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Mechanisms of Direct Democracy in the United States. The Case of Same-Sex Marriages under the Popular Vote in California

Abstract: The article mainly deals with mechanisms of direct democracy used under the state law of California. In the opening part, however, it explains the differences between the two main direct democracy devices: the initiative and referendum. It then provides overview of the basic rules of federal and state law on direct democracy pointing to the differences and lack of regulation on the direct democracy in the federal constitution. The article further follows with the introduction of the initiative and referendum legal grounds in California. To introduce the practical use of the direct democracy devices, the article uses the coverage of the Californian battle over the same-sex marriage under the propositions submitted to popular vote in this state together with the judicial decisions resulting from the battle. The article ends with the final say given by the United States Supreme Court in the problematic question of the legality of same-gender marriages and final conclusions on the state of direct democracy in California.

Keywords: initiative, referendum, Proposition 8, same-sex marriage

1. Introduction

The main goal of the presented article is to focus on one particular issue that went under the popular vote in California and that is the right to marry by same-sex couples, a social dilemma widely discussed and dealt by several states in the United States and a dilemma that divided the states, their regulations and judicial decisions severely enough for the United States Supreme Court to take the final vote and end the battle. The history and regulations of initiatives and referendums in California are taken as an example, due to the fact that Californian residents participate in the popular vote most often comparing to other American states.

To clearly analyze the problem it is necessary to explain the terminology used in the United States when referring to two instruments (two ballot measures) mainly used when the voice of the people is to be heard directly.

An initiative (also called popular initiative, voter initiative, citizen initiative or, simply, initiative) is an instrument used when a given number of voters in a state effectuate the placement of an amendment or proposal on the ballot for acceptance by the voters in the particular state. Through initiatives citizens may amend their state constitutions (constitutional initiatives) or they may be used for the introduction of the citizens' legislative schemes (statutory initiatives).¹ Depending on the state regulations the initiatives may be direct or indirect while proposing constitutional amendments or statutes.

A referendum allows citizens to decide on a statute passed by the state legislature. They may enact or repeal the provisions in question. Referendums fall within two basic categories. The first type entails the suspension of any previous legislative action on the subject until the electorate determines the outcome of the proposed measure. In the second type, all legislative acts remain in effect until the decision of the electorate is final.²

It should be noted that both initiatives and referendums might be used on the lower level – in communities within a state. It should also be noted that there are many variations concerning the two instruments as their legal regulations differ from state to state.³

2. Direct democracy under federal and state constitutions in the United States

The Constitution of the United States of America does not specifically provide for any form of direct democracy on the federal level. There has never been a national referendum or initiative where the proposal on government action would be submitted to popular vote.⁴

1 P.F. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, "Urban Law Annual" 1981, vol. 22, p. 135.

2 *Ibidem*.

3 More on the types and terminology issues: D.S. Greenberg, The Scope of the Initiative and Referendum in California, "California Law Review" 1966, vol. 54, p. 1717.

4 W.B. Fish, Constitutional Referendum in the United States of America, "American Journal of Comparative Law" 2006, vol. 54, p. 485. It should be noted that there were attempts to consider the right to initiative and referendum unconstitutional as contrary to the provision of the federal Constitution guaranteeing the republican form of government. See: W.A. Coutts, Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United States?, "Michigan Law Review" 1908, vol. 6, p. 304.

The Supreme Court of the United States confirmed however, that the decisions of particular states to provide for direct democracy use under their legal orders do not violate the federal constitution.⁵

The closest it ever got to the nation-wide and citizen-made decision was the repeal of the Eighteenth Amendment to the Constitution (the prohibition Amendment) in 1933. It was the only situation in the history of the constitutional amending procedure where the ratification of the Amendment was done through state ratifying conventions. The US Constitution provides for two forms of Amendment ratification – by state legislatures or by state conventions. In all other cases the ratification was processed through state congresses. Amendment Twenty First however, was decided by the conventions called in every of (back then) forty-eight states. While some states chose the form of direct ballot, in other states voters had chosen special delegates, who later casted their ballots deciding „for” or „against” the repeal of prohibition. In a way, citizens of all states were able to provide their vote – directly or indirectly on the most controversial issue of the times – the legality of „intoxicating liquors”.⁶

On the state level, the situation is quite different as many various forms of direct democracy mechanisms have been present in the state constitutions and state traditions since the 17th century when ordinances were voted on during hall meetings in New England. In 1778 the first legislative referendum was organized in Massachusetts in which the draft constitution was rejected only to be ratified after another referendum held two years later. Further amendments to the state constitution were submitted to the popular vote.⁷

At the same time other states used the direct democracy mechanisms to build their constitutional structures based on the involvement of the citizens. By 1830, ten of 24 American states had used some form of popular vote in constitutional issues.⁸

Presently 26 out of 50 American states provide for some kind of direct democracy mechanism (power of initiative or referendum) under state laws and the regulations vary depending on what kind of laws may be subject to the popular vote (constitution, statutes or both).

5 *Pacific States Telephone and Telegraph Company v. Oregon*, 223 U.S. 118 (1912).

6 More on the repeal of the Prohibition Amendment see: J.M. Rotter, J.S. Stambaugh, What's Left of the Twenty-First Amendment, "Cardozo Public Law, Policy & Ethics Journal" 2008, vol. 6, p. 601, J.H. Crabb, State Power over Liquor under the Twenty First Amendment, "University of Detroit Law Journal" 1948, vol. 12, p. 11, R.H. Skilton, State Power under the Twenty-First Amendment, "Brooklyn Law Review" 1938, vol. 7.

7 G.H. Haynes, How Massachusetts Adopted the Initiative and Referendum, "Political Science Quarterly" 1919, vol. 34, no. 3, p. 460.

8 J.G. Matsusaka, For the Many Or the Few: The Initiative, Public Policy, and American Democracy, University of Chicago Press 2004, p. 125, R. Tuck, Democratic Sovereignty and democratic government: the sleeping sovereign [in:] R. Bourke, Q. Skinner (eds.), Popular Sovereignty in Historical Perspective, Cambridge University Press 2016, p. 136.

In 15 states all options are allowed. In all but one state (Delaware) popular vote is required to approve amendments to the state constitution. But for example in three states (Florida, Illinois, Mississippi) only constitutional amendments may be initiated or constitutional convention may be called through initiative. No legislation may be initiated or repealed through the referendum. In three other states (Alaska, Idaho, Maine) the popular vote proposing constitutional amendment is not possible, but statutes can be initiated and statute referendum can be called. 24 states do not provide for any form of initiative or referendum.⁹ The power of initiative or referendum is granted to the citizens directly under the state constitution and detailed procedures are included in statutes.¹⁰

The direct democracy mechanisms in the states allowing them, are widely used to get the people's voice on an extensive range of issues, including problematic social dilemmas. The voting is usually organized together with political elections. Every two years citizens of all states elect members of the House of Representatives and one-third of the Senators, so the questions submitted to popular vote come together during election time. In the recent elections in November 2018, different ballot measures were introduced in 36 states. In 22 states providing for initiatives and referendums a variety of questions were raised including legality of marijuana (Michigan Missouri, North Carolina and Utah), abortion (Alabama, Oregon and West Virginia) and other specific problems, such as Gender Identity Anti-discrimination Veto Referendum in Massachusetts or Voter Approval of Casino Gambling Initiative in Florida. In 14 additional states constitutional amendments were subject of citizens' decision. What is worth mentioning is the fact that there is usually more than one issue put into question during one voting, so a total of 155 issues were decided upon on November 6, 2018.¹¹

Looking at the map of the United States it is clear that the ballot measures through which citizens directly participate in the legislative process have developed mostly in the West, while the South and East stayed away from these types of direct actions historically afraid of the power they would vest in the hands of African Americans and immigrants.¹²

9 Ballotpedia Information available at: https://ballotpedia.org/States_lacking_initiative_or_referendum (access 27.12.2018).

10 For example art. 4 of the Arizona Constitution is supplemented by Arizona Statutes Title 19, 19-101, 19-102 and further provisions. Art. 5 of the Colorado Constitution finds its extension in Colorado Statutes 1-40-101 and further provisions. Art. 2 of the Ohio Constitution provides for the basic rights and the procedures are included in Ohio Statutes Chapter 3519.

11 Ballotpedia Information available at: https://ballotpedia.org/Ballot_Measure_Scorecard,_2018#November_6 (access 27.12.2018).

12 A. Debray, *Governing by the people: the example of California's propositions (1990-2012)*, "Mémoire(s), identité(s), marginalité(s) dans le monde occidental contemporain" 2015, no. 14, p. 2.

3. Constitutional regulations and main principles regarding the initiative and referendum in California

Direct democracy instruments were introduced in California during the wave of progressive movement that introduced reforms in 22 states providing for initiatives and referendums to become part of the state's legal orders. The movement went across the country in the early 1900's and reached California in 1911. Hiram Johnson was the leading Californian politician at the time (governor of the Golden State between 1911 and 1917) and strong supporter of progressivism. Under his leadership California adopted the initiative and referendum into the state system as a weapon against the dominance of the monopolist company in the railroad industry that had controlled the state politics at the time.¹³ Johnson believed that the people can be best armed to protect themselves by the powers granted in the instruments of direct democracy such as referendum, initiative and recall.¹⁴

On October 10, 1911 three milestone propositions (proposed legislations) were submitted to popular vote (among many other propositions voted in the same time). Proposition 7 extended the use of direct democracy devices in California. In addition to the obligatory vote on constitutional amendments through referendum, now the optional initiative and referendum were options possible to be used. Proposition 4 granted women in California the right to vote and Proposition 8 introduced another instrument known as recall that allows citizens to remove and replace a public official before the end of a term of office.¹⁵

The presented article further focuses on two measures used in California that is initiative (including constitutional amendment initiative and state statute initiative) and the veto referendum, leaving other instruments (such as recalls, bonds or legislatively referred constitutional amendments and state statutes) outside of the scope of the research.

Basic rules for the initiative and referendum are provided for in the state constitution and supplementary regulations are passes by the legislatures in the state statutes. According to the California Constitution, initiative and referendum powers may be exercised by the electors of each city or county. Statutes passed by the state

13 More on the history of progressive reforms in California: B.P. Janiskee, K. Masugi, *Democracy in California: Politics and Government in the Golden State*, Rowman & Littlefields Publishers 2011, pp. 20-23.

14 F. Hichborn, *Story of the Session of the California Legislature of 1911*, San Francisco 1911, p. 93.

15 G. Gendzel, *The People versus the Octopus: California Progressives and the Origins of Direct Democracy*, "Siècles" 2013, vol. 37, p. 5. The recall is now governed by the constitutional provisions together with the initiative and referendum.

legislature provide for the specific provisions on the circulation, presentation, and certification of signatures for both mechanisms.¹⁶

3.1. Constitutional regulations on initiative

Presently article II of the California Constitution provides fundamental rules for the initiative and referendum. Section 8 is dedicated to initiative defined as „the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them“. Any citizen or group of citizens may present to the Secretary of the State an initiative measure by signing a petition including the text of the proposed statute or proposed constitutional amendment. The petition must be signed by certain amount of signatures representing percentage of the total number of ballots cast for governor in the last election – eight percent in the case of the amendment and five percent in the case of the proposed statute. The Secretary of State then submits the measure at the next general election at least 131 days after it qualifies or at any special statewide elections held within that time. If necessary, a special statewide election may be organized by the Governor of the state.¹⁷

There are some constitutional limitations on the initiative. It may not embrace more than one subject. Furthermore, it may not or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision. Finally, the initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.¹⁸ Additional limitation is set forth to prevent putting into the initiative vote any particular names of individuals to hold any office, or names or identifies of any private corporation to perform any function or to have any power or duty.¹⁹

If the majority of the votes supports the proposition, it becomes law, even though it never went through the legislative procedure in the state congress and it was not signed by the governor of the state, as would happen in the regular legislative process.

16 *Ibidem*, Art. II Sec 11. California Statutes (California Code, Elections Code) provide for specific, detailed instructions for the initiative and referendum procedures. See: Division 9: Measures Submitted to the Voters CA ELEC § 9000-9610. On-line version available at: <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=ELEC&tocTitle=+Elections+Code+-+ELEC> (access 27.12.2018).

17 California Constitution, Art. II Sec. 8 a-c. The on-line version of the Constitution is available at: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=II (access 27.12.2018).

18 *Ibidem*, Art. II Sec. 8 d-f.

19 *Ibidem*, Art. II Sec 12.

In this way the progressive reform gave citizens supreme authority by granting them the mechanism that would limit the power of politicians and allow the people to bypass the legislative procedure.²⁰

3.2. Constitutional regulations on referendum

Section 9 of the Art II of the Constitution provides for the referendum process in California stating: “The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.”²¹

This instrument is used to repeal the law that has already been passed. The referendum measure can be proposed by presenting the Secretary of the State a petition signed by the number of signatories equal to five percent of the votes for all candidates for Governor at the last gubernatorial election. The Secretary then submits the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. Special statewide elections may also be organized.²²

The constitutional limitations for referendum provide the deadline for the proposition of the measure. It must be done within 90 days after the enactment date of the statute. Furthermore, some restrictions regard the case of a statute enacted by a bill passed by the Legislature on or before the date the Legislature adjourns for a joint recess to reconvene in the second calendar year of the biennium of the legislative session, and in the possession of the Governor after that date, the petition may not be presented on or after January 1 next following the enactment date unless a copy of the petition is submitted to the Attorney General, in accordance with the relevant constitutional provisions, before January 1.²³

There is a mechanism allowing the state Legislature to amend or repeal the referendum statute. It is done through passing of another statute. However, this statute becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors’ approval.²⁴ It is worth noting that California is the only state in which the initiative cannot be repealed or amended by the Legislature.²⁵

A simple majority of votes is required for the initiative statute or referendum to take effect. If provisions of two or more measures approved at the same election

20 G. Genzel, *The People...*, *op. cit.*, p. 4.

21 California Constitution, Art. II Sec 9 a).

22 *Ibidem*, Art. II Sec. 9 b-c.

23 *Ibidem*, Art. II Sec 9 b).

24 *Ibidem*, Art. II Sec 10 c).

25 A. Debray, *Governing...*, *op. cit.*, p. 2.

conflict, the provisions of the measure receiving the highest number of affirmative votes shall prevail.²⁶

4. Propositions on socially controversial issues in California

The numbers of ballot measures introduced for the popular vote in California grants this state the winning position among other states in terms of the use of direct democracy devices.

Already in 1912 three initiatives were voted on regarding the consolidation of local government, bookmaking prohibition and set procedures for local taxation.

Between 1912 and 2017 a total of 1996 initiatives were titled of which 376 (19.26 percent) qualified for the popular vote. Out of those, 132 initiatives (35,11 percent) were approved by the voters, 241 were rejected and 3 were removed from the ballot by court order.²⁷

During the same time a total of 89 referendums were titled and 50 of them (56.18 percent) were qualified for the ballot and voters approved 21 (42 percent) and rejected 29 (58 percent) of them.²⁸

Only in 2018 16 statewide ballot propositions were certified (five in June and eleven in November) including eight initiatives and no referendums.²⁹

Through initiatives and referendums Californians propose or repeal the laws covering a wide range of issues. Some of them regard housing regulations, tax regulations or school system. Some of the voting aims at issues that may be qualified as socially controversial including those regarding the sexual orientation, gun possession, abortion, marijuana use and death penalty.

Narrowing the scope of the research, the Californian decisions concerning the right to marry of same-sex couples were chosen for the presented article as they provided the full spectrum of problems – from the initiatives taken down by the state court decisions up to the federal courts' ruling and the two decisions issued by the United States Supreme Court.

26 *Ibidem*, Art. II Sec 10 a-b.

27 History of California Initiatives. Data Provided by the Secretary of State in California. On-line version available at: <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/summary-data.pdf> (access 27.12.2018).

28 History of California Referenda. Data Provided by the Secretary of State in California. On-line version available at: <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/referenda-data.pdf> (access 27.12.2018) The law which is voted on during the referendum is repealed only if majority of voters reject the referendum (cast NO votes).

29 Other included bonds and legislatively referred statutes and constitutional amendments.

4.1. Propositions concerning same-sex issues

California has been generally known as a liberal state strongly supporting the Democratic Party in all political elections.³⁰ However, the popular vote on issues concerning sexual orientation has not always reflected the liberal atmosphere of the Golden State.

In 1978, the so called Briggs Initiative (Proposition 6) was submitted to popular vote to pass the law banning gay and lesbian teachers from working in public schools in California. Only a year before, Harvey Milk had been elected to the San Francisco Board of Supervisors marking the historical victory of the LGBT movement and becoming the first openly gay politician to win public office. The anti-gay ballot initiative turned out to be an important test to Californians and their views in the times when gays and lesbians faced intense discrimination across the country, but also in California itself. Harvey Milk was the face and the voice of the dedicated movement fighting the measure.³¹

The initiative was supported by gay rights opponent – Senator John Briggs and required firing of gay and lesbian schoolteachers and officials or anyone with openly pro-gay positions working at schools. With voter turnout reaching 70.41 percent, the Proposition 6 was defeated with 58.4 percent of “no” votes and became a symbol of the LGBT movement for the fight of their rights.³²

The right to marry of same-gender couples had constituted a nation-wide problem among the states through all the years prior to the US Supreme Court verdict in 2015 confirming the right from the federal level and thus making it impossible for state laws to ban it.

Same-sex marriage measures were put on ballots in many states in 1990s starting with Hawaii, after the state Supreme Court ruled that refusing same-sex marriage constituted sex discrimination under the state Constitution.³³ The results in most of

30 President Barack Obama won 60.9 percent of the state vote in the presidential elections in 2008 and 34 out of 53 seats in House of Representatives were taken by Democrats. In 2016 Hilary Clinton received 61.5 percent of the votes and 39 seats in the House of Representatives were taken by the Democrats. Data available on the New York Times websites: 2008: <https://www.nytimes.com/elections/2008/results/states/california.html> and 2016: <https://www.nytimes.com/elections/2016/results/california> (access 27.12.2018).

31 Harvey Milk was assassinated in November 1978 together with the San Francisco Mayor George Moscone. R. Eyerman, Harvey Milk and the Trauma of Assassination, “Cultural Sociology” 2012, no. 6(4), pp. 399-421.

32 J.J. Dyck, S. Pearson-Merkowitz, The Conspiracy of Silence: Context and Voting on Gay Marriage Ballot Measures, “Political Research Quarterly” 2012, no. 65(4), pp. 745-746.

33 *Baehr v. Lewin*, 852 P. 2nd 44 (Hawai'i 1993). More on the case: M.D. Sant' Ambrogio, S.A. Law, *Baehr v. Lewin* and the Long Road to Marriage Equality, “University of Hawai'i Law Review” 2011, vol. 33, p. 705.

the states came out as conservative and showed a high margin of votes supporting the ban on same-sex marriage.³⁴

In 2000 the problem reached California when voted on Proposition 22 stated that the California Family Code should amend section 2 to include the statement: only marriage between a man and a woman is valid or recognized in California.³⁵ It was approved by 61.2 percent of voters in favor. The amended law stayed in force for seven years.³⁶ It was struck down by the decision of the California Supreme Court on May 15, 2008, when in the 4-3 decision the judges decided that limiting marriage to opposite-sex couples is in violation of the California Constitution.³⁷

The reaction was immediate and surprising. In November 2008 California Proposition 8 qualified for the ballot with the same goal as Proposition 22, only now aiming at amending the state constitution with the same statement: “only marriage between a man and a woman is valid and recognized in California”. With almost 80 percent turnout, the same-sex marriage was hold constitutionally banned in the state by the 52.24 percent of votes in favor of the amendment.

As introducing a constitutional provision, the Proposition overturned the California Supreme Court’s decision addressing the statutory provisions and making the same-gender marriages illegal in the state of California. Worth noting is the fact that during the same election President Obama was elected the first African American President of the United States.³⁸

4.2. The legal and court battle over Proposition 8 on same-sex marriage in California

The legal rollercoaster in the same-gender ride took another sharp turn as, immediately after the vote on Proposition 8, lawsuits were submitted to invalidate the Proposition and the Supreme Court of California decided to consider the cases.

In the 6-1 decision issued on May 26, 2009 the Court upheld the constitutionality of the Proposition stating that the right of same-sex couples to enter in civil unions type of relationship allowed to “choose one’s life partner and enter with that person into a committed, officially recognized and protected family relationship that enjoys

34 A. Debray, *Governing...*, op. cit., pp. 12-13.

35 The act was cited as “California Defense of Marriage Act”. N. Kubasek, Ch. Glass, K. Cook, *Amending the Defense of Marriage Act; A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, “American University Journal of Gender Social Policy and Law” 2011, no. 3, p. 6.

36 On the Anti-Proposition 22 Campaign see: T. Broaddus, *Vote No If You Believe in Marriage: Lessons from the No on Knight/No on Proposition 22 Campaign*, “Berkeley Women’s Law Journal” 2000, vol. 15, pp. 1-13.

37 *In re Marriage Cases*, No. S147999 (Cal. May 15, 2008).

38 N.D. Wadsworth, *Intersectionality in California’s Same-Sex Marriage Battles: A Complex Proposition*, “Political Research Quarterly” 2011, vol. 64(1), pp. 200-202.

all of the constitutionally based incidents of marriage“. Civil unions then fulfilled the goal and the definition of marriage stayed as including opposite-sex couples only.³⁹

The procedural state level has been therefore closed and the problem had to be raised to the federal level for the battle to be continued. The federal level was opened by the Federal District Court Judge Walker who decided that Proposition 8 was in violation with the provisions of the federal and thus supreme the United States Constitution, namely the Due Process and the Equal Protection clauses of the Fourteenth Amendment. The judge, who admitted to being gay himself, concluded that the Proposition 8 “unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation“⁴⁰. As a result, the enforcement of the law was barred and the marriages could be resumed.

Twelve days later however, the 9th U.S. Circuit Court of Appeals put the same-sex marriages on hold indefinitely pending the appellate procedures. Those were eventually held by the three-judges panel of the Court. The ruling came after some complicated legal battles and turns on February 7, 2012 and eventually held Proposition 8 unconstitutional. For the purpose of this article it is necessary to quote the passage from the verdict stating: „although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted.“⁴¹

Worth noting is the fact that the decision did not consider all bans on same-sex marriages as unconstitutional but argued specifically on the Proposition 8 and the revocation of previously granted right to marriage. The request, made by the Proposition 8 proponents to the 9th U.S. Circuit Court of Appeals, to re-hear the case *en banc* was denied and the only further appeal possibility was to the Supreme Court of the United States.⁴²

4.3. The semi-final and the final decision of the United States Supreme Court

The Californian struggle with the same-sex marriage law was not the only struggle on the issue in the country. In 2012 the case originating in New York addressed the validity of federal law that denied benefits to gay couples who entered into marriages.⁴³

39 *Straus v. Horton*, 46 Cal. 4th 364 (2009).

40 *Perry v. Schwarzenegger*, 591 F. 3d 1126 (9th Cir. 2009). See also: C.J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, “Arizona Law Review” 2011, vol. 53, p. 914 and next.

41 *Perry v. Brown*, Nos. 10-16696, 11-16577, 671 F.3d 1052 (9th Cir. 2012).

42 W.N. Eskridge Jr., *The Ninth Circuit’s Perry Decision and the Constitutional Politics of Marriage Equality*, „Stanford Law Review Online“ 2012, vol. 66, p. 93.

43 *Windsor v. United States* No. 12-2335 (2d Cir. 2012).

At the same time, in November 2012 referendums in three states (Maryland, Maine and Washington) legalized marriages of same-sex couples marking the first time in the US history that such decisions were made through the popular vote. Still, in over 30 states the bans on same-sex marriages were upheld by the citizens' decisions.⁴⁴

Under such divided circumstances the United States Supreme Court decided to hear the combined cases – the New York case and the Californian case – to enter the complicated nationwide debate on legality of same-gender marriage. The Court ruled that the same-sex married couples do have the right to federal benefits and the law defining marriage as a union of man and woman violates this right. The Court did not however rule on the substance of the Californian case regarding Proposition 8 (on the grounds that the official proponents of the Proposition lacked the standing for appeal), but by declining to decide, the Court effectively invalidated Proposition 8 and thus allowed same-sex marriage in California but in California only.⁴⁵

Based on this case then, the United States Supreme Court did not provide for the nation-wide applicable rule on the same-sex marriage, so both the proponents and opponents were to find other grounds.

The final say of the United States Supreme Court on the same-gender marriage came on June 26, 2015, that is eight years after the famous Proposition 8 had been put to popular vote in California.

Several groups of same-sex couples sued the state institutions in Kentucky, Michigan, Ohio and Tennessee and challenged the constitutionality of the provisions banning the marriage or refusing to recognize those, which were performed in states allowing them. Each of the suits used the argument of unconstitutionality of the laws with the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. The trial courts supported the plaintiffs' arguments and ruled in their favor, however the US Court of Appeals for the Sixth Circuit reversed and decided there was no violation of the Amendment. Since other appellate courts and district courts ruled in favor of same-sex marriage rights in that time, the problem of split interpretation occurred providing a clear path for the United States Supreme Court to provide final answers.⁴⁶

As much as the country was divided, so were the justices of the US Supreme Court and the decision was made with the 5:4 vote. Majority of the justices argued

44 E. Honan, Maryland, Maine, Washington approve gay marriage, Reuters, November 7, 2012. On-line version: <https://www.reuters.com/article/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107> (access 27.12.2018).

45 Hollingsworth v. Perry, 570 U.S. 693 (2013). The case originated from the Perry v. Schwarzeneger and Perry v. Brown. For the procedural explanation see: C.E. Borgmann, Hollingsworth v. Perry: Standing Over Constitutional Rights, "CUNY Law Review" 2013, vol. 17, p. 27 and next.

46 S.E. Isaacson, Obergeffell v Hodges: the US Supreme Court Decides the Marriage Question, "Oxford Journal of Law and Religion" 2015, vol. 4(1), pp. 530-532.

that Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and that it also applies to the same-sex couples in the same manner as it does to opposite-sex couples.⁴⁷

Despite the dissents written by other justices, the decision was final and became a landmark one in the civil rights field. The laws prohibiting same-sex marriages in the states represented in the case were struck down due to the violation of the federal constitution and, as a consequence, so were similar laws in all other states throughout the country.

The long-fought battle came to an end, at least until the possible reverse decision of the United States Supreme Court itself, which may happen with the change in the bench and strengthening of the conservative wing among the justices.

5. Closing remarks

The issue of same-gender marriages was selected as the topic of research for the presented article but it was not the only socially sensitive field touched upon in the citizens' vote in California.

The state is also known for the decisions taken through popular vote regarding legalization of marijuana. Already in 1996 through Proposition 215 marijuana for medical use was legalized in California as in the first state in the United States. In 2010 the initiative providing for legalization of recreational marijuana was lost in the vote and it took Californians another 6 years before the "Control, Regulate and Tax Adult Use of Marijuana Act" was approved by means of Proposition 64 in 2016.⁴⁸

It is interesting to note that during the same voting in 2016, Proposition 62 focusing on the capital punishment was submitted to popular vote. The punishment was originally reintroduced into the state law by Proposition 17 voted in 1972 to change the ruling of the California Supreme Court. Since then citizens rejected two initiatives to repeal the capital punishment - in 2012 and in 2016. The liberal state has shown a conservative face in this socially difficult issue.⁴⁹

California is called "the big western tail that wags the American dog when it comes to direct democracy" but at the same time the arguments have been recently heard that the state's political and financial troubles can be caused by the same direct democracy.⁵⁰

47 *Obergefell v. Hodges*, 576 U.S. (2015).

48 T. Todd, The Benefits of Marijuana Legalization and Regulation, „Berkeley Journal of Criminal Law“ 2018, vol. 23, p. 100 and next., J. Wong Jessica, Proposition 64 Legalizes Marijuana in California but the War on Drugs Continues, „The Contemporary Tax Journal“ 2017, vol. 6(2), p. 21 and next.

49 V. E. Bravo, J. Gosney, Proposition 62: Death Penalty, "The Justice at Works Act of 2016", California Initiative Review (CIR) 2016, p. 1 and next.

50 G. Genzel, The People..., *op. cit.*, p. 1.

It seems however that the citizens of the Golden State do not pay much attention to such comments, as they prove to use the initiative and referendum in the same manner and with the same involvement as ever.

There are a couple of conclusions worth underlining based on the Californian popular vote use. Most importantly the turnout is high which proves that citizens are eager to participate in the law-making process. It seems also that sometimes it takes more than one attempt to finalize the idea and introducing the new law and the proponents of certain Propositions have learned their lessons well. In addition, the same-sex marriage case and some other examples prove that the popular vote is used as a way to overrule the state highest court's decisions and that society is aware of such a possibility. From the social perspective the results of the popular vote show that California is not that liberal when it comes to the sensitive, difficult issues and the battles fought to change the mind of the voters are long, complicated and challenging.

A short analysis of the most recent popular vote confirms those conclusions. There were a total of 16 statewide ballot propositions certified for the vote together with the elections in 2018 (5 in June and 11 in November) again with high turnouts reaching over 70% in the November round. Among those, citizens' initiatives aimed for example to amend the statutes to allow ambulance providers to require workers to remain on call during breaks paid or to ban the sale of meat of animals from confined spaces below specific sizes (both with positive results). The citizens' initiative also provided for issuance of \$1.5 billion in bonds for children's hospitals. The most controversial one – proposing to divide California into three separate states was removed from the ballot.⁵¹ The initiative touching upon gender issues (The California Free Exercise of Gender Identity Initiative 2018) did not make it to the ballot⁵², but additionally proves that the citizens are eager to decide on socially controversial dilemmas and that the use of direct democracy devices continues to be strong as a guarantee of the power of the people in the state.

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