGill-Queen's University Press, 2011. 27 ff.

to social progress.[4] Although democratic political systems were more likely to accept and ensure human rights in history, democratic decision-making processes didn't always contribute to their recognition, what's more, they even turned out to hinder the extension of specific rights.

In the following I would like to highlight one aspect of the development of women's rights: what role did referendums play in this process? In this respect, the two issues which emerged most frequently in direct popular votes were the women's suffrage and the problem of abortion. What was the legal background of these referendums and to what extent did the institutional design influence the result of the votes? What other factors can be identified which promoted the success of referendums, or on the contrary, which made direct popular decisions an impediment to the expansion of women's rights? To what extent are referendums suitable tools in deciding on human rights matters?

As resources for finding examples which can help to get closer to the answers, I used the databases of the Centre for Research on Direct Democracy in Aarau and Beat Müller's Database and Search Engine for Direct Democracy.[5]

2. Women's suffrage

2.1. The evolution of women's suffrage in general

The pioneers of introducing female franchise can be found in America. Until the second half of the 19th century women's suffrage was an exceptional phenomenon. Presumably the first example that can be mentioned is the 1776 Constitution of New Jersey which didn't make any difference between men and women when laying down the conditions of franchise: full age, a clear estate worth fifty pounds and twelve months' residence in the colony.[6] As proprietary rights of married women

---

4 *"Asserting the rights which women in common with men ought to contend for, I have not attempted to extenuate their faults; but to prove them to be the natural consequence of their education and station in society. If so, it is reasonable to suppose that they will change their character, and correct their vices and follies, when they are allowed to be free in a physical, moral, and civil sense. Let woman share the rights, and she will emulate the virtues of man..."* Mary Wollstonecraft: *A vindication of the rights of woman: with strictures on political and moral subjects.* Third edition, London, J. Johnson, 1796. 450–451. Both Condorcet's train of thought and the views of Olympe de Gouges and Mary Wollstonecraft are mentioned by Alfred Kölz: *Neuere Schweizerische Verfassungsgeschichte. Ihre Grundlinien in Bund und Kantonen seit 1848.* Bern, Stämpfli, 2004. 783–784.

5 See: http://www.c2d.ch/votes.php?table=votes and http://www.sudd.ch (accessed: 11 April 2016).

6 Sec. 4.: *"That all Inhabitants of this Colony of full Age, who are worth Fifty Pounds proclamation Money clear Estate in the same, and have resided within the County in which they claim a Vote for twelve Months immediately preceding the Election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other publick Officers that shall be elected by the People of the County at Large."* Horst Dippel (ed.): *Constitutions of the world from the late 18th century to the middle of the 19th century. Constitutional documents of the United States of America 1776–1860*, Part V. München, Saur, 2007. 26.

were limited, this regulation practically entitled single women to cast their votes for parliamentary representatives and other officers. However, this early concession proved to be short-lived as in 1807 the Parliament reinterpreted the constitutional provision on franchise and passed a new election law which only provided suffrage for taxpaying adult white male inhabitants.[7]

Only in the second half of the 19th century did it come to the introduction of female franchise without property qualifications in a series of US member states. The Territory of Wyoming[8] can take pride in being the first in this process as in 1869 the women's right of suffrage and to hold office was enacted by the Council and the House of Representatives.[9] The example was later followed by further American states: Utah (1870), Colorado (1893) and Idaho (1896). As for other parts of the world: New Zealand introduced women's suffrage – the first to do so at state level – in 1893, Australia in 1902; in 1906 Finland as first European country did likewise, followed by Norway (1913) and Denmark (1915). After the First World War further countries did the same (Russia 1917, Austria 1918, Germany 1919, USA 1920) and in a second wave of democratization around the end of the Second World War almost every European country adopted free female franchise.[10]

2.2. The Republic of the Philippines (1937)

The extension of voting rights to women happened only exceptionally by means of referendum. One of the first exceptions was the Republic of the Philippines.

After more than three centuries under Hispanic rule the islands were ceded by Spain to the USA in 1898 as a result of the Spanish-American War. In 1934, the US Congress passed the Philippine Commonwealth and Independence Law which authorized the Philippine Legislature to provide for the election of a constitutional convention in order to elaborate an own constitution for the Commonwealth of the Philippine Islands. The Law envisaged a transitional period of ten years for establishing an independent Philippine Republic. The constitutional convention's draft was approved by the President of the USA and subsequently – in pursuance of the Law – submitted to the people of the islands for ratification. In May 1935, Philippine people ratified the Constitution with a majority of 96% of the votes.[11]

---

[7] Judith Apter Klinghoffer – Lois Elkis: The petticoat electors: women's suffrage in New Jersey, 1776–1807. *Journal of the Early Republic,* 12, 1992/2. 159–161.

[8] Wyoming was admitted into the United States as the 44th state in 1890.

[9] Sect. 1.: *"That every woman of the age of twenty-one years, residing in this territory, may, at every election to be holden under the laws thereof, cast her vote. And her rights to the elective franchise and to hold office shall be the same under the election laws of the territory, as those of electors." General laws, memorials and resolutions of the Territory of Wyoming, passed at the first session of the Legislative Assembly, convened at Cheyenne, October 12, 1869.* Cheyenne, 1870. 371.

[10] Kölz (2004) op. cit. 785.

[11] George Arthur Malcolm: *The Commonwealth of the Philippines*. New York, D. Appleton-Century Company, 1936. 59–64, 132–145, 421, 424–425; the text of the Constitution: 435–458.

The Constitution of 1935 established a presidential system of government based on the US Constitution, with a unicameral National Assembly as legislator, a President as executive power and a Supreme Court with inferior courts for the judiciary. For the amendment of the Constitution a proposal of three-fourths of the National Assembly or the convocation of a convention was required, but in both cases the amendment only became valid if it was submitted to the people for direct vote and ratified by the majority of votes cast. Thus, any amendment was subject to mandatory constitutional referendum.[12]

Although women were entitled to participate in the referendum of 1935, female franchise was not ensured by the Constitution.[13] It only enfranchised literate male citizens of twenty-one years or over who had acquired one year's residence in the Philippines. However, the Constitution encompassed a further provision as well: *"The National Assembly shall extend the right of suffrage to women, if in a plebiscite which shall be held for that purpose within two years after the adoption of this Constitution, not less than three hundred thousand women possessing the necessary qualifications shall vote affirmatively on the question."*[14] This clause practically meant that the Constitution entrusted – for a period of two years – the women themselves with the decision on their own suffrage. Some feminist organisations which demanded equal political rights for women since the first decades of the 20th century (Asociacion Feminista Filipina, 1905; Asociacion Feminista Ilongga, 1906)[15] certainly contributed as motivating factors to this authorization made by the constitutional convention. The Constitution didn't contain any rule on how to initiate a popular vote on the issue. Finally in 1936, the National Assembly passed a special law (Commonwealth Act No. 34) which ordered the plebiscite. On 30 April 1937, 492,032 votes were cast out of 588,052 registered female voters. 91% of the votes were affirmative, the right of suffrage was thus extended to women.[16]

2.3. The Republic of Liberia (1946, 1955)

Liberia was established as an attempt to form a civilized Christian state in West Africa from liberated slaves repatriated from the USA to the black continent. The plan was advocated by the American Colonisation Society (ACS) and supported by the US Government. In 1822, the first colony was founded at Cape Montserrado, later named Monrovia after the American president James Monroe. In the 1830s, other state colonisation societies also established settlements which were united into the "Commonwealth of Liberia", administered by the Board of Directors, a body

[12] Art. XIV, sec. 1.

[13] Malcolm op. cit. 36, 212.

[14] Art. V, sec. 1.

[15] Lilia Quindoza-Santiago: Roots of feminist thought in the Philippines. (translated by Thelma B. Kintanar) *Review of Women's Studies,* 6, 1996/1. 165.

[16] *Second annual report of the President of Philippines to the President and Congress of the United States covering the calendar year ended December 31, 1937.* Washington, 1939. 18.

composed of delegates of the societies. After conflicts with British coastwise traders who didn't have much respect for the regulations of the Liberian Government,[17] the ACS proposed to the "people of the Commonwealth of Liberia" to adopt a constitution and "to undertake the whole work of self-government".[18] The constitution was ratified by popular vote in 1847 and the new state recognised by foreign powers in 1848–1849 (only in 1862 by the USA).[19]

The Constitution of 1847 was modelled after the Constitution of the United States of America, however, real political life differed in many respects from the principles of the latter. The power was centralized in the executive branch and the country governed by the repatriated elite. The True Whig Party dominated Liberian politics all by themselves from the end of the 1870s, for more than a hundred years. On the other hand, the great mass of indigenous inhabitants lived in the interior provinces in a tribal system and disparaged the measures of the central government which wasn't able to control large parts of the country.[20]

As for the election of the House of Representatives and of the Senate, the Constitution enfranchised male citizens starting from the age of twenty-one who possessed real estate. In addition, the Constitution required residence of two and three years, respectively, the possession of a specific value of real estate (150 and 200 dollars, respectively), and a higher age limit (twenty-three or twenty-five) to become eligible as representative or senator.[21] As for constitutional amendments not only a two-third majority vote of both Houses but also a popular approval by two thirds of all electors was mandatory,[22] the extension of franchise to women could only be realized in a series of referendums. This process ran parallel with the extension of the voting rights of male citizens.

Large masses of inhabitants living in the inland provinces were practically excluded from male franchise due to the voting precondition of possession of real estate. In 1944, the Parliament passed a constitutional amendment which recognised huts in the hinterland provinces as equivalent to real estate provided that the possessor paid the hut tax. The same was applied to the criteria of eligibility for representatives (but not for senators). This amendment was approved in a referendum in May 1945, thus, male citizens not less than twenty-one years of age living in the inland provinces

[17] Britain regarded the Commonwealth and the ACS as private persons, not as a sovereign entity entitled to levy customs duties, see: Elwood D. Dunn – Svend E. Holsoe: *Historical Dictionary of Liberia*. Metuchen, Scarecrow Press, 1985. 46.

[18] John Hanson Thomas McPherson: *History of Liberia*. Baltimore, The Johns Hopkins Press, 1891. 14–29., for the quotation: 30.

[19] *Spanish and Italian Possessions: Independent States*, No. 130: Liberia. New York, 1969. 10–11.

[20] Jean R. Tartter: Government and Politics. In: Harold D. Nelson (ed.): *Liberia: a country study.* Washington, D.C., American University, 1985. 198–199, 226.; *Spanish and Italian Possessions*, 20–21, 24–25.; Raymond Leslie Buell: *Liberia: a century of survival 1847–1947.* Philadelphia, University of Pennsylvania Press, 1947. 7–8.

[21] Art. I, sec. 11, art. II, sec. 2 and 5. For the text of the Constitution see: *British and foreign state papers 1846–1847*, vol. XXXV, London, 1860. 1301–1314.

[22] Art. V, sec. 17.

became enfranchised voters if they had a hut and paid the tax for it. They also became eligible to become representatives.[23]

Still in 1945, the Parliament adopted a next amendment, which extended the male active suffrage to women of twenty-one years possessing real estate.[24] This alteration practically enfranchised women living in the coastal region (in the counties), provided that they possessed real estate. Women possessing a hut in the hinterland provinces were not included. This amendment was also subject to a popular vote which took place in May 1946. In this case – contrary to the Philippine plebiscite of 1937 – only male citizens had the right to vote but they approved the introduction of female active suffrage.

A last stage in the process was a constitutional referendum in May 1955, when active franchise was granted to women who possessed a hut in the hinterland for which they paid the hut tax. In addition to this, passive suffrage of representatives was granted to all women over twenty-three years of age, who owned real estate of no less than 1,000 dollars in value or possessed a hut in the hinterland provinces. This last amendment ensured eligibility for female senator candidates only if they owned real estate above 1,000 dollars in value and reached the age of twenty-five years.[25] Thus, women living in the hinterland provinces were not eligible to become senators. (The negative discrimination of hinterland provinces vis-à-vis coastal provinces was ended in the middle of the 1960s.)

2.4. The Swiss Federation (1959, 1971)

Switzerland qualifies as the country which has the most experience with direct democracy. Here, popular rights were developed step by step both on cantonal and on federal level in the 19th, and partly in the first half of the 20th century. The two cornerstones are facultative legislative referendums by which a certain amount of citizens are enabled to enforce a popular vote on laws passed by the Parliament and popular constitutional initiatives, which empower a specific number of citizens to initiate referendums on constitutional amendments. In addition to this, every amendment of the federal constitution must be submitted to popular vote for ratification or rejection (mandatory constitutional referendum).[26] The cantons have an even greater variety of instruments at their disposal.[27] The frequent use of

---

23 Buell op. cit. 8, 10, 14–15.

24 Dunn–Holsoe op. cit. xvi–xvii.

25 For details see the database of Beat Müller's *Database and Search Engine for Direct Democracy*: http://www.sudd.ch.

26 For an overview of the evolution of direct democratic instruments on the federal level see: Alexander H. Trechsel – Hanspeter Kriesi: Switzerland: the referendum and initiative as a centrepiece of the political system. In: Pier Vincenzo Uleri – Michael Gallagher: *The referendum experience in Europe*. Basingstoke, Macmillan, 1996. 186–190.

27 For a summary see Adrian Vatter: *Kantonale Demokratien im Vergleich. Enstehungsgründe, Interaktionen und Wirkungen politischer Institutionen in den Schweizer Kantonen*. Opladen, Leske & Budrich, 2002. 219–228.

direct democratic rights contributed to the formation of a consensus democracy, as governments tend to draw political forces into the decision-making process which are able to initiate referendums and put a veto on laws passed by the Parliament. In addition to this, such issues can also be placed on the agenda by means of popular initiatives which would otherwise be lost in the labyrinth of the parliamentary process.[28]

The Constitution of 1874 enfranchised only Swiss male citizens of at least twenty years of age.[29] The first female propagator of the women's voting rights was the historian Barbara Margaretha von Salis-Marschlins (1855–1929), who demanded equal rights to women in her article "Ketzerische Neujahrsgedanken einer Frau" ("Heretical New Year's Thoughts of a Woman") in the newspaper "Zürcher Post" in 1887. At the end of the century, the lawyer, writer and expert in constitutional law Karl Hilty (1833–1909) also advocated the issue in his paper "Frauenstimmrecht".[30] However, the Swiss Federal Assembly only addressed the topic for the first time in 1919 and forwarded the motions of Emil Göttisheim and Herman Greulich, two members of the National Council as a demand to the Federal Council which put off the discussion referring to "more urgent problems".[31] In 1929, a petition signed by more than 170,000 women and by nearly 80,000 men was filed requesting the introduction of female franchise but it was not followed by a referendum because it was presented in form of a simple petition and not as a popular constitutional initiative.[32]

In the meantime some of the Swiss cantons also began the debate of female suffrage. Between 1919 and 1959 25 cantonal referendums were held on the issue but neither of these efforts was crowned with success. The first canton which entitled women to vote on cantonal and local level was Waadt in 1959; the example was followed by Neuchâtel (1959), Geneva (1960), Basel-Stadt (1966), Basel-Landschaft (1968), Ticino (1969), Wallis, Luzern and Zurich (1970).[33]

Since the end of the Second World War, the question was subject to discussions on federal level as well.[34] In 1957, the Federal Council completed a detailed motion to

---

[28] On direct and indirect impacts of referendums and popular initiatives see Wolf LINDER: Direkte Demokratie. In: Ulrich KLÖTI et al. (eds): *Handbuch der Schweizer Politik*. Zürich, Verlag Neue Zürcher Zeitung, 1999. 117–121.

[29] Art. 74, for the text of the constitution see: Alfred KÖLZ (ed.): *Quellenbuch zur neueren schweizerischen Verfassungsgeschichte. Von 1848 bis in die Gegenwart*. Bern, Stämpfli, 1996. 151–186.

[30] Carl HILTY: Frauenstimmrecht. *Politisches Jahrbuch der Schweizerischen Eidgenossenschaft*, 11, 1897. 245–296.

[31] Yvonne VOEGELI: *Zwischen Hausrat und Rathaus. Auseindandersetzungen um die politische Gleichberechtigung der Frauen in der Schweiz 1945–1971*. Zürich, Chronos, 1997. 171–175.

[32] Pursuant to art. 120 of the Federal Constitution of 1874, the number of signatures of male citizens was enough for a popular constitutional initiative (it required only 50,000). The simple petition is mentioned in art. 57 of the Constitution. For the difficulties around the introduction of female franchise in Switzerland see A. KÖLZ (1996) op. cit. 784–795. I rely on it to a large extent.

[33] KÖLZ (2004) op. cit. 786.

[34] VOEGELI op. cit. 180 ff.

the Federal Assembly which argued for the introduction of female suffrage.[35] After heated debates the National Council voted for the proposal with 95 "yes" votes to 37 "no" votes and 64 abstentions. However, the constitutional referendum, which took place in February 1959, led to a disappointing result: more than two thirds of the voters (66,92%) voted against the proposition with a participation of 67%.[36]

Nevertheless in the 60ies, the question was not taken off the agenda. The social changes transformed the traditional ideas on gender roles,[37] more and more cantons approved female suffrage on cantonal referendums. In addition to this, Switzerland intended to sign the European Convention on Human Rights but – in the absence of female franchise – this could only have happened with reservations. In 1969, the Federal Council proposed that the Federal Assembly reconsider the issue.[38] This time both Houses unanimously accepted the constitutional amendment which was submitted to referendum in February 1971. The popular vote was successful: women's suffrage was introduced by two-thirds of the votes (65,73%) with a participation of 58% of the male voters.[39]

2.5. The Principality of Liechtenstein (1968, 1971, 1973, 1984)

An even more difficult process led to the acknowledgment of female suffrage in Liechtenstein.

The 1921 Constitution of the Principality of Liechtenstein – which was still in force during the course of referendums on female franchise – determined the form of government as a constitutional and hereditary monarchy which functions on a democratic and hereditary basis. It involved extensive popular rights, similar to that of Switzerland. Accordingly, citizens were entitled to call referendums on laws passed by the Parliament and they also had the right to launch popular initiatives both on legislative and constitutional matters. A mandatory constitutional referendum was not provided, however, the Parliament could submit constitutional amendments to the referendum at its own deliberation, furthermore a certain number of citizens were empowered to enforce referendums on constitutional amendments adopted by the Parliament.[40]

As for female suffrage, the Parliament first debated the question in 1965, when the parliamentary deputy Roman Gassner proposed a test ballot on which the women

---

35 *Bundesblatt* 1957, I. 665–798, http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10039736 (accessed: 11 April 2016).

36 Kölz (1996) op. cit. 360–361.

37 For how the image of women changed in the late 1960s see: Melanie Hediger: *Das Bild der Schweizer Frau in Schweizer Zeitschriften. Studien zu »Annabelle«, »Schweizer Illustrierte« und »Sonntag« von 1966 bis 1976*. Fribourg, Academic Press, 2004.

38 *Bundesblatt* 1969, I. 61–103, http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10044587 (accessed: 11 April 2016).

39 Kölz (2004) op. cit. 793–794.

40 Martin Batliner: *Die politischen Volksrechte im Fürstentum Liechtenstein*. Freiburg, Institut für Föderalismus, 1993. 178.

themselves could express their will.[41] This proposal was rejected by the Parliament. However, three years later, due to the suggestion of the local councils,[42] the Parliament reconsidered its position and ordered a consultative referendum. The two dominant parties, the Progressive Citizens' Party (FBP) and the Fatherland Union (VU) were in favour of the proposal. Both men and women could vote on this plebiscite in July 1968 and 56% of the registered voters took part in the referendum. The bare majority of the women answered affirmatively (1265 "yes" and 1241 "no" votes), however, a significant majority of the men voted against the proposal (887 "yes" and 1341 "no" votes; as for the total electorate: 54,5% "no" and 45,5% "yes" proportion). The negative result provoked the formation of a women's organisation for the introduction of female suffrage ("Kommittee für das Frauenstimmrecht", 1969).

In February 1971 – three weeks after the women's franchise had been adopted in Switzerland – a second referendum was held, this time with binding force. It was not only the civil movement who advocated the issue, the parliamentary parties were also in favour of the proposal. The Parliament passed the appropriate amendment for the introduction of female suffrage but instead of putting it into force without popular vote it decided to submit it to referendum. In this case only men had the right to vote and they narrowly rejected the proposal (49 vs. 51%).

It came to a third attempt in February 1973, when the Parliament – in order to comply with the request of another civic organisation, the Working Group for Women ("Arbeitsgruppe für die Frau") – adopted female suffrage again. Although the civic organisation suggested not to put the question on the popular vote, the Parliament ordered a plebiscite in this case as well. The male voters denied the proposal again with a proportion of 56% of the votes and a participation rate at 86%.

Beyond other factors, which led to a negative answer in the third referendum, the fear of foreign women must also be mentioned. If a foreign woman married a citizen of Lichtenstein, she acquired the citizenship. On the other hand, women of Liechtensteinian origin who married foreigners lose their citizenship. Not only the possible influence of incoming women was feared but also the discrepancy was emphasized, that the introduction of female franchise would have accorded an advantage for women marrying into Liechtensteinian citizenship to indigenous women who married foreigners.[43]

After the third unsuccessful referendum, a series of "small steps" were taken in order to overcome the obstacles which had a part in the negative result. In 1974, the Parliament passed an amendment which made the repatriation of women who lost their citizenship by marrying a foreigner possible within five years. In 1976, the Parliament adopted a constitutional amendment which entitled local communities to give voting

[41] Wilfried Marxer: 20 Jahre Frauenstimmrecht – Eine kritische Bilanz. Erweiterte Fassung eines Vortrages zur Jubiläumsveranstaltung "20 Jahre Frauenstimmrecht" am 26. Juni 2004 in Vaduz. *Beiträge, Liechtenstein-Institut*, Nr. 19/2004. 5. For the history of Liechtensteinian referendums on female suffrage I rely on this work, esp. 4–10.

[42] Paul Vogt: *125 Jahre Landtag*. Vaduz, Selbstverlag des Landtags des Fürstentums Liechtenstein, 1987. 246.

[43] Marxer op. cit. 6–7.

rights to women in local matters. The communities introduced female suffrage one after the other. Like Switzerland, Liechtenstein also ratified the European Convention on Human Rights which became an argument for the introduction of female suffrage. In addition to this, new social movements were started ("Aktion Dormröschen" – "Action Sleeping Beauty"; "Männer für das Frauenstimmrecht" – "Men for Female Franchise") which entered upon a campaign for women's suffrage. The two big parties also established their organisations for the issue. Finally, the Parliament put the question of female franchise on its agenda again. First it introduced a waiting period of twelve years to acquire citizenship by naturalization for foreign women who married into Liechtenstein. Thus, the argument relating to the discrimination of indigenous to foreign women was rendered harmless. Then the Parliament adopted a constitutional amendment on female franchise. The subsequent referendum in July 1984 was already successful: 51,3% of the men voted for the enfranchisement of women with a participation of 86%.[44] Liechtenstein was the last European country to adopt female suffrage.

2.6. Conclusion

From a legal point of view referendums on female franchise were mostly held because it was compulsory to submit constitutional amendments to referendum. In this respect Liechtenstein is the only exception as the Parliament's decision didn't require a popular approval in this country but in this case it was also deemed to be "politically necessary" to submit the question to referendum. Interestingly, constitutional referendums played a rather delaying role in the process of the extension of voting rights to women precisely in such solid democracies as Switzerland and Liechtenstein, as men repeatedly voted down the introduction of female suffrage. In these countries, only the change of traditional ideas concerning the role of women opened the way to enfranchising. This change did certainly not only mean a more conscious attitude to the political activity of women but it also led to legislation on other female rights, especially on equal treatment of women in education and employment, and promoted women's equality to that of men in these fields as well.[45] It is also remarkable that, although the possibility of "bottom-up" initiatives for constitutional amendments is given both in Switzerland and Liechtenstein, in the case of female suffrage the "initiative" finally came "from above", from the Parliament. A possible reason for this is that before the enfranchisement of women the power to launch popular initiatives was the privilege of men and they did not consider it important to extend voting rights to women. Notwithstanding civic organisations played an important role after the issue was placed on the political agenda. Two further similarities are also to be mentioned: due to a decentralized power structure, the extension of rights was first realized in both Switzerland and Liechtenstein on the sub-national level, in the cantons and the local communities. On the other hand the joining to the Council

---

[44] Marxer op. cit. 7–10.; Vogt op. cit. 247–248, 251.

[45] Kölz (2004) op. cit. 793–794.; Marxer op. cit. 30–37.

of Europe and the ratification of the European Convention on Human Rights were promoting factors for the recognition of female franchise in both countries.

As for the Philippines, the introduction of female voting rights was a part of the process in which the country gained its sovereignty: the Constitution of 1935 was intended to lay the foundation for an independent republic, which needed democratic legitimization. Perhaps this is the reason for the unprecedented generous regulation that the women themselves could decide on their enfranchisement.[46] In Liberia, the adoption of female suffrage was a step in a wider and gradual democratisation process which evolved after the Second World War. The main issue of this development was the emancipation of the inhabitants of the interior provinces and it took place gradually: first male citizens were endowed with equal rights and women only followed subsequently. However, even after the enfranchisement of women, suffrage remained limited by property qualifications.

3. Referendums on abortion issues

3.1. Introductory remarks

Referendums on abortion issues raise even more serious questions than female suffrage, as the phenomenon of induced abortion leads to a very complex mass of problems. The beginning of human life, the human nature of the unborn, the relation of the mother to her own body and her foetus, the rights of the individual and of the community – all these aspects are entwined not only in the consideration of concrete cases but also in the making of general rules for abortions. Modern state regulations of the 20th and 21st century are diverse in many respects and are mostly classified based on what extent they allow induced abortion. The range spreads from countries with full prohibition to legal systems which allow abortion on request without any specific reason. The most widespread solution is to specify indications – reasons for which an induced abortion is permissible: intervention to save the life of the pregnant woman, preservation of her physical or mental health, termination of pregnancy resulting from rape or incest, suspicion of foetal impairment, termination of pregnancy for socio-economic distress. In some countries time limits are set, mostly the first trimester, within which the abortion can be performed without any valid ground.[47]

Cases, when popular votes decided abortion issues are not less frequent than referendums on female franchise. According to the Centre for Research on Direct Democracy's database,[48] seventeen questions related to abortion were submitted to referendum since 1977 (Switzerland: 1977, 1978, 2002; Italy: 1981; Northern Mariana

[46] Theo Schiller identifies as a specific type of the emergence of direct democratic institutions if they appear in the process of the formation of independent states – see Theo SCHILLER: The emergence of direct democracy – a typological approach. In: Wilfried MARXER (ed.): *Direct democracy and minorities*. Wiesbaden, Springer VS, 2012. 35–37, 40–41.

[47] UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION: *Abortion policies: a global review*. Vol. I. New York, United Nations, 2001. 1–10.

[48] See: http://www.c2d.ch/votes.php?table=votes.

Islands: 1985, 1996; Philippines: 1987; Seychelles: 1992; Ireland: 1983, 1992, 2002; Portugal: 1998, 2007; Liechtenstein: 2005). The extent of this article does not allow an in-depth study on every single case, I have therefore picked out two examples: Ireland and Italy.

3.2. The Republic of Ireland (1983, 1992, 2002)

The Constitution of Eire of 1937 safeguards Christian moral values and reflects the doctrine of the Catholic Church in many respects. Its preamble begins by mentioning the Holy Trinity, it protects the family as the "natural primary and fundamental unit group of society" and ensures the rights of the mother. In its original version it also recognised "the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the faith professed by the great majority of the citizens".[49] As for direct democracy, the Constitution involves two instruments: the mandatory constitutional referendum and a kind of facultative legislative referendum which can be initiated by the majority of the Senate and at least a third of the Lower House (Dáil) and ordered finally by the president.[50] The latter instrument has never been used[51] but the mandatory constitutional referendum led to a significant practice of direct democracy as – except for a transitional three-year period after the Constitution came into effect – every amendment of the Constitution passed by the Parliament was subject to popular vote (altogether thirty-eight between 1959 and 2015). Three main topics dominated these votes: public law issues (especially electoral matters), international agreements which involved sovereignty transfer (EU treaties) and ecclesiastical and moral issues (the position of the Roman Catholic Church, divorce, abortion, and, more recently, same-sex marriage).[52]

The "Offences against the Person Act" of 1861 promised severe punishment for different kinds of induced abortion.[53] In addition to this, in 1973, in a dictum to the Irish Supreme Court's decision in McGee v. Attorney General, justice Walsh voiced

---

[49] Art. 41 and 44. The Fifth Amendment removed the special position of the Catholic Church (1972) and the provision which prohibited the dissolution of marriage was modified by the Fifteenth Amendment (1995) which provided for the dissolution of marriage in certain specified circumstances. In 2015 the Thirty-fourth Amendment enacted that "Marriage may be contracted in accordance with law by two persons without distinction as to their sex."

[50] Art. 46–47, 27.

[51] Maurice Manning: Ireland. In: David Butler – Austin Ranney (eds): *Referendums. A comparative study of practice and theory.* Washington, D.C., American Enterprise Institute for Public Policy Research, 1978. 200–201.

[52] For an overview of Irish constitutional referendums see Serge Zogg: *Direkte Demokratie in Westeuropa: Staaten*. Aarau, Bildung Sauerländer, 2000. 43–51.; Vernon Bogdanor: Western Europe. In: David Butler – Austin Ranney (eds.): *Referendums around the world: the growing use of direct democracy.* Washington, D.C., The AEI Press, 1994. 80–87.

[53] Art. 58: Administering drugs or using instruments to procure abortion; art. 59: Procuring drugs, &c., to cause abortion. In: Thomas W. Saunders – Edward W. Cox (eds): *The criminal law consolidation acts, 1861: the other criminal statutes and parts of statutes of the same session, together with a digest of the criminal cases... from 1848 to 1861.* London, John Crockford, 1861. 238–239.

his opinion that the killing of the unborn for family planning reason would infringe the Constitution.[54] On the other hand, the Court ruled that the right to marital privacy is safeguarded by the Constitution and that the prohibition on the sale and importation of contraceptives was inconsistent with this right. The decision gave rise to the fear in Catholic circles that in the future the Court may accept an interpretation which doesn't consider induced abortion to be an unconstitutional action. This fear was even increased by the secularization of Irish society since the mid of the 1970s: Catholic teachings were no longer adopted as the main guide of behaviour.[55] In response to these developments, lay activists and organisations created an association to establish the Pro-Life Amendment Campaign (PLAC) in the beginning of the 1980s in order to amend the Constitution with a rule which would have enacted the "absolute right to life of every unborn child from conception". The proposal was supported almost unanimously by the political parties in the November 1982 election campaign. Although the all-party consensus ended after the election, the new Parliament passed the appropriate amendment and put the question to popular vote. The referendum of September 1983 was successful and approved the Eighth Constitutional Amendment with 66,45% of the votes and a turnout at 54,6%.[56] According to the amendment, the state acknowledges and defends the right to life of the unborn with due regard to the equal right of life of the mother.[57] As it turns out from the wording, the right to life of the unborn and the right to life of the mother are equally protected. But what conclusion may be drawn if the two equal rights conflict with each other?

Such a case created commotion throughout the country in 1992 (also known as "X Case"). A 14 year old girl was raped, became pregnant and intended to travel to Great Britain to have an abortion. However, the Attorney General who became aware of the situation ordered the young mother to renounce her intention. In response, the girl announced that she will commit suicide if she cannot interrupt her gravidity. The High Court declared the injunction of the Attorney General to be valid. The plaintiff appealed to the Supreme Court. The Court said that in danger of suicide ("a real and substantial risk to the life") the right to life of the mother should prevail: she is entitled to travel abroad for abortion.[58]

---

[54] *"On the other hand, any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question."* McGee v. Attorney General [1974] 1 *The Irish Reports* 284, 312.

[55] Brian GIRVIN: Social change and moral politics: the Irish constitutional referendum 1983. *Political Studies*, 34, 1986/1. 65–66.

[56] GIRVIN op. cit. 70–76.

[57] Art. 40, sec. 3 (new): *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*

[58] *"[T]he proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s. 3, sub-s. 3 of the Constitution".* Attorney General v. X [1992] 1 *The Irish Reports* 1, 53–54.

The decision mobilized both "pro-life" and "pro-choice" organisations and the Parliament rapidly prepared a constitutional amendment on the abortion issue with regard to the Supreme Court's resolution. Three proposals were put to vote in November 1992. According to the first one, abortion is prohibited unless it is necessary to save the life of the mother, but the risk of suicide is not to be considered a legitimate ground for abortion. This regulation was rejected by 65% of the votes. The second question concerned the freedom to travel for abortion and the third one the freedom to obtain information relating to abortion services lawfully available in another state. These two last proposals were adopted by 64% and 60% of the votes and with a turnout of 68%.[59] The new regulation practically means that 1) the real and substantial threat to the life of the mother is recognized as a legitimate ground for abortion (suicide is to be considered a real and substantial threat); 2) the mother cannot lawfully be prevented from travelling abroad to have an abortion; 3) the dissemination of information concerning legal abortion services in other countries cannot be restricted.[60]

Although the result was clear, the referendum didn't establish a wide-ranging consensus. In the election campaign of 1997, Fianna Fail's leader, Bertie Ahern promised to re-examine the abortion issue if he came to government. In 1999, his government presented a Green Paper which proposed an additional constitutional amendment and a detailed regulation to be submitted to referendum.[61] The "Protection of Human Life in Pregnancy Act" would have removed the threat of suicide as a legitimate ground for abortion, but it would have permitted abortion in other cases when it was necessary to prevent the death of the mother. In addition to this, the bill defined abortion as "the intentional destruction by any means of unborn human life after implantation in the womb of a woman". This practically left the door to the interpretation of permitting "morning after" pills. Besides, the bill repeated the freedom to travel abroad for abortion which was already adopted in 1992 and prescribed an imprisonment of not more than twelve years or a fine for carrying out an abortion in Ireland.[62] Finally in March 2002, Irish voters narrowly rejected the bill with 50,42% of the votes with a turnout of nearly 43%. Thus, neither the proposed amendment nor the detailed statute entered into force. Their aim to put the abortion issue to rest could not be achieved.

---

[59] The alterations were enacted as Thirteenth and Fourteenth Amendments of the Constitution.

[60] For a summary of the 1992 referendum see Steven T. Johansen: Clearly ambiguous: a visitor's view of the Irish abortion referendum of 2002. *Loyola of Los Angeles International and Comparative Law Review*, 25, 2002. 212–214.; see further Zogg op. cit. 48–49.

[61] Johansen op. cit. 215–217, for further analysis 218–241.

[62] The Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill (2001) would have amended the Constitution with a reference to the detailed regulation laid down by the Protection of Human Life in Pregnancy Act (2002). The bill also involved the latter. The Parliament passed the bill, but its entry into force was prevented by the referendum. The text of the bill is available through the following link: http://www.oireachtas.ie/documents/bills28/bills/2001/4801/b48b01d.pdf (accessed: 11 April 2016).

In 2013, the Parliament passed the "Protection of Life During Pregnancy Act".[63] The regulation lays down the preconditions and procedures of induced abortions in Ireland in line with the Supreme Court's decision adopted in the "X Case".

3.3. The Italian Republic (1981)

The Italian Constitution of 1948 provides different forms of referendum,[64] however, the most used instrument is the rejective referendum ("referendum abrogativo") which entitles 500,000 enfranchised voters or five regional councils to initiate a popular vote on the total or partial abrogation of an existing law. The referendum is valid only if the majority of enfranchised voters take part in the vote. The detailed regulation on referendums was adopted only in 1970 (Law of 25 May 1970, N° 352) and between 1974 and 2015 seventy questions were submitted to popular vote on a variety of issues (institutions and state organisation, justice, moral and social issues, environment and energy, economic and financial questions, mass media).[65]

Until the 1970s, induced abortion was punishable by an imprisonment of up to five years. In 1975, a feminist group, the "Movimento della Liberazione delle Donne Italiane" and the tiny "Partito Radicale" (Radical Party) started a signature collection campaign for the repeal of the article of the penal code which prescribed punishment for abortion. The referendum was postponed until 1978 but finally it was not held because in the same year the Parliament passed a law which complied with the request of the initiative.[66] The Law N° 194 on the social protection of motherhood and the voluntary termination of pregnancy[67] declared that the state protects human life from its inception and that the voluntary termination of the pregnancy shall not

---

[63] Number 35 of 2013. The text of the Act is available through the following link: http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf (accessed: 11 April 2016).

[64] The Constitution was adopted by the Constituent Assembly in December 1947 and it entered into effect on 1 January 1948. It involves the following direct democratic instruments: imperfect statutory initiative (art. 71), which entitles 50,000 electors to initiate legislation); rejective referendum (art. 75), see above; facultative referendum on regional statutes (art. 123), which can be initiated by one-fiftieth of the electors of the region or one-fifth of the regional council; mandatory referendum on the alteration of the borders of the regions (art. 132, merger, creation, separation of regions); facultative constitutional referendum (art. 138), which empowers 500,000 electors, five region councils or one fifth of the Parliament to submit to referendum constitutional amendments passed by both Houses.

[65] Pier Vincenzo Uleri: Italy: referendums and initiatives from the origins to the crisis of a democratic regime. In: Pier Vincenzo Uleri – Michael Gallagher (eds): *The referendum experience in Europe*. Basingstoke, Macmillan, 1996. 106–108.

[66] Paul Ginsborg: *A history of contemporary Italy: society and politics, 1943–1988*. New York, St. Martin's Griffin, 2003. 369–370.; Uleri op. cit. 112.; Pier Vincenzo Uleri: The 1987 referenda. In: Robert Leonardi – Piergiorgio Corbetta (eds.): *Italian politics: a review*. Vol. 3. London, Pinter, 1989. 158. On the referendum proceedings see further Erica DiMarco: The tides of Vatican influence in Italian reproductive matters: from abortion to assisted reproduction. *Rutgers Journal of Law and Religion*, 2009. 6–15. (online available through the following link: http://www.lawandreligion.com/sites/lawandreligion.com/files/A10S-1DiMarco.pdf, accessed: 11 April 2016).

[67] A partial English translation is available through the following link: http://www.hsph.harvard.edu/population/abortion/ITALY.abo.htm (accessed: 11 April 2016).

be a means of birth control. According to the law, the pregnant woman is entitled to have an abortion carried out during the first ninety days if childbirth or motherhood would seriously endanger her physical or mental health, with regard to her economic, social or family circumstances, to the circumstances of the conception and to the probability that the child would be born with abnormalities or malformations. The law prescribes further that the woman shall consult an appropriate counselling centre which has to help her to overcome the difficulties. In case the woman holds by her decision to terminate pregnancy, she is allowed to have an abortion carried out. After the first ninety days voluntary termination of the pregnancy can only be performed if the pregnancy or childbirth seriously endangers the life of the woman or her physical or mental health, for example if the foetus suffers from serious abnormalities or malformations. The Law also provides that health personnel may refuse to assist abortion if they have a conscientious objection, declared in advance.[68]

In 1981, as a result of popular referendum initiatives, two abrogative referendums took place on the issue. One initiative was launched by Pro-Life organisations, the "Democrazia Cristiana" (Christian-Democratic Party) and the "Movimento Sociale Italiano–Destra Nazionale" (Italian Social Movement–National Right) and was also supported by the Catholic Church. It aimed at the abolition of most legal grounds for abortion. The other was triggered by the Radical Party and tended to eliminate the restrictions. Finally, in May 1981 both proposals were refused by 68% and 88% of the votes with a turnout of nearly 80%. Although the initiative of Catholic organisations was rejected to a lesser degree than that of the Radical Party, the result was explained as the defeat of the Church, because more than two-thirds of the voters practically approved the existing regulation which allowed induced abortion.[69] Since the peak of 1982 (17,2 per 1,000), the number of abortions has been steadily declining among Italian women (in 2008: 7,2 per 1000), however, for foreigners living in Italy, it has been significantly increasing. Another trend can also be established: the number of gynaecologists who refuse to perform abortion for conscientious reasons has also been growing (in 2013 around 80%).[70] Debates over abortion issues flare up in Italy time and time again.

3.4. Concluding remarks

With regard to the institutional design, the Irish and Italian cases are different. In Ireland it was the instrument of the mandatory constitutional referendum which made

---

68 Art. 1, 4–6, 9.

69 Cf. Anna Capretti: Direkte Demokratie in Italien. In: Hermann K. Heussner – Otmar Jung (eds): *Mehr Demokratie wagen:Wolksentscheid und Bürgerentscheid: Geschichte / Praxis / Vorschläge.* München, Olzog, 2009. 166.

70 Vincenzina Santoro: A nation turns away from abortion. *Mercatornet*, 13 September 2010, http://www.mercatornet.com/articles/view/a_nation_turns_away_from_abortion; Hilary White: Nearly 80% of Italian doctors refuse abortion; MPs attack conscience rights. *LifeSiteNews.com*, 17 June 2013, http://www.lifesitenews.com/news/nearly-80-of-italian-doctors-refuse-abortion-mps-attack-conscience-rights/ (both accessed: 11 April 2016).

it necessary to make a decision by popular vote three times because the regulation of abortion issue had a constitutional character. In Italy, abortion was regulated at statutory level and this regulation was subsequently challenged by "bottom-up" initiatives. However, in both cases, it came to a first detailed regulation – to a change of the status quo – under the pressure of civic movements: in Ireland Pro-Life organisations urged on the enactment of the absolute right to life of the unborn and in Italy, Pro-Choice activists entered a campaign to repeal the ban of abortion. Subsequent referendums proved in both countries that traditional religious values are not as widely accepted as they were decades before. In 1992, Irish voters declined the Government's proposal which was in line with the standing-point of the Catholic Church and which was aimed at the exclusion of the risk of the suicide of the mother from the legitimate grounds for abortion. In Italy, the liberal regulation of 1978 was indirectly approved by the voters when they rejected the initiatives which questioned the Law N° 194 from different aspects.

Compared to the female franchise issue, the regulation of abortion raises more serious questions: while in the former case the matter is the extension of political rights to citizens who didn't possess these rights in the past, in the latter the decision concerns concurrent rights, the right to life of the unborn and the mother's right to self-determination. The extension of political rights can be realized by the decision of those who are already endowed with these rights as members of the political community; however, decision-makers have to be respectful of the general principle of equality, the requirement to treat equal groups equally. Accordingly, the decision can be simplified to the question whether female citizens are equal to male citizens in their capacity of understanding public affairs and in exerting influence on political matters. This question can be answered unanimously with "yes" or "no". In case of abortion, the question is more complex: in one respect it must be established whether the unborn is a human being, and, if the answer is positive, its right to life must be compared with the interests of the mother. The former question can hardly be the subject of free deliberation, it rather seems to be a given reality which can only be acknowledged by indirect or direct legislation. Even if it is acknowledged, the reason for deciding between the life of the unborn and that of the mother is still to be found in case they conflict with each other, but at least the choice can be unanimous: either the life of the unborn, or that of the mother must be preferred. If the unborn is not acknowledged as a full-fledged human being (as a person), but its life is still considered valuable (and this is not doubted not even by the liberal Italian regulation), further principles must be specified in order to decide in which cases and precisely what interests of the mother can be considered more important than the life of the unborn. In this respect, the variety of possibilities is large, and the risk is always present that solutions based on principles will be set aside under the influence of concrete cases. This can also reduce the chance of a satisfying and stable arrangement. From this point of view, referendums seem to be a less appropriate means for the regulation of concurrent rights.