



Quadrimestrale di teoria generale, diritto pubblico comparato  
e storia costituzionale

## REFERENDUM AS AN INSTRUMENT OF “POLICY CHANGE” ON A CRUCIAL BIOETHICAL ISSUE: A COMPARATIVE CASE STUDY ON ABORTION IN ITALY AND IRELAND\*

di Giulia Santomauro \*\*

TABLE OF CONTENTS: 1. Introductory notes: referendum as a concrete expression of popular sovereignty in democratic representative states – 2. The constitutional bases of referendum in the Italian and Irish system 3. The implications of referendum on moral questions: a comparison between two well-known “Catholic countries” – 3.a Italy: abortion as an “achieved” or an “obstructed” right? The results of the referenda for repealing the 1978 law and the impact of the clause of the conscientious objection on the access to full abortion services – 3.b The effect of referendum on the abortion laws in Ireland: from the incorporation of the “Eighth Amendment” into the Constitution to the following attempts calling for end to the ban and the 2018 vote – 4. Conclusion

### 1. Introductory notes: referendum as a concrete expression of popular sovereignty in democratic representative states

The referendum has played a key role in the democratization process of several European states and traces its origins as an active instrument of popular decision-making in the political sphere. In this sense, firstly, the referendum needs to be analysed according to its broad scope of mobilisation and participation of the general public in the political experience. In fact, most of the

\*Contributo sottoposto a *double blind peer review*.

\*\* Dottoranda di ricerca in Teoria dello Stato e Istituzioni Politiche Comparate presso l’Università degli studi di Roma La Sapienza.

literature connects the constituent features of this institution to the concepts of popular sovereignty and democracy<sup>1</sup>.

More generally, one of the characteristic of a democratic state (literally meaning, from ancient Greek, “rule by the people”) might be to have the concrete possibility to address the political direction of a representative government through a popular vote. In this perspective, the referendum would be one of the potential devices by which to put the theoretical principle of popular sovereignty into effect. This is justified by the fact that popular consultations would allow to give voice to the electorate on specific legal issues by an immediate and (most of the time) binding outcome on the political system. Thus, political representation and referendum seem to be two sides of the same puzzle, that is the diverse ways through citizens can acquire the power to take part to fundamental institutional choices.

In line with this thinking and in the attempt to understand the significance of referendum more in depth, it appears relevant to also mention the idea of direct democracy. This theory was already explored at the times of Enlightenment by Jean-Jacques Rousseau. Specifically, the French philosopher believed that a form of governance based on popular sovereignty had to involve a degree of intermediation of the political representation reduced at the lowest level possible<sup>2</sup>. Consequently, from his point of view, a law required to be approved from the “general will” or, in other words, from the citizens of a given nation reunited in a sovereign assembly, for being considered truly valid. However, this ideal model was clearly difficult to achieve in modern democratic States, where the delegation of politicians is considered essential both because of numerical and educational reasons. According to this conception, representative democracies are not simply based on the majority rule, but they are expression of the most capable individuals that are selected to speak for the general public. The crucial vehicle that allows to make effective this passage of power are political parties in which people may identify themselves and that, at the same time, identify with the State acting as the electoral majority chosen<sup>3</sup>. Still, political representation maintains key characteristics in common with

<sup>1</sup> In this regard, see, for example, LEIBHOLZ G., *La rappresentazione nella democrazia*, edizione italiana a cura di S. FORTI, Milano, 1989, 314 ss.; FROSINI T. E., *Potere costituente e sovranità popolare - Atti del convegno Costantino Mortati: Potere costituente e limiti alla revisione costituzionale*, Roma, 14 dicembre 2015.

<sup>2</sup> See ROUSSEAU J. J., *Contratto sociale*, Feltrinelli Editore, 2003.

<sup>3</sup> This opinion is expressed by LUCIANI M. (sub art. 75, La formazione delle leggi, Il referendum abrogativo, in BRANCA G., PIZZORUSSO A., *Commentario della Costituzione*, Il Foro italiano, 2005, 23) who concludes his reasoning saying that by the means of the political parties the general public becomes State. Literally, in his words “il popolo si identifica nei partiti (che, anzi, sono il popolo); i partiti si identificano con lo Stato (perché la volontà dello Stato, manifestata in Parlamento, è quella della maggioranza partitica); attraverso i partiti, per conseguenza il popolo si fa Stato”.

direct democracy, such as the principle of equality of the vote among electors by universal suffrage in diverse types of decisions that may occur in the management of public affairs. Therefore, the results of public consultations cannot be reduced at the simple sum of single votes<sup>4</sup>, but they would form an articulation of the collective identity. In this perspective, representative governments should be conceived as the vital prerequisite of referendum<sup>5</sup>, in an evolving historical continuum with some elements of direct democracy and not in complete opposition with it. In short, the possibility to assign a vote per citizen in representative democracy, as in the case of the referendum, would consent to the people to play a role in an equal measure in the policy-making process<sup>6</sup>.

Across Europe, a large spectrum of experiences of different types of referendum votes have developed throughout time, which includes plebiscites<sup>7</sup>, constitutionally prescribed and mandatory votes, and advisory or binding votes. This paper will focus on the implications of abrogative referendum in Italy and of constitutional referendum in Ireland, which have as objective, respectively, the abrogation of a decision already taken and implemented, that are an enforced law or a decree, and the repeal of a constitutional norm. More specifically, the present work will observe the effect of referendum votes on a crucial bioethical issue in these well-known “Catholic societies”, that is the voluntary interruption of pregnancy. Finally, this contribution aims at examining the fundamental developments of the legislation on abortion across time in both these democracies, seeking to highlight potential similarities and differences and to analyse the main difficulties of the current systems.

## 2. The constitutional bases of referendum in the Italian and Irish system

In general terms, the introduction of the referendum in the Western Europe has largely acted as a supplement to the cabinet government and as a provision of

---

<sup>4</sup> This view is presented by SCHMITT C. (a cura di CARACCIOLI A., *Dottrina della Costituzione*, Giuffrè, Milano, 1984) who clearly distinguishes between direct democracy and representative democracy, since the presence of the latter consequently would imply the lack of the former.

<sup>5</sup> In this perspective, see LUCIANI M. (sub art. 75, *La formazione delle leggi, Il referendum abrogativo*, 2005) who questions the definition of referendum as an instrument of direct democracy when compared to representative democracy.

<sup>6</sup> On this aspect, see BOVERO M. (*Contro il governo dei peggiori. Una grammatica della democrazia*, Editori Laterza, 2000).

<sup>7</sup> According to the scholarship, the plebiscite would be a sub-category of the referendum or a form of consultation through which the people express an opinion without a blinding effect. Examples of plebiscites can be found in the French experience, from the Revolution to the Second Empire, in the German and Italian experiences during the nazi and fascist regimes, and in other authoritarian regimes. In this respect, see SALERNO G. M., *Il referendum*, CEDAM, Padova, 1992, 2; LAVAGNA C., *Istituzioni di diritto pubblico*, Torino, UTET, 1985, 500.

increasing public participation in the political affairs. In a number of countries the mobilization of the electorate has been precisely empowered by this form of legitimacy seeking to pass fundamental institutional changes into law. In this perspective, the adoption of referendum emerged in Italy and Ireland in similar conditions, that is after, respectively, the fascism dictatorship and the British foreign control.

More in detail, in Italy, after World War II, the referendum phenomenon immediately assumed the significance of “representative democracy”, since it decreed the end of the monarchy in favor of the republic through a national popular vote by universal suffrage in 1946. The exceptional event to give the opportunity to the population to determine the form of state and to appeal the constituent assembly demonstrated that the modernized country actually recognized the role of the public in crucial political decisions. In this sense, the bases of referendum are traceable immediately in Article 1 of the Constitution of 1947, where it declares that sovereignty belongs to the people, in the forms and limits established by the Chart itself, in line with the rule of law<sup>8</sup>. Therefore, popular sovereignty constitutes the key principle not simply for popular consultations, but of the entire system, since it might be defined as the main element of the new constitutional order<sup>9</sup>. For this reason, it seemed essential to identify some constitutional institutes which were able to dispose the concrete exercise of popular sovereignty and, above all, to regulate the referendum, since a democratic state cannot be founded only on instruments of delegation<sup>10</sup>. The fact that popular sovereignty and democracy are inextricably linked in the Italian Constitution would be confirmed by reading Article 1 alongside the explicit limit set by Article 139, establishing that the republican principle cannot be modified. The idea behind this boundary was to protect those preconditions of pluralism and fundamental freedoms from potential constitutional revisions<sup>11</sup>.

---

<sup>8</sup> See MELONI G., La sovranità popolare e la nuova Costituzione italiana, in *Rass. Dir. Pubbl.*, 1949, 163.

<sup>9</sup> In this perspective, see MORTATI C. (Commento all'art. 1 Cost., in *Principi fondamentali. Commentario della Costituzione*, a cura di G. BRANCA, Bologna – Roma, 1975, 2) who defines popular sovereignty as the ultimate interpretative criteria for all the others constitutional norms.

<sup>10</sup> In this regard, see MEZZANOTTE C. (*Referendum e legislazione*, relazione presentata al Convegno annuale dell'Associazione annuale dei costituzionalisti sul tema “Democrazia maggioritaria e referendum”, Siena 3-4.11.1993, 8) who interprets the importance to empower citizens of decisional instruments as a fundamental right in modern democracies.

<sup>11</sup> In relation to that, see MEZZANOTTE C. (*Referendum e legislazione*, 9) who points out that the rigid nature of the new constitutional Chart is linked with the popular sovereignty principle as a unicum rule of legal culture.

In the light of the above, despite the Constitution created a parliamentary republic in which the legislative branch results central, Italy has become the Western country in which referendum has been held most frequently, next to Switzerland<sup>12</sup>. This is mainly due to the fact that Italy is the only democracy (with the exception of the Swiss state) where the referendum can be invoked by the people themselves. In particular, under the Article 75 of the Constitution, abrogative referendum can be requested on all laws or decree, even on individual parts, articles or clauses, if there is a demand of 500,000 voters or five regional councils. In addition, the result to be considered valid necessitates that the majority of the people entitled to vote participates to the consultation and that the majority of the votes validly cast are in favor. The types of laws excluded from the possibility of being repealed through popular vote are those dealing with financial legislation, pardons and treaty ratification. Moreover, another kind of significant restriction on the use of abrogative referendum concerns the need to receive the approval of the Constitutional Court, which has to perform a preliminary check if a request includes the aforementioned items<sup>13</sup>. Indeed, the role of the Court when judging the admissibility of referendum requests is especially relevant as established by the law no. 352/1970<sup>14</sup>, which provides specific measures on the procedure of the abrogative institute in Italy. This type of control is not limited to verify the respect of the provisions regarding the object of the referendum as embodied by the fundamental Chart, but, according to the jurisprudence of the Court, it also regards how the requests must be formulated<sup>15</sup>. In particular, the scholarship highlights the importance of the criteria of coherence, exhaustiveness and homogeneity for the referendum requests, since these conditions would be connected to the possibility to actually express the vote<sup>16</sup>. In this perspective, heterogeneous referendum requests

---

<sup>12</sup> On this point, see BOGDANOR V., in BUTLER D., RANNEY A., *Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994, 62.

<sup>13</sup> ULERI P. V. (The 1987 referenda, in *Italian Politics*, 1989, 3, 176) claims that this restriction was established in order to prevent abrogative referendum being “transformed without possibility of appeal into a distorted instrument of representative democracy, whereby essentially plebiscites or votes of confidence are proposed with regard to complex, inseparable political choices of parties or of organized groups that have adopted or supported the referendum initiatives”.

<sup>14</sup> This aspect is analysed by CARIOLA A. (*Referendum abrogativo e giudizio costituzionale: contributo allo studio di potere sovrano nell'ordinamento pluralista*, Milano, A. Giuffrè Editore, 1994).

<sup>15</sup> The Constitutional Court interprets the limits of its judgment in an extensive way in diverse sentences, such as the well-known no. 16/1978.

<sup>16</sup> On this issue, see for example CARNEVALE P., *Il «referendum» abrogativo e i limiti alla sua ammissibilità nella giurisprudenza costituzionale*, Milano, 1992.

presented on a plurality of issues that are not uniform in the meaning or clearly formulated might compromise the right to freely vote of the general public<sup>17</sup>.

In view of this, it should be thus underlined that abrogative referendum was enforced only in 1970, when the necessary implementing law no. 352/1970 aforementioned was finally enacted and the divorce vote occurred in 1974. In fact, until that time, the Christian Democracy (*Democrazia Cristiana, DC*), which was the party in clear majority in the Italian Parliament, was not willing to promote an instrument whose effect would private it of its control over the legislative process. Hence, only when the *DC* lost part of its consent and radical groups started to put pressure for repealing the divorce ban abrogative referendum was finally made in practice, evolving as a powerful weapon of reform of the Italian political system<sup>18</sup>.

In Ireland, the tradition of the referendum is firstly linked to the Constitution of the Free State of 1922, when the principles of the Westminster-style parliamentary system that had governed the country in the past were enshrined in a written document. Furthermore, despite the fact that the framers of the Free State Constitution were denied the chance of a full republic under the terms of the Anglo-Irish treaty which mandated dominion status, they sought to incorporate some elements of democratic “radicalism”. In this sense, the inclusion of the provisions of referendum and popular initiative, respectively, in Articles 47 and 48 of the Constitution<sup>19</sup>, were perceived as a way to rebalance the excessive power of the British Cabinet at the expense of the Parliament and the people<sup>20</sup>. Nonetheless, in 1929, the eight-year period, originally stipulated in Article 50 to consent to the Irish Parliament to make any amendments to the Constitution without the request of popular vote, was extended up to sixteen years, which meant that the referendum device was never used under the Free State. Then, in 1937 the fundamental law of the Free State was replaced by the modern Constitution of Ireland (*Bunreacht na*

<sup>17</sup> The need of the criterion of homogeneity of the referendum requests is analysed by MEZZANOTTE C., NANIA R. (Referendum e forma di governo in Italia, in *Democrazia e Diritto*, 1981, 72) in the sense of a general rule individuated by the Constitutional Court for allowing a free choice of the electorate; on the same point, see also BALDASSARRE A. (Il referendum abrogativo nel sistema costituzionale, in AA. VV., *Corte costituzionale e sviluppo della forma di governo in Italia*, Atti del convegno, Firenze, 1981, 79).

<sup>18</sup> However, as observed by GINSBORG P. (*A history of contemporary Italy: society and politics, 1943-1988*. Palgrave Macmillan, 2003, 350) initially the use of abrogative referendum seemed to undermine not only the power of the *DC* and the other Catholic groups, but also those of the Italian Communist Party (Partito Comunista Italiano, *PCI*) that, precisely for this reason, started to have a highly equivocal position on divorce.

<sup>19</sup> In particular, Article 48 provided the opportunity for initiative under certain conditions, and once the institution of the initiative had been established, 50,000 people could call for the enactment of a law or put the issue to a popular vote.

<sup>20</sup> In that respect, see MANNING M., Ireland, in, BUTLER D., RANNEY A., *Referendums: A comparative study of practice and theory*, Aei Pr, 1978, 193.

*bÉireann* in Irish language), drafted by Eamonn de Valera and approved by the electorate with a majority of 57% following the first Irish referendum, also called “plebiscite” because of its precious symbolic value. De facto, since only the Parliament had the power to amend the previous constitutional chart, that it could be interpreted as a sort of extensive “revision” of the already existent text, theoretically the use of the referendum was forbidden in the present case. Still, this procedure was crucial for activating the new Constitution in the perspective supported by De Valera<sup>21</sup>. In this sense, the fundamental law had the merit to remove some of the most debated provisions of the past Chart, such as the Irish Oath of Allegiance, which required that members of the Lower House of the Irish Parliament and Senators swore before taking their seats. However, although the referendum was permitted in two broad cases, the 1937 Constitution seemed to give much less scope for the exercise of this instrument popular sovereignty than the Free State had done<sup>22</sup>. Specifically, according to Article 46, any amend to the Constitution must ratified through referendum, which needs to be approved by a simple majority of those voting and then signed by the president to be promulgated into law. More in detail, the process of amendment involves two phases: in the first, the parliament must reach an agreement on the referendum request to be presented to the citizens; in the second, the people have the possibility to vote the potential change, but they do not have the right to initiate any proposal. In addition, the rules for holding a referendum are set out by law, especially by the Referendum Act of 1994<sup>23</sup>. Differently, rejective referendums to repeal ordinary legislation are regulated by Article 27 of the Constitution, which prescribes that the president has the authority to call a referendum in certain circumstances, but this provision has never been used<sup>24</sup>. In any case, the apparent narrow basis for the holding of referendums, as stated by Article 46 of the Irish Constitution, has proved to be a sufficient ground for consulting the people on quite a large number of issues<sup>25</sup>. This is probably attributable to the presence of specific views about a range of fundamental matters (from basic nationalist principles, sovereignty, religion and moral issues to the

<sup>21</sup> In this respect, see GALLAGHER M., Referendum e democrazia nella Repubblica di Irlanda, in Caciagli M., Uleri P. V. (a cura di), *Democrazie e Referendum*, Editori Laterza, 1994, p. 182.

<sup>22</sup> On this point, see BOGDANOR V., Western Europe, in *Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994, 93.

<sup>23</sup> Moreover, all voters have a card in which it is indicated where to vote and a short description of the proposal at issue. Similarly to Italy, then citizens vote either YES or NO on the ballot paper.

<sup>24</sup> In particular, this would be the case in which a majority in the upper house of the Irish Parliament (the *Seanad*), together with a minority in the lower house (the *Dail*) can seek a referendum on any non-constitutional bill that the latter has approved but the former has rejected. The president, at his or her discretion, then decides within ten days whether the bill contains “a proposal of such national importance that the will of the people thereon ought to be ascertained”.

<sup>25</sup> On this regard, see O'MAHONY J., The Irish Referendum Experience, in *Representation*, 1998, 35:4, 227.

details of the electoral system) in the fundamental law itself, which have consequently raised several constitutional questions, that, unlike in other European countries where ordinary legislation will suffice, must be resolved by referendum<sup>26</sup>.

Therefore, although referendum occurs more often in Italy than in Ireland, it surely plays a significant part in both these democracies, especially if its use is compared to the majority of the other Western countries where it is definitely less practiced. To this end, the object of the present study is to examine the effect of popular consultation on the legislative and constitutional changes of a controversial question such as abortion.

### **3. The implications of referendum on moral questions: a comparison between two well-known “Catholic countries”**

The reason why the present work will study the case of abortion in Italy and Ireland is connected to the fact that, as outlined by the existing scholarship, the referendums that have caused most polemics in these democracies precisely concerned moral issues<sup>27</sup>.

In fact, the lawfulness of the circumstances in which women can obtain a termination of pregnancy might be surely considered a subject of divisive ethical, religious and political debate in many European democracies. But this matter has caused extensive discussions especially in countries where the influence of religion on society is clearly persuasive, such as those where Catholic church is predominant, like in the Italian and Irish states.

Ireland, in particular, has a unique legal approach to reproductive health rights. The importance of the catholic conscious is firstly guaranteed at the constitutional level in the articles on fundamental rights (Arts 40 to 44<sup>28</sup>), in addition to the preamble, which are considered to be a reflection of the importance of God and the tenets of Catholicism in Irish society. In this sense, Ireland was the last country in Europe to legalize contraception, while reproductive health services such as in-vitro

---

<sup>26</sup> This point of view is expressed by SINNOTT R., *Irish Voters Decide*, Manchester University Press, 1995, 219.

<sup>27</sup> In that respect, see BUTLER D., RANNEY A., *Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994, 81.

<sup>28</sup> More specifically, Art. 40 deals with personal rights, Art. 41 deals with rights in relation to the family, Art. 42 deals with rights in relation to education, Art. 43 deals with private property rights and Art. 43 outlines one's rights in relation to religion. In particular, the insertion of Art. 40.3.3, which concerns the right to life to the unborn and will be analyzed in details in section 3.b, has been strongly supported by the Catholic Church in Ireland and by the Vatican for their explicit position against abortion. On this point, see MILLS E., MC CONVILL J., *The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience*, in *Eur. J.L. Reform* 4, 2002, 483.

fertilization (I.V.F.) remain unregulated. Moreover, from the 1980s onwards, highly divisive disputes on terminations ban have mainly focused on the Constitution, the law and the moral-legal aspects of abortion, rather than the medical-health or indeed women's rights aspects<sup>29</sup>.

In Italy, the Constitution defines the state as laic and pluralist and the loss stature of the Catholicism as national religion has been formalized in 1984<sup>30</sup>. However, the catholic doctrine has always played a relevant part at the political and social level. In this sense, the Vatican's position has been often taken into consideration in the public affairs, especially when the Christian Democratic Party has been in government for more than 30 years. For this reason, despite the fall of the DC within the party spectrum, the decision to amend the Italian law to permit abortions has been complex and its practical application is often still interpreted from a religious and ideological point of view<sup>31</sup>.

Hence, this comparative case study aspires to highlight the arguments that have motived the referendums on abortion in these countries, dedicating particular attention to the different results that the votes have produced on the respective legislative framework or Constitution.

### **3.a Italy: abortion as an “achieved” or an “obstructed” right? The results of the referenda for repealing the 1978 law and the impact of the clause of the conscientious objection on the access to full abortion services**

Prior to legalize terminations, the Italian legal framework on the matter was regulated by Article 546 of the 1930 Italian Penal Code, which criminalized both the person performing an abortion and the woman who consented to have one as a “crime against the integrity and health of the race”, punished with two to five years' imprisonment. Moreover, in the same section of the code it was stated that the dissemination of all information regarding birth control and sterilization were

<sup>29</sup> This opinion is advanced by BACIK I., Legislating for Article 40.3.3, in *Irish Journal of Legal Studies*, 2013, 3:3.

<sup>30</sup> As stated by the Modifications to the Lateran Concord stipulated by the Holy See and the Italian Republic, at art. I “the [Italian] State and the Catholic Church are each in their own way independent and sovereign”. The change in status was attributed to the “process of political and social change that has occurred in Italy over the last decades”. For a full analysis of the issue, see DIMARCO E., The tides of Vatican influence in Italian reproductive matters: From abortion to assisted reproduction, in *Rutgers JL & Religion* 10, 2009.

<sup>31</sup> This aspect is particularly stressed by D'AMICO M., Le problematiche relative alla procreazione medicalmente assistita e all'interruzione volontaria di gravidanza in D'AMICO M., LIBERALI B., *Procreazione medicalmente assistita e interruzione volontaria della gravidanza: problematiche applicative e prospettive future*, Napoli, Edizioni scientifiche italiane, 2016, 11.

forbidden and penalties from imprisonment to heavy fines were imposed against those who would have break the law<sup>32</sup>.

Throughout 1970s there have been a set of attempts that aimed at, on the one hand, a new criminalization of abortion supported by pro-life groups, and, on the other, the full legalization of terminations advocated by some leftist political parties within the Italian Parliament and a growing feminist movement coming from the society.

In particular, in 1971 the Italian Supreme Court repealed the ban on contraceptive information, but still the availability at family planning services was not achieved until the middle of the decade or later. In this regard, in 1975 the government decided to pass a bill establishing the installation of family advice centers (*consulitori familiari*) with the object to offer contraceptive information and services in every Italian municipality. In addition, the Italian Constitutional Court through the decision no. 27/1975 declared illegitimate the penal punishment of abortion as regulated by Article 546 of the Penal Code, which was modified according to the principle that the mother's right to health and life outweighs that of the fetus. In this respect, the Court established that this prevision proved to be unconstitutional in the part related to the criminalization of the interruption of pregnancy even in the case of serious physical or psychological threat to the life of the mother that could not be avoided by other means. The decision has been mainly based on the attempt to seek a balance between two constitutional principles, that are "the defense of the unborn", as guaranteed by Article 31.2, in addition to the more general "inviolable rights of every human being", as guaranteed by Article 2, and the "right to the life and the health of the mother", as guaranteed by Article 32.2 of the Italian Constitution<sup>33</sup>. More in detail, the Court declared that "no provision ... for the interruption of pregnancy when continuing gestation might cause serious and medically certifiable danger to the mother's health". This episode

---

<sup>32</sup> In more detail, Article 552 and Article 553 of the Code criminalized the act of sterilizing and the act of sponsoring sterilization, declaring, respectively, that: "Chiunque compie, su persona dell'uno o dell'altro sesso, col consenso di questa, atti diretti a renderla impotente alla procreazione è punito con la reclusione da sei mesi a due anni e con la multa da lire cinquantamila a duecentomila. Alla stessa pena soggiace chi ha consentito al compimento di tali atti sulla propria persona."; and that: "Chiunque pubblicamente incita a pratiche contro la procreazione o fa propaganda a favore di esse è punito con la reclusione fino a un anno o con la multa fino a lire quattrocentomila. Tali pene si applicano congiuntamente se il fatto è commesso a scopo di lucro".

<sup>33</sup> For a full comment on the decision no. 27/1975 of the Constitutional Court, see D'ALESSIO R., L'aborto nella prospettiva della Corte Costituzionale, in *Giurisprudenza Costituzionale*, 1975, 538 ss.

favored further steps forward the full legalization of abortion, primarily advocated by a certain part of the Italian political spectrum and by the electorate<sup>34</sup>.

In 1976 this general climate of change culminated in the proposal of a popular referendum presented by the Radical Party (*Partito Radicale, PR*)<sup>35</sup>, legitimized by the collection of one-half million signatures. However, the vote was postponed for two years because of the party in power was brought down and new elections were called. After the installation of a new government, which was the result of an "historical compromise" between the Christian Democracy Party and the Italian Communist Party (*Partito Comunista Italiano, PCI*), several bills on abortion were presented to the Parliament. Finally, in 1978 the law no. 174 passed<sup>36</sup>, introducing a new liberalized legal framework on abortion. According to the law, abortion is available to women who have obtained a certificate of permission by a private doctor, at a family advice center or a government hospital, through which, after a seven-day waiting period, they can access to health facility for the termination of a pregnancy in an approved health structure. Furthermore, the reasons considered legitimate for seeking an abortion by the first-trimester include the possibility of an abnormal fetus, a pregnancy as the result of rape or incest and economic, health or personal issues. Differently, second-trimester terminations are considered lawful only in the case of a serious threat to the mother's life or physical health or a professional diagnosis of fetal abnormality. Abortions can be also requested by women under the age of 18, but only with the consent of a parent or guardian, or of a magistrate acting in loco parentis.

Nevertheless, at the beginning of 1980s some groups sought to repeal the law no. 174/1978 through the request of abrogative referendums. In this respect, in 1981 three different popular votes have been proposed with two main opposite objectives, that are the attempt to further liberalize the legal framework on the matter and those to reintegrate the penalization of abortion. Specifically, the first, nominated the "radical proposal", was presented by the *RP* and aimed at eliminating all the sections which in any way obstructed a woman's access to abortion, namely

---

<sup>34</sup> On this point, FILICORI M. and FLAMIGNI C. (Legal abortion in Italy, 1978-1979, in *Family planning perspectives*, 1981, 13.5: 228 ss.) report that the results of a national opinion poll, taken in March 1976, precisely showed that most Italians would have voted to abolish the country's strict abortion law.

<sup>35</sup> It seems interesting to note that at the end of the 1970s the Italian Radical Party, on the basis of a renewed electoral success, proposed a set of popular referenda on different issues in addition to abortion, such as those in favour of divorce, legalization of light drugs or against nuclear power and the state financing of parties. In this sense, the *PR* has surely the merit to have given expression to the transformation of the Italian society towards more liberal behaviours and ideas in the post-war period.

<sup>36</sup> For examining the full text of the law no. 194/1978, see the following link published by the Italian Ministry of Health: [http://www.salute.gov.it/imgs/c\\_17\\_normativa\\_845\\_allegato.pdf](http://www.salute.gov.it/imgs/c_17_normativa_845_allegato.pdf).

the limitations on gestational age, on physician consent, on approved government or private facilities, on minors and on the mentally incompetent<sup>37</sup>. The second, sponsored by the Pro-Life Movement (*Movimento per la Vita, MpV*), was called the “moderate proposal” and aspired to permit terminations only when the woman's physical health or her life were at risk, returning, in this way, a sort of status quo ante. The third, recommended by the *MvP* as well, would have made abortion illegal under any circumstances. However, this has been declared inadmissible by the Constitutional Court through the decision no. 26/1981 and it has been thus never voted by the Italian electorate. The Court justified its choice reaffirming that the core of the 1978 law cannot be repealed without also altering the effectiveness of the constitutional values involved<sup>38</sup>. In this sense, the “radical proposal” was judged as constitutionally admissible since the potential abrogation of those provisions would not have affected the fundamental principles protected by the legislative framework on the matter<sup>39</sup>. But despite the positive predictions<sup>40</sup>, both the so-called radical and moderate proposals, voted in the middle of May 1981, were rejected, respectively, by a vote of 89% and of over 68% of the population, leaving the content of the legislation on abortion unvaried. Therefore, these results seem to confirm the willingness of the Italian electorate to preserve the 1978 law against the several attempts of the Church and of right-wing political parties to persuade them otherwise.

In 1997 the *RP* presented a set of abrogative referenda which have been validated by the Constitutional Court and voted by the electorate<sup>41</sup>, with the exception of its new proposal regarding the repeal of the 1978 law. In fact, even though the content of the proposal was the same of those already submitted and approved by the Court in 1981, on this occasion the bill has been declared unconstitutional through the

<sup>37</sup> However, it should be underlined that this “radical proposal” would not have deleted the conscience clause from the 1978 law, which will be then analyzed in further details in this section.

<sup>38</sup> On this point, see BARTOLE S. (*Ammonimenti e consigli nuovi in materia di referendum e di aborto*, in *Giurisprudenza costituzionale*, 1981, 140) who makes also reference to the aforementioned decision no. 27/1975 in which the Constitutional Court stated that the right to the life and to the health of a person already alive (the woman) cannot be compared to the protection of the unborn.

<sup>39</sup> In this respect, see LIBERALI B., *Una nuova censura (nuovamente respinta) nei confronti della l. n. 194 del 1978*, in *Biodiritto*, 2012.

<sup>40</sup> FILICORI M. and FLAMIGNI C. (*Legal abortion in Italy, 1978-1979*, in *Family planning perspectives*, 1981, 13,5, 231) note that the “moderate proposal” was expected to gain majority acceptance since the strong support for it showed by the Pope John Paul II, upon whom an assassination attempt was made five days before the referendum.

<sup>41</sup> Specifically, on 15 June 1997 Italian voters were asked whether they approved six proposals repealing laws on a wide range of matters including privatisation, conscientious objectors, hunting, the judiciary and journalists and the abolition of the Ministry of Agrarian Politics. However, despite all the proposals were approved by voters, the low voter turnout (around 30%) was below the compulsory 50% threshold and, therefore, the results were invalidated.

decision no. 35/1997. Specifically, the Court denied the possibility to abrogate some of the articles of the 1978 law addressed toward a greater liberalization. As a consequence of this decision, a new balance of the different contrasting principles involved arose and the rights of the unborn become reinforced<sup>42</sup>. In particular, the Court explained its judgement making reference to the centrality of Article 1 of the 1978 law, which establishes the need to protect the human life for its beginning, and underlining the crucial importance of conscious and responsible procreation measures and of the maternity value<sup>43</sup>.

In addition to the issues related to the potential repeal of the Italian legislation on abortion through popular vote, a crucial aspect of the matter concerns the concrete implications deriving from the possibility to exercise the conscientious objection. This right, as explicitly guaranteed by Article 9 of the law no. 194/1978, consists in the opportunity for the medical staff (including doctors, nurses, anaesthesiologists and other health aides) to refuse to take part to all the activities that directly provoke a voluntary interruption of pregnancy if this procedure is against to personal and moral beliefs. Conscientious objectors require to communicate their choice by one month of their medical license or of their first appointment at the health structure where they are employed. However, the qualified health personnel is still obliged to provide assistance to women who seek a termination during all the phases before and after the surgery. The conscientious objection is also considered inadmissible if the woman's health is in jeopardy and an urgent abortion is required to save her life. Moreover, the 1978 law establishes that all the authorized health services must, in any case, to assure the access to safe abortions, protecting, in this way, both the right of women to the interruption of pregnancy by lawful terms and the right to the conscientious objection of the doctors. Precisely for this reason, the Italian regions should oversee the actual fulfilment of the law at their territorial level and all participating facilities are committed to submit quarterly service reports to the regional health authority of reference.

In the light of these provisions, most literature has underlined the difficulty to find an effective compromise between the two aforementioned rights in practical terms. In this sense, previous scholars stressed the lack of clarity of specific conditions under which the conscientious objection might be permitted and the

---

<sup>42</sup> This interpretation is also highlighted by D'AMICO M., Le problematiche relative alla procreazione medicalmente assistita e all'interruzione volontaria di gravidanza in D'AMICO M., LIBERALI B., *Procreazione medicalmente assistita e interruzione volontaria della gravidanza: problematiche applicative e prospettive future*, Napoli, Edizioni scientifiche italiane, 2016, 35.

<sup>43</sup> The right to the life of the new-born and to the physical and psychological wealth of the mother are further guaranteed by the Declaration of the Rights of the Child, adopted by the United Nations in 1959.

scarcity of valid instruments to regulate the phenomenon<sup>44</sup>. In fact, the prospect to practice the conscientious clause without clear limitations regulated by the law creates a problem of unevenly distribution of abortion health services throughout Italy. In this respect, the data<sup>45</sup> show that the percentage of conscientious objectors generally constitutes the majority of the gynaecologists in the country and that, especially in the south of Italy, there are still difficulties for obtaining legal first-trimester abortion. Consequently, this implies a discrimination in the fulfilment of abortion rights and obvious inequities among women belonging to different regions of Italy in the access to the health facilities that should be available to perform terminations. The discrimination would result even more serious since women that are usually not able to move to another territory for obtaining an abortion are those with economic difficulties and, therefore, in need of further protection<sup>46</sup>. As suggested by some analyses, this situation might be also the cause of an increasing number of clandestine abortions, officially recorded as potential "miscarriage"<sup>47</sup>.

In this respect, two collective complaints have been submitted to the European Committee of Social Rights of the Council of Europe (ECSR) on the application of the 1978 law<sup>48</sup>. In the complaint no. 87/2012, presented by the international non-governmental organization *International Planned Parenthood Federation European Network (IPPF EN)*, the ECSR has confirmed that Italy would have not properly guaranteed the women's rights to the access to full abortion services. The main reason of that would be the dearth of public measures that compensate for the excessive number of conscientious objectors. In particular, the ECSR, making reference to the right to health recognized by Article 11 of the European Social Charter, stated that this principle needs to be assured not only in theoretical and

<sup>44</sup> On this point, see D'ATENA A., Commento all'art. 9, in BIANCA C. M., BUSNELLI F. D. (a cura di), *Commentario alla l. 22 maggio 1978, n. 194*, in *Le nuove leggi civili commentate*, 1978, I, 1660 ss.

<sup>45</sup> The data are taken from the Report 2016 on the fulfilment of the law no. 194/1978 issued from the Italian Ministry of Health and submitted to the Italian Parliament on 29 December 2017. According to the analysis, in 2016 the percentage of gynecologists that are employed in health structures providing abortion services and that are recorded as conscientious objectors is 63.9 in the Northern Italy, 70.1 in Central Italy and 83.5 in Southern Italy. The most alarming data regard the regions of Molise and Campania, where in 2015 less than 30% of the participating facilities make available abortion services to women. For the full Report, see online *Relazione del Ministro della Salute sull'attuazione della Legge 194/78 per la tutela sociale della maternità e per l'interruzione volontaria di gravidanza - dati definitivi 2016*, at: <http://www.salute.gov.it>.

<sup>46</sup> This perspective is underlined by D'AMICO M., Le problematiche relative alla procreazione medicalmente assistita e all'interruzione volontaria di gravidanza in D'AMICO M., LIBERALI B., *Procreazione medicalmente assistita e interruzione volontaria della gravidanza: problematiche applicative e prospettive future*, Napoli, Edizioni scientifiche italiane, 2016, p. 41.

<sup>47</sup> In this sense, see CARMINATI A., La decisione del Comitato europeo dei diritti sociali richiama l'Italia ad una corretta applicazione della legge 194 del 1978, in *Osservatorio Costituzionale AIC*, 2014, 12.

<sup>48</sup> For a recent comment on these two collective complaints, see BUSATTA L., Insolubili aporie e responsabilità del SSN. Obiezione di coscienza e garanzia dei servizi per le interruzioni volontarie di gravidanza, in *Rivista AIC*, 2017, 3.

abstract terms but also by a reliable procedural framework throughout the whole territory of Italy. In this sense, the Committee stressed the importance of the “time factor” in providing an efficient abortion service<sup>49</sup>, since the law establishes fixed terms for obtaining lawful terminations. Moreover, the ECSR also confirms the violation of the principle of non-discrimination, as provided by part V Article E of the Social Charter. In more detail, the fact that there are still inequities in access to terminations services would create a form of indirect discrimination against those women who cannot fully enjoy their abortion rights because they live in areas where there is an higher percentage of conscientious objectors<sup>50</sup>. The ECSR also reveals that, despite the *IPPF EN* claimed for the inadequate application of the 1978 law only through unofficial sources<sup>51</sup>, still the Italian Government was not able to provide any other useful information to contest the situation.<sup>52</sup>

Then, the complaint no. 91/2013, requested by the Italian Confederation of Labour (*Confederazione Italiana del Lavoro*), in addition to be based on the need to better assure the right to health of women, referred to the labour rights of the doctors who are not conscientious objectors and to the principle of non-discrimination. In fact, since the percentage of objectors clearly constitutes a majority in Italy, the other category of doctors would suffer a form of disadvantage in terms of excessive workload and career prospects. The Committee confirmed the presence of psychological harassment experienced by the doctors who do not practice conscientious objection and the shortage of useful means to face the problem. Therefore, as in the case of the complaint no. 87/2012, the ECSR recognized the legitimacy of the right to conscientious objection under the 1978 law, but it put in emphasis the insufficiency of proper solutions proposed by the Italian government to manage the situation.

---

<sup>49</sup> This factor is observed by BUSATTA L., *Diritti Individuali e intervento pubblico nell'interruzione volontaria di gravidanza: percorsi e soluzioni per la gestione del dibattito in una prospettiva comparata*, in D'AMICO M., LIBERALI B., *Procreazione medicalmente assistita e interruzione volontaria della gravidanza: problematiche applicative e prospettive future*, Napoli, Edizioni scientifiche italiane, 2016, 160.

<sup>50</sup> On this point, see CARMINATI A., La decisione del Comitato europeo dei diritti sociali richiama l'Italia ad una corretta applicazione della legge 194 del 1978, in *Osservatorio Costituzionale AIC*, 2014, 14.

<sup>51</sup> In particular, the *IPPF EN* submitted to the European Committee the data provided by an Italian association called *Libera Associazione Italiana Ginecologi per l'Attuazione della legge 194 (LAIGA)*, which were partially outdated and mainly based on face-to-face interviews or previous cases reported by the media, trade unions or family advice centers.

<sup>52</sup> According to CARMINATI A. (La decisione del Comitato europeo dei diritti sociali richiama l'Italia ad una corretta applicazione della legge 194 del 1978, in *Osservatorio Costituzionale AIC*, 2014, 13), this lack of appropriate monitoring would be particularly serious in the light of the high number of conscientious objectors recorded in Italy. In fact, the alarming data about the percentage of doctors who do not practice interruptions of pregnancy and the concrete possibility to not have full abortion services throughout the country should incentive the regional authorities to realize constant reports on the issue.

In conclusion, although the use of the abrogative referendum has represented an important instrument to verify whether the Italian electorate approved the current status of abortion rights in the country or not, at the present moment the central issue on the subject relates more to other types of problems. Specifically, as highlighted by the doctrine and the jurisprudence, the crucial point of the question would concern the need of a fair balance between the right to have an interruption of pregnancy by legitimate terms and the right to the conscious objection if requested<sup>53</sup>. The matter would be particularly complex since these two rights are not only protected by the law, but they are also supported by relevant constitutional principles, namely the individual freedom of personal and moral beliefs and the right to health. To this end, the scholarship has proposed different types of solutions, such as the possibility to pay an allowance to the doctors who are not conscientious objectors or to open internal competitions only reserved to the members of the health staff that perform abortions<sup>54</sup>. In fact, these mechanisms might be useful in order to, respectively, compensate for potential extra workload or inconvenience and less chances of promotion, but they would need to be adequately integrated in the current system. Indeed, correctional facilities were already elaborated at the times of the proposal of a regulation on abortion, precisely with the aim to protect the purpose of the subsequent law no. 194/1978<sup>55</sup>. However, the abolition of the measure according to which local health centres had to publish the list of objectors, initially introduced in the draft law to avoid change of moral orientation by doctors, also removed the chance to be more informed for women on the medical structures available for abortion<sup>56</sup>. Therefore, it seems clear that now the main challenge for the Italian system remains to seek a solution flexible enough to adjust, at the same time, to the evolution of the society and to the current legislative and constitutional framework.

---

<sup>53</sup> The crucial importance to find a fair balance among the different contrasting values concerning the issue of abortion has been also highlighted by the European Court of Human Rights. In particular, the ECHR in the case *P & S v. Poland*, par. 106, declares that the States have the duty to “organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation”. This interpretation has been then also adopted by the ECSR in the aforementioned case *International Planned Parenthood Federation European Network v. Italy*.

<sup>54</sup> These potential solutions are mentioned by Viola L., Obiezione di coscienza ‘di massa’ e diritto amministrativo, in [www.federalismi.it](http://www.federalismi.it), 2014.

<sup>55</sup> In this regard, see the report of the IV and XIV Commissions of the Board of Justice and Health of the Italian Chamber of Deputies reunited for discussing the legislative proposal on abortion on 9 June 1977, pp. 4-5, at: [http://legislature.camera.it/\\_dati/leg07/lavori/stampati/pdf/15240002.pdf](http://legislature.camera.it/_dati/leg07/lavori/stampati/pdf/15240002.pdf).

<sup>56</sup> On this, see DOMENICI I. (Obiezione di coscienza e aborto: prospettive comparate, in Rivista di BioDiritto, 2018, 3) who analyses the current challenges of conscious objection in Italy also from a comparative law perspective.

### 3.b The effect of referendum on the abortion laws in Ireland: from the incorporation of the “Eighth Amendment” into the Constitution to the following attempts calling for end to the ban and the 2018 vote

Unlike the Italian referendums of 1981, which had as object a further liberation or restriction of the abortion rights, in the Irish case a real possibility to make legal the interruption of pregnancy has never been seriously considered until very recent times. In fact, earlier than any referendum, when Ireland was under the Great Britain's dominance<sup>57</sup>, abortion was already unlawful according to the English common law, which considered this practice as a misdemeanour. In more detail, in 1861 the Irish Parliament passed the “Offences against the Person Act”, which declared in section 582 and section 593 that the act of performing or undergoing an abortion was a felony, punishable by between three years and life imprisonment<sup>58</sup>. Although the abortion ban was embodied only in the ordinary law but not in the Constitution, after the 1861 Act there has not been any prospect to legalize it neither by the Ireland's Parliament nor by the Supreme Court. Indeed, the 1861 Act was reaffirmed by the Irish legislature in the “Health (Family Planning) Act” of 1979<sup>59</sup>. During the 1960s and 1970s, while Ireland maintained a very conservative abortion policy, in 1967 Great Britain approved the “Abortion Act”, legalizing abortions performed during the first trimester if the pregnancy would be harmful to the physical or mental health of the woman or her family.

Then, in 1973 Ireland joined the European Economic Community, but conservative groups interpreted this as a further threat to the restrictive abortion regime of the country. According to their view, to be part of the Community and to incorporate the right to freedom of movement between member states implied to leave the door open to Ireland's European neighbours, where most of whom had much more liberal abortion regimes<sup>60</sup>. This event, combined with the approval of liberal abortion laws in Great Britain, led to an intensified campaign by anti-abortionist and to the proposal of a first abrogative referendum on the matter.

<sup>57</sup> Historically, Irish law practically consisted in the law of the English Parliament until the creation of the Irish Free State in 1922.

<sup>58</sup> More generally, Section 58 makes it an offence for a pregnant woman unlawfully to “attempt to procure a miscarriage”, i.e. to undergo an abortion, while section 59 criminalises anyone who assists a woman in having an abortion.

<sup>59</sup> On this point, see DOOLAN B., *Constitutional law and constitutional rights in Ireland*, Gill & Macmillan, 1994.

<sup>60</sup> Also for this reason, as a condition of becoming a Community member, Ireland was required to diminish part of its sovereignty by amending the Constitution to state that its own laws would be subordinate to Community law. In this respect, see MILLS E., MC CONVILL J., The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience, in *Eur. J.L. Reform* 4, 2002, 482.

In particular, in 1983 a “Pro-Life Amendment”, presented by an extra parliamentary pressure group and designed to ensure that abortion could not be introduced either by law or by a decision of the courts, was passed by a majority of about two to one<sup>61</sup>. This vote resulted in the introduction of the so called “Eighth Amendment” in the Constitution of Ireland, which consists in the recognition of the right to life of the mother same as of her foetus. In this way, a constitutional ban for any government willing to introduce legislation which allows for terminations in the womb was officially approved. Prior to the entry into force of the Eight Amendment, the Irish Constitution did not contain any specific provision on abortion. Anyway, it should be underlined that the lack of discussion of this issue in pre-Eight Amendment abortion law was already been interpreted by some judges as implying the absolute right to life, including both the right to be born and the right to be protected against all threats directed against one’s existence<sup>62</sup>. However, the result of this first referendum legitimated the insertion of a specific additional text to the renewed Article 40.3.3° of the Irish Constitution, stating that:

“The State acknowledge 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.”

In this way, the amendment to Article 40 permitted to constitutionally entrench the rights of the unborn and ensured that these were not jeopardized by the Irish judiciary again. As a consequence, the use of (a further) referendum de facto became the only way to modify or fully abrogate the criminalization of abortion in Ireland, putting the electorate in the central position to potentially shape the content of the Constitution on a serious ethical issue.

The occasion has presented again in 1992, when three new referenda regarding constitutional amendments on abortion have been announced after the resolution of the so-called “X case”, that is the case of *Attorney General v. X and Others*<sup>63</sup>. X was a 14-year-old girl who became pregnant as a result of a rape committed by a 41-year-old married man, father of her best friend. X and her family sought to travel to Britain for an interruption of pregnancy, since she had threatened to commit suicide

<sup>61</sup> For further insights on the antiabortion defence of the restrictions introduced by the 1861 Act, see HESKETH T., *The Second Partitioning of Ireland?: the abortion referendum of 1983*, Brandsma Books, 1990.

<sup>62</sup> For more details on judgements prior to the Eight Amendment and the common interpretation of the question of abortion in those years, see KINGSTON J., BACIK I., WHELAN A., *Abortion and the Law*, Dublin, Round Hall Sweet & Maxwell, 1997, 3.

<sup>63</sup> The judgment can be consulted on-line at: <http://www.bailii.org/ie/cases/IESC/1992/1.html>.

if she was not allowed to do so. Nevertheless, before the abortion could take place, the Irish police force (*the Garda*) informed them that the Attorney General had obtained an interim injunction from the High Court ordering the girl to return to Ireland and to impede to have the pregnancy terminated. The decision of the Irish High Court to grant the injunction was based on an interpretation of Article 40.3.3 of the Constitution in the purpose to evenly balance the rights of the unborn child and the mother<sup>64</sup>. Predictably, two weeks after the High Court's decision was appealed to the Irish Supreme Court, which surprisingly upheld the appeal and ordered that the injunction be lifted. Specifically, the Supreme Court concluded that the Constitution would allow to go abroad for the purpose of obtaining an abortion when there is “a real and substantial risk” to the life of the mother that could be avoided only through a termination. Therefore, although the Court had not given any conclusive ruling on whether a suicidal woman had the power to decide to travel abroad to obtain an abortion or not, the historic decision on the “X case” implied that this right could be actually permitted in certain exceptional circumstances<sup>65</sup>.

This critical episode intensified the abortion debate and generated worldwide protests, provoking two opposing reactions in the Irish society. On the one hand, anti-abortionist supporters and Catholic groups sought an absolute ban on abortion, on the other, the pro-choice opponents strongly encouraged a shift toward a more liberal position or, at a minimum, to maintain the lawfulness of abortion in circumstances such as those in the “X case”. Moreover, the need to require further amendments was emphasized by the fact that the Supreme Court’s decision did not resolve diverse types of problems relevant to the specific conditions in which an abortion abroad was justified by the law<sup>66</sup>.

---

<sup>64</sup> In particular, as explained by MILLS E., MC CONVILL J. (The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience, in *Eur. J.L. Reform* 4, 2002, p. 484.) “the High Court determined that a decision other than to grant the injunction would undermine the rights of the unborn given that the risk that the girl might have committed suicide if the injunction was granted was far lower than the certainty that the unborn child's life would be terminated if the order was not made”.

<sup>65</sup> This implication is highlighted by BUTLER D., RANNEY A., *Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994, 83.

<sup>66</sup> In particular, KENNELLY B. AND WARD E. (*The abortion referendums*, in GALLAGHER M., LAVER M., *How Ireland Voted 1992*, Dublin: Folens, Limerick: PSAI Press, 1993, 116) mention a set of the most debated legal questions after the “X” case, from which the following 1992 referendums would have then taken place. Firstly, *could Irish women who were not suicidal be prevented from travelling abroad on the basis that they might have an abortion abroad?* Secondly, *if abortion were to be available in certain circumstances in Ireland, how could this be reconciled with earlier Supreme Court decisions which banned the distribution of information about abortion?* Thirdly, *if abortion were to be available when there was a “real and substantial risk to the life of the mother”, who would determine when such a risk existed or whether a pregnant woman was suicidal?* Fourthly, *how would the Supreme Court decision affect the ratification of the Maastricht Treaty in Ireland?* In fact, with

Specifically, the first 1992 referendum concerned the incorporation of the “Twelfth amendment” in the Irish Constitution, then termed “right to life amendment”. This proposal, which restricted even more the availability of abortion stating that the risk of suicide should not be considered a sufficient reason to legally allow the interruption of pregnancy, was defeated. The second referendum was about the possibility to include the “Thirteenth amendment” relating to the right to freedom of travel outside the State to have an abortion. In practice, this way of act was already clandestinely practiced in massive numbers by Irish women, which used to choose Britain as favourite destination to terminate their unwanted pregnancies<sup>67</sup> and, possibly, precisely for this reason, the proposal was passed. Also in the case of the third referendum, regarding the introduction of the “Fourteenth amendment” touching the right of people to obtain information on services lawfully available in other States, which was considered illicit since the 1983 vote, the “Yes” vote won<sup>68</sup>.

Following these amendments, the “Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995”<sup>69</sup> came into force, providing for the conditions under which information on abortion may be provided. It is relevant to point out that the 1995 Act does not oblige anyone to inform on the possibility of obtaining an abortion abroad if desired or necessary, but, at the same time, it lays down severe rules for people and agencies who wish to give this type of general information. Indeed, the 1995 Act prohibits to “advocate or promote” terminations, but it does not properly define this way of acting, making the status of abortion even more confused and essentially creating a climate of censure on the matter<sup>70</sup>.

Hence, the results of the 1992 votes in part indicate that forcing Irish people to confront the issue of abortion in a much more personal way, thanks to the “X case”, than the abstract terms of the 1983 debate, has had a persuasive impact on the electorate behaviour. In this sense, it might be said that the 1992 referendums

---

reference to this point, it necessary to specify that according to the Protocol 17 of the Maastricht Treaty “nothing in the Treaty on European Union ... shall affect the application in Ireland of Article 40.3.3”, with the exact intent to preserve the abortion ban in the Irish constitution.

<sup>67</sup> KENNELLY B., WARD E. (*The abortion referendums*, in Gallagher M., Laver M., *How Ireland Voted 1992*, Dublin: Folens, Limerick: PSAI Press, 1993, 115) report that even though the precise number is not available, at the early 1990s at least 4,000 Irish women travelled to the United Kingdom for seeking abortion.

<sup>68</sup> In summary, after the 1992 referendums, Article 40.3.3 of the Constitution has been reformed as follows: “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. This subsection shall not limit the freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state”.

<sup>69</sup> See the 1995 Act online at: <http://www.irishstatutebook.ie/eli/1995/act/5/enacted/en/html>.

<sup>70</sup> For all these reasons, the 1995 Act has been widely criticized by Amnesty International. See online the article on the issue at: <https://www.amnesty.org.uk/abortion-ireland-facts-crime>.

produced an early progress toward the de-institutionalisation of the church-state relations in Ireland. Nonetheless, the limited changes in the Irish legislative framework deriving from these referenda also suggest that the partisan spectrum and the voters proved to be less liberal than expected, especially if compared with the Italian experience<sup>71</sup>.

After the 1992 vote, the highly confused state of the abortion laws proved to be problematic and unsatisfactory according to the Irish government. In particular, the main concern referred to the likelihood that the Supreme Court's decision would cause many Irish women to falsely threaten suicide in order to gain an abortion. Further attempts to reverse the Supreme Court's decision or, in some measure, to clarify the question needed to be taken and, in this respect, in November 1997 an Inter-Departmental Working Group on Abortion was formed. The Group developed a set of options for dealing with the X case<sup>72</sup> and in March 2002 the President, Bertie Ahern, announced another referendum. This time the Irish people were asked whether they wanted the existing criminal law on abortion to be replaced by a constitutionally-entrenched Act that would have allowed for an abortion where there was a real and substantial risk to the life of the woman, other than by threat of suicide<sup>73</sup>. The Act consisted in "the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001", introduced in February 2002, which would have led to the inclusion of two new subsections, that are the proposed subsections 40.3.4 and 40.3.5<sup>74</sup>. The fundamental intention of the referendum was thus threefold: to remove the threat of suicide as grounds for a legal termination of pregnancy; to provide a new definition of abortion; and to give constitutional and legal safeguards to existing medical practices where interventions

<sup>71</sup> This interpretation is supported by KENNELLY B. AND WARD E., *The abortion referendums*, in GALLAGHER M., LAVER M., *How Ireland Voted 1992*, Dublin: Folens, Limerick: PSAI Press, 1993.

<sup>72</sup> MILLS E. AND MC CONVILL J. (The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience, in *Eur. J.L. Reform* 4, 2002, p. 486) report the seven different options presented in a "Green Paper on Abortion" by the group in September 1999. These are: i. an absolute constitutional ban on abortion; ii. an amendment of the constitutional provisions so as to restrict the application of the X case; iii. the retention of the status quo; iv. the retention of the constitutional status quo with legislative restatement of the prohibition on abortion; v. legislation to regulate abortion in circumstances defined in the X case; vi. a reversion to the pre-1983 position; vii. permitting abortion on grounds beyond those specified in the X case.

<sup>73</sup> Specifically, at the referendum, voters were to be asked a simple question: *Do you approve of the proposal to amend the Constitution in the undermentioned Bill? Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001*.

<sup>74</sup> Proposed subsection 40.3.4 stated: 'In particular, the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act 2002'. Proposed subsection 40.3.5 stated that the amendment procedures in Articles 46 and 47 of the Irish Constitution shall apply to any Bill proposing to modify the Protection of Human Life in Pregnancy Act 2002 (if enacted). Therefore, subsection 40.3.5 in effect implied that any proposal for an amendment of law on abortion could only be provided by another referendum.

are made to protect the life of the mother and which entail a termination of pregnancy<sup>75</sup>. In more detail, abortion was defined as the intentional destruction by any means of unborn human life after implantation in the womb of a woman<sup>76</sup>, rather than applying from the moment of conception. In fact, the government put pressure on the Working Group on Abortion precisely on this point in order to ensure that the morning-after pill (and similar devices) would have had legal protection. However, this new conceptualization of abortion has been seen as excessively liberal from conservatives, which advocated that, in this way, the amendment would not have protected the rights of preimplantation embryos. Moreover, Irish people were mostly confused about the practical consequences that the 2001 Act would have had if enacted. The main uncertainties regarded especially the circumstances in which abortion would or would not be allowed, such as in the event of rape or incest of a woman who subsequently became pregnant, or in the case of a diagnosis of fetal abnormalities. These motivations, in addition to a low voter turnout<sup>77</sup>, contributed to the defeat of the referendum that occurred by an incredibly slim majority - 50.42% voted against the proposed Bill, while 49.58% voted in support.

Following the 2002 referendum, despite the fact that several issues related to requests for terminations by Irish women were ruled by the High Court and the European Court of Human Rights<sup>78</sup>, abortion was substantially absent from the political agenda of the country for some years. Only two cases reawakened, to some extent, the debate on the matter. The first regards the decision of the European Court in *A., B., & C. v. Ireland* on December 2010<sup>79</sup>, in which three women contested Ireland's failure to implement its existing abortion law and to have breached their human rights under the Convention, since they had been obliged to travel to England to terminate their unwanted pregnancies in a range of different circumstances. The Court's decision was against both the applications of *A* and *B*. Still, it has been also established that Ireland had failed to implement the existing constitutional right to a lawful abortion in the country when a woman's life is at risk, violating, in this way, the right to respect for private life under Article 8 of the

---

<sup>75</sup> For having further information on the campaign and the context in which the referendum was proposed, see KENNEDY F., Report - Abortion Referendum 2002, in *Irish Political Studies*, 2002, 17:1.

<sup>76</sup> This definition was provided by subclause 1(1) of the Act.

<sup>77</sup> According to the data reported by MILLS E. and MC CONVILL J. (The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience, in *Eur. J.L. Reform* 4, 2002, 490) only 42.89% of the nearly three million registered voters in Ireland participated in the referendum.

<sup>78</sup> In this regard, see BACIK I., Legislating for Article 40.3.3, in *Irish Journal of Legal Studies*, 2013, 3:3, p. 31.

<sup>79</sup> *A., B. & C. v. Ireland*, no. 25579/05 [2010] E.C.H.R. 2032 (16 December 2010) [hereinafter *A., B. & C.*].

European Convention on Human Rights<sup>80</sup> in respect of Applicant C, since the pregnancy had posed a risk to her life<sup>81</sup>. In November 2011, the Irish government (a Fine Gael-Labour coalition) announced the formation of an Expert Group with the purpose to review the implications of the European Court's judgment and to clarify the criteria under which terminations of pregnancy may be carried out in order to save a woman's life. Meanwhile, on April 2012, a bill on abortion supported by pro-choice campaigners was introduced in the lower house of the Irish Parliament (*the Dáil*). However, this attempt was defeated by the government on the basis of the fact that it would have preempted the findings of the Expert Group, which were expected to be published on November 2012. Unfortunately, just before that the Group set out the framework for legislation on abortion, the death of a young woman named Savita Halappanavar happened while undergoing a miscarriage, after that she and her husband had requested a life-saving abortion but this had been denied at Galway University Hospital in October 2012. This tragic episode, which was widely due to the lack of legal and ethical clarity as to when doctors may intervene with a termination, generated a wave of public outrage and garnered considerable international media attention.

In response to these two developments, the Irish government expressed an intention to legislate on the matter in order to implement the European Court's judgment in *A, B & C* and to provide an "accessible and effective procedure" whereby women may vindicate their constitutional right to life in accordance with the X case test<sup>82</sup>. On April 2013, a General Scheme of the "Protection of Life During Pregnancy Bill 2013" was published by the Government. Then, on 30 July 2013, the Act was signed into law by the President of Ireland and commenced on 1

---

<sup>80</sup> The Article 8 of the ECHR states that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." This Article has been often interpreted as one of the Convention's most open-ended provisions by the European Court, as suggested by Rainey B., Wicks E. and Ovey C., *The European convention on human rights*. Oxford University Press, USA, 2014, 334.

<sup>81</sup> In particular, in the words of the European Court, Ireland would have violated Article 8 of the Convention because "the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution".

<sup>82</sup> See BACIK I. (Legislating for Article 40.3.3, in *Irish Journal of Legal Studies*, 2013, 3:3, 34) for more details about the context in which the proposal of the 2013 Act arose.

January 2014<sup>83</sup>. The essential aim of the 2013 Act consists in complying with Ireland's obligations under the ECHR and in giving effect to the existing position under the Constitution, as interpreted by the Supreme Court in *Attorney General v. X*, according to which an abortion is lawful in circumstances where there is a threat to the life of the woman. In this sense, the 2013 Act can certainly take the credit to have introduced a statutory framework regulating abortion into the Irish law for the first time. But it is also important to underline that while the 2013 Act disciplines the cases and the modalities according to which the condition of health of the woman must be controlled, it does not fully legitimize abortion because of health reasons. In fact, all the cases where the foetus suffers from a fatal foetal abnormality incompatible with life outside the womb, and where the pregnancy results from rape or incest, still remain illegal. The Act contains separate procedures depending on whether the risk to the life of the woman arises from a physical illness or from suicidal ideation. More precisely, Section 7 specifies that it is lawful to carry out a medical procedure in respect of a pregnant woman in the course of which, or as a result of which, an unborn human life is ended. In addition, this is possibly only in the condition where two medical practitioners have examined the situation and have jointly certified, in good faith, that there is a real and substantial risk of loss of life and in their reasonable opinion that risk can only be averted by carrying out the medical procedure. In Section 9, it is clarified that when there would be risk to the life of the mother from suicide, it is necessary for three medical practitioners to examine the woman and to jointly certify, in good faith, that there is a real and substantial risk of loss of her life and in their reasonable opinion that risk can only be averted by carrying out a medical procedure. It is also present a part that refers to the immediate risk of loss of the woman's life in emergency situations, namely Section 8. In these circumstances, the medical procedure would be carried out by the medical practitioner making the assessment, but the cases in which the risk to the life of the woman arises from suicidal ideation are excluded.

The dominant public discourse on abortion remained thus largely focused on the issue of suicidality, instead of making reference to central concepts such as choice, dignity or reproductive rights of women<sup>84</sup>. Consequently, even after the introduction of the 2013 Act, abortion continued to be allowed only in rare cases and Irish women face up to 14 years in prison for an interruption of pregnancy not

---

<sup>83</sup> There are also a number of statutory instruments that sets out forms for use by medical practitioners under the terms of the 2013. These are: S.I. no. 537 of 2013, S.I. no. 538 of 2013, S.I. no. 539 of 2013 and S.I. no. 546 of 2013.

<sup>84</sup> This interpretation is extensively developed by MURRAY C., The Protection of Life during Pregnancy Act 2013: Suicide, dignity and the Irish discourse on abortion, in *Social & Legal Studies*, 2016, 25:6, 667 ss.

covered by the law. For all these reasons, Ireland surely remained one of the countries with the most restrictive and punitive legal frameworks on abortion not only in Europe, but in the entire “developed word”.

Indeed, according to the report published by the Council of Europe’s Commissioner for Human Rights, Nils Muižnieks, on March 2017<sup>85</sup>, the Ireland’s abortion criminalization was considered a violation of human rights in several respects. The Commissioner puts particular emphasis on the discriminatory nature of forcing people to travel abroad for obtaining an abortion, since “not everyone has the freedom or the financial means to do so” and, consequently, “this means that poor women, asylum-seekers and undocumented migrants among others cannot access the necessary health care”. Moreover, the Commissioner underlined how the past legal system had a negative impact on women’s rights and recalled that the lawfulness of abortion did not have an effect on a woman’s need for it, but only on her access to a safe healthcare service. In fact, in practice, the ban did not result in fewer terminations, but, on the contrary, it mainly caused increasing clandestine abortions, which were more traumatic and incremented maternal mortality. Serious concerns relating to the abortion ban in Ireland were already been promoted by the UN Human Rights Committee and the CEDAW on diverse occasions, especially with reference to the “mental suffering that the denial of abortion services causes to the pregnant woman in cases of rape, incest, serious risks to the health of the mother, or fatal fetal abnormality”. Another critical point noticed in the report regarded the position of doctors, who were forced to decide by themselves whether the restrictive requirements of legal abortion were met in individual cases. In consideration of the above, the Commissioner stressed the urgency to make progress towards a legislative regime that was more respectful of the human rights of women through the decriminalization of abortion within reasonable gestational limits or, at the very minimum, ensuring that terminations performed to preserve the physical and mental health of women, or in cases of fatal fetal abnormality, rape or incest are made lawful.

In light of all these set of problems relative to the condition of the Irish reproductive rights, in October 2016 a citizens’ assembly was established to evaluate different types of heated debated political and ethical questions and, in particular, the abortion issue. After a series of consultations and votes, the assembly has drawn

---

<sup>85</sup> The report has been realized on the basis of a visit to Ireland, from 22 to 25 November 2016. See the report online at:

<https://wcd.coe.int/com.intranet.IntraServlet?command=com.intranet.CmdBlobGet&IntranetImage=2968549&SecMode=1&DocId=2399932&Usage=2>.

attention to the need to replace or amend, but not repeal, the Eighth Amendment, submitting a number of recommendations to the Government on June 2017. These included a significant range of potential situations in which abortion might be permitted, restricted to a maximum number of weeks' gestation, such as cases of pregnancy as result of rape or because of socio-economic reasons<sup>86</sup>. A more radical view was instead supported by an alliance of pro-choice groups called "Coalition to Repeal the Eighth Amendment", which was catching international attention through the involvement of over 100 organisations including human rights, feminist, trade unions, health organisations, NGOs, community organisations and many others<sup>87</sup>.

As a result of the new interest in the matter, a referendum on the abrogation of the Eighth Amendment governing Ireland's abortion laws was formally approved by the government and held on 25 May 2018. This project of revision was reinforced by the decision taken by the Supreme Court on 7 March of the same year, when it was coming to the unanimous conclusion that the unborn would not have further protections than the right to the life under Article 40.3.3 of the Constitution<sup>88</sup>. In line with this political climate, the result of the referendum clearly expressed the willing of Irish citizens to rescind the constitutional bar to abortion by an overwhelming majority of 66% to 34%. This powerful democratic moment was supported by a consistent turnout of 64.13%<sup>89</sup> that can be classified as the fourth-highest for any referendum in the history of Ireland, after the 1972

---

<sup>86</sup> See online the "First Report and Recommendations of the Citizens' Assembly", published on 29 June 2017, for the full data and details of the voting on the matter at: <https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf>.

<sup>87</sup> Among all these organization, it appears particularly relevant the contribution of Amnesty International that has been strongly sustaining the decriminalization of abortion putting pressure on the Irish government, through several manifestations and starting a petition aiming at repealing the Eight Amendment. See online its website dedicated to the campaign nominated "It's time. Repeal the 8<sup>th</sup>" at: <https://www.amnesty.ie/itstime/>.

<sup>88</sup> More in detail, in the case *M. v. Minister for Justice & Ors* [2018] IESC 14, §. 10.63 the Court clarified that the unborn cannot be considered as a child under the constitutional provisions. However, the Court also specified that the foetus would be not 'constitutionally invisible' if the Eight Amendment was repealed., since "the State is entitled to take account of the respect which is due to human life as a factor which may be taken into account as an aspect of the common good in legislating".

<sup>89</sup> See the voter turnout in referendums from 1998 to 2018 in Ireland on the "Report on the referendum on the regulation of termination of pregnancy" presented by the Irish referendum Commission and available at: <https://www.refcom.ie/previous-referendums/referendum-on-termination-of-pregnancy/36th-RefCom-Report.pdf>.

referendum on joining the EEC, the 1992 abortion referendums and the 1968 referendum to change the Irish electoral system<sup>90</sup>.

However, it is important to note that the 2018 referendum was not dealing with the draft legislation, but with the Thirty-sixth Amendment to the Constitution. In fact, once passed, the new constitutional article simply stated that the Irish Parliament (*the Oireachtas*) reacquired the power to legislate, providing for the termination of pregnancy in accordance with law. The Yes Campaign was thus oriented on a fair draft bill, which was prepared by Minister for Health, Simon Harris, and then come back to Cabinet for approval<sup>91</sup>. The detailed general scheme of the bill, which was in line with the recommendations of the All-Party Committee, was published prior to the vote in March 2018, but it could not become law or debated in the *Oireachtas* until the referendum passed<sup>92</sup>. In this sense, the implications of the 2018 referendum largely depended on the final content of the bill approved through the Houses of the *Oireachtas*. The final text of the Health (Regulation of Termination of Pregnancy) Bill was signed into law on 20 December 2018 and it allows for abortion services to be provided, at the condition to be

<sup>90</sup> According to the analysis proposed by FIELD L. (The abortion referendum of 2018 and a timeline of abortion politics in Ireland to date, in *Irish Political Studies*, 2018, 33:4, 608 ss.) the high turnout of the 2018 referendum would assume particular relevance especially if it is considered that it was a standalone ballot, while the three referendums in 1992 had happened together and alongside a general election. The author also observes that predictably women were more in favour if compared with men (70% per IT/72.1% per RTE vs 65%/65.9%); urban voters were more so than rural voters (71%/72.3% vs 60%/63.3%); and younger voters generally more in favour than older voters (compare 87%/87.6% for the 18–24 cohort vs 63%/63.7% for the 50–64 cohort).

<sup>91</sup> In particular, Irish Minister for Health declared that he does not “believe that the Constitution is the place for making absolute statements about medical, moral, and legal issues”, but rather that “the time has come to allow the people to make this decision”. The Minister then also stressed that “the all-party committee has rightly pointed out the impossibility of requiring women to establish that their pregnancy was as a result of rape or incest. If we attempt to do so, we make them victims for a second time. They also identified the fact that nearly two thousand women every year take the abortion pill on this island and that they do so without any medical advice or supervision. [...] If the referendum is approved by the Irish people, a doctor-led, safe and legal system for the termination of pregnancies will be introduced. There will be restrictions. The pill which brings on miscarriage in early pregnancy will not be available on demand over the counter of a pharmacy or anywhere else. It will only be prescribed by a doctor who is on the specialist register. Doctors will discuss with their patient the pros and cons of this option in a crisis pregnancy, other options, and offer counselling and other supports. Ultimately though, it will be the woman’s decision. After 12 weeks’ gestation, abortion will only be allowed in exceptional circumstances such as a serious risk to the life or health of the woman or in the event of a fatal foetal abnormality. Ultimately, it will be a decision based on the wishes of the woman concerned and the best available medical evidence. Safe, legal and rare”. See online the full speech on the Taoiseach’s Press Releases, published on 29 January 2018, at: [https://www.taoiseach.gov.ie/eng/News/Taoiseach's Press Releases/Post-Cabinet Statement by An Taoiseach Leo Varadkar.html](https://www.taoiseach.gov.ie/eng/News/Taoiseach's%20Press%20Releases/Post-Cabinet%20Statement%20by%20An%20Taoiseach%20Leo%20Varadkar.html).

<sup>92</sup> An update of the general scheme was published by the Minister for Health on 10 July 2018. Following the Supreme Court’s refusal to hear a further challenge, the Thirty-sixth Amendment of the Constitution Bill 2018, which replaces the Eighth, Thirteenth and Fourteenth Amendments with the wording “Provision may be made by law for the regulation of termination of pregnancies”, was signed into law on September 2018 by President Michael D. Higgins.

subject to certification by two different doctors, up to the 12th week of pregnancy after a three day waiting period, where the physical or mental health of the mother is in danger or in the case of a fatal foetal abnormality<sup>93</sup>. Moreover, it should be underlined that since the bill's introduction at first stage in October 2018, the provision to review the legislation after three years, rather than five years as originally planned, has been included. Finally, the new legislation contains the faculty to refuse to practice abortion for the doctors and the medical staff that express conscientious objection<sup>94</sup>; but it is also specified that, in similar circumstances, arrangements for the transfer of care need to be made within the shortest possible timeframe. Therefore, similarly to Italy, the chance to practice the conscious objection inevitably raises the problem to assure the effective enjoyment of abortion rights guaranteed by the legislation throughout the whole national territory, requesting thus a government intervention on this regard<sup>95</sup>.

#### 4. Conclusion

In this paper, firstly it has been examined the origins of referendum from a constitutional point of view and the main provisions according to which this institution is regulated in the Italian and Irish systems. In particular, the concepts of direct and representative democracy have been briefly explored in relation to the introduction of referendum in European democratic states.

Then, this study has dedicated particular attention to the effect of referendum on an highly debated moral issue, namely the interruption of pregnancy. In this comparative analysis, the role of the electorate and the party spectrum in the process of liberalization of women's abortion rights have been also mentioned. In this respect, the present work has highlighted that, despite these countries appear similar in terms of religious backgrounds, the results obtained by the votes on the matter have been deeply different. In fact, in all the previous five referenda held on the theme in Ireland in the past, the electorate has always demonstrated to prefer to substantially preserve the Catholic moral within the political system than to

---

<sup>93</sup> See, respectively, section 12 named "Early pregnancy"; sections 9 and 10 named "Risk to life or health" and "Risk to life or health in emergency" of the bill; and section 11 named "Condition likely to lead to death of foetus". Consult online the full text of the bill on the Oireachtas website, at the following link: <https://data.oireachtas.ie/ie/oireachtas/act/2018/31/eng/enacted/a3118.pdf>.

<sup>94</sup> The only cases in which conscious objection is not accepted are those of health emergency of the pregnant woman.

<sup>95</sup> On this point, see ROSSI S. (*Blowin' in the Wind Referendum irlandese e legalizzazione dell'aborto*, in *Forum Quaderni costituzionali*, 2018, 10) who properly analyses the potential most critical points of the new legislative proposal on abortion in Ireland.

translate new liberal values in the Constitution<sup>96</sup>, with the only exception of the last 2018 vote. In this context, a referendum proposal about a more far-reaching legal change regarding the full repeal of the abortion ban stated by the Article 40.3.3 of the Irish Constitution has never been presented until recent times. For this reason, the result of the historic 2018 referendum can be surely seen as a revolutionary step forward to the liberalization of the Irish legal framework on the topic and, more generally, as an important signal of secularization. Differently, in Italy, the political class and, especially, the radical groups, have taken active part in the struggle against the abortion ban since the early seventies, when it has been abolished through the ordinary law in 1974. Moreover, the people themselves have confirmed to be willing to protect the reproductive health needs of women, guaranteed by the law, through their referendum votes concerning different possible repealing alternatives in 1981.

Secondly, from the analysis above it comes to the light the importance of the supreme courts in the legalization of abortion in these countries. In particular, in Italy, the decisions of the Constitutional Court set limits to the potential abrogation of the already existing legal framework through referendum. More specifically, the Court decided to not approve the referendum proposals that would have modified the core of the law no. 194/1978, both in an excessive conservative or liberal way. Differently in Ireland, the development of the laws on abortion has been driven precisely by the judiciary power that had to make decisions within a legislative vacuum. This was due to the persistent reluctance of legislators to properly confront the issue. In this sense, the outcomes of the several aforementioned votes seemed to suggest that the instrument of referendum, at least in the case of abortion, produced only a moderate “reformative effect” in the country, often contributing to maintain the status quo to the maximum extent possible. However, the implications of the 2018 vote have changed the political direction of the country in a new unexpected way, contributing to a progressive evolution of a more contemporary Ireland thanks to the support of decisions made by the citizens themselves.

Thirdly, in the present work the diverse types of problems regarding the current Italian and Irish legislation on abortion have been taken into careful consideration. More in detail, on the one hand, in Italy, a discrepancy between the rights guaranteed under the 1978 law and the Constitution and the access to full abortion services throughout the country has been observed. This procedural lack has been confirmed by the recent decisions of the ECSR. In particular, the European

---

<sup>96</sup> To this regard, see the considerations expressed by BUTLER D., RANNEY A. (*Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994, p. 80) and ULERİ P. V., GALLAGHER M. (*The referendum experience in Europe*, Springer, 1996, p. 99).

Committee have alerted the Italian government on the insufficiency of the practical application of the 1978 law and the need of further measures to manage the excessive number of conscious objectors in some regions. Hence, after more than forty years since the adoption of the legislation on abortion, the necessity to regulate the matter on the basis of a fair balance between the right to the interruption of pregnancy of women and the right to conscious objection of doctors would be still the most urgent obstacle to the Italian system. On the other hand, in Ireland, a clear legal framework which permits terminations by acceptable terms was missing for a very long time. In this sense, the removal of the abortion ban at the constitutional level and the adoption of a more liberalized legislation through the approval of the Health (Regulation of Termination of Pregnancy) Bill 2018 is a concrete starting point of policy change. In other words, the 2018 vote would have represented a fundamental occasion for the Irish population to explicitly voice their view of innovation and for parliament to finally find a legislative solution against unsafe, unregulated and unlawful terminations. However, the current risk for a full implementation of the legislation might consist, as happens in Italy, in an excessive number conscious objectors, especially in rural areas where voters were less in favour of abortion.

Concluding, nowadays the use of referendum for deciding on moral controversies and, more specifically, on abortion's rights results a topical question in Italy and Ireland because of different but both relevant reasons. Indeed, the emblematic case of the voluntary interruption of pregnancy would be certainly included in those set of challenges with which every modern society necessitates to face, since this involves fundamental rights relative to individual choices but it also affects the whole population. In this perspective, the hearth of the puzzle largely consists in the types of responses that a democratic system may offer to complex demands for social justice. Therefore, the comparison of the progresses achieved on the abortion laws in these countries offers the possibility to evaluate the effectiveness and suitability of the popular participative instrument par excellence in representative states, that is the referendum, on crucial questions for the community.

## References

- BACIK I., Legislating for Article 40.3.3, in *Irish Journal of Legal Studies*, 2013, 3:3
- BACIK I., The Irish Constitution and Gender Politics: Developments in the Law on Abortion, in *Irish Political Studies*, 28:3, 2013, 380 ss.
- BALDASSARRE A., Il referendum abrogativo nel sistema costituzionale, in AA. VV., *Corte costituzionale e sviluppo della forma di governo in Italia*, Atti del convegno, Firenze, 1981
- BARAGGIA A., «Who shall decide what rights we have when we all disagree?». Il caso della regolamentazione dell'aborto in Irlanda e Nord-Irlanda, in *Osservatorio Costituzionale AIC*, 2018, 3
- BARBERA A., MORRONE A., *La Repubblica dei referendum*, Il mulino, 2003
- BARRETT G., The use of referendums in Ireland: an analysis, in *The Journal of Legislative Studies*, 2017, 23:1, 71 ss.
- BARTOLE S., Ammonimenti e consigli nuovi in materia di referendum e di aborto, in *Giurisprudenza costituzionale*, 1981, 140 ss.
- BERTOLINO R., Obiezione di coscienza. 1) Profili teorici, in *Enciclopedia Giuridica Treccani*, XXI, Roma, 1990, 1
- BOVERO M., *Contro il governo dei peggiori. Una grammatica della democrazia*, Editori Laterza, 2000
- BRADY P. B. L., A Critical Analysis of the Heads of Bill and the Legal Necessity of Legislating for X, in *Irish Journal of Legal Studies*, 2013, 3:3
- BRUNELLI G., PUGIOTTO A., VERONESI P. (a cura di), Dei diritti e dell'egualanza (III), in *Scritti in onore di Lorenza Carlassare*, Napoli, Jovene, 2009
- BUDZISZ C., After the Irish Referendum - What It Means for Ireland, in *Commonweal Magazine*, 10.08.2018

BUSATTA L., Insolubili aporie e responsabilità del SSN. Obiezione di coscienza e garanzia dei servizi per le interruzioni volontarie di gravidanza, *Osservatorio Costituzionale AIC*, 2017, 3

BUTLER D., RANNEY A., *Referendums: A comparative study of practice and theory*, Aei Pr, 1978

BUTLER D., RANNEY A., *Referendums around the world: The growing use of direct democracy*, American Enterprise Institute, 1994

CACIAGLI M., ULERI P. V. (a cura di), *Democrazie e Referendum*, Editori Laterza, 1994

CARDER K. E., Liberalizing Abortion in Ireland: In re Article 26 and the Passage of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, *Tulsa J. Comp. & Int'l L.*, 1995, 3: 253

CARIOLA A., *Referendum abrogativo e giudizio costituzionale: contributo allo studio di potere sovrano nell'ordinamento pluralista*, Milano, A. Giuffrè Editore, 1994

CARMINATI A., La decisione del Comitato europeo dei diritti sociali richiama l'Italia ad una corretta applicazione della legge 194 del 1978, in *Osservatorio Costituzionale AIC*, 2014

CARNEVALE P., *Il «referendum» abrogativo e i limiti alla sua ammissibilità nella giurisprudenza costituzionale*, Milano, 1992.

CEFFA C. B., Gli irrisolti profili di sostenibilità sociale dell'obiezione di coscienza all'aborto a quasi quarant'anni dall'approvazione della legge 194 sull'interruzione volontaria della gravidanza, in *Osservatorio Costituzionale AIC*, 2017

CHIAPPETTI A., *L'ammissibilità del referendum abrogativo*, Giuffrè, 1974

D'ALESSIO R., L'aborto nella prospettiva della Corte Costituzionale, in *Giurisprudenza Costituzionale*, 1975, 538 ss.

D'AMICO M., LIBERALI B., *Procreazione medicalmente assistita e interruzione volontaria della gravidanza: problematiche applicative e prospettive future*, Napoli, Edizioni scientifiche italiane, 2016

D'AMICO M., Una lettura della disciplina sull'interruzione volontaria della gravidanza in una problematica decisione di inammissibilità del referendum, in *Giurisprudenza Costituzionale*, 1997, 1139 ss.

D'ATENA A., Commento all'art. 9, in BIANCA C. M., BUSNELLI F.D. (a cura di), *Commentario alla l. 22 maggio 1978, n. 194*, in *Le nuove leggi civili commentate*, 1978

DE LONDRA F., Constitutionalizing fetal rights: A salutary tale from Ireland, in *Mich. J. Gender & L.*, 2015, 22, 243 ss.

DE LONDRA F., GRAHAM L., Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate, in *Irish Journal of Legal Studies*, 2013, 3:3

DI BLASI A., I limiti della tutela del concepito tra Corte di Cassazione e Corte costituzionale, in *Costituzionalismo.it*, 2004, fascicolo 3, 23.03.2005

DIMARCO E., The tides of Vatican influence in Italian reproductive matters: From abortion to assisted reproduction, in *Rutgers JL & Religion* 10, 2009

DOMENICI I., Obiezione di coscienza e aborto: prospettive comparate, in *Rivista di BioDiritto*, 2018, 3

DOOLAN B., *Constitutional law and constitutional rights in Ireland*, Gill & Macmillan, 1994

ERDMAN J. N., Procedural abortion rights: Ireland and the European Court of human rights, *Reproductive health matters*, 2014, 22:44, 22 ss.

FIELD L., The abortion referendum of 2018 and a timeline of abortion politics in Ireland to date, in *Irish Political Studies*, 2018, 33:4, 608 ss.

FILICORI M., FLAMIGNI C., Legal abortion in Italy, 1978-1979, in *Family planning perspectives*, 1981, 13:5, 228 ss.

FROSINI T. E., *Potere costituente e sovranità popolare*, Atti del convegno Costantino Mortati: *Potere costituente e limiti alla revisione costituzionale*, Roma, 14 dicembre 2015

GINSBORG P., *A history of contemporary Italy: society and politics, 1943-1988*, Palgrave Macmillan, 2003

GIRVIN B., Social change and moral politics: the Irish constitutional referendum 1983, in *Political Studies*, 1986, 34:1, 61 ss.

HESKETH T., *The Second Partitioning of Ireland?: the abortion referendum of 1983*, Brandsma Books, 1990

KENNEDY F., Report - Abortion Referendum 2002, in *Irish Political Studies*, 2002, 17:1, 114 ss.

KENNELLY B., WARD E., The abortion referendums, in Gallagher M., Laver M., *How Ireland Voted 1992*, Dublin: Folens, Limerick: PSAI Press, 1993, 115 ss.

KINGSTON J., BACIK I., WHELAN A., *Abortion and the Law*, Dublin, Round Hall Sweet & Maxwell, 1997

LAVAGNA C., *Istituzioni di diritto pubblico*, Torino, UTET, 1985

LEIBHOLZ G., *La rappresentazione nella democrazia*, edizione italiana a cura di S. FORTI, Milano, Giuffrè, 1989

LIBERALI B., Una nuova censura (nuovamente respinta) nei confronti della l. n. 194 del 1978, in *Biodiritto*, 2012

LUCIANI M., sub art. 75, La formazione delle leggi, Il referendum abrogativo, in BRANCA G., PIZZORUSSO A., *Commentario della Costituzione*, Il Foro italiano, 2005

LUZZI C., La questione dell'obiezione di coscienza alla luce della legge 219/2017 tra fisiologiche esigenze di effettività e nuove prospettive di tutela, in [www.dirittifondamentali.it](http://www.dirittifondamentali.it), 2019, 1

MELONI G., La sovranità popolare e la nuova Costituzione italiana, in *Rass. Dir. Pubbl.*, 1949

MEZZANOTTE C., *Referendum e legislazione*, relazione presentata al Convegno annuale dell'Associazione annuale dei costituzionalisti sul tema "Democrazia maggioritaria e referendum", Siena 3-4.11.1993

MEZZANOTTE C., NANIA R., Referendum e forma di governo in Italia, in *Democrazia e Diritto*, 1981, 72 ss.

MILLS E., MCCONVILL J., The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience, in *Eur. J.L. Reform* 4, 2002, 481 ss.

MORGAN D.G., *Lineamenti di diritto costituzionale irlandese*, Torino, Giappichelli, 1998

MORTATI C., Commento all'art. 1 Cost., in *Principi fondamentali. Commentario della Costituzione*, a cura di G. BRANCA, Bologna – Roma, 1975

MORTATI C., *Istituzioni di diritto pubblico*, II, Padova, 1975-1976

MURRAY C., The Protection of Life during Pregnancy Act 2013: Suicide, dignity and the Irish discourse on abortion, in *Social & Legal Studies*, 2016, 25:6, 667 ss.

PARIS D., *L'obiezione di coscienza. Studio sull'ammissibilità di un'eccezione dal servizio militare alla bioetica*, Passigli, Firenze, 2011.

PARIS D., Riflessioni di diritto costituzionale sull'obiezione di coscienza all'interruzione volontaria della gravidanza a 30 anni dalla legge n. 194 del 1978, in *Quaderni regionali*, 2008, 3, 1091 ss.

PENASA S., La Corte Europea dei Diritti dell'Uomo di fronte al fattore scientifico: analisi della recente giurisprudenza in materia di procreazione medicalmente assistita e interruzione volontaria di gravidanza, in *Revista Europea de Derechos Fundamentales*, 2013, 235 ss.

PERICO G., I referendum sull'aborto, in *Aggiornamenti Sociali Milano*, 1980, 569 ss.

O'MAHONY J., The Irish Referendum Experience, in *Representation*, 1998, 35:4

O'SULLIVAN C., SCHWEPPE J., SPAIN E., Article 40.3.3° and the Protection of Life During Pregnancy Bill 2013: The Impetus for, and Process of, Legislative Change, in *Irish Journal of Legal Studies*, 2013, 3:3

PAPADOPOULOS Y., Democrazia e Referendum, in *Italian Political Science Review/Rivista Italiana Di Scienza Politica*, 1995, 25:2, 197 ss.

RAINEY B., WICKS E., OVEY C., in *The European convention on human rights*, Oxford University Press, USA, 2014

RODOTÀ S., Problemi dell'obiezione di coscienza, in *Quaderni di Diritto e Politica ecclesiastica*, 1993, 1, 55 ss.

ROSSI S., Blowin' in the Wind Referendum irlandese e legalizzazione dell'aborto, in *Forum Quaderni costituzionali*, 2018, 10

ROUSSEAU J. J., *Contratto sociale*, Feltrinelli Editore, 2003

SALERNO G. M., *Il referendum*, CEDAM, Padova, 1992

SAPORITI M., Se fossero tutti obiettori? Paradossi e fraintendimenti dell’obiezione di coscienza all’aborto in Italia, in *Materiali Storia Cultura Giur.*, 2013, 2, 477 ss.

SCHMITT C., a cura di CARACCIOLI A., *Dottrina della Costituzione*, Giuffrè, Milano, 1984

SHAVER S., *Abortion Politics, Women's Movements and the Democratic State: A Comparative Study of State Feminism*, Oxford University Press, 2001

SINNOTT R., *Irish Voters Decide*, Manchester University Press, 1995

SMYTH A., *The abortion papers – Ireland*, Attic Press, 1992

ULERI P. V., On referendum voting in Italy: YES, NO or non-vote? How Italian parties learned to control referendums, in *European Journal of Political Research*, 2002, 41, 863 ss.

ULERI P. V., Referendum: tra liberalismo e democrazia. Asserzioni di valore e osservazioni empiriche, in *Italian Political Science Review/Rivista italiana di scienza politica*, 2002, 2, 195 ss.

ULERI P. V., The 1987 referenda, in *Italian Politics*, 1989, 3, 155 ss.

ULERI P. V., GALLAGHER M., *The referendum experience in Europe*, Springer, 1996

VIOLA L., Obiezione di coscienza ‘di massa’ e diritto amministrativo, in [www.federalismi.it](http://www.federalismi.it), 2014

## ABSTRACT

Il presente contributo propone, in primo luogo, una breve riflessione sulla natura ed il ruolo del referendum nelle democrazie rappresentative e sviluppa uno studio comparato delle basi costituzionali di questo istituto nel sistema italiano e irlandese. L’elaborato si concentra, poi, sull’effettività dell’uso dello strumento referendario rispetto a tematiche bioetiche e morali fortemente dibattute negli Stati presi in considerazione. In particolare, viene analizzato il caso del referendum sull’aborto, approfondendo i differenti risultati ottenuti ed il relativo impatto sulle legislazioni in materia in entrambi questi Paesi. A tale scopo, il lavoro che segue indaga sui punti più critici del quadro legislativo italiano sull’effettiva facoltà all’interruzione volontaria di gravidanza e sulle principali vicende giurisprudenziali che hanno segnato lo sviluppo della disciplina irlandese. Dunque, da una parte, verrà osservata l’eventuale non

piena realizzazione della normativa sull'aborto in Italia, dovuta alla complessa questione della regolamentazione dell'obiezione di coscienza. Dall'altra, sarà esaminata la sostanziale negazione di tale diritto che si è lungamente riscontrata in Irlanda, ricostruendo le vicende susseguitesi dall'approvazione del cosiddetto "Eight Amendment" fino al cambiamento di rotta registrato con l'esito positivo dell'ultima consultazione referendaria risalente a maggio 2018.

Firstly, the present contribution proposes a brief review on the nature and the role of referendum in representative democracies and it develops a comparative study of the constitutional bases of this institute in the Italian and Irish systems. Then, the essay focuses on the effectiveness of the use of the referendum instrument on heated debated bioethical and moral issues in the States taken into consideration. In particular, the case of the referendum on abortion is analysed, exploring the different results obtained and the relative impact on the legislation on the subject in both these countries. For this purpose, the following work indagates the most critical aspects of the Italian legal framework regarding the actual faculty to voluntarily interrupt a pregnancy and the main jurisprudential events that have been part of the evolutive process of the Irish legislation. Therefore, on the one hand, the possible not full implementation of the legislation on abortion in Italy due to the complex question of the regulation of the conscious objection will be observed. On the other, the substantial negation of the right of abortion over a long period in Ireland will be examined. This will be performed assessing the sequence of the events since the adoption of the so-called Eight Amendment to the change of direction experienced with the positive result of the last referendum vote in May 2018.

**PAROLE CHIAVE:** referendum; bioetica; aborto; Italia; Irlanda

**KEYWORDS:** referendum; bioethics; abortion; Italy; Ireland