10. Conclusions on referendum authorization procedures in Europe

In recent years, a number of referendums have been organized in European countries that fell short of the ideal of direct democracy. The rise of populism in some European countries has also contributed to the criticism of referendums. In some of the votes, such as the Brexit referendum, the Russian constitutional referendum, or the Hungarian migrant quota referendum, the empowerment and the genuine will-formation of the voters seemed secondary to the political gains of the governments and the political parties. In other instances, such as the defense of marriage referendums in Central Europe or the referendums on the rights of foreigners and asylum seekers in Switzerland, the popular votes directly targeted the rights of minorities and vulnerable groups.

I make the argument that more emphasis should be laid on the legal construction of direct-democratic instruments and specifically on the legal construction of citizen-initiated and state institution-initiated referendums. Citizen-initiated referendums can be genuine tools of democratic empowerment because they allow the voters to react to governmental actions between elections. The voters can formulate their own policy or legislative ideas in a proactive referendum proposal or react to governmental decisions by confirming, rejecting, or abrogating legal acts. The legal design of these instruments can largely determine how the referendum practice can strike a balance between empowering citizens and protecting the core values of liberal democracy and the rule of law. The genuine empowerment through referendums presupposes that voters can express their preferences clearly and the freedom of vote is ensured. It is also crucial that the referendums do not annihilate core democratic values, fundamental rights, or the rule of law, because unfettered popular sovereignty can be detrimental to minorities as well as to democracy itself. In contrast, referendums initiated by state institutions tend to offer the least democratic empowerment and are often tools of populist politics, as the Hungarian government-initiated referendums show. It cannot be assumed that state institutions will not propose unconstitutional or unlawful referendums, thus these direct-democratic instruments should also be constructed in a way that the checks and balances of the constitutional order apply. The relevant international norms, most importantly the Code of Good Practice on Referendums by the Venice Commission, underline this point. The
Code explicitly emphasizes that the referendum design should protect the free vote as well as the constitutional order and the rule of law.

The questions of referendum design are not new in the legal or political science literature on direct democracy. However, the book lays emphasis on the procedural side of the referendum design. It focuses on procedures that enforce the legal rules on referendums and specifically on the procedures for authorizing the referendum issue. When deciding which referendum proposals can go forward to a popular vote and how the legal provisions regulating referendums should be interpreted, state institutions exercise effective control over the referendum process. Parliaments, presidents, election commissions, or courts have a final say in whether the citizens can exercise their right to vote. If there is a lack of certain procedural guarantees, the decision can arbitrarily restrict the right of citizens to exercise popular sovereignty. Alternatively, the decision-making process might not be able to effectively protect the right to vote along with other fundamental rights, democratic values, or the rule of law. Thus, I argue that the legal rules governing referendums should not be seen as static, but equally emphasis should be paid to constructing the procedures enforcing them.

The book provides an overview of referendum authorization procedures in the member states of the Council of Europe. The focus is primarily on citizen-initiated referendums. The data collection shows that citizen-initiated referendums are also popular instruments of direct democracy throughout Europe. While some states, such as Switzerland or Italy, have a long-standing practice of citizens initiating referendums, a large number of states from the former Eastern Bloc have introduced these instruments since the fall of the Soviet Union. Even though the voters can theoretically initiate referendums in 25 member states of the Council of Europe, only 15 have held at least one referendum since 1989–90. The number of states that frequently use these direct-democratic instruments is even lower. This already suggests that both the legal rules governing citizen-initiated referendums and their enforcement should be investigated when trying to understand the practice (or the lack of it). Although, referendums initiated by state actors are prevalent choices among the direct-democratic instruments, very few legal and procedural constraints are imposed on these instruments. Consequently, the legal and procedural analysis of these instruments pose challenges.

A clear distinction between citizen-initiated and institution-initiated referendums is that most European states impose a number of substantive and formal legal limits for citizens initiating referendums. In contrast, state institutions are usually relatively free of constraints to propose referendums. There is a clear correlation between the number of formal and substantive legal limits imposed on referendums and the number of referendum events held. Even though there are some states that have held referendum events regardless of
the extensive legal limits imposed on citizen-initiated referendums (Hungary, Malta), the most frequent users of these instruments impose few limits on these instruments (Italy, Liechtenstein, Switzerland). The most common formal limit imposed on citizen-initiated referendums is the requirement of clarity. Among the substantive limits, the majority of states prohibit referendums on state finances, including budgetary issues, taxes, or other financial obligations. Questions about pardon and amnesty or emergency powers are also common exceptions from citizen-initiated referendums. Referendums on fundamental rights and freedoms are also often prohibited.

The member states of the Council of Europe mostly entrust the enforcement of formal and substantive limits on citizen-initiated referendums to parliaments, election commissions, or constitutional courts. In rare cases, presidents or governments can authorize referendums. Regular courts usually provide remedies in referendum authorization procedures. Meanwhile, referendum authorization procedures are less frequently devised for referendums initiated by state institutions.

A common trend is that while the technical registration and the formal review of the citizens' referendum proposal is entrusted to election commissions and governmental bodies, the substantive authorization is left to parliaments or constitutional courts. While legal remedies are always provided against the decisions of election commissions and governmental bodies, the decisions of parliaments and constitutional courts are often final. When comparing the number of referendum events to the institutional choices, no clear correlation could be found. Parliaments, election commissions, or constitutional courts are common choices in states with extensive referendum practice and in states without practice. This suggests that the institutional choice alone does not determine the referendum practice and that any of these institutions can be an appropriate choice for referendum authorization.

Nonetheless, by looking into the nature of referendum authorization procedures, I establish that certain state institutions are more suited to decide about referendums than others. The first inquiry in this regard is about the legal or political nature of referendum authorization. The right to vote in a referendum is a political right and the referendum allows the citizens to participate in politics. Still, the referendum authorization procedure cannot be deemed political once legal limits are imposed and a corresponding authorization procedure is available. This applies both for citizen-initiated and state institution-initiated referendums. In the referendum authorization procedure, the state institutions decide whether the referendum proposal violates any legal limits. Consequently, the legal limits serve as legal standards for the procedure. I use the analogy of the political question doctrine to show that referendum authorization involves legally resolvable issues and necessitates competence in deciding legal disputes.
The state institution authorizing referendums needs competence in legal adjudication also because it conducts an abstract and a concrete review of the referendum proposal. The assessment of the referendum proposal against the substantive limits is akin to the abstract review of legislation in constitutional adjudication. The initiators submit a draft legal act or a generally worded question for authorization. The state institution reviews the submission against the constitution, international law, or other substantive limits. The state institution has to decide how the referendum proposal would fit into the legal system if adopted in the popular vote. This analysis is *a priori* and detached from any individualized legal dispute.

However, the referendum authorization is primarily about the concrete controversy of whether the proposal can reach the ballots. The initiators ask for a ‘permit’ to continue the referendum process. The ultimate aim of the procedure is to decide whether the referendum can take place, which brings concreteness into the review. The referendum authorization differs from the concrete review in constitutional adjudication in one significant aspect. In the case of concrete review, the applicants traditionally aim to decide an individual legal dispute and challenge the legal act regulating the dispute. Thus, the court reviews the legal act and decides about its applicability in the individual case. In referendum authorization, the individual dispute is about whether the voters can exercise their right to vote, while the challenged ‘legal act’ is the referendum proposal. In most cases there is no topical connection between the referendum proposal and the right to vote. The authorization procedure itself makes a connection when the state institution assesses the clarity of the referendum proposal and its adherence to other formal limits, and thus protects the right to vote.

The legal nature of referendum authorization accompanied with the abstract and concrete dimensions of the review necessitates that the state institution authorizing referendums has experience in legal adjudication or even in constitutional adjudication. As the data collection shows, a variety of state institutions can be involved in the review of the formal and substantive limits. All the potential state institutions – presidents, parliaments, governments, election commissions, regular and constitutional courts – carry out referendum authorization as an ancillary task to their other constitutional functions. Even in states with extensive use of referendums, such as Switzerland or Liechtenstein, the annual number of referendum authorization cases would not warrant the establishment of a specialized state institution that only adjudicates referendum cases. In other European states, the referendum authorization procedure is even more exceptional. Thus, the competence to authorize referendums is an additional task for state institutions primarily conducting other constitutional functions. Since the competence to authorize referendums confers the task of legal/constitutional adjudication, the state institutions that already have such
functions are better equipped to decide about referendums. This means that solely based on the nature of referendum authorization, election commissions and regular and constitutional courts are more suitable to authorize referendums than governments, parliaments, or presidents.

It also follows from the nature of referendum authorization procedures that procedural guarantees should be available for the initiators and the voters. Both the initiators and the voters have a legal interest in the outcome of the referendum authorization. The decision is about their right to vote and directly participate in public matters. Thus, their involvement in the procedure should be guaranteed to some extent. The need for procedural guarantees is also affirmed if we look into the legal limits the state institutions have to enforce. The authorizing state institutions have to apply broadly worded substantive and formal limits in most European states. When evaluating the most common substantive and formal limits, I have found that almost all limits confer considerable discretion on the state institution to define the permissible scope of referendum issues. This increases the chance of arbitrary decision-making and the development of inconsistent practice. The procedural guarantees in the referendum authorization can play a crucial role in keeping the state institution checked and accountable.

The traditional fair trial guarantees are not fully applicable to referendum authorization because it is not a traditional civil or criminal dispute. It is a future-oriented, a priori legal dispute about the permissibility of the referendum issue and the exercise of constitutional rights. By comparing the Code of the Venice Commission to the fair trial catalogues of the ICCPR and the ECHR, as well as to the rule of law literature, four procedural guarantees – the independence and impartiality of the decision-maker, the right to a reasoned decision, the right to be heard, and the right to an effective remedy – are compatible with referendum authorization procedures. These guarantees are also minimum requirements to ensure that the rights of the initiators and voters are represented in the procedure and to reduce the risk of arbitrary decision-making.

In the book I analyze how these four procedural guarantees appear in the referendum practice of eight European states with diverse institutional solutions and various practices with referendums. Croatia, Liechtenstein, Slovenia, and Switzerland entrust parliaments to authorize referendums, but in Liechtenstein and Slovenia judicial remedies are also available. Hungary and Latvia leave referendum authorization to election commissions with an appeal to regular courts. In Slovakia, the President authorizes referendums, while Italy involves only regular and constitutional courts in the procedure. Only Hungary and Slovakia have devised the same authorization procedure for both citizen- and institution-initiated referendums, while the other states either do not have rules or apply more lenient rules to referendums initiated by state actors.
Conclusions

The state practice related to the four procedural guarantees shows that election commissions and courts can better incorporate referendum authorization into their other constitutional functions and are better at providing procedural guarantees for the parties than parliaments, governments, or presidents. Parliamentary and presidential decision-making fares especially poorly in providing procedural guarantees to the participants.

Even though the independence and impartiality of the authorizing state institutions have not been questioned often in the state practice, parliaments and governments face an inherent strategic and ideological conflict when deciding about referendums. The members of the parliament and the government are dependent on periodical elections by voters, which creates a strategic conflict when they try to balance their task to uphold the legal limits on direct democracy and keep their electoral support. In addition, a potential ideological conflict also arises, when voters want to take away decision-making powers over important economic, social, and political questions that would otherwise be decided by parliaments or governments. It is difficult to assess to what extent these potential conflicts influence the referendum practice; however, none of the other state institutions authorizing referendums face similar challenges.

The parliaments and presidents entrusted with referendum authorization only exceptionally provide reasons for their decisions. Even in cases where legal reasoning would be necessary to formulate an appeal, no justification is provided by the parliaments. Similarly, the right to be heard or other forms of participation rights are not guaranteed in these procedures and the right to an effective remedy is rare. Due to the lack of reasoning and of participation rights, the parliamentary and presidential referendum practices are not transparent and concerns about the arbitrary interpretation of legal limits are difficult to dispel.

Nonetheless, some best practices can be identified that can alleviate the shortcomings of the parliamentary and presidential procedures. From the states that rely on parliaments to authorize referendums, the examples of Slovenia and Liechtenstein can be highlighted. Both states allow the initiators to challenge the rejection decisions at the constitutional courts, thus providing correctional and control mechanisms over their review of the legal limits. Liechtenstein also involves experts in the decision-making process, while Slovenia is the only state where the parliament provides a detailed reasoning for its decisions. Although the parliamentary procedures do not accommodate participation rights, the parties are able to submit written arguments in the appeal procedures and react to the developments in the case.

The procedures of election commissions and judicial bodies are better equipped with procedural guarantees, although the participation rights of the parties might not be the same as in other public law disputes. The two states with referendum authorization by election commissions, Hungary and Latvia,
Referendum authorization procedures in Europe have similar strengths and weaknesses. The composition of both election commissions might raise concerns about the political independence of the bodies, but it is difficult to ascertain the bias in current practice. The election commissions provide detailed reasoning for their decisions and allow remedies against their decisions. However, participation rights are limited in their procedures. In Hungary, the active involvement of the parties is at the discretion of the National Election Commission, while in Latvia the Central Election Commission does not even allow the initiators to comment on the developments in the case. However, the availability of a judicial remedy can alleviate some of these deficiencies, as for instance in Latvia where the trial provides an adversarial procedure for the parties.

Regular and constitutional courts are involved in the referendum authorization procedure as expert bodies (Croatia, Slovakia), first instance decision-makers (Italy) or appeal forums (Hungary, Latvia, Liechtenstein, Slovenia). The independence of these courts in deciding referendum cases has not raised concerns in most states. The only exception is Hungary, where the case law of the Curia shows some inconsistencies in deciding citizen-initiated referendums, especially if contrasted with the decisions about government-initiated referendums. All the courts provide extensive reasoning for their decisions. A right to be heard is not prevalent even in the judicial procedures, but the initiators of the referendum are usually able to submit written arguments. From a procedural perspective, the practice of the Italian Constitutional Court is exemplary in the provision of extensive participation rights to the initiators and to the civil society.

Even though the referendum authorization procedures of election commissions and courts offer some procedural guarantees, none of the selected states adheres fully to the Code of the Venice Commission. Most states do not provide the necessary safeguards that could ensure that referendums initiated by state institutions adhere to ‘superior laws and international law as well as the principles of democracy, human rights, and the rule of law’. These instruments are often deemed as purely political, without legal limits and corresponding authorization procedures. Meanwhile, in the case of citizen-initiated referendums, most of the deficiencies can be found regarding the provision of procedural rights, especially hearing and appeal rights. The lack of participation opportunities can be traced back to multiple reasons.

One potential reason is that referendum authorization is an ancillary task of the state institutions, and the procedure is not regulated as extensively as the other constitutional functions of the state institution. None of the states provides extensive procedural rules for referendum authorization. Meanwhile, the

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1 Revised Code III.1.
rules of the other procedures of the state institution might not be fit for referendum procedures. This can be clearly seen in parliamentary decision-making where the rules of procedure for adopting legislative acts are not appropriate for adjudicating referendum disputes. In the case of election commissions and courts, the rules of civil or administrative procedures can provide sufficient procedural guarantees for referendum authorization. However, in many states – due to the special, abstract dimension of the review – special procedural rules apply for referendum cases that do not offer enough guarantees for the parties. Thus, another reason is that most states lay emphasis on the abstract dimension of referendum authorization and focus only on reviewing the referendum proposal. This approach disregards the fact that referendum authorization is decisive for the referendum event taking place and for the exercise of the right to vote.

The lack of proper procedural guarantees increases the chance of the arbitrary limitation of popular sovereignty. However, the lack of procedural guarantees can also contribute to the inconsistent protection of the rule of law and core democratic values. If the independence and impartiality of the decision-maker is not ensured, then the referendum authorization can be influenced by political or other non-legal considerations. If the decision is not reasoned, then it cannot be ascertained that the decision-maker has exercised its discretion in a non-arbitrary manner. If no participation or remedy rights are available for the initiators of the referendum or the voters, then they are not able to voice their arguments that could contribute to a more well-rounded decision. They are also not able to keep the decision-maker accountable or build trust in the decision-making process.

The state practice shows that none of the states can effectively balance the empowerment of citizens and the protection of the core values of liberal democracy and the rule of law. In Hungary, it is almost impossible for citizens to formulate a referendum proposal that is not rejected. Meanwhile, in Switzerland, it is almost impossible to block a citizen-initiated referendum from reaching the polls. Most selected states have held citizen-initiated referendums that raise questions about the protection of minorities, or fundamental rights and freedoms. Croatia, Slovakia, and Slovenia have held referendums that aimed to prohibit the marriage of same-sex couples. Citizens have wanted to introduce a ban on abortion in Liechtenstein. Italy has held a vote on reproduction rights, and Latvia on the rights of the Russian minority. The Swiss voters have decided about the life-long custody of non-treatable, extremely dangerous sexual and violent offenders.

The institutional and procedural configurations of referendum authorization are just one element of a well-designed direct-democratic instrument. These configurations may not be enough to affect the overall referendum practice and to prevent such controversial referendums. What makes a direct-democratic
instrument able to empower citizens to effectively participate in the decision-making and at the same time protect the rule of law depends on multiple elements of the referendum design. The conditions for initiating referendums, such as the required number of signatures, the legal limits imposed on the referendum, or the rules governing the campaign and the voting and quorum rules, all influence the referendum practice. The institutional and procedural settings for authorizing referendums are one element of this system. Focusing on this element puts an emphasis on avoiding arbitrary decision-making instead of on the number of referendums. The non-arbitrary referendum authorization is instrumental for both the exercise of popular sovereignty and the protection of the rule of law. Thus, ensuring the independence and impartiality of the decision-maker, the transparency of the procedure, and the empowerment of the parties through participation and remedy rights are all crucial elements of the overall referendum design.