1. Introduction to Referendum Authorization Procedures in Europe

The instruments of direct democracy are often seen as antithetical to representative democracy.\(^1\) In a representative democracy, decisions are reached through a careful deliberation process with the involvement of multiple state institutions, whereas voters decide free of constraints in referendums.\(^2\) Jean-Jacques Rousseau powerfully depicts this antithetical relationship when he writes

> When we see among the happiest people in the world bands of peasants regulating the affairs of state under an oak tree, and always acting wisely, can we help feeling a certain contempt for the refinements of other nations, which employ so much skill and effort to make themselves at once illustrious and wretched?\(^3\)

However, direct democracy does not mean that citizens decide questions completely free, under an oak tree, without any intervention from state institutions. In modern democracies, direct-democratic instruments co-exist with representative democracy.\(^4\) The organization of a referendum requires the assistance

---


of state institutions. The referendum process from the initiation until the vote entails several decisions by the state. State institutions validate the results of the signature collection, set the date for the vote, decide about the legality of campaign actions, and declare the official results.

Arguably, the most important decision state institutions make in the referendum process is the selection of issues for the vote. In the procedure authorizing the referendum issue, the state institutions review the content of the referendum proposal and are able to block the whole referendum process from going forward. In reaching this decision, the state institutions always have some level of discretion: when reviewing whether the referendum proposal violates any legal limits, the state institutions have some leeway to reach legally acceptable decisions. By authorizing certain issues and refusing others, state institutions exercise considerable control over the whole referendum process.

Thus, the design of the referendum authorization procedure, including the choice of the state institution and the procedural guarantees provided for the initiators and voters, can be decisive for the fate of the referendum. Nevertheless, the intricacies of the institutional and procedural settings of referendum authorization have not been in the focus of comparative research. The present book aims to fill this gap in the comparative constitutional law literature by providing an overview and an analysis of the most common institutional and procedural configurations for authorizing referendums in Europe. The book was completed as part of the ‘Popular Sovereignty vs. the Rule of Law? Defining the Limits of Direct Democracy’ (LIDD) research project, which is funded by the European Research Council and is hosted at the University of Zurich.5

1. THE IMPORTANCE OF REFERENDUM AUTHORIZATION PROCEDURES

The instruments of direct democracy and particularly referendums have been in the spotlight for some of the most important economic and political events of the last decades in Europe.6 Central and Eastern European countries organized multiple referendums in the democratic transition of 1989–90 to declare

5 See http://lidd-project.org/about/, accessed 2 October 2022.
their independence and to adopt democratic constitutions. They have organized referendums to prohibit same-sex marriage. In Ireland and Switzerland, the right of same-sex couples to marry has been granted in referendums. Referendums have been held on controversial moral issues such as abortion, reproduction rights, or divorce in Ireland, Liechtenstein, Malta, Portugal, Slovenia, and Italy. Even countries with extensive tradition in direct-democratic decision-making have caused political turmoil with referendums: Swiss voters banned the building of minarets in a popular vote and adopted constitutional amendments that introduced automatic expulsion for convicted foreign criminals and lifelong custody for non-treatable, extremely dangerous, sexual and violent offenders. The perception of referendums has been controversial both in everyday life and in the legal literature. Some of the mentioned referendum events, such as the referendums during democratic transition in Central and Eastern Europe, have been celebrated for their role...
in democratic empowerment. Others, such as the vote on Brexit, have been criticized for their lack of clarity. Again others, such as the Swiss vote on the ban on building minarets, have been denounced for violating fundamental rights and freedoms as well as international law.

The rise of populist political parties and governments in Europe has also brought direct democracy to the fore – and mostly in a negative light. Populism and direct democracy seem to go hand in hand. Even the definitions of populism suggest that in prioritizing the ‘common people’ over the ‘corrupt elites’, populism has a strong preference for popular sovereignty and majority rule over liberalism or rule of law. Populism is a thin-centered ideology, meaning that beyond some core elements such as anti-elitism, anti-pluralism, and the focus on majority will, a variety of other ideas (nationalism, socialism, etc.) can attach to its core. This makes it possible that we see parties from the left to the right claiming to give power back to the people and restore popular sovereignty through initiating referendums. However, the populist claim to represent the people is not an empirical but a moral one, based on identity politics.

Referendums only serve the purpose of reassuring the populist standpoint on a certain issue. As Jan-Werner Müller summarizes:

> the referendum isn’t meant to start an open-ended process of deliberation among actual citizens to generate a range of well-considered popular judgments; rather, the referendum serves to ratify what the populist leader has already discerned to be

---

13 Ronald J. Hill, Stephen White, ‘Russia, the Former Soviet Union and Eastern Europe’ in Matt Qvortrup (ed), Referendums Around the World (Palgrave Macmillan 2018) 19.
14 Reid (n 8) 623–637.
17 Abts, Rummens (n 16) 407–408; Mudde, Kaltwasser (n 16) 1670.
18 Bugarić, Kuhelj (n 16) 21–22; Mudde, Kaltwasser (n 16) 1669–1670.
19 Müller (n 16) 2–3. and 27.
the genuine popular interest as a matter of identity, not as a matter of aggregating empirically verifiable interests.\textsuperscript{20}

Thus, populist politicians are less interested in the genuine will of the people and more in showing off popular support for their own agendas. The Hungarian migrant quota referendum in 2016 served the purpose of turning up the volume on the anti-migrant propaganda, which is shown by the fact that the government celebrated its victory in the media, even though the referendum was invalid due to the low turn-out.\textsuperscript{21} Similarly, the Russian constitutional referendum, or ‘All-Russian vote’, in 2020 was more of a theatrical gesture than an actual openness to popular opinion, as the referendum did not follow the rules of any of the legally recognized direct-democratic instruments. Moreover, it did not even facilitate the expression of voters’ opinion as all constitutional amendments had to be affirmed or rejected in their entirety instead of separate questions.\textsuperscript{22}

The frequent use of referendums by populist politicians can increase the distrust in the instruments of direct democracy. The populist use of referendums can cause tension between the exercise of popular sovereignty and the protection of the rule of law. It may distort the genuine democratic character of the instruments and give emphasis to those features of direct democracy that are most commonly criticized. Arguments about the competency of voters to decide complex legal and policy questions can surface in relation to votes that determine the future of the country, such as the Brexit vote or the vote on the Greek financial bailout.\textsuperscript{23} Concerns can be voiced about the freedom of vote when the referendum proposal is unclear and when the populist referendum campaign – such as the Brexit campaign – only amplifies the misinformation about the legal consequences of the vote.\textsuperscript{24} Populist referendums on the rights

\textsuperscript{20} Müller (n 16) 101.
\textsuperscript{22} Julian Ivan Beriger, ‘Russia’ in Daniel Moeckli, Anna Forgács, Henri Ibi (eds), \textit{The Legal Limits of Direct Democracy} (Edward Elgar Publishing 2021) 260.
\textsuperscript{24} Reid (n 8) 623–637.
of asylum seekers, foreigners, or other minorities are capable of strengthening the populist notion of ‘us against them’ and harmfully affect the societal groups that populists deem not to belong to ‘the people’. 25 Thus, the populist use of referendums can increase concerns about the ‘tyranny of the majority’ and that the rights and interests of minorities cannot be effectively protected in a popular vote. 26

Even if in the recent years some referendum events have been controversial, it must be emphasized that direct-democratic instruments can genuinely ease the disconnect between the people and governments. 27 Direct democracy provides a control over the representative organs 28 and can restore the trust in the government and democracy. 29 Direct democracy opens a new channel between the representatives and the people: it creates an ‘institutionalized discussion process’ 30 for important policy questions, in which minority and majority opinions are articulated in the public sphere. Studies suggest that direct democracy improves the responsiveness of the government toward the citizens’ demands, especially when citizens have the power to influence the political


agenda through initiatives or when they have the power to react to government decisions.\textsuperscript{31} Direct-democratic instruments can ensure that the policy decisions are more in line with the citizens’ preferences than in a purely representative system.\textsuperscript{32} The direct-democratic instruments introduce a new veto-player in the political system,\textsuperscript{33} an additional check on the representatives beyond the periodical elections, thus reducing chances that the government does not act according to the interests of the majority.\textsuperscript{34} The threat of referendums encourages governments to seek consensual decisions and consider minority positions.\textsuperscript{35} The right to participate in the decision-making also incentivizes citizens to inform themselves about political issues.\textsuperscript{36} An encouraged participation in politics and legislation increases civic engagement and political knowledge and provides a democratic outlet for the dissatisfaction.\textsuperscript{37}

However, direct democracy can only fulfill the promise of enhanced civic engagement and genuine democratic will-formation, if the direct-democratic instruments are well constructed. The legal construction of the direct-democratic instruments must ensure that the majorities are able express their genuine will, and at the same time that the rights of the minorities and the rule of law are protected.\textsuperscript{38} The careful construction of direct-democratic instruments can reduce

\begin{thebibliography}{10}
\bibitem{Kirchgässner} Gebhard Kirchgässner, ‘Direkte Demokratie und Menschenrechte’ in Lars P. Feld, Peter M. Huber, Otmar Jung, Christian Welzel, Fabian Wittreck (eds), \textit{Jahrbuch für direkte Demokratie} 2009 (Nomos 2010) 66–89; Stadelmann-Steffen, Vatter (n 29) 538.
\bibitem{Qvortrup} Matt Qvortrup, ‘Direct Democracy and Referendums’ in Erik S. Herron, Robert J. Pekkanen, Matthew S. Shugart (eds), \textit{The Oxford Handbook of Electoral Systems} (Oxford University Press 2018) 22.
\bibitem{Frey2} Frey, Stutzer, Neckermann (n 32) 114; Stadelmann-Steffen, Vatter (n 29) 536.
\bibitem{Kiener} Kiener, Krüsi (n 15) 244; Setälä, Schiller, ‘Comparative Findings’ (n 31) 258–259; Francis Cheneval, Alice El-Wakil, ‘The Institutional Design of Referendums: Bottom-Up and Binding’ (2018) 24(3) \textit{Swiss Political Science Review} 294, 295; Stephen Tierney, ‘Democratic Credentials and Deficits of Referendums A Case
\end{thebibliography}
the chance of controversial referendums taking place and may also counter the populist threat of misusing referendums.

The need for a careful design of direct-democratic instruments also follows from international law. The International Covenant on Civil and Political Rights (ICCPR) states that every citizen shall have the right and opportunity to take part in the conduct of public affairs directly, without discrimination and unreasonable restrictions. The Human Rights Committee emphasizes that the Covenant does not impose any particular form of democracy on its member states, but if the state introduces a direct-democratic instrument, such as referendums, then any restriction on the direct participation must be reasonable and should not constitute a barrier to the use of the instrument.

Meanwhile the Revised Guidelines on the Holding of Referendums (‘Revised Code’, ‘Code’) adopted by the European Commission for Democracy through Law (‘Venice Commission’) highlight that ‘a number of guarantees are necessary to ensure that they [referendums] genuinely express the wishes of the electorate and do not go against international standards in the field of human rights, democracy, and the rule of law’. The Venice Commission has determined these necessary guarantees in detail through the adoption of the original Code of Good Practice on Referendums (‘Original Code’) and its recent revision. These documents are highly important for the European referendum practice, as they are the only international standards adopted specifically for referendums. The Venice Commission drafted the Original Code in 2006–07, which contained the Guidelines on the holding of referendums, and an Explanatory Memorandum. The Guidelines were revised in 2020, in order to better reflect the recent challenges of referendum practice. Although no explicit reference is made to any of the controversial referendums of the


40 Mario Staderini and Michele De Lucia v Italy, UN Human Rights Committee, No. 2656/2015, para 9.3–9.4.


last years, the introduction of the Revised Code states that the revision of the previous Code was influenced by the recurring concerns about the protection of rule of law in the recent practice. The Revised Code is not binding on the member states but it serves as an important point of reference. The Code is not only cited by the Venice Commission in its legal opinions, but also guides national practice.

There are several elements of the referendum design that can affect the balance between popular sovereignty and the rule of law. The conditions of initiating the referendum; the rules of the signature collection; the legal limits imposed on the formulation and the substance of the referendum question; the authorization procedure enforcing the legal limits; the rules governing the referendum campaign, and the voting event all influence this balance. The Revised Code makes recommendations in all these areas.

First and foremost, it is crucial who has the power to initiate a referendum and determine the issue to be put to a popular vote. Some direct-democratic instruments have inherently more potential for democratic empowerment than others, while some are more prone to populist capture. When citizens have the power to initiate referendums, then direct democracy can be used to correct the failures of representation and to empower the citizens to take action into their own hands. Meanwhile referendums triggered by governments or parliamentary majorities are discretionary tools of the majorities that can be used

---

44 Revised Code, Introduction para 5.
48 Cheneval, El-Wakil (n 38) 295.
49 Ibid, 299.
to enhance their powers and avoid electoral accountability on certain issues. Most populist referendums mentioned throughout the book (e.g. Brexit or the Hungarian migrant quota referendum) fall into the latter category.

It is a crucial element of the referendum design that the conditions of initiating the referendum are clearly regulated. The rules of initiation should not create such technical hurdles for the citizens that would hollow out democratic participation. Among other suggestions, the Revised Code highlights that the necessary number of signatures for initiating a referendum should ensure that citizens are interested in the referendum issue but should not be so high as to make the initiation of referendums impossible. For instance, the introduction of impossible technical hurdles in Russia, where 4500 voters are required to form an initiative group to collect two million signatures, has made citizen-initiated referendums practically unattainable for voters.

The formulation of the referendum question is also important so that the voters are able to understand the legal consequences of the vote and decide according to their actual preferences. The vote on Brexit has been criticized for the lack of clarity in the legal consequences of voting for leaving the EU. The Revised Code emphasizes the importance of clarity as part of free suffrage. The freedom of voters to form an opinion about the referendum question requires the question to be clear and comprehensible. States also have to devise rules for countering misleading and biased referendums where the voters are prevented from expressing their genuine preferences due to the formulation of the question.

Limitations on the permissible scope of direct-democratic decision-making can effectively protect the values of constitutional democracy and the rule of law against the potential misuse of referendums. In this regard, the Revised Code emphasizes that the text submitted to a referendum must comply with all superior laws and international law as well as the principles of democracy, human rights, and the rule of law. Based on empirical studies, there are few

---

51 See more on this in section 3.2 of this chapter.
52 Revised Code III.3.c.
53 Beriger (n 22) 260.
55 Revised Code I.3.1.
57 Revised Code III.1.
instances when referendums aim to restrict the existing rights of minorities, although they are not without precedent, as the 2009 Swiss minaret ban referendum shows. More often the minorities are harmed by the majority blocking or repealing government efforts to provide more rights for minority groups and eliminate discrimination. For example, the defense of marriage referendums in Slovakia, Slovenia, Croatia, and Romania all aimed at obstructing the legal recognition of same-sex marriage. It has been shown that the ‘outgroups’ of society, the groups that the given society considers not integrated, such as foreigners or certain racial or religious minorities, can be negatively affected by referendums.

The legal rules governing the initiation of referendums, the formal limits on the wording of the referendum proposal, and the substantive limits excluding certain issues can all contribute to a well-functioning direct-democratic instrument. However, the regulatory framework should not be regarded as static. The different institutional and procedural configurations for enforcing the legal limits and authorizing certain referendums while rejecting others are just as crucial. The institutional choices and the procedural guarantees governing the authorization can hinder both the arbitrary restriction of democratic rights as well as the exercise of uncontrolled majoritarian power.

The Revised Code emphasizes that an impartial body – preferably an independent central commission – must be entrusted with the organization and the supervision of the referendum. The Code also requires an effective system of appeals for referendum matters with an impartial and independent appeal body. Regarding the individual procedural rights, the Code states that all voters must be entitled to an appeal and that the ‘applicant’s right to a hearing involving both parties must be protected’.


59 Marxer, ‘Foreword’ (n 1) 9.


61 Revised Code II.4.1.

62 Revised Code II.4.3.a.

63 Revised Code II.4.3.f. and II.4.3.h.
The procedural design of referendums is vital to enforce the rules protecting the freedom of vote and other fundamental rights and freedoms. The referendum authorization procedure holds the key to blocking referendums that might go against the fundamental values of constitutional democracy and the rule of law. The institutional choice for the procedure as well as the procedural guarantees provided for the parties can determine how effectively the state can prevent such referendums and protect its citizens.

The procedural design of referendums is also crucial to ensure that the state cannot arbitrarily restrict the exercise of popular sovereignty when exercising discretionary powers. The procedural guarantees such as the independence and impartiality of the decision-maker, the availability of effective remedies, or hearing rights can all ensure that the initiators of the referendum and the voters are protected against the arbitrariness of state action.

Lastly, the procedural guarantees can themselves have an empowering effect. As Jeremy Waldron, a theorist of the procedural understanding of the rule of law, highlights, the essential idea of procedure ‘embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as being capable of explaining themselves’. 64 Social psychology research has shown that the perception of procedural justice can itself represent a value. 65 If the participants perceive that the authorities conducted a fair procedure respecting their dignity, then this perception increases the legitimacy of the authority as well as the acceptance of the decision. 66

2. THE UNIQUENESS OF REFERENDUM AUTHORIZATION PROCEDURES

Almost all European states regulate the permissible scope of citizen-initiated referendums, and voters cannot initiate a referendum completely free of legal constraints. Most European states have introduced substantive limits on referendums, most commonly excluding financial matters, questions of amnesty and pardon, and fundamental rights from the scope of referendums. 67 The sub-

stantive limits are often supplemented with some form of clarity requirement for the formulation of the question.68 The legitimacy of limiting the exercise of popular sovereignty is not questioned here but is accepted as a given.

The focus of the book is on the question of how the enforcement of the legal limits can strike a balance between competing interests. In the referendum authorization procedure, the decision-maker must find an equilibrium between protecting the individual and public interests and allowing the exercise of the democratic rights of citizens. Legal limits can serve multiple individual and public interests. Substantive limits can be imposed in order to protect the current constitutional order or more generally the rule of law. Excluding certain issues can also aim to protect fundamental rights and freedoms, the functionality of the state, or the stability of the state organization.69 Meanwhile formal limits generally aim to protect the right to vote. In the referendum authorization procedure, the state institutions have to assess whether the referendum proposal violates these protected interests in a way that would make the exercise of democratic rights impermissible. At the same time the state has to devise a practice that does not make the instruments of direct democracy dead letter and completely unattainable for citizens.

From a procedural standpoint this means that the competent state institution shall not decide in an arbitrary way. The procedural rules should enable the state institution to consider all relevant arguments on both sides. The final decision should reflect that the exercise of discretion is the result of careful deliberation. Consequently, the main question is how to minimize the risk of arbitrary decision-making and maximize the chance of a balanced decision.

The referendum authorization procedure is an atypical public law dispute where the traditional fair trial guarantees may not seem evidently applicable. Indeed, most European states do not ensure the same procedural guarantees for referendum authorization procedures as for civil or administrative law disputes.70 The referendum authorization is a future-oriented and mostly abstract review of the referendum proposal. It is not a classic contradictory procedure between individual parties. In most states only the initiators of the referendum are a party to the authorization procedure, although arguably the interests of all voters are affected by the decision since the subject of the procedure is the exercise of their political rights. This last element – the exercise of political rights – warrants the observance of some procedural guarantees. However,

69 More on legal limits in Chapter 4, section 3.
it must be acknowledged that a full-fledged list of fair trial rights may not be applicable to referendum authorization due to its special nature.

When trying to understand the nature of the referendum authorization procedure among public law disputes, multiple questions arise. Is the referendum authorization procedure legal or political in its nature? Is the review of legal limits abstract or concrete? Can this procedure be regarded as legal adjudication where procedural guarantees should be available for the affected parties? And, if so, then what procedural guarantees should be applicable?

The present book aims to answer these questions. I explore in detail the applicability of four procedural guarantees: the independence and impartiality of the decision-maker; the right to a reasoned decision; the right to be heard; the right to an effective remedy. The four procedural guarantees are selected based on the fair trial rights guaranteed by international treaties, on the procedural understanding of the rule of law and on the procedural recommendations of the Venice Commission's Revised Code. I investigate the applicability of these procedural guarantees based on the special nature of referendum authorization procedures. I explore the referendum practice of selected European states in order to flesh out the advantages of certain institutional or procedural solutions in reducing the chance of arbitrary decision-making.

3. THE SCOPE OF THE BOOK

3.1 Terminology

*Instruments of direct democracy* can be classified in numerous ways and the terminology used in the literature is also quite diverse. The most commonly mentioned direct-democratic instruments are referendums, popular or citizens’ initiatives, plebiscites, agenda initiatives, and recalls. Agenda initiatives describe citizen-initiated proposals to representative bodies that aim to put issues on the agenda of the state institution but do not result in a vote. Recalls are popular votes specifically about terminating the mandate of certain state officials or representatives: these are votes on persons and not policy issues.
The literature either uses the term referendum for all events of popular vote on policy issues or it differentiates between referendums and popular initiatives.\(^{75}\) If used separately, then referendums refer to reactive popular voting events, when citizens confirm, reject, or abrogate legislation and popular or citizens’ initiatives refer to votes on initiatives formulated by citizens. Meanwhile plebiscites carry a negative connotation and traditionally refer to referendums initiated by the government.\(^{76}\) I will use the term ‘referendum’ to cover both reactive and proactive popular voting events regardless of the initiator of the vote. Since the referendum authorization procedures take place before the voting event, the terms ‘referendum proposal’, ‘initiative’, or ‘referendum request’ will be used to describe the issue submitted to a referendum.

Referendums can be classified in multiple ways.\(^{77}\) One dimension of the classification is the mandatory or facultative (optional) nature of the referendums: whether the referendum is a compulsory element of the decision-making process on pre-determined issues or the referendum can be freely initiated by state actors or citizens.\(^{78}\) Another dimension is based on the legal effect of the vote: whether the referendum results bind the representative organs or are merely consultative.\(^{79}\) Yet another categorization can be made according to the types of questions that can be submitted to a referendum: is it possible to initiate a popular vote on constitutional revisions, or is it limited to legislative changes?\(^{80}\) Is it permissible to call referendums on individual administrative acts or only on normative provisions?\(^{81}\) Referendums can also be differentiated based on their direction: referendums can be reactive or proactive. A reactive referendum is non-propositional and decision-controlling,\(^{82}\) as the initiators aim

---

\(^{75}\) Zoltán Tibor Pállinger, Bruno Kaufmann, Wilfried Marxer, Theo Schiller (eds), Direct Democracy in Europe: Developments and Prospects (Springer VS 2007) 19; Schiller, Setälä, ‘Introduction’ (n 1) 1.

\(^{76}\) Altman (n 1) 7.

\(^{77}\) Suksi (n 1) 28; Michael Bützer, ‘Introduction’ in Andreas Auer, Micheal Bützer (eds), Direct Democracy: The Eastern and Central European Experience (Ashgate 2001) 5–6; Altman (n 1) 7–8; Morel, ‘Types of Referendums, Provisions and Practice at National Level Worldwide’ (n 72) 29–34.

\(^{78}\) Altman (n 1) 8; Morel, ‘Types of Referendums, Provisions and Practice at National Level Worldwide’ (n 72) 29.

\(^{79}\) Altman (n 1) 8; Morel, ‘Types of Referendums, Provisions and Practice at National Level Worldwide’ (n 72) 33.


\(^{82}\) Pier Vincenzo Uleri, ‘Institutions of Citizens’ Political Participation in Italy: Crooked Forms, Hindered Institutionalization’ in Theo Schiller, Maija Setälä (eds), Citizens’ Initiatives in Europe: Procedures and Consequences of Agenda-Setting.
to confirm, veto, or abrogate a state decision. In contrast, a proactive referendum is propositive and decision-promoting, as the initiators formulate the issue put to a popular vote. Finally, referendums can be classified based on the \textit{initiator} of the popular vote. A referendum can be top-down if it is initiated by the political establishment, or bottom-up if by citizens.

I rely on the classification used in the LIDD research project. This classification is based on the initiator of the direct-democratic instrument, thus the entity that has the power to define the subject of the referendum or agenda initiative. Referendums may be initiated by citizens or by state institutions or may be legally mandated. \textit{Citizen-initiated referendums} come in two versions: proactive citizen-initiated referendums allow a certain number of citizens to initiate a referendum and formulate the topic of the referendum, while rejective citizen-initiated referendums allow a certain number of citizens to initiate a ref-

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{diagram.png}
\caption{Instruments of direct democracy}
\end{figure}


83 Ibid.
84 Altman (n 1) 8.
ereendum that is aimed to prevent new laws from being passed or to repeal existing laws. *Institution-initiated referendums* are optionally initiated by the executive, by the legislature, or by a number of subnational entities, and these institutions define the issue for the popular vote. Meanwhile *law-initiated referendums* are triggered if certain conditions specified by law (i.e. the constitution or a legislative act) are met. The law may determine the topic (e.g. transfer of sovereignty) or the type of legal act (e.g. constitutional amendment) that triggers the referendum process.

### 3.2 Topical Scope

The instruments of direct democracy have extensive comparative political science literature, where the focus lies mostly on the use of direct-democratic instruments, the campaign, and the voting process.\(^{86}\) Referendums and other direct-democratic instruments also appear prominently in comparative constitutional law scholarship. Some of the comparative constitutional law volumes thoroughly describe the conditions of initiating referendums and the practice of referendums in selected states.\(^{87}\) In these edited books, the state institutions authorizing referendums are usually mentioned, but procedural details are not provided. Other comparative works highlight the challenges of direct democracy.\(^{88}\) Some of these works focus on the protection of individual rights or on the imposition of legal limits,\(^{89}\) but without revealing much about the procedures for enforcing these limits. Similarly, the national literature on direct-democratic instruments offers valuable sources for understanding how

---

\(^{86}\) Butler, Ranney (n 1); Altman (n 1); Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge 2018); Matt Qvortrup (ed), *Referendums Around the World* (Palgrave Macmillan 2018).


the legal limits imposed on referendums are interpreted in specific countries, but rarely reflects on the procedural aspects of referendum authorization. The only question about referendum authorization that occasionally appears in the national literature is the question of institutional choice. Meanwhile, the constitutional law literature on the state institutions authorizing referendums also provides little guidance, because referendum authorization is never the core constitutional function of the given institution. For instance, most of the comparative works on constitutional courts focus on their constitutional review functions and only mention election and referendum disputes as possible ancillary tasks.

I analyze primarily the various institutional and procedural guarantees applied in authorizing citizen-initiated referendums. Citizen-initiated referendums are selected due to their high potential for democratic empowerment. Both types of citizen-initiated referendums allow people to start the referendum process and ultimately decide about the issue. Citizen-initiated referendums are specifically designed to allow citizens to interact with the representative government: rejective referendums are called for the confirmation or rejection of the decisions of the representative organs, while proactive citizen-initiated referendums are able to bring up issues that are disregarded by the representative government. Thus, citizens can voice their discontent with decisions or the lack of decisions through initiating referendums and can keep the elected representatives accountable.

---


93 Cheneval, Ferrín (n 4) 116.

94 Frey, Stutzer, Neckermann (n 32) 108.

95 Matsusaka, Let the People Rule: How Direct Democracy Can Meet the Populist Challenge (n 27) 155.
Examples of referendums initiated by state institutions are highlighted briefly to provide contrast to citizen-initiated referendums. These instruments have the least democratic potential.96 Being completely at the service of state actors, these referendums rarely serve civic empowerment, regardless of their procedural design. Instead, these direct-democratic instruments are often used by (populist) governments to further their agenda and to claim that their ideas are in fact supported by the electorate.

Citizen-initiated referendums and state institution-initiated referendums accentuate different aspects of the tension between popular sovereignty and rule of law. Citizen-initiated referendums represent the fullest exercise of popular sovereignty among the direct-democratic instruments, these confer the most power to citizens. However, this also means that these instruments can be potentially in conflict with the rule of law and the fundamental values of a liberal democracy. For these reasons, citizen-initiated referendums are usually extensively regulated, including the referendum authorization procedures. In contrast, referendums initiated by state institutions are controlled forms of the exercise of popular sovereignty, because the state institutions have discretion to select the issues put to a vote. Traditionally, these instruments are deemed purely political and the legal constraints – including the authorization procedures – imposed on these instruments are not comparable to referendums initiated by citizens. However, the increasing populist use of these instruments has shown that referendums initiated by state actors can also be in conflict with the rule of law. Still, the fact that these instruments are underregulated and authorization procedures are rarely devised for them makes it difficult to analyze these direct-democratic instruments from a legal (procedural) perspective. Consequently, only a few examples of government-initiated referendums are highlighted in the comparative analysis of referendum authorization decisions.97

I use the term *referendum authorization procedure* to describe the procedure of the competent state institution that reviews whether the citizen-initiated referendum complies with the legal limits imposed on the instrument. According to the type of legal limits, the referendum authorization procedures can be categorized into three groups.

All citizen-initiated referendums have to comply with certain *technical limits*: the legal rules determine the number of signatures that is needed to initiate a referendum and, in some states, prescribe the formation of an initiative group, the use of certain submission forms, or time-limits for submitting

---

96 Daniel Moeckli, ‘Referendums: Tyranny of the Majority?’ (n 50) 337; Cheneval, El-Wakil (n 38) 299.
97 See Chapter 5.
questions. In the corresponding technical authorization procedure, the state institution counts and verifies the signatures and officially registers the initiative or referendum request. The technical limits and procedures can be decisive for the accessibility of a referendum. Especially the number of required signatures is crucial for the practical use of the direct-democratic instrument. However, these limits are unrelated to the issue of the referendum: the content of the referendum proposal is not assessed in these procedures. Additionally, the review of technical limits rarely requires the exercise of discretion. The procedures are usually very straightforward, thus they are excluded from the analysis.

The second group of limits encompasses the formal limits that determine how the referendum issue or question has to be worded. Such formal limits ensure that the voters can express their genuine preferences at the ballots, thus that they are not misled or confused by the formulation of the referendum question. They can base their answer on a clear understanding of both the question and its potential legal consequences. This way the formal limits protect all voters and the freedom of the vote. The most common formal limits are the clarity, the unity of form, and the unity of substance requirements. The unity of form requirement ensures that the referendum issue is not a mix of a generally worded proposal and a draft legal text. The unity of substance guarantees that the issues put to a vote are connected to each other. Meanwhile, the clarity requirement is a broader category that can cover any requirement that ensures the free will-formation of the voters. The corresponding formal authorization procedures are for reviewing the formulation of the initiative or the referendum question. As the content of the referendum proposal is evaluated in these procedures and the state institutions exercise considerable discretionary powers, formal authorization procedures are a fundamental part of the present research.

Lastly, substantive limits exclude certain subject matters from being put to a popular vote. Some substantive limits aim to protect fundamental rights and freedoms or the constitutional order of the state. Other substantive limits ensure that decisions about the core functions of the state (e.g. national security, emergency powers, or finances) or decisions about the state organization (e.g. election rules, competences of government branches, civil service laws)

98 For instance, in Russia, the lack of practical experience with citizen-initiated referendums is due to the extensive technical limits. See: Beriger (n 22) 245.

99 These limits may also appear under different names in the literature or in the national legislation. For instance, the Swiss legislation uses the terms ‘consistency of subject matter’ and ‘consistency of form’. See Art. 75 Federal Act on Political Rights. Here I rely on the terms used in the Revised Code III.2.
are reserved for the elected representatives. In the corresponding *substantive authorization procedures* the state institutions review whether the issue proposed for a popular vote falls under one or more of the prohibited topics. These procedures are also part of the analysis, because – similarly to formal authorization procedures – the content of the referendum proposal is evaluated in them, and state institutions exercise discretionary powers.

Most states do not have a clear-cut separation between the different types of authorization procedures in practice. In some states the technical and formal authorization procedures are carried out together, for instance the formulation of the question is checked when the initiative group is registered, and the signatures are counted. In other states the same institution reviews the formal and substantive limits in a single procedure. The reason for still using this distinction is mostly to signal that the pre-vote referendum authorization procedures can fulfill different functions: checking that technical requirements are complied with, ensuring that the referendum request has gathered enough popular support, protecting the free will-formation of all voters, and protecting individual rights or other public interests.

I focus exclusively on pre-vote authorization procedures. In terms of the timing of the referendum authorization procedure, three possible solutions exist: the citizen-initiated referendum may be reviewed before the signature collection starts, after the necessary number of signatures have been collected, or after the vote has taken place. The Council of Europe member states all use pre-vote review procedures, while post-vote review is typical in the United States. Pre-vote review ensures that the subject of the authorization is in fact only a proposed question and not the expressed will of the people. If a referendum request is blocked from reaching the ballot, the pre-vote review protects the people from the frustration of a decision that is impossible to implement. So, in reality, the pre-vote review fosters not only the rule of law, but also the democratic process by not allowing fruitless popular votes to take place. It also mitigates the political pressure on the state institutions, which may be more reluctant to find an initiative unconstitutional after the voters have showed their support for it. In contrast, the post-vote review effectively means the review of the legislative act that was adopted in the referendum process. Most European states have established constitutional courts or authorized

---

100 See Chapter 4, section 3.1.
101 See Chapter 1, section 4.
regular high courts to review the constitutionality of legislative acts.\textsuperscript{104} The assessment of these post-vote review systems is excluded from the analysis, because they would raise different questions than the pre-vote review. While the pre-vote review focuses on deciding whether popular sovereignty should be exercised, the post-vote review is about the legislative change following the referendum. The post-vote review procedures are not able to fully remedy the potential defects of the referendum proposal. Most evidently, these remedies are \textit{ex post facto}: the vote on a potentially unlawful or unconstitutional referendum has taken place and the results of the successful referendum have become part of the legal system. This means that while certain defects such as violation of fundamental rights and freedoms can be corrected after the vote, other defects such as the misleading formulation of questions are final.

Other state interventions during the referendum process are also excluded from the scope of this book. Once a citizen-initiated referendum has been authorized as fulfilling all the technical, formal, and substantive requirements, the next stages of the referendum process are the campaign, then the vote itself and the verification of the results. These stages also entail a number of decisions by state institutions. Campaign rule violations, irregularities during the vote, or even the final results of the referendum may be challenged. These procedures are excluded because these are not linked to the content of the referendum and are not decisive for the popular vote taking place.

3.3 Temporal Scope

I analyze the referendum authorization procedures currently in force, without going into details about their historical development. Institutional and even procedural choices are often rooted in constitutional traditions or can be traced back to certain constitutional events. Historical references are only used when they can contribute to interpreting the current institutional and procedural settings.

I primarily focus on referendum authorization decisions and referendum events that occurred between 1989–90 and 2022. The one exception from the temporal scope is an Italian referendum case from 1978.\textsuperscript{105} This case is included in the analysis because the Italian Constitutional Court introduced new legal limits, which are highly influential in the current practice of the Court.


\textsuperscript{105} Judgment no. 16 of 1978 of the Constitutional Court, Official Gazette, 1st Special Series no. 39 of 8 February 1978.
The main reason for choosing 1989–90 as a starting point is that the new constitutions of the Central and Eastern European countries were adopted in or after 1989. Thus, in this region, direct democracy was introduced or reintroduced then. Drawing on more than 30 years of practice also makes it possible to include countries that are sporadic users of direct democracy.106

3.4 Geographical Scope

The geographical scope of the book is limited to Europe and to national referendums. The member states of the Council of Europe are assessed to establish the general trends of referendum authorization, while a smaller set of member states is used for the more detailed analysis. The member states of the Council of Europe have committed themselves to protect the rule of law and ensure the enjoyment of human rights and fundamental freedoms.107 Focusing on these states offers an opportunity to assess how they can balance these fundamental principles in their referendum practice. The member states of the Council of Europe are also subject to the only international standards guiding referendums: the Revised Guidelines on the Holding of Referendums. Consequently, the fulfillment of the institutional and procedural requirements of the Revised Code is a relevant question regarding the referendum practice of these states.

Limiting the analysis to Europe also provides a manageable set of states that still represent a wide variety of different systems and practices. Some countries are on the world-wide frontline of referendum practice (Switzerland, Liechtenstein), while others are frequent or regular users.108 Some states impose many limits (Portugal, Hungary), while others none or only few (Switzerland, Croatia). Several different institutional solutions appear in Europe for referendum authorization, from election commissions through presidents and parliaments to regular and constitutional courts. The procedural rights of the parties are also varied.109

The smaller set of states is selected based on the following criteria: (1) the selected states need to have some form of citizen-initiated referendum at the national level, (2) the citizen-initiated referendum has been used in practice since 1989–90, (3) the states need to represent prevalent institutional choices for referendum authorization in Europe and (4) the states should represent

109 See Chapter 2, section 3.
both ‘old’ and ‘new’ democracies. Including ‘new’ democracies contributes to an even geographic distribution of states. More importantly, several ‘new’ democracies have introduced citizen-initiated referendums after the fall of the Soviet Union and a couple of them have organized multiple referendums since. Meanwhile relatively few ‘old’ democracies use these instruments.

Of the member states of the Council of Europe only 25 have legal institutions for citizen-initiated referendums at national level. Since 1990 only 15 of these states have had national referendum events initiated by citizens: Bulgaria, Croatia, Georgia, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Malta, North Macedonia, San Marino, Slovakia, Slovenia, Switzerland, and Ukraine. For the selection of the smaller set of states I focus on states that have had multiple citizen-initiated referendums since 1989–90, because the exceptional use of citizen-initiated instruments does not allow for developing a practice in referendum authorization procedures. This selection step excludes Georgia, Malta, North Macedonia, and Ukraine. Croatia has also had only one citizen-initiated referendum. However, the referendum was on the issue of same-sex marriage, which allows for a comparison with Slovakia and Slovenia where citizens also initiated referendums on same-sex marriage.

Out of the ‘old’ democracies, San Marino is excluded because it has similar institutional settings to Italy (authorization by the Constitutional Court). This leaves Italy, Liechtenstein, and Switzerland. Out of the ‘new’ democracies in Central and Eastern Europe and the Baltics, Bulgaria and Lithuania are excluded based on similar considerations. They both leave referendum authorization decisions to the parliaments, an institutional setting that is already represented by other states (Croatia, Liechtenstein, Slovenia, and Switzerland). Consequently, the book highlights the referendum practice of the following eight states: Croatia, Italy, Hungary, Latvia, Liechtenstein, Slovakia, Slovenia, and Switzerland.

110 Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Georgia, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, North Macedonia, Poland, Portugal, Russia, San Marino, Serbia, Slovakia, Slovenia, Switzerland, Ukraine. See LIDD data dashboard > Summaries > By Instrument/Countries on http://lidd-project.org/data/, statistics correct as at 15 March 2022. The data collection was carried out when Russia was still a member of the Council of Europe. The figures and tables illustrating the data collection and analysis incorporate the Russian rules on referendums as well as the practice, and the book contains references to this practice. 111 See LIDD Referendum events dashboard > Vote trigger > Citizens (included) on <http://lidd-project.org/data2/> or <https://www.sudd.ch/>, statistics correct as at 15 March 2022.
4. THE STRUCTURE OF THE BOOK

Following these introductory remarks, the next chapter provides an overview of the referendum authorization procedures for citizen-initiated referendums in the Council of Europe (Chapter 2). This overview is built primarily on the LIDD database, and its aim is to show the general trends in referendum authorization procedures. Subsequently, a brief introduction is provided to the legal provisions that govern referendums in the eight selected states (Chapter 3). Then, the special nature of the referendum authorization procedure is analyzed in more detail (Chapter 4). This part of the book tries to resolve the dualities surrounding the procedure: is the referendum authorization procedure political or legal? Is the review of legal limits abstract or concrete? This chapter also provides an overview of the most common legal limits from a procedural standpoint. Next, I explore how the principles of 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 shape the referendum authorization practice of the selected states (Chapters 5–9). Each procedural guarantee is evaluated through three questions: (1) What is the function of the procedural guarantee in referendum authorization procedures with regard to the special nature of these procedures? (2) Is the procedural guarantee ensured in the referendum authorization practice of the selected states? (3) How could the procedural guarantee be better incorporated in the referendum authorization procedures of the selected states? Finally, I draw some conclusions based on the comparative analysis and attempt to establish best practices for referendum authorization procedures (Chapter 10).