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The Referendum in the Portuguese Constitutional Experience

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Chapter 4

The Referendums on the Decriminalisation of Abortion

1. Antecedents

1.1. I Legislature: 1976-1980

On 8 March 2007 Parliament passed Law No. 16/2007 of 17 April decriminalising abortion. The result of the referendum held on 11 February that year, ended a long process of heated discussions, both inside and outside the Parliament, legal proceedings and human dramas. In that process, the referendum had a leading and decisive role. It was used to block, and later enabled the adoption of legislative measures to decriminalise abortion up to the tenth week of pregnancy. Long before the Constitutional possibility of holding referendums in Portugal, the issue of abortion was already referred to as a prototypal example of the kind of question that justified the appeal to referendum.

Portugal criminalised abortion with the Penal Code of 1886, which kept the legal system in force since the Penal Code of 1852, and remained in force up to 1982. According to Article 358 of that Code, a pregnant woman who aborted, using for that purpose violence, beverages, medicines, or any other means, should be condemned to a prison penalty from 2 to 8 years. The same penalty would be applied to any woman who consented to actually have the abortion through those means, or who voluntarily tried to abort herself (Decree of 16 September 1886, *DG*, 20 September 1886).

Close to the end of the I Legislature, in June 1980, deputy Mário Tomé (*UDP*) introduced Bill No. 500/I [*DAR* (II) 69, 6 June 1980, pp. 1138-1140], which was the first parliamentary initiative to put an end to the criminalisation of abortion. That bill revoked Article 358 of the 1886 Penal Code and allowed a pregnant woman to request an abortion as long as it was carried out by qualified personnel, in either a public or private hospital, or in a properly equipped health centre within the first 12 weeks. The bill specified the reasons that could justify the termination of pregnancy, but gave women the right not to reveal those reasons. The legislative session ended without any discussion of that bill, and it automatically lapsed.

1.2. II Legislature (1980-1983): The Debate of 1982

In the II Legislature, which began after the elections of 5 October 1980, which resulted in an absolute majority for the *AD*, Parliament revived the issue of abortion with the introduction of Bill No. 309/II, on 4 February 1982 by the *PCP* [*DAR* (II) 50, 6 February 1982, pp. 1034-1041]. In that bill, the *PCP* proposed the revocation of Article 358 of the Penal Code and the legalisation of abortion in certain conditions. The pregnant woman could request a termination of the pregnancy within the first 12 weeks and under the direction of a doctor, in a public or private health establishment especially authorised for that purpose, when: **a)** the pregnancy was the result of rape or another act that could be considered a violation of the woman's freedom; **b)** the termination of the pregnancy was a suitable means of removing a serious danger or harm to the woman's physical or psychological health; **c)** there was a serious risk that the child could suffer a severe illness or malformation; **d)** the woman, due to her familial situation or serious lack of economic resources, was unable to assure reasonable living conditions and education for the child, or the pregnancy would put her in a social and economic situation which was unbearable.

On the other hand, the pregnancy could be terminated at any time when, according to the rules and knowledge of medicine, **a)** it was necessary to take action to remove the danger of death or serious harm to the pregnant woman; **b)** there was a serious probability of illness or malformation for the child that was not detected within the first 12 weeks. Anyone who conducted an abortion outside of these permitted circumstances would be punished with a jail sentence of up to one year if the woman had consented, or from 2 to 8 years if there was no consent, and from 8 to 12 years in the case of death or serious damage to the woman's health. In other cases the woman would not be punished. The discussion on the general principles happened for the first time on 2 March 1982 [*DAR* (I) 59, 3 March 1982, pp. 2392-2420].

On 22 May 1982, while the procedure of the *PCP* bill was pending, the Government introduced Bill No. 100/II [*DAR* (II) 94, 22 May 1982] asking for authorisation to legislate in order to draw a new Penal Code. This gave rise to the 1982 Penal Code published on 23 September (Executive Law No. 400/82). That Code laid down that, anyone who conducted an abortion on a woman without her consent should be punished with between 2 and 8 years in prison. Abortion with the woman's consent should be punished with prison sentence of up to 3 years, and the same penalty should be applied to any woman that aborted her own child or gave her consent for someone else to conduct the abortion. The penalty should only be up to 2 years in prison if the abortion

was carried out to hide the woman's dishonour. If the abortion led to the woman's death or serious harm, or if the person conducting the abortion did so frequently or for purposes of gaining profit, the penalty should be even more severe. That penalty, however, should not be applied to the woman.

Bill No. 309/II was discussed again, in general terms, on 9 November 1982 and rejected on 11 November. The voting was nominal, and the bill had 127 nay votes (from the *PSD*, the *CDS*, the *PPM* and the *ASDI*) and 105 yea votes (from the *PS*, the *PCP*, the *UEDS*, the *MDP/CDE*, the *UDP* and one from the *PSD*), [*DAR* (I) 12, 12 November 1982, p. 406]. During the procedure, Teresa Ambrósio (*PS*), [*DAR* (I) 10, 10 November 1982, p. 261], Helena Roseta [*DAR* (I) 59, 3 March 1982, pp. 2412-2413] Amadeu dos Santos (*PSD*) and the *PPM* members [*DAR* (I) 12, 12 November 1982, pp. 417-418] defended a referendum on the decriminalisation of abortion, expressing regret that the Constitution did not allow it.

1.3. III Legislature (1983-1985): Law No. 6/84, of 11 May

In the III Legislature, after the 25 April 1983 elections, and under the *PS/PSD* Government, the *PCP* revived plans to decriminalise abortion through the introduction of Bill No. 7/III [*DAR* (II) 1, 1 June 1983, pp. 23-31], on 31 May 1983, thus resubmitting the contents of the previous *PCP* bill. On 12 January 1984, the *PS* introduced Bill No. 265/III [*DAR* (II) 73, 14 January 1984, pp. 1955-1957], which excluded certain cases of abortion from illegality. It also proposed that no punishment should be handed down to a doctor for carrying out an abortion in a health establishment provided the consent of the pregnant woman had been obtained and, according to the knowledge and experience of medicine: **a**) it was the only means to remove the danger of death or serious and irreversible harm to the body or the physical or psychological health of the pregnant woman; **b**) it was suitable to avoid the danger of death or durable harm to the body or the physical or psychological health of the woman, and the abortion was conducted within the first 12 weeks of pregnancy; **c**) there were good reasons to predict that the child would suffer from a serious and incurable disease or malformation, and the abortion was conducted within the first 12 weeks of pregnancy; **d**) there were evidence that the pregnancy had been the result of rape and the abortion was made within the first 12 weeks of pregnancy. Besides that, the penalties laid down in the Code remained essentially the same. The only changes were that the penalty of up to 2 years in prison, which formerly applied if the abortion had been conducted to hide the woman's dishonour, would be

replaced by prison of up to one year if the abortion had been conducted to prevent the woman experiencing social blame, or if there was another reason that could sensibly decrease the agent's guilt.

On 25 and 26 January 1984, the general principles of both bills were discussed. Through nominal voting, the *PCP* bill was rejected. It had 128 nay votes (from the *PSD*, the *CDS*, 24 from the *PS* and two from the *ASDI*), 44 yea votes (from the *PCP*, the *UEDS* and the *MDP/CDE*) and 63 abstentions (from the *PS* and one from the *PSD*). The general principles of *PS* bill was passed with 132 yea votes (from the *PS*, the *PCP*, the *UEDS*, the *MDP/CDE*, one from the *ASDI* and one from the *PSD*), 102 nay votes (from the *PSD*, the *CDS* and one from the *ASDI*) and with one abstention from a *PS* member [*DAR* (I) 67, 26 January 1984, pp. 2886-2948 and 68, 27 January 1984, pp. 2953-3070].

In the debate of 26 January 1984, António Marques Mendes, on behalf of the *PSD*, expressed his regret that a referendum was not permitted by the Constitution because it would shed light on the true feelings and will of the Portuguese people towards the abortion issue [*DAR* (I) 68, 27 January 1984, p. 3060]. That same position was Stated in the declarations of vote by the *PSD* members Agostinho Branquinho and Luís Monteiro [*DAR* (I) 68, 27 January 1984, pp. 3077-3078]. In the final overall vote, on 14 February 1984, the bill was passed with yea votes from the *PS*, the *PCP*, the *UEDS*, the *MDP/CDE* and one from the *ASDI*. The nay votes were from the *PSD*, the *CDS* and two *ASDI* members, and there were two abstentions from *PS* members [*DAR* (I) 75, 15 February 1984, p. 3292].

Thus, Law No. 6/84, of 11 May, changed Articles 139, 140 and 141 of the 1982 Penal Code in the sense of the *PS* proposal.²¹⁶ The enactment of this law was not peaceful. The President of the Republic Ramalho Eanes requested a prior review its Constitutionality by the Constitutional Court, and even suggested an extraordinary Constitutional revision to allow a referendum on the abortion issue. In the event, the Constitutional Court did not declare the law unConstitutional.²¹⁷

²¹⁶ In the case of eugenic abortion, with the possibility of a serious disease or malformation of the child, the abortion could be made within the first 16 weeks and not only within the first 12 weeks as had been previously proposed.

²¹⁷ See Ruling No. 25/84, of 19 March. The Ombudsman (*Provedor de Justiça*) also requested the review of Constitutionality of Law No. 6/84, of 11 May, which was confirmed by Ruling No. 91/85, of 18 June 1985. See the synthesis of the Constitutional jurisprudence on this subject in the report on Bills No. 177/VII, 235/VII and 236/VII,

1.4. VI Legislature (1991-1995): The Reform of Criminal Law in 1994

During the VI Legislature (1991-1995), the second with a *PSD* absolute majority, the abortion issue reappeared with Government Bill No. 92/VI, which authorised a review of the Penal Code. This bill was introduced on 16 February 1994 [*DAR* (II-A) 24 – Supplement, 24 February 1994, pp. 380(2-45)]. In the debate on the general principles, on 29 June 1994, the Justice Minister, Laborinho Lúcio, answered a question from Mário Tomé by declaring that the issue of abortion decriminalisation should be submitted to popular consultation, i.e. through a referendum [*DAR* (I) 85, 30 June 1994, p. 2751].

On 13 July 1994, in the detailed debate of the Government Bill, the *PCP* requested a discussion of its proposal to exclude abortions made within the first 12 weeks from the Penal Code, provided they had been requested by the woman. They also proposed to lengthen the time limit for eugenic abortion from 16 weeks to 22 weeks, and to decriminalise the behaviour women who had abortions outside the circumstances laid down in Article 142 of the Penal Code. The requirement was rejected with nay votes from the *PSD* and the *CDS*, but had yea votes from the *PS*, the *PCP*, the *PEV*, the *PSN*, the *UDP* and the *ID* [*DAR* (I) 91, 14 July 1994, p. 2976].

Executive-Law No. 48/95, of 15 March, published under the Authorisation given by Law No. 35/94, of 15 September, which changed the Penal Code, was submitted to parliamentary consideration.²¹⁸ On that occasion, the *PS* and the *PCP* proposed to change the legal framework of abortion criminalisation, but the parliamentary majority rejected these proposals. The issue of abortion was neither in the core of the debate of the 1994 reform of criminal law, nor was it the subject of significant public discussion at that time, even if it was not exactly absent. The legal framework introduced a small amount of flexibility, but it was discreet and made no controversy or had important social impact.²¹⁹

made for the Youth Parliamentary Committee by Luís Pedro Martins (*PS*), [*DAR* (II-A) 22, 20 February 1997, pp. 329-331].

²¹⁸ See *Ratificação* No. 138/VI [*DAR* (II) 26, 8 April 1995, p. 126] and the respective debate [*DAR* (I) 76, 13 May 1995, pp. 2463-2474].

²¹⁹ In this sense, see the Report by José Magalhães (*PS*) for the Committee of Constitutional Affairs, Rights, Freedoms and Guaranties on Bills No. 177/VII, 235/VII and 236/VII [*DAR* (II-A) 21 - Supplement, 21 February 1997, pp. 358(12-16)].

After the 1994 reform, the Penal Code retained the criminalisation of abortion in Article 140. Anyone who, by any means, and without the woman's consent, aborted an unborn child, should be sentenced to between 2 and 8 years in prison (No. 1); anyone who, by any means, and with the woman's consent, conducted an abortion, should be imprisoned for up to 3 years (No. 2); the woman who gave consent for the abortion, conducted by a third person or, through her own initiative or through a third person's, aborted an unborn child herself, should be punished with prison up to 3 years (No. 3).

Article 141(3) strengthened the penalties when the abortion or the means used to cause an abortion resulted in the death, or caused significant harm to the pregnant woman's health, or when the agent dedicated himself to the usual practice of abortions, or conducted abortions for purpose of gaining a profit. Finally, Article 142(1) laid down that the abortion was not punishable when it was made by a doctor, or under his direction, in an official or officially recognised health establishment, and with the pregnant woman's consent, provided, according to the knowledge and experience of medicine **a)** it was the only means to remove the danger of death or serious and irreversible harm to the body or physical and/or psychological health of the pregnant woman; **b)** it was appropriate to avoid the danger of death or serious and irreversible harm to the body, or to the physical or psychological health of the pregnant woman, and it was made within the first 12 weeks of pregnancy; **c)** there were sure reasons to believe that the child would suffer from a serious and incurable disease or malformation, and the abortion was conducted within the first 16 weeks of pregnancy; **d)** there were serious signs that the pregnancy had been the result of a crime against the woman's sexual freedom and self-determination, and it was made within the first 12 weeks of pregnancy. This was the starting point at the beginning of the VII Legislature.

1.5. VII Legislature: 1995-1999

1.5.1. The Attempt to Decriminalise Abortion in 1996-1997

On 20 June 1996, the *PCP* revived the initiative on the decriminalisation of abortion, introducing Bill No. 177/VII [*DAR* (II-A) 51, 22 June 1996, pp. 985-987]. In this bill, the *PCP* proposed **a)** the decriminalisation of abortion conducted within the first 12 weeks of pregnancy upon the woman's request; **b)** the extension of the time limit to 16 weeks if the pregnant woman was addicted to drugs; **c)** a further extension from 16 to 22 weeks in the case of eugenic abortion, including cases when the child could be infected with AIDS; **d)** an extension the period when the abortion could be made without penalties from 12 to 16

weeks to avoid danger of death or serious and durable harm to the body or physical and psychological health of the pregnant woman; **e)** the extension from 12 to 16 weeks in the cases where the woman had been the victims of crimes against her sexual freedom and self-determination, and up to 22 weeks where the woman was younger than 16 or mentally handicapped; **f)** the decriminalisation of the behaviour of the woman who consented to the abortion outside of the time limits laid down by law. The *PSD* proposed a referendum on the subject. This idea was strongly criticised in the Assembly of the Republic by Odete Santos (*PCP*), [*DAR* (I) 5, 25 October 1996, pp. 176-178].

On 30 October 1996, socialist members introduced two different bills on abortion. Bill No. 235/VII [*DAR* (II-A) 5, 9 November 1996, pp. 60-62], subscribed at first by Manuel Strecht Monteiro, proposed **a)** the decriminalisation of abortion, without a time limit, if the child was unfeasible; **b)** the extension from 16 to 24 weeks in the cases of eugenic abortion, where the problem had been confirmed by an ultrasound; **c)** the extension from 12 to 16 weeks for abortions without punishment in the cases of crimes against the sexual freedom and self-determination and those younger than sixteen or mentally handicapped. Bill No. 236/VII [*DAR* (II-A) 5, 9 November 1996, pp. 62-66], whose first subscriber was the Secretary General of the Socialist Youth (*JS*), Sérgio Sousa Pinto, proposed **a)** the exclusion of the illegality of abortion made within the first 12 weeks upon the woman's request, when she deemed herself unable to exercise a conscious motherhood; **b)** the extension of the time limit from 12 to 16 weeks when the abortion was recommended to avoid the danger of death or serious harm to the body or the physical and psychological health of the pregnant woman; **c)** the extension of the time limit from 12 to 16 weeks in the cases of crimes against sexual freedom and self-determination, and up to 18 weeks when these crimes were committed against those younger than 16 or mentally handicapped.

1.5.2. The Bills' Discussion and Voting

The joint discussion and the nominal voting of the bills took place on 20 February 1997 [*DAR* (I) 42, 21 February 1997, pp. 1480-1545]. The *PCP* Bill No. 177/VII was rejected with 99 yea votes, 115 nay votes and 12 abstentions. The yea votes came from all the *PCP* members (13) and the *PEV* (2), as well as the *PS* (80) and the *PSD* (4). 15 members from the *CDS-PP*, 84 from the *PSD* and 16 from the *PS* voted nay. The 12 abstentions came from *PS* members. The *PS* Bill No. 326/VII was also rejected by a margin of one single vote. It received 111 yea votes, 112 nays and three abstentions. The yea votes came from 93 *PS* members, 13

PCP members, two *PEV* members, and three *PSD* members. 83 *PSD* members, 15 from the *CDS-PP* and 14 *PS* members voted nay. The abstentions came from the *PS* (two) and the *PSD* (one). Only Bill No. 235/VII was passed in general terms, with 155 yea votes (106 from the *PS*, 34 from the *PSD*, 13 from the *PCP* and two from the *PEV*), 47 nay votes (34 from the *PSD* and 13 from the *CDS-PP*), and 24 abstentions (19 from the *PSD*, three from the *PS* and two from the *CDS-PP*).

While three parties stood united in their voting (*PCP*, *CDS-PP* and *PEV*), the *PSD* and especially the *PS*, were divided. In the case of the *PSD*, four members voted affirmatively on the *PCP* bill, three members voted affirmatively on the bill from the young socialists and one member abstained. As for the Strecht Monteiro bill, 34 members from the *PSD* voted in favour and 19 abstained.

The deepest divisions, however, were within the *PS*. Although the majority position inside the party favoured relaxing the law that criminalised abortion to some extent, the opposition of the leader and Prime Minister, António Guterres, was well known. That division was clear since the introduction of the two different bills, and the *JS* bill, were rejected by one vote due to the abstentions from three *PS* members. The division of the Socialist field was actually induced by the position of the Catholic sectors, which strongly opposed the decriminalisation of abortion.

Nonetheless, Bill No. 235/VII was passed. After the detailed voting in the Committee on 17 June 1997 [*DAR* (II-A) 53, 19 June 1997, pp. 1047-1048], it was submitted to a final overall vote on 26 June 1997, having been passed with 118 yea votes (*PS*, *PSD*, *PCP* and *PEV*), 36 nay votes (*PSD* and *CDS-PP*) and 11 abstentions (*PS*, *PSD*, *CDS-PP*), [*DAR* (I) 86, 27 June 1997, p. 3047]. Assent was therefore given to Law No. 90/97, of 30 July, which changed the time limits for the exclusion of illegality in some cases of abortions foreseen in Article 242 of the Penal Code. Being certain that the child would suffer from an incurable and serious congenital disease or malformation, the time limit for abortion without punishment was lengthened from 16 to 24 weeks of pregnancy, except in the cases of an embryo that was not viable, which could be aborted at any time. Given serious signs of crime against sexual freedom or self-determination, the time limit for an unpunished abortion was extended from 12 to 16 weeks.

1.5.3. The Draft Referendum

Meanwhile, on 20 December 1996, the *PSD* proposed a referendum on abortion, introducing Draft Resolution No. 38/VII [*DAR* (II-A) 12, 9 January 1997, p. 200]. The *PSD* considered that the position on the legal framework for abortion was not a normal ideological or partisan situation because it was essentially a matter of individual conscience, based on personal convictions and attitudes towards values and fundamental rights. On the other hand, the *PSD* thought that some of the proposed bills would mean a liberalisation of abortion although limited in time, and that question should be decided by the Portuguese people through a referendum. They argued that this would represent a fundamental change of the law in force, that it would essentially touch on values and fundamental rights, and that these decisions should be based on the free and intimate convictions of each Portuguese citizen. The question proposed was the following: ‘Should the right to have an abortion, without any medical reasons, be free within the first 12 weeks?’

The debate of the *PCP* and *PS* bills was scheduled for 20 February 1997. The *PSD* wanted its draft referendum to be previously debated, but it did not have *PS* or *PCP* support for that. However, by the end of January, the *PS* announced the acceptance of the referendum, but never before the general debate of the bills. This position, although criticised by the *PSD*, which insisted on a referendum before any parliamentary position on the bills, reflected the weight of those who opposed the decriminalisation of abortion inside the *PS*.

The referendum would be held only if any bill was passed in principle because, if bills were rejected, their renewal would not be possible in the same legislative session. Thus, if the decriminalisation was passed in principle in Parliament, the voters could contradict that decision by referendum and withdraw it. However, if Parliament rejected the decriminalisation, the voters would not have the possibility to pronounce themselves in opposition to this decision.²²⁰ Nevertheless, the *JS* and the *PCP* bills were rejected in general on 20 February 1997, and consequently, Draft Resolution No. 38/VII, which proposed the referendum, was not discussed.

1.5.4. A New Attempt at Decriminalisation: 1997-1998

In the very beginning of the next legislative session, the *PCP* revived the initiative, introducing Bill No. 417/VII in 7 October 1997

²²⁰ See speeches by Correia de Jesus (*PSD*) and Jorge Lacão (*PS*) on 30 January 1997 [*DAR* (I) 33, 31 January 1997, pp. 1222-1226].

[*DAR* (II-A) 3, 17 October 1997, pp. 19-32] essentially with the same content of Bill No. 177/VII but with some adjustments resulting from Law No. 90/97, of 30 July. On the contrary, the *CDS-PP* introduced Bill No. 448/VII on 14 January 1998, which proposed the change of Article 66 of the Penal Code in order to establish the beginning of the legal personality from the moment of conception [*DAR* (II-A) 24, 17 January 1998, pp. 441-445].

The *PS* introduced two different bills once again. On 23 January, Bill No. 451/VII [*DAR* (II-A) 27, 29 January 1998, pp. 478-480] had the Secretary General of the *JS* as the first subscriber. It essentially recycled the content of Bill No. 236/VII, but shortened the proposed period when abortion would not be illegal from 12 weeks to 10 weeks after the advice of a family consultancy centre. According to the subscribers, the new time limit only had a political reason, with the purpose of obtaining parliamentary support for its approval.

On 28 January 1998, two *PS* members, António Braga and Eurico Figueiredo, introduced Bill No. 453/VII [*DAR* (II-A) 28, 31 January 1998, pp. 555-559] proposing to add a new cause of exclusion of the illegality of abortion to the Penal Code. The legal framework proposed was as follows: **a)** the illegality of abortion would be excluded if realised within the first 12 weeks, rightly authorised by a Commission of Motherhood Protection, upon a woman's request, and only for social and economic reasons; **b)** if the pregnant woman was underage, the request should be made with the legal representatives' consent; **c)** in every district or region there would be a Commission of Motherhood Protection, which would be responsible for assessing the reasons for the request and promoting the right conditions for the pregnancy or abortion, and inform the requester of the meaning and consequences of the abortion; **d)** the Commission should authorise or refuse the abortion requested within five days, leaving the requesters with the chance to appeal to the Justice Minister or to the Supreme Administrative Court; **e)** the Commission would have five members: an obstetrician, a psychiatrist, a psychologist, a magistrate and a social service technician; **f)** the abortion requests would be free, urgent and confidential.²²¹

After the *PCP* bill, and once the *PS* bill was announced proposing the exclusion of the illegality of abortion up to the 10th week with the woman's request, the *PSD* introduced Draft Resolution No.

²²¹ See Report drawn by José Magalhães (*PS*) for the Constitutional Affairs, Rights, Freedoms and Guaranties Committee on Bills No. 417/VII, 451/VII and 453/VII [*DAR* (II-A) 29, 5 February 1998, pp. 567-576].

75/VII [DAR (II-A) 23, 15 January 1998, pp. 434-435]. One of the reasons called upon by the *PSD* was the position taken by the *PS* in 1997 in favour of a referendum if any initiative aimed at the decriminalisation of abortion passed in general terms. The *PSD* argued that any decision substantially changing the philosophy of the legal framework for abortion should be taken by the Portuguese citizens, through a referendum, before any parliamentary decision was made. However, if the parliamentary majority did not agree and sustained that the decision should be taken by Parliament, then, in the worst case scenario, the referendum should be made soon after the decision and discussed in detail until it is held.

On 4 February 1998, all of the general terms of the bills were discussed. The *PSD* Draft Resolution No. 38/VII, the first that proposed the referendum, remained valid and it was also discussed. Meanwhile, the appreciation of the second draft resolution on the referendum was scheduled for 19 February. In the 4th of February debate, Sérgio Sousa Pinto (*PS*) criticised the *PSD* proposal and rejected the idea of a referendum aiming to bypass the Assembly of the Republic if the *PS* bill passed. According to him, that was a weapon against the democratic legitimacy of the Assembly, and behind the referendum was a hidden hope to delay, which would prevent any legal evolution [DAR (I) 36, 5 February 1998, p. 1171].

Given the predicable rejection of Draft Resolution No. 38/VII, the *PSD* did not submit it to voting, announcing immediately that if any decriminalisation bills passed in general terms, it would forward a new referendum proposal. The voting was nominal. The *PCP* Bill No. 417/VII was rejected, with 107 yea votes, 110 nays and nine abstentions. The yea votes were from the *PCP* (13), the *PEV* (2), the *PS* (89) and the *PSD* (3). The nay votes were from the *CDS-PP* (15), the *PSD* (85) and the *PS* (10). The abstentions were only from *PS* members. The *CDS-PP* Bill No. 448/VII was rejected, with only 14 yea votes, all of them from the *CDS-PP*, 24 abstentions (22 from the *PSD*, one from the *PS* and one from the *PSD*) and 188 nay votes [DAR (I) 36, 5 February 1998, pp. 1209-1211]. Bill No. 453/VII subscribed by António Braga and Eurico Figueiredo was not submitted to nominal voting, because no one requested that, but it was also rejected with only yea votes from both subscribers, a few abstentions from *PS* and *PSD* members, and nay votes from all parties [DAR (I) 36, 5 February 1998, p. 1214]. Meanwhile, Bill No. 451/VII was passed in general terms, with 116 yea votes (98 from the *PS*, 13 from the *PCP*, two from the *PEV* and three from the *PSD*), 107 nays (74 from the *PSD*, 15 from the *CDS-PP* and eight from the *PS*), and three *PS* abstentions [DAR (I) 36, 5 February 1998, p. 1211-1213].

2. The Referendum of 1998

2.1. The Procedure

One day after the passing, in general, of *PS* Bill No. 451/VII, the socialist leadership announced an agreement with the *PSD* to hold a referendum on the decriminalisation of abortion. The counterpart to this agreement was a compromise on the composition of the Constitutional Court and the *PSD* acceptance that the referendums on the European Union and regionalisation could be held on the same day. The election of judges to the Constitutional Court by the Assembly of the Republic (10 in 13) demanded a two-thirds majority, which involved an agreement between the *PS* and the *PSD*. In the beginning of 1998, an impasse between both parties meant that several unoccupied judge positions went unfilled. The *PS* leadership considered yielding to the *PSD* on the abortion referendum in exchange for an agreement that would lift the blockade on the Constitutional Court's composition. This *PS* position, in response to the *PSD* referendum proposal, which denied all the arguments of its deputies during the discussion the day before, was strongly criticised in Parliament by *CDS-PP* and *PCP* members, who accused the socialists of withdrawing a Statement and giving up on principles in exchange for a beneficial deal.²²²

In the plenary sittings of 19 February 1998, the *PSD* Draft Resolution No. 75/VII was discussed [*DAR* (I) 42, 20 February 1998, pp. 1409-1423]. After that, the *PSD*, hoping that the proposal would be strictly discussed in the committee in order to obtain the clearest and most objective question to submit to the citizens, requested the sending of the draft to the Constitutional Affairs, Rights, Freedoms and Guaranties Committee, for four weeks, so that the final overall vote could happen up to 19 March 1998. The request was passed with the yea votes from the *PS*, the *PSD* and the *CDS-PP* and nay votes from the *PCP* and the *PEV* [*DAR* (I) 42, 20 February 1998, p. 1423].

On 19 March, the plenary of the Assembly of the Republic discussed the question (or questions) to submit to the voters [*DAR* (I) 51, 20 March 1998, pp. 1743-1750]. The *PSD* and the *CDS-PP* proposed to replace the first *PSD* proposal with the following questions: 1) 'Do you agree that the abortion should be free within the first 10 weeks of pregnancy?' 2) 'Do you agree that economic and social reasons may justify an abortion as being a serious danger to the woman's health?'

²²² See speeches by Jorge Ferreira (*CDS-PP*) and Octávio Teixeira (*PCP*) on 11 February 1998 [*DAR* (I) 39, 12 February 1998, pp. 1290-1291 and 1293-1294].

Submitted to vote, these questions were rejected with nay votes from the *PS*, the *PCP* and the *PEV*, and yea votes from the *PSD*, the *CDS-PP* and two *PS* members (Claúdio Monteiro and Maria do Rosário Carneiro), [*DAR* (I) 51, 20 March 1998, p. 1750]. After that, the *PS* submitted its proposal for the referendum question, which was the following: ‘Do you agree with the decriminalisation of abortion where a woman can choose to abort within the first 10 weeks of pregnancy, in a legally authorised health establishment?’ This question was passed with yea votes from the *PS*, nay votes from the *PCP*, the *PEV* and two *PS* members, and abstentions from the *PSD*, the *CDS-PP* and 12 *PS* members [*DAR* (I) 51, 20 March 1998, p. 1750]. The *PS* also proposed that only registered voters in the national territory could vote in the referendum. This proposal had yea votes from the *PS* and the *PSD*, nay votes from the *PCP*, the *PEV* and two *PS* members, and the abstention from the *CDS-PP* [*DAR* (I) 51, 20 March 1998, p. 1750].

Therefore, the *PS* accepted the referendum imposing, however, its own question, and refusing the *PSD* and *CDS-PP* proposal. These parties, in spite of their disagreement regarding the question, abstained from the *PS* proposal, thus showing their support for the referendum. The *PCP* and the *PEV*, voted against all the proposals in disagreement with the referendum on abortion, considering that the decision on that subject should be taken by Parliament.

On 31 March, Resolution No. 16/98, including the referendum proposal [*DR* (I-A) 76, 31 March 1998, p. 1414] was published. On 2 April 1998, the President of the Republic submitted it to the Constitutional Court for the prior review of the referendum’s Constitutionality and legality, including its electoral universe.

The Constitutional Court, through Ruling No. 288/98 [*DR* (I-A) 91, 18 April 1998], concluded that the proposal for referendum was according to the Constitution and the law. The decision was taken by seven judges against six, which considered that the Constitution did not allow the decriminalisation of abortion, so that the affirmative answer would be unConstitutional. Given the Constitutional Court’s decision, the President of the Republic called the referendum for 28 June 1998 [*DR* (I-A) 98 – Supplement, 28 April 1998].

Ten political parties and seven citizen groups declared their intention to take part in the campaign to the National Elections Commission. The parties were all the parliamentary parties (the *PS*, the *PSD*, the *PCP*, the *CDS-PP* and the *PEV*), the *PPM*, the *PCTP/MRPP*

(former Maoist party), and three parties that would later create the Left Block (the *PSR*, the *UDP* and the *Politics XXI*). As for the citizen groups, four of them supported the negative answer ('Abortion by request? No!', 'North Life'; 'Solidarity and Life Platform'; and 'Together for Life') and three of them supported the affirmative answer, being all of them named 'Yes, for Tolerance', but having different subscribers. On 28 June 1998, the results were as follows:²²³

Table 3

National Results of the 1998 Referendum on Abortion

Registered voters	Actual Voters		Abstentions		Blank ballot papers		Null ballot papers	
	Total	%	Total	%	Total	%	Total	%
8,496,089	2,709,503	31.89	5,786,586	68.11	29,057	1.07	15,562	0.57
YES Votes				NO Votes				
Total		%	Total			%		
1,308,130		48.28	1,356,754			50.07		

2.2. Analysis of the Results

The main point to note regarding the results of the first national referendum during the democratic period is the high rate of abstention. In fact, an abstention rate of 68.11% was a historical low for electoral participation. In the three previous elections, the rate of participation was much higher. In the parliamentary elections of 1 October 1995 the abstention rate was 33.70%; in the presidential election of 14 January 1996 33.71% of the registered voters abstained; and in the local elections of 14 December 1997 the abstention rate was 39.90%. The abstention in the 28 June referendum even passed the highest rate of abstention in national elections in history, which was 64.46% for the European Parliament election of 12 June 1994.

Michael Baum and André Freire (2003a) considered the abstention as the most remarkable fact of this referendum, given its extremely high rate. The abstention rate was more than twice the rate of the 1995 legislative elections in Portugal and it was about twice as high as the abstention rate in national referendums in other western democracies.

²²³ Available at <http://eleicoes.cne.pt/raster/index.cfm?dia=28&mes=06&ano=1998&eleicao=re1> [accessed 17 June 2011].

The authors suggested three main explanations for the abstention. First, divisions within the Socialist Party forced the party to present a campaign that was simultaneously for and against the decriminalisation. Second, the efforts of the Catholic Church that used the pulpit and media as a way of getting their message across. And third, the erroneous pre-announcement of the ‘yes’ victory by the polls without verification of the ballots (Freire & Baum, 2003a, p. 15).

Table 4

Results of the 1998 Referendum on Abortion, by Districts and Autonomous Regions

	% Abstention	% Yes	% No		% Abstention	% Yes	% No
<i>Aveiro</i>	69.4	32.3	67.7	<i>Lisboa</i>	65.7	68.5	31.5
<i>Beja</i>	77.0	78.2	21.8	<i>Portalegre</i>	75.9	67.7	32.3
<i>Braga</i>	60.5	22.7	77.3	<i>Porto</i>	66.6	42.4	57.6
<i>Bragança</i>	71.4	26.3	73.8	<i>Santarém</i>	70.2	56.6	43.4
<i>C.Branco</i>	71.2	47.2	52.8	<i>Setúbal</i>	66.6	81.9	18.1
<i>Coimbra</i>	72.7	52.9	47.1	<i>V. Castelo</i>	65.9	26.2	73.8
<i>Évora</i>	73.3	73.0	27.0	<i>Vila Real</i>	68.7	24.0	76.0
<i>Faro</i>	77.6	69.6	30.4	<i>Viseu</i>	69.6	24.2	75.8
<i>Guarda</i>	68.0	29.9	70.1	<i>Açores</i>	72.8	17.2	82.8
<i>Leiria</i>	70.6	48.3	51.7	<i>Madeira</i>	67.2	24.0	76.0

Regarding the positions of the main parties in the referendum, it there were several important aspects. On the left, the *PCP* was for decriminalisation but against the referendum, thinking that the Assembly of the Republic should directly assume the responsibility of changing the criminal law, and considering the referendum as an attempt to block the decriminalisation by Parliament. The right wing, both the *PSD* and the *CDS-PP*, assumed a position against decriminalisation and tried to use the referendum as a means to avoid it. The *PSD* favoured a referendum but were divided over the preferred answer. Several well known members supported the affirmative option and actively took part in its campaign, in spite of having a large majority inside the party against decriminalisation. However, there was no serious division inside the *PSD*, whose members regarded the referendum as a useful tool to weaken the *PS* in the upcoming 1999 elections. The *CDS-PP* was united around the ‘no’.

The *PS* was, in fact, the most divided party, and its positions suffered the greatest changes. One should be reminded that, less than 24

hours after the passing of the *PS* bill in Parliament, in which several *PS* members strongly criticised the *PSD* for supporting a referendum in debate, an agreement between both leaders precisely about the referendum was announced. The positions of the Prime Minister and the *PS* Secretary General, António Guterres, and the Catholic sectors of the party against decriminalisation, were well known. The majority of the party supported the ‘yes’ campaign in the referendum, but there was no official position and the party’s division prejudiced the commitment of the party in the campaign and confused the voters.

As Freire and Baum (2003a, pp. 11-12) highlight, the division within the *PS* encouraged abstention, and was decisive for the result. They demonstrated that the municipalities with a *PS/PCP* majority had higher abstention rates than municipalities with a *PSD/CDS-PP* majority. In the 1995 parliamentary elections, the left parties were stronger in the municipalities with higher participation, unlike the ones on the right. In the abortion referendum, these correlations inverted. The higher abstention rate took place precisely in the left municipalities and, given the tight margin that decided the referendum, it is clear that the abstention played a decisive role.

Another influential factor in the campaign, and surely in the result, was the Catholic Church’s involvement. Despite some moderate voices, several bishops and priests used religious services and the media to address extremist messages against the liberalisation of abortion. That involvement converged with the active participation of the rightist parties in the campaign, aiming to second the Church efforts and to give the idea that the referendum was a religious matter.

The fact that every poll on the referendum predicted a ‘yes’ victory could also have acted to demobilise voters. On the one hand, they had the *PS* divided between the ‘yes’ and the ‘no’, and the *PCP* struggling actively for the ‘yes’ but not very enthusiastic as for the referendum itself. On the other hand, they had the right sectors strongly committed, supported by the Catholic Church activism. The result was the disinterest of some sectors potentially in favour of the decriminalisation during the referendum day, which contributed to the tangential victory of the ‘no’ campaign, contradicting all opinion polls.

The geography of the referendum shows that, besides the higher abstention in the regions with greater influence of the ‘yes’ parties, there was a clear victory of the ‘no’ in the seven northern districts (*Aveiro, Braga, Bragança, Guarda, Viana do Castelo, Vila Real* and *Viseu*) and in Madeira and The Azores Islands, with results higher than 67%. In the

Oporto district, the ‘no’ campaign won tangentially, while the ‘yes’ campaign won in the city and in the surrounding areas. In two districts of the central region (*Castelo Branco* and *Leiria*), the ‘no’ campaign won by a slight margin. The ‘yes’ campaign gained a narrow victory in two other districts of the central region (*Coimbra* and *Santarém*) and clearly won in Lisbon (with results over 67%) and in all south districts (*Setúbal*, *Portalegre*, *Évora*, *Beja* and *Faro*).

Table 5

Comparative Results of the 1998 Referendum and Parliamentary Elections²²⁴

	% Yes Parties 1995	% Yes	% Yes Parties 1999	% No Parties 1995	% No	% No Parties 1999
<i>Aveiro</i>	44.0	32.3	45.4	54.0	67.7	52.2
<i>Beja</i>	78.9	78.2	78.6	19.3	21.8	18.4
<i>Braga</i>	48.8	22.7	51.8	48.9	77.3	45.9
<i>Bragança</i>	43.7	26.3	43.8	54.2	73.8	53.8
<i>C. Branco</i>	58.2	47.2	58.8	39.7	52.8	38.7
<i>Coimbra</i>	55.9	52.9	55.9	41.5	47.1	41.6
<i>Évora</i>	72.6	73.0	73.5	25.7	27.0	24.1
<i>Faro</i>	59.5	69.6	60.1	37.5	30.4	36.8
<i>Guarda</i>	47.3	29.9	48.2	49.9	70.1	49.0
<i>Leiria</i>	42.8	48.3	44.7	54.7	51.7	52.2
<i>Lisboa</i>	59.0	68.5	60.8	38.4	31.5	36.2
<i>Portalegre</i>	67.5	67.7	68.7	29.7	32.3	28.8
<i>Porto</i>	53.7	42.4	57.1	44.3	57.6	40.5
<i>Santarém</i>	57.5	56.6	58.6	39.7	43.4	46.3
<i>Setúbal</i>	71.8	81.9	73.2	26.0	18.1	24.1
<i>V. Castelo</i>	44.5	26.2	47.1	53.7	73.8	50.3
<i>Vila Real</i>	43.4	24.0	44.5	53.8	76.0	52.9
<i>Viseu</i>	41.4	24.2	42.0	55.7	75.8	55.1
<i>Açores</i>	40.5	17.2	56.4	57.1	82.8	41.3
<i>Madeira</i>	37.6	24.0	39.1	59.0	76.0	57.1
Total National	54.2	49.1	56.3	43.3	50.9	41.0

²²⁴ Parties voting ‘yes’ in 1995: *PS*, *CDU (PCP/PEV)*, *PCTP/MRPP*, *PSR* and *UDP*. Parties voting ‘yes’ in 1999: *PS*, *CDU (PCP/PEV)*, *BE*, *PCTP/MRPP* and *POUS*. Parties voting ‘no’ in 1995: *PSD*, *CDS-PP* and *PPM/MPT*. Parties voting ‘no’ in 1999: *PSD*, *CDS-PP* and *PPM*.

Seeking to determine the relation between the parties' influence in the parliamentary elections immediately before and after the referendum and the referendum results, we drew Table 5. In nine districts in the north and the autonomous regions, the 'yes' result in 1998 was lower than the sum total of the 'yes parties' in the 1995 and 1999 elections. In the three districts of *Alentejo* (*Portalegre*, *Évora* and *Beja*), the results were closer to the ones of the parties, but in the Lisbon area (Lisbon and *Setúbal* districts), *Leiria* and *Faro* the 'yes' result largely exceeded the result of its party's supporters. The conclusions from these facts are merely tendencies, given the high rate of abstention. However, it seems clear that many *PS* voters in the north of the country decided to vote 'no', while mainly in the urban centres, but also in the *Leiria* and *Faro* districts, the number of *PSD* voters who voted 'yes' was significant. It also seems clear that the cultural influence of the Catholic Church was important in the northern districts and in the autonomous regions.

Finally, it is possible to conclude that the citizen groups did not replace the political parties as the main mediators between the State and civil society. The Referendum Law gave an important role to the parties in the referendum campaign, but also, as Freire and Baum (2003a, p. 16) remark, the traditional political culture in Portugal overlapped the new democratic possibilities opened by the referendum. The faithful partisans were, after all, decisive in the voting, and when partisanship broke down, the voters decided to abstain.

The 28 June 1998 referendum halted the legislative process on decriminalisation of abortion. Constitutionally, the referendum had no binding effect because more than 50% of the registered voters did not vote. However, that effect was politically recognised. The bill passed in Parliament to decriminalise abortion up to the 10th week of pregnancy was not discussed in detail and lapsed by the end of the legislature.

3. Between Two Referendums: 1998-2007

3.1. VIII Legislature: 1999-2001

In the VIII Legislature, the *PCP* once again introduced its bill to decriminalise abortion on 17 November 1999 [Bill No. 9/VIII, *DAR* (II-A) 5, 27 November 1999, pp. 53-55]. Meanwhile, the *BE*, now a constituted political party that obtained parliamentary representation in the October 1999 elections, introduced a bill on the same subject on 10 January 2000 [Bill No. 64/VIII, *DAR* (II-A) 14, 13 January 2000, pp. 265-267]. These initiatives were never discussed and lapsed on 4 April 2002 following the dissolution of Parliament. However, the issue of abortion did not

disappear from the media agenda or political discourse. On 18 October 2001, 17 women were submitted to trial, at the *Maia* court, and charged with abortion in a lawsuit where 43 people were accused. The impact of this trial activated the debate on the need to change the criminal law.²²⁵

3.2. IX Legislature (2002-2005): The Majority against the Referendum

During the IX Legislature, under a *PSD/CDS-PP* coalition Government, the issue of abortion returned to the political agenda. The first bill of that legislature, introduced by the *PCP* on 10 April 2002, tackled the abortion issue head on [Bill No. 1/IX, *DAR* (II-A) 4, 9 May 2002, pp. 32-34], reviving the contents of previous bills from that party. Four years after a referendum without binding effect, the Assembly of the Republic had total legitimacy to change the criminal law without a referendum. The Penal Code, which punished abortion, remained unchanged. The criminal prosecution of women charged with abortion had followed. These facts were the reasons why the *PCP* decided to revive the initiative, proposing to decriminalise abortion, upon the woman's request, within the first 12 weeks of pregnancy.

On 18 April, the *PS* introduced Draft Resolution No. 3/IX [*DAR* (II-A) 4, 9 May 2002, p. 63] on the accomplishment of Laws No. 6/84, of 11 May, and No. 90/97, of 30 July, on backstreet abortion in Portugal, proposing that the Assembly of the Republic should commission a study by an external entity, namely a university, in order to assess as objectively as possible the situation in Portugal as to that subject. The discussion took place on 16 May 2002 and the draft was sent to the Work and Social Affairs Committee for detailed consideration before voting. There, the *PS*, the *PSD* and the *CDS-PP* arrived at an agreement that significantly extended the scope of the study.²²⁶ This text was passed as Resolution No. 57/2002, of 17 October, with the only opposition of the *PCP* and the *PEV* which saw that Resolution as a way to delay the passing of legislation. The study, however, was never made.

On 27 June 2002, the *BE* introduced its first bill on abortion proposing, like the *PCP*, the decriminalisation of abortion upon a woman's request within the first 12 weeks of pregnancy [Bill No. 89/IX, *DAR* (II-A) 17, 29 June 2002, pp. 512-517]. On 4 December 2003, there was a new trial against seven women charged with abortion.

²²⁵ See parliamentary speeches by Francisco Louçã (*BE*), Helena Roseta (*PS*), Margarida Botelho (*PCP*) and Isabel Castro (*PEV*), [*DAR* (I) 14, 19 October 2001, pp. 466-468].

²²⁶ See the Committee's Report [*DAR* (II-A) 30, 8 October 2002, pp. 931-517].

In Parliament, the issue of abortion was again revived at the beginning of 2004. The *PS* introduced the Bill No. 405/IX on 20 January [DAR (II-A) 31, 14 January 2004, pp. 1755-1757], which excluded illegality in certain cases of abortion, and Draft Resolution No. 203/IX [DAR (II-A) 31, 14 January 2004, p. 1760] proposing a referendum on the decriminalisation of abortion within the first 10 weeks of pregnancy. The *PS* introduced a bill on decriminalisation, but proposed at the same time that the solution be submitted to referendum. In their view, any change of law would depend on a referendum that overturned the decision of the voters taken in 1998, in spite of its non-binding effect and the recognition of the legitimacy of Parliament to change the law without referendum.

On 30 January 2004, the *PEV* introduced Bill No. 409/IX [DAR (II-A) 33, 5 February 2004, pp. 1795-1797] essentially agreeing with the solution proposed by the *PCP* and the *BE*. On 11 February 2004, the Assembly of the Republic received the first popular initiative for referendum. 121,151 citizens used the power of initiative that the Constitution and the law gave them to propose, to the Assembly, a fresh referendum on the decriminalisation of abortion. The Constitutional Affairs, Rights, Freedoms and Guaranties Committee unanimously considered that the initiative met the conditions to be admitted, and assumed, as laid down by law, the responsibility of drawing the respective draft resolution.²²⁷ The question was the following: ‘do you agree that an abortion carried out within the first 10 weeks of pregnancy with the woman’s consent in a legal health establishment should cease being considered a crime?’

On 17 February, the *PSD* and the *CDS-PP*, acting together, introduced Draft Resolution No. 225/IX [DAR (II-A) 37, 19 February 2004, pp. 1926-1928] on preventive measures for abortion, including several recommendations for the Government in the areas of education, motherhood support, family planning, and the guarantee of law enforcement. On that same day, the *BE* introduced Draft Resolution No. 227/IX [DAR (II-A) 37, 19 February 2004, p. 1929] proposing a referendum in the terms of the popular initiative that had already introduced.

On 3 March 2004, the *PCP* used its right to schedule the order of business in the Assembly of the Republic, setting the discussion of its Bill No. 1/IX. As laid down by the Rules of Procedure, the Group holder of the initiative can allow the discussion of bills introduced by other

²²⁷ See Draft Resolution No. 230/IX [DAR (II-A) 41, 4 March 2004, pp. 2015-2020].

parties for a common discussion. The *PCP* allowed the discussion of the bills and draft resolutions on the referendum proposed by the *PS*, the *BE* and the *PEV*. It did not allow the discussion of the *PSD* and the *CDS-PP* draft resolution since it thought that its subject was not the decriminalisation of abortion. However, the parliamentary majority forced a new interpretation of the Rules of Procedure, compelling the holder of the schedule to accept the discussion of other initiatives even against its will. Despite the *PCP*'s protest, and even without ruling grounds, the majority imposed itself and the *PSD* and *CDS-PP* draft resolution was also scheduled for 3 March 2004.²²⁸

In the end, the *PSD/CDS-PP* majority rejected all the bills that proposed the decriminalisation of abortion and did not even allow the nominal voting proposed by the *PS* and the *PCP* [*DAR* (I) 58, 4 March 2004, p. 3256]. The *PCP*, *BE* and *PEV* bills were rejected with nay votes from the *PSD*, the *CDS-PP* and nine *PS* members, abstention from three *PS* members and yea votes from the *PS*, the *PCP*, the *BE* and the *PEV*. The *PS* bill was also rejected by the majority and four *PS* members, with abstentions from two *PS* members. The draft resolutions proposing referendums were also rejected by the negative votes from the *PSD*, the *CDS-PP* and three *PS* members. The *PS*, the *PCP*, the *BE* and the *PEV* voted affirmatively on all of them.

As we can see, the party positions towards the referendum changed from 1998. The *PS* and the *BE* supported the change of the law as long as it was preceded by a referendum, and they proposed that referendum because it actively supported the gathering of signatures for the popular initiative. The *PCP* and the *PEV* supported the change of the law without a referendum. However, once the parliamentary majority had rejected all the bills on decriminalisation, they voted in favour of the draft resolutions for referendum since that was the only way to change the law during that legislature. The *PSD* and the *CDS-PP* believed that the law must not be changed without referendum, but they voted against all the draft resolutions for referendum, finding them inopportune.

In the *PS* strategy, the referendary option was heavier than decriminalisation. The party majority supported the decriminalisation of abortion, but they did not want to assume that responsibility without the legitimacy given by a new referendum. The *BE*, not even divided as to the decriminalisation, decided to bet on the referendum as a way to overcome it. The *PCP* and the *PEV*, who were against the referendum in 1998 since

²²⁸ See debate [*DAR* (I) 58, 4 March 2004, pp. 3204-3273].

they believed that it had been called precisely to avoid decriminalisation, voted for it in 2004 because it would not be possible to decriminalise abortion through a parliamentary decision during that legislature because of the position of the majority. The *PSD* and the *CDS-PP* made their option against decriminalisation clear. They wanted the referendum in 1998 to avoid decriminalisation, and they rejected it in 2004 with exactly the same purpose. In 2004, the right wing parties' intentions were clear: neither a law nor a referendum was acceptable.

Only the draft resolution by the *PSD* and the *CDS-PP* passed with both party votes, nay votes from the *PS*, the *PCP*, the *BE* and the *PEV*, and the abstention of 33 *PS* members. The decriminalisation of abortion was rejected and no proposal for referendum was passed.

3.3. X Legislature (2005-2009): A Troubled Procedure

3.3.1. The First Attempt for Referendum

On the very first day of parliamentary work, on 16 March 2005, the *PCP*, the *PEV* and the *BE* introduced their bills to decriminalise abortion once again.²²⁹ On that same day, the *BE* introduced Draft Resolution No. 7/X which proposed the referendum [*DAR* (II-A) 4, 2 April 2005, p. 107]. On 22 March 2005, the *PS* introduced Bill No. 19/X on the exclusion of the illegality of certain cases of abortion [*DAR* (II-A) 4, 2 April 2005, pp. 98-100] and Draft Resolution No. 9/X [*DAR* (II-A) 4, 2 April 2005, pp. 109-110] which proposed a referendum on the decriminalisation of abortion within the first 10 weeks of pregnancy. On that same day, the independent MPs, Maria do Rosário Carneiro and Teresa Venda, who had been elected on the *PS* ticket but were members of a Christian movement named Humanism and Democracy, which was against decriminalisation, introduced Bill No. 20/X [*DAR* (II-A) 4, 2 April 2005, p. 101]. It mandatorily stipulated the provisional suspension of the criminal proceedings on certain cases of abortion.²³⁰

The initiatives of the *PCP*, the *PEV*, the *BE* and the *PS*, essentially revived the bills introduced by these parties and refused by the parliamentary majority in the previous legislature. The bill introduced by the Humanism and Democracy Movement reflected the disquiet of significant sectors of Portuguese society. Even those who declared

²²⁹ See Bills No. 1/X (*PCP*), No. 6/X (*PEV*) and No. 12/X (*BE*), in *DAR* (II-A) 4, 2 April 2005, respectively pp. 3-5, 28-31 and 38-44.

²³⁰ This bill was not included in the order of business with the others and was later removed for being considered useless.

themselves against the decriminalisation of abortion, and supported the criminal censure of its practice, sometimes felt uncomfortable with the practical consequences of that censure. In fact, the trials after the 1998 referendum, in which were amplified by the media, specifically in the *Maia* and *Aveiro* Courts, proved that criminalisation was not innocuous, and that the women, even if found not guilty, which was never sure, were submitted to police prosecution and public humiliation during the trial.

To sum up, according to the *PCP* and the *PEV*, the Assembly of the Republic should decriminalise abortion without a referendum, because it was not Constitutionally or politically required, and they introduced bills with that purpose. The *PS* and the *BE* supported the decriminalisation of abortion, but it should depend on a referendum to supersede the 1998 result. They accepted that the referendum was not Constitutionally required, but they thought that a political decision taken by referendum should only be changed by another referendum. Maria do Rosário Carneiro and Teresa Venda considered that, with a new referendum in sight, the criminal proceedings against women accused of abortion should be provisionally suspended.

The general debate was held on 20 April 2005, and the *PS* [*DAR* (I) 10, 21 April 2005, pp. 347-376] agreed to discuss the bills of the *PCP*, the *PEV* and the *BE*. The yea votes from the *PS*, the *PCP*, the *BE*, the *PEV* and four *PSD* members passed the *PS* bill in general terms. It had nay votes from the *PSD*, the *CDS-PP* and four *PS* members, and abstentions from one *PS* and one *PSD* members [*DAR* (I) 10, 21 April 2005, p. 376]. The other bills were rejected.²³¹

The position of the *PS*, holder of an absolute majority, was decisive. Insofar as the option to pass the law after a referendum that legitimised it, the *PS* decided to pass only its bill, in order to make the question proposed in the referendum and the wording proposed in the law coincide, that is, the decriminalisation of abortion in the first 10 weeks of pregnancy. Thus, the *PS* voted against the *PCP* bill, rejecting it, and abstained in the *BE* bill, leading to its rejection by the right wing parties. The difference of attitude from the *PS* towards the *BE* and *PCP* bills is explained by the difference of opinions that these parties held towards the

²³¹ The *PCP* bill had nay votes from the *PS*, the *PSD* and the *CDS-PP*, and abstentions from 10 *PSD* members. The *PEV* bill had nay votes from the *PS*, the *PSD* and the *CDS-PP*, yea votes from the *PCP*, the *BE* and the *PEV* and abstentions from seven *PSD* members. The *BE* bill had nay votes from the *PSD*, the *CDS-PP* and four *PS* members, yea votes from the *PCP*, the *BE* and the *PEV*, and abstentions from the *PS* and seven *PSD* members [*DAR* (I) 10, 21 April 2005, p. 376].

referendum. While the *PCP* refused the referendum and accused the *PS* of trying to escape from its responsibility to decriminalise abortion and passing it on to Parliament (Filipe, 2007), the *BE* proposed the referendum as well and accepted the *PS* proposal in that sense.

The draft resolutions from the *PS* and the *BE* on the referendum were discussed on the same day, 20 April 2005 [*DAR* (I) 10, 21 April 2005, pp. 377-396]. The *BE* withdrew its draft and the *PS* draft was passed with yea votes from the *PS* and the *BE*, nay votes from the *PCP*, the *CDS-PP*, the *PEV*, one from the *PS* and one from the *PSD*, and abstentions from the *PSD* and one *PS* member [*DAR* (I) 10, 21 April 2005, p. 396].

The *CDS-PP*, taking into consideration that the *PS* bill, included a provision in which abortion could be decriminalised when it was appropriate to avoid the danger of death or serious and durable harm to the body, or physical and psychological health of the pregnant woman, including for economic and social reasons, within the first 16 weeks, thought that the question was not about abortion up to 10 weeks, but actually up to 16 weeks. Thus, it introduced an amendment to the *PS* draft, replacing the question for the following: 'do you agree with the decriminalisation of abortion within the first 16 weeks of pregnancy, with the woman's consent, in a legal health establishment?' This *CDS-PP* proposal was undermined by the previous passing of the *PS* proposal, which led to the Resolution of the Assembly of the Republic No. 16-A/2005, of 26 April.

However, the President of the Republic, Jorge Sampaio, decided to use his power to refuse to hold the referendum. On 2 May 2005, he transmitted that decision with a message addressed to Parliament [*DAR* (II-A) 12, 7 May 2005, p. 2]. Taking into consideration the time limits in force, the proposed referendum would need to happen on a Sunday in July. For that reason, the President of the Republic thought that the minimum conditions for a significant participation did not exist. In his message, Jorge Sampaio reminded Parliament of the weak participation in the 1998 referendum. He was concerned that, if such a low turnout were repeated, it could fundamentally jeopardise the institution of the referendum itself. Therefore, the President's refusal should not be seen as a political rejection of the proposal, but as an appeal to hold a referendum in better circumstances, encouraging a more active and participative citizenship.

The reading of the presidential message on 5 May, gave rise to a brief debate in Parliament. The *BE* disagreed with the President, and

believed that the Assembly of the Republic should move forward with decriminalising abortion if no referendum was held in 2005.²³² The *PSD* and the *CDS-PP* applauded the President's decision.²³³ From the left, the *PCP* and the *PEV* welcomed the decision, and challenged the *PS* to reintroduce the legislative procedure in Parliament, given the impossibility of making a referendum during the first legislative session. If the *PS* insisted on the referendum, the decriminalisation of abortion would be delayed for a very long time.²³⁴ The *PS* understood the President's worries, but reasserted again its compromise to have the referendum.²³⁵

3.3.2. The Change of the Legal Time Limits

On 28 June 2005, the *PS* introduced Bill No. 122/X [*DAR* (II-A) 31, 2 July 2005, pp. 8-10] to solve the problem of the time limits for the referendum and other electoral acts, with a view to calling a referendum on the decriminalisation of abortion. The *PS* proposed at this time to change the time limits regarding referendums. The Referendum Law (Organisational Law No. 15-A/98, of 3 April) laid down in Article 35(2) that the referendum should happen between the 60th and the 90th day after the President of the Republic decreed on it. The bill proposed a new time limit that spanned between the 40th and the 180th days.

In addition, the *PS* proposed to change some intermediate time limits established in the law: **a)** the time limit for parties, coalitions and citizen groups to declare their participation in the campaigns would be changed from the 15th to the 30th day before the referendum (Articles 40 and 41); **b)** the time limit to fix the polling stations would be changed from the 35th to the 30th day before the referendum (Article 77); **c)** the time limit to stipulate the location of the polling stations would be changed from the 25th to the 30th day before the referendum [Article 79(1)]; **d)** the time limit to publicise the location of the polling stations would be changed from the 28th to the 23th day before the referendum [Article 79(2)].

²³² See speeches by Luís Fazenda and Francisco Louçã [*DAR* (I) 16, 5 May 2005, pp. 593 and 596-598].

²³³ See speeches by Nuno Melo (*CDS-PP*) and Luís Marques Guedes (*PSD*), [*DAR* (I) 16, 5 May 2005, pp. 593-594 and 595].

²³⁴ See speeches by Heloísa Apolónia and Francisco Madeira Lopes (*PEV*) and Bernardino Soares (*PCP*), [*DAR* (I) 16, 5 May 2005, pp. 592-593, 600-601 and 598-600].

²³⁵ See speech by Alberto Martins (*PS*), [*DAR* (I) 16, 5 May 2005, pp. 595-596].

Some time limits laid down in the Electoral Registration Law (Law No. 13/99, of 22 March) would be changed, with the referendum being called with less than 55 days of antecedence. The Electoral Law to the President of the Republic would also be changed so that it could be scheduled with 60 days of antecedence, lowering the time limit from 80 days.²³⁶ The idea was to hold a referendum in 2005, a race against time and the time limits. Given that no referendum could be called or held after elections for sovereignty organs had been called, it was necessary to shorten the time limits for holding referendums and for calling elections, keeping in mind that local elections were due to be held in October 2005.

The first reading debate and the general voting of that bill happened on 8 July 2005 [*DAR* (I) 40, 9 July 2005, pp. 1762-1783]. The *PS* and the *BE* passed the bill, despite the votes against it from other parties. The opponents accused the *PS* of trying to condition the free decision of the President of the Republic, making him responsible for the eventual refusal of holding the referendum in 2005. Even if the President of the Republic and the Constitutional Court did not use up the time available to make their decisions and accepted to make them earlier, the referendum could hardly take place before 19 December; neither could it occur after 9 January, because the presidential elections would then need to be called. Therefore, the referendum could not be held in conditions would guarantee high levels of citizen participation.²³⁷

The *BE* were in favour of the *PS* bill, and considered that a decision to decriminalise abortion without referendum could be an ephemeral and unsafe solution, susceptible to being overturned by another parliamentary majority. However, the *BE* declared that it would support the referendum only if it were held before the presidential elections. A second failed referendum should lead to the only acceptable alternative, which was through a legislative procedure in Parliament.²³⁸

In the detailed debate, on 20 July 2005, the *PS* made some changes on the Referendum Law that were not in the initial text: **a)** Article 8 allowed the introduction of referendum initiatives even after the calling of elections for the sovereignty organs, self-government bodies of the autonomous regions, local authorities and the European Parliament; **b)** Article 35(2) fixed a special time limit for calling referendums with the

²³⁶ See Executive-Law No. 319-A/76, of 3 May, article 11.

²³⁷ See speeches by Vitalino Canas (*PS*) supporting the bill [*DAR* (I) 40, 9 July 2005, pp. 1762-1764] and Luís Marques Guedes (*PSD*), António Filipe (*PCP*) and Pedro Mota Soares (*CDS-PP*) in the opposite sense [*DAR* (I) 40, 9 July 2005, pp. 1768-1776].

²³⁸ See speech by Fernando Rosas (*BE*), [*DAR* (I) 40, 9 July 2005, p. 1778-1779].

participation of emigrants, which would be between the 55th and the 180th days.

All provisions had the yea votes from the *PS* and the *BE* and nay votes from all other parties [*DAR* (II-A) 40, 30 July 2005, pp. 6-9]. The same happened in the final overall vote on 28 July [*DAR* (I) 42, 29 July 2005, pp. 1917-1918]. Organisational Law No. 4/2005 was passed on 8 September.

3.3.3. The Second Attempt for a Referendum

At the beginning of the parliamentary sittings, on 15 September, the *PS* re-introduced the initiative for a referendum by introducing Bill No. 69/X [*DAR* (II-A) 50, 22 September 2005, pp. 22-23], thus creating a Constitutional problem. Article 115(10) of the Constitution specified that a draft referendum refused by the President of the Republic could not be resubmitted during the same legislative session, except when there had been new elections for the Assembly of the Republic. Article 171(1) laid down that ‘the legislature shall last for four legislative sessions’ and Article 171(2) laid down that in the event of the dissolution of the Assembly, the newly elected Assembly shall commence a new legislature, with the amount of time needed being extended to complete the period that corresponded to the legislative session that was in progress at the date of the election.

This meant that the *PS* draft referendum should be accepted, since a new legislative session had begun on 15 September 2005. Based on Article 115(10) of the Constitution, the *PS* thought that the prohibition laid down in such a provision did not exist in the event of a new election of the Assembly of the Republic. The opposition parties, except for the *BE*, did not think that way. Based on Article 171, and given that the 2nd legislative session had begun on 15 September, the legislature would not have four, but five legislative sessions. Obviously, the problem existed because there were elections on 20 February 2005 as a result of the dissolution of the Assembly.

On 21 September 2005, the *CDS-PP* appealed against the admission of the *PS* draft resolution [*DAR* (I) 47, 22 September 2005, pp. 2124-2125], but the appeal was rejected with the passing of an opinion drawn by Vitalino Canas on 22 September. The conclusion, with affirmative votes from the *PS* and the *BE* and negative votes from all the other parties, was that the legislative sessions lasted one year, and their beginning was always the 15th of September. The holding of elections

does not interrupt the ongoing legislative session. Therefore, on 15 September 2005 a new legislative session had begun and Draft Resolution No. 69/X could be introduced.²³⁹

The draft resolution was discussed in plenary sittings on 28 September 2005, and passed with the votes from the *PS* and the *BE*, with all the other parties and Teresa Venda, elected as an independent in the *PS* lists, having voted against it. Maria do Rosário Carneiro, also elected in the *PS* lists, abstained [*DAR* (I) 50, 29 September 2005, p. 2204]. This gave rise to the Resolution of the Assembly of the Republic No. 52-A/2005, of 29 September, proposing a referendum to the President of the Republic, through which the registered voters in the national territory were called to decide on the following question: ‘do you agree with the decriminalisation of abortion, if the woman chooses to abort within the first 10 weeks in a legally authorised health establishment?’ Meanwhile, considering the position taken by the majority in Parliament, according to which a new legislative session had begun, the *PCP* introduced its bill on the decriminalisation of abortion once again [Bill No. 166/X, *DAR* (II-A) 55, 13 October 2005, pp. 40-43].

After the resolution was submitted to a prior review, the Constitutional Court decided on 28 October, with Ruling No. 578/2005, that the first legislative session of the X Legislature would only finish on 15 September 2006, according to Article 171 of the Constitution. The Assembly elected on 20 February 2005 had begun a new legislature whose duration was added to the time needed to finish the ongoing legislative session. Consequently, the Constitutional Court considered that the two resolutions regarding the referendum on abortion were passed in the same legislative session, despite the prohibition of Article 115(10) of the Constitution and 36(3) of the Referendum Law. The proposed referendum was judged unconstitutional and illegal²⁴⁰ and the President of the Republic sent it back to Parliament on 10 November 2005 [*DAR* (I) 59, 10 November 2005, pp. 2664-2665].²⁴¹ Given the Constitutional Court decision as to the beginning of the first legislative session, the *PCP* withdrew Bill No. 166/X [*DAR* (II-A) 62, 12 November 2005, p. 4]. It was necessary to wait for the second legislative session to see more developments.

²³⁹ See the opinion text [*DAR* (II-A) 51, 24 September 2005, pp. 6-8] and the debate in plenary session [*DAR* (I) 48, 23 September 2005, p. 2204].

²⁴⁰ The decision was taken by seven votes against six [*DR* (I) 220, 16 November 2005].

²⁴¹ See the debate on the presidential message addressed to Parliament [*DAR* (I) 65, 9 December 2005, pp. 3099-3108].

3.4. The Referendum of 2007

3.4.1. The Procedure

On the very first day of the second legislative session, on 15 September 2006, the *PCP* introduced Bill No. 308/X [*DAR* (II-A) 2, 21 September 2006, pp. 14-18] re-introducing the contents of its previous initiatives.²⁴² The *PEV* introduced Bill No. 309/X [*DAR* (II-A) 2, 21 September 2006, pp. 18-19]. The *PS* introduced Draft Resolution No. 148/X [*DAR* (II-A) 2, 21 September 2006, p. 42] proposing again the referendum on the decriminalisation of abortion within the first 10 weeks. On 27 September the *BE* introduced Bill No. 317/X [*DAR* (II-A) 5, 6 October 2006, pp. 13-19].²⁴³

The debate and passing of Draft Resolution No. 148/X took place on 19 October 2006. The *PS*, the *BE* and the *PSD* voted yea. The *PCP*, the *PEV*, Matilde Sousa Franco (*PS*) and Pedro Quartin Graça (*PSD*) voted nay. The *CDS-PP*, two *PS* members and one *PSD* member, abstained [*DAR* (I) 14, 20 October 2006, pp. 6-28]. The question that passed was as follows: ‘do you agree with the decriminalisation of abortion, when a woman decides to abort within the first 10 weeks in a legally authorised health establishment?’²⁴⁴ The *CDS-PP* introduced a draft replacement for the question, replacing the word ‘decriminalisation’ for ‘liberalisation’ [*DAR* (II-A) 12, 28 October. 2006, p. 11].

It is important to highlight the evolution of the right wing parties’ thought, particularly the *PSD*, to become more favourable towards the referendum. This can be explained by several factors. Essentially, the *PSD* did not change its position regarding the referendum. The circumstances, however, had changed. In 1998, the *PSD* had been the first to support the referendum as a way to prevent the passing of a law that decriminalised abortion. In the IX Legislature, with a *CDS-PP* coalition and a majority able to prevent decriminalisation, the *PSD* opposed the referendum. In the X Legislature, there was a majority with a tendency towards decriminalisation, and the *PSD* had nothing to lose with the referendum. On the *PS* draft referendums, the *PSD* abstained on the first and voted against the second, not so much for being against the referendum, but given the weaknesses of the proposals regarding the

²⁴² This bill expired on 22 November 2007 because the decriminalisation of abortion passed in the meanwhile.

²⁴³ This bill expired on 3 October 2007 because the decriminalisation of abortion passed in the meanwhile.

²⁴⁴ See the Assembly of the Republic Resolution No. 54-A/2006, of 20 October.

calendar, which eventually led to their failure. Once these obstacles were gone, the *PSD* put aside its opposition to the referendum. Meanwhile, the position of that party as to the main question had also changed. The *PSD* did not adopt an official position against the decriminalisation of abortion any longer, having recognised the freedom of vote of its militants in the referendum and of its members in Parliament. The *CDS-PP* moved towards abstention because since the parliamentary majority was in favour of decriminalisation, and the best hope of avoiding that outcome would be a victory for the 'no' campaign in the referendum, as in 1998.

On the left, the positions remained the same. The *PCP* and the *PEV* continued to oppose the referendum, thinking that Parliament should assume the responsibility of deciding on the decriminalisation. The *BE* supported the *PS* position on the referendum. This tactic caused problems for the *BE*, keeping in mind that there was some similarity between the *BE* and *PS* positions regarding the referendum, and the confusion that the latter party embroiled in the process. In fact, by accepting the idea supported by the *PS* that the decriminalisation of abortion should be decided by referendum, the *BE* became dependent on the socialist strategy. When the *PS* went forward with draft referendums that were clearly weak and always counted on the support of the *BE*, but delayed decriminalisation given the refusal of the referendums by the President of the Republic, the *BE* itself was targeted by the *PCP* critics, who thought the referendum was not essential for decriminalisation. For that reason, the *BE* position was accused of being hesitant and ambiguous, somewhere between full support for the referendum and the admission that, if the referendum was impossible, Parliament should change the law.

In a prior review, the Constitutional Court judged the draft referendum as being Constitutional and legal with Ruling No. 617/2006, taken on 15 November.²⁴⁵ Consequently, the President of the Republic elected in the meantime, Aníbal Cavaco Silva, scheduled the referendum for 11 February 2007 (Decree No. 117-A/2006, of 30 November).

All the parties represented in Parliament (the *PS*, the *PSD*, the *PCP*, the *CDS-PP*, the *BE* and the *PEV*) declared their intention to participate in the campaign to the National Election Commission (*CNE*). The Humanist Party (*PH*), the National Renovator Party (*PNR*), the Worker Party of Socialist Unity (*POUS*) and the Popular Monarchist Party (*PPM*), did the same. The number of citizen groups created to take part in

²⁴⁵ The decision was taken by seven votes against six. Some judges disagreed of the decision regarding essentially the requirements of objectivity, clearness and precision of the question and the conformity of the positive answer as to the Constitution.

the campaign was the highest ever. 19 groups were constituted, with five for the ‘yes’ campaign and fourteen for the ‘no’.²⁴⁶ Three parties fought for the answer ‘no’ (the *CDS-PP*, the *PPM* and the *PNR*) and six fought for the answer ‘yes’ (the *BE*, the *PH*, the *PCP*, the *PEV*, the *POUS* and the *PS*). The *PSD* did not take an official position. André Freire (2007, pp. 108-109) stresses the great increase of civic mobilisation compared to 1998, mainly in the ‘no’ field, with several movements linked to the Catholic Church.

3.4.2. Analysis of the Results

Table 6

National Results of the 2007 Referendum on Abortion²⁴⁷

National results								
Registered Voters	Actual Voters		Abstentions		Blank ballot papers		Null ballot papers	
	Total	%	Total	%	Total	%	Total	%
8,814,016	3,840,176	43.57	4,973,840	56.43	48,094	1.25	25,884	0.67
YES Votes				NO Votes				
Total		%		Total		%		
2,231,529		59.25		1,534,669		40.75		

The first data to note is the inversion of the results in relation to the 1998 referendum. The substantial reduction of abstentions, by 11.7%, contributed decisively in that respect. There were 1,130,673 more voters than in 1998. The ‘yes’ campaign had 923,399 more votes than in 1998 (a relative increase of 10.1%) and the ‘no’ had 177,915 more votes (a relative decrease of 10.1%). The speculation after the 1998 referendum that the high abstention rate had decisively harmed the ‘yes’ option was proven entirely true in 2007. On the other hand, while in 1998 the ‘no’ campaign had won narrowly, by 1.89%, in 2007 the ‘yes’ won a decisive victory with an advantage of 18.16%.

²⁴⁶ Full list available at <http://www.cne.pt/index.cfm?sec=0306000000&EleicaoID=49&Eleicao2ID=0> [accessed 18 June 2011].

²⁴⁷ Results available at <http://eleicoes.cne.pt/raster/index.cfm?dia=11&mes=02&ano=2007&eleicao=re1> [accessed 18 June 2011].

The results of the districts (Tables 7 and 8) revealed that the ‘yes’ campaign, besides strengthening the districts where it had clearly won in 1998, also clearly won in the *Coimbra* and *Santarém* districts. In *Castelo Branco*, *Leiria* and *Oporto* districts, there was an inversion of the results, with the victory of ‘yes’. The ‘no’ campaign won again in the seven districts of the north, except in *Oporto* (*Viana do Castelo*, *Braga*, *Vila Real*, *Bragança*, *Guarda*, *Viseu*, *Aveiro*), and in the Autonomous Regions of The Azores and Madeira.

Table 7

Results of the 2007 Referendum on Abortion, by Districts and Autonomous Regions

	% Abstentions	% YES	% NO		% Abstentions	% YES	% NO
<i>Aveiro</i>	57.7	44.6	55.4	<i>Lisboa</i>	51.3	71.5	28.5
<i>Beja</i>	60.2	83.9	16.1	<i>Portalegre</i>	61.1	74.4	25.6
<i>Braga</i>	53.6	41.2	58.8	<i>Porto</i>	55.1	54.4	45.6
<i>Bragança</i>	65.6	40.8	59.2	<i>Santarém</i>	55.9	65.1	34.9
<i>C.Branco</i>	59.4	61.6	38.4	<i>Setúbal</i>	51.5	82.0	18.0
<i>Coimbra</i>	59.9	62.9	37.1	<i>V. Castelo</i>	60.4	40.4	59.6
<i>Évora</i>	57.0	78.4	21.6	<i>Vila Real</i>	64.8	38.1	61.9
<i>Faro</i>	61.2	73.6	26.4	<i>Viseu</i>	62.3	38.5	61.5
<i>Guarda</i>	61.5	46.7	53.3	<i>Açores</i>	70.5	30.7	69.3
<i>Leiria</i>	56.1	58.3	41.7	<i>Madeira</i>	61.4	34.6	65.4

Table 8 compares the results of the 1998 and the 2007 referendums in each district.

In addition to the inversion of results in three districts, that inversion also became apparent in three district capitals (*Aveiro*, *Guarda* and *Leiria*) and in 37 municipalities. In 1998, the ‘no’ had won in 184 municipalities and the ‘yes’ in 124. In 2007, the situation was the opposite: the ‘yes’ won in 161 municipalities and the ‘no’ in 147.

Table 9 shows the relation between the abstention, the ‘yes’ vote and the ‘no’ vote in both referendums. This table shows that, despite the reduction of abstentions in all districts of the country, the reduction was more substantial in the districts where the ‘yes’ vote won and where the left parties are more influential, with reductions of over 14% in the eight southern districts.

In the districts with the ‘no’ vote, the reduction of abstention was less significant, given that in 1998 there was a greater mobilisation of voters in these regions. However, the most significant increase of the ‘yes’ vote took place precisely in the strongest districts of the ‘no’, where the positions were inverted or the differences were significantly reduced, as in Oporto, *Leiria* and *Castelo Branco*.

Table 8

Comparative Results of the Referendums on Abortion, by Districts and Autonomous Regions

	YES		NO		Abstentions	
	1998	2007	1998	2007	1998	2007
	%	%	%	%	%	%
<i>Aveiro</i>	32.3	44.6	67.7	55.4	69.4	57.7
<i>Beja</i>	78.2	83.9	21.8	16.1	77.0	60.2
<i>Braga</i>	22.7	41.2	77.3	58.8	60.5	53.6
<i>Bragança</i>	26.3	40.8	73.8	59.2	71.4	65.6
<i>Castelo Branco</i>	47.2	61.6	52.8	38.4	71.2	59.4
<i>Coimbra</i>	52.9	62.9	47.1	37.1	72.7	59.9
<i>Évora</i>	73.0	78.4	27.0	21.6	73.3	57.0
<i>Faro</i>	69.6	73.6	30.4	26.4	77.6	61.2
<i>Guarda</i>	29.9	46.7	70.1	53.3	68.0	61.5
<i>Leiria</i>	48.3	58.3	51.7	41.7	70.6	56.1
<i>Lisboa</i>	68.5	71.5	31.5	28.5	65.7	51.3
<i>Portalegre</i>	67.7	74.4	32.3	25.6	75.9	61.1
<i>Porto</i>	42.4	54.4	57.6	45.6	66.6	55.1
<i>Santarém</i>	56.6	65.1	43.4	34.9	70.2	55.9
<i>Setúbal</i>	81.9	82.0	18.1	18.0	66.6	51.5
<i>Viana do Castelo</i>	26.2	40.4	73.8	59.6	65.9	60.4
<i>Vila Real</i>	24.0	38.1	76.0	61.9	68.7	64.8
<i>Viseu</i>	24.2	38.5	75.8	61.5	69.6	62.3
<i>Açores</i>	17.2	30.7	82.8	69.3	72.8	70.5
<i>Madeira</i>	24.0	34.6	76.0	65.4	67.2	61.4
Total National	49.1	59.2	50.9	40.8	68.1	56.4

Table 9
Evolution of Results in the Referendums on Abortion

	% Abstention	% YES	% NO		% Abstention	% YES	% NO
<i>Aveiro</i>	▼ 11.7	▲ 12.3	▼ 12.3	<i>Lisboa</i>	▼ 14.4	▲ 3.0	▼ 3.0
<i>Beja</i>	▼ 16.8	▲ 5.7	▼ 5.7	<i>Portalegre</i>	▼ 14.8	▲ 6.7	▼ 6.7
<i>Braga</i>	▼ 6.9	▲ 18.5	▼ 18.5	<i>Porto</i>	▼ 11.5	▲ 12.0	▼ 12.0
<i>Bragança</i>	▼ 5.8	▲ 14.5	▼ 14.5	<i>Santarém</i>	▼ 14.3	▲ 8.5	▼ 8.5
<i>C.Branco</i>	▼ 11.8	▲ 14.4	▼ 14.4	<i>Setúbal</i>	▼ 15.1	▲ 0.1	▼ 0.1
<i>Coimbra</i>	▼ 12.8	▲ 10.0	▼ 10.0	<i>V. Castelo</i>	▼ 5.5	▲ 14.2	▼ 14.2
<i>Évora</i>	▼ 16.3	▲ 5.4	▼ 5.4	<i>Vila Real</i>	▼ 3.9	▲ 14.1	▼ 14.1
<i>Faro</i>	▼ 16.4	▲ 4.0	▼ 4.0	<i>Viseu</i>	▼ 7.3	▲ 14.3	▼ 14.3
<i>Guarda</i>	▼ 6.5	▲ 16.8	▼ 16.8	<i>Açores</i>	▼ 2.3	▲ 13.5	▼ 13.5
<i>Leiria</i>	▼ 14.5	▲ 10.0	▼ 10.0	<i>Madeira</i>	▼ 5.8	▲ 10.6	▼ 10.6
Total National	▼ 11.7	▲ 10.1	▼ 10.1				

In Table 10, we make an extrapolation of tendencies between the vote in the 2007 referendum and the results of the previous legislative elections, which happened in February 2005. There are two new data for analysis: first, the fact that the *PSD* did not take an official position, recognising the freedom of vote of its militants, which is obviously important, in spite of the participation of the leader in the ‘no’ campaign. Second, there were the good results of the *PS*, which for the first time in its history won the absolute majority. What we see, however, is that in the districts south of *Coimbra*, except in *Castelo Branco*, the percentage of ‘yes’ votes, is higher than the percentage of the parties that supported the

‘yes’ votes. In the north and in the islands, the percentage of ‘no’ votes is higher than the sum of the *PSD* and the *CDS-PP* votes. This means that in the north, many socialist voters voted ‘no’, and on contrary many rightist voters in the centre and in the south voted ‘yes’. The traditional influence of the Catholic Church in the north of the country remained powerful.

Table 10

Comparative Results of the 2007 Referendum and the 2005 Parliamentary Elections²⁴⁸

	% YES Parties 2005	% YES	% NO Parties 2005	% NO
<i>Aveiro</i>	50.6	44.6	45.6	55.4
<i>Beja</i>	81.9	83.9	15.4	16.1
<i>Braga</i>	56.0	41.2	40.8	58.8
<i>Bragança</i>	47.5	40.8	48.9	59.2
<i>Castelo Branco</i>	64.5	61.6	32.2	38.4
<i>Coimbra</i>	58.3	62.9	37.5	37.1
<i>Évora</i>	76.9	78.4	20.5	21.6
<i>Faro</i>	65.3	73.6	30.6	26.4
<i>Guarda</i>	54.2	46.7	42.0	53.3
<i>Leiria</i>	46.8	58.3	48.9	41.7
<i>Lisboa</i>	64.0	71.5	32.1	28.5
<i>Portalegre</i>	72.7	74.4	24.6	25.6
<i>Porto</i>	61.7	54.4	34.6	45.6
<i>Santarém</i>	62.6	65.1	33.5	34.9
<i>Setúbal</i>	75.5	82.0	21.4	18.0
<i>Viana do Castelo</i>	51.4	40.4	45.1	59.6
<i>Vila Real</i>	49.7	38.1	47.1	61.9
<i>Viseu</i>	46.9	38.5	49.0	61.5
<i>Açores</i>	58.2	30.7	38.5	69.3
<i>Madeira</i>	44.1	34.6	51.8	65.4
Total National	60.2	59.2	36.2	40.8

André Freire (2007, pp. 97-122), in a work that analyses the connections between the referendum results, the religious practice and the partisanship vote, concludes that religious practice is strongly and positively correlated with the ‘no’ vote, and negatively and strongly correlated with the ‘yes’ vote. Regarding the partisanship vote, the author concludes that there were changes of intensity, but the general pattern of

²⁴⁸ Yes parties: *PS*, *CDU* (*PCP/PEV*), *BE* and *PCTP/MRPP*; No parties: *PSD* and *CDS-PP*.

distribution of partisan votes remained unaltered. The greatest differences are connected to abstention. In 1998, the more religious zones were participated more actively, while in 2007 the contrary occurred. In 2007, abstention was higher in the *PSD* bastions.

3.4.3. Comparative Analysis of the Referendums on Abortion

Several factors led to the change of results between 1998 and 2007. The first factor was the real situation of clandestine abortion and the criminalisation of women. This situation did not change for the better between 1998 and 2007, and obtained more visibility in the meantime. The trials of women accused of abortion, in the *Maia*, *Aveiro* or *Setúbal* courts, were widely reported in the media, and demonstrated to the public that criminalisation was neither merely symbolic nor irrelevant. Even without condemnations, there were judicial inquests, charges, trials and humiliations that shocked public opinion, which even led some supporters of the 'no' campaign to separate themselves from the criminal consequences of the law that they supported to maintain.

The second factor is the changing of the political and partisanship situation. Unlike the situation in 1998, the *PS* appeared as a united party that supported the 'yes' vote. While in 1998 the leader of the party and Prime Minister publicly supported the 'no' vote, which did not happen in 2007, isolating those who supported the 'no' vote inside the *PS*. On the other hand, the *PSD* did not assume an official position in favour of the 'no'. Although the leader, Marques Mendes, publicly supported the 'no', several MPs and outstanding militants assumed a defence of the 'yes' vote, and were more intensively committed to the campaign than in 1998. On the left, the *PCP*, despite its position against the referendum, was committed to the 'yes' campaign, just as in 1998, and the *BE*, which had consolidated itself as a party with significant parliamentary representation, also participated actively in the campaign.

Finally, the complacency that contributed to the defeat of the 'yes' campaign in 1998 did not occur in 2007 for obvious reasons. Participation in the referendum increased and, consequently, the 'yes' votes increased as well. Although participation was still less than a half of the registered voters, and consequently the referendum was non-binding from the legal point of view, its political efficacy was entirely recognised.

3.4.4. Consequences of the Referendum

On 7 and 8 March the *PS* Bill No. 19/X was discussed in detail [DAR (II-A) 51, 8 March 2007, pp. 1-12]. Then, the *PSD* and the *CDS-PP* still tried to include in the law some schemes to make it difficult for the woman to freely choose to abort. On the 8 March plenary sittings, these proposals were rejected. At the final overall vote, Law No. 16/2007, of 17 April was passed with yea votes from the *PS*, the *PCP*, the *BE*, the *PEV* and 21 *PSD* members, nay votes from the *PSD*, the *CDS-PP* and three *PS* members, and abstentions from three *PSD* members [DAR (I) 58, 9 March 2007, pp. 42-44]. Law No. 16/2007, of 17 April, which excludes the illegality of some cases of abortion, changed Article 242 of the Penal Code in order to consider abortion not punishable when performed by a doctor, or under his direction in an officially recognised health establishment, and with the woman's consent, when carried out within the first 10 weeks of pregnancy.

4. In conclusion

The decriminalisation of abortion will take its place in history as the most important issue of the Portuguese referendary experience. The subject gave the Portuguese political agenda moments of particular intensity, with passionate debates flaring up since the beginning of 1980s. From 1998 onwards, the issue of decriminalising abortion was always connected to the referendum. This, imposed initially by the *PSD* and later accepted by the *PS*, hindered the decriminalisation in 1998 due to the tangential and non-binding victory of the negative answer. In the IX Legislature, the referendum would come to be proposed by the *PS*, the *BE* and by a popular initiative, but was rejected by the *PSD/CDS-PP* majority. In the X Legislature, the *PS*, in which by then had a majority, sought to decriminalise abortion if the Portuguese citizens favoured this course of action in a referendum. Given several ups-and-downs, the referendum was only held on the third attempt. However, the decriminalisation of abortion was, in the event, decided through a referendum.

The referendum on abortion was also an important test of this institution as it related to political parties, citizens and the Portuguese political system. The experience of the referendums on abortion demystified the referendum, showing that it was sometimes revered with an excessive importance as an instrument of expression of popular will. Indeed, the will of Portuguese citizens to express themselves through referendum was not confirmed by effective participation when the referendums were held. The participation of Portuguese citizens, particularly in the first referendum held in 1998, did not meet

expectations, and was lower than participation in elections for the representative bodies. Nonetheless, within the first 38 years of Portuguese democracy, the decriminalisation of abortion was the only case of optional referendum actually carried out. It gave rise to two referendums with different results, and produced real consequences at the level of politics, legislation and civilisation.