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Illiberal Direct Democracy

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Abstract: Instruments of direct democracy can be – and are – used to further and strengthen illiberal democracy by restricting minority rights (1). The legal design of these instruments can make this easier or less likely (2).

Keywords: direct democracy, referendum, popular initiative, illiberal democracy, minority rights, populism, deliberative democracy

1 Direct Democracy and the Tyranny of the Majority

Instruments of direct democracy such as citizens' initiatives and referendums are often considered as a way to compensate for the deficiencies of representative democracies and to enhance the responsiveness of government.[1] I share this view, yet they may also be used in a somewhat different way.

1 For a synoptic review of some academic literature on the pros and cons of direct democracy, see Fernando Mendez et al., *Referendums and the European Union. A comparative Inquiry* (Cambridge University Press 2014) 7–8; for direct democracy as 'an intermittent safety valve against the perverse or unresponsive behavior of representative institutions and politicians', see David Altman, *Direct Democracy Worldwide* (Cambridge University Press 2011) 59; for its pitfalls, eg, Christopher H. Achen and Larry M. Bartels, *Democracy for Realists* (Princeton University Press 2016) 68–69. For the effects of constitutional initiatives, see John Dinan, 'State Constitutional Initiative Processes and Governance in the Twenty-First Century' (2016) 19 Chapman Law Review 61. The Centre for Research on Direct Democracy at Aarau, Switzerland, is running a database on direct democracy in Switzerland, Europe and the world available at http://c2d.ch/. For democracy in between elections in general, see Pierre Rosanvallon, *Counter-Democracy* (Cambridge University Press 2008).

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In many countries of Europe there have recently been popular initiatives and referendums directed against religious, ethnic or sexual minorities. A few examples: In 2009, a Swiss initiative was successful to include in the constitution a ban of minarets.[2] In 2016, the Hungarian government organized a referendum against the resettlement of refugees in Hungary by the European Union.[3] In the same year, Swiss voters decided on an initiative for the unconditioned expulsion of criminal foreigners.[4] Latvians rejected the Russian language as the second language of the state in a referendum in 2012.[5] In 2012, a Slovakian initiative led to a referendum on a gay marriage and adoption ban.[6] In 2013, Croatians voted for marriage as an exclusive union of man and woman.[7] In 2015, Slovenians decided on an initiative to repeal a statute on same-sex marriage.[8]

Of course, these examples provide just anecdotal evidence, and not even all of the mentioned referendums produced a valid result or a majority for restricting minority rights. They are certainly not typical for the use of direct democracy in general but they demonstrate a well-known risk: the risk of a tyranny of the majority. This risk has always been a concern in political theory,[9] and if political science and legal scholarship do not agree in all aspects, they provide many more examples for the use of

2 Nick Cumming-Bruce and Steven Erlanger, 'Swiss Ban Building of Minarets on Mosques' *The New York Times*, (29 November 2009) <www.nytimes.com/2009/11/30/world/europe/30swiss.html> (accessed 25 May 2018).

3 Patrick Kingsley and Benjámin Novák, 'Hungary's refugee referendum not valid after voters stay away', *The Guardian* (2 October 2016) <www.theguardian.com/world/2016/oct/02/hungarian-vote-on-refugees-will-not-take-place-suggest-first-poll-results> (accessed 25 May 2018); Gábor Halmai, 'The Invalid Anti-Migrant Referendum in Hungary' (*Verfassungsblog*, 4 October 2016) <verfassungsblog.de/hungarys-anti-european-immigration-laws> (accessed 25 May 2018).

4 'Swiss vote 'no' to automatic expulsion of foreign criminals', *The Telegraph* (29 February 2016) <www.telegraph.co.uk/news/worldnews/europe/switzerland/12177234/Swiss-vote-no-to-automatic-expulsion-of-foreign-criminals.html> (accessed 26 May 2018).

5 David M. Herszenhorn, 'Latvians Reject Russian as Second Language', *The New York Times* (19 February 2012). <www.nytimes.com/2012/02/20/world/europe/latvia-rejects-bid-to-adopt-russian-as-second-language.html> (accessed 26 May 2018).

6 'Slovak conservatives fail to cement gay marriage ban in referendum', *The Guardian* (8 February 2015) <www.theguardian.com/world/2015/feb/08/slovak-conservatives-fail-gay-marriage-ban> (accessed 26 May 2018).

7 'Croatians vote to ban gay marriage', *The Guardian* (1 December 2013) <www.theguardian.com/world/2013/dec/01/croatia-vote-ban-gay-marriage-referendum> (accessed 26 May 2018).

8 Barbara Surk and Sewell Chan, 'Slovenians Deliver Major Setback to Same-Sex Marriage in Referendum', *The New York Times* (21 December 2015) <www.nytimes.com/2015/12/22/world/europe/slovenians-deliver-major-setback-to-same-sex-marriage-in-vote.html> (accessed 26 May 2018).

9 Aristotle, *Politics* (2nd edn., The University of Chicago Press 2013) 106–107 (1292a4 et seq) and 174 (1318a25); James Madison, 'Federalist No. 10' in Alexander Hamilton et al., *The Federalist Papers* (Bantam 1989); Thomas E. Cronin, *Direct Democracy* (Harvard University Press 1989) 90–91.

direct democracy against minorities, and give us good reasons to assume that the risk is bigger in initiatives and referendums than in representative democracy:[10]

Initiatives and referendums lack the 'filters' of parliamentary procedures. Once drafted, they cannot be amended or improved like bills are in committee hearings and parliamentary voting. The usual strict yes-no-design of initiatives and referendums does not allow for compromise or not even postponing the decision. Neither is coalition building an option because voters cannot trade their votes in exchange of support of other actors. Whereas voting in parliament is a repeat game with possible consequences for the next time, voting in a referendum is a one-shot game. Ballot decisions are secret; there is no public record of votes and no need to explain them, so not even restraints of political correctness apply.

These features may easily be exploited by political groups who are more interested in a conflict than a solution. The reduction of political issues to a choice of yes or no furthers the escalation of political disagreements and the mobilization of voters. The results of popular votes are easily presented as expression of the true will of the people and thus seem to correspond to democracy's basic principle of popular sovereignty. Their pure majoritarian design seems to justify doing away with minority rights and other constitutional limitations such as a lack of legislative powers or holdings of constitutional courts. Thus, it is not a coincidence that more direct democracy is on the agenda of most illiberal parties.

Finally, the possible adverse effects of initiatives and referendums are not limited to an unfavorable result at the ballot box: The campaigns already can deepen cleavages in society, promote hate speech, create an illiberal political climate,[11] and pave the way to illiberal regimes. Once in power, these regimes can and do use referendums as plebiscites[12]: for acclamation purposes, in order to

10 Derrick A Bell, Jr, 'The Referendum: Democracy's Barrier To Racial Equality' (1978) 54 Washington Law Review, 1; Janice C May, 'The Constitutional Initiative: A Threat to Rights?' in Stanley H Friedelbaum (ed.), *Human Rights in the States: New Directions In Constitutional Policymaking* (Greenwood Press 1988) 163; Julian N Eule, 'Judicial Review of Direct Democracy' (1990) 99 Yale Law Journal 1503 (1551–1552); Lynn A Baker, 'Direct Democracy And Discrimination: A Public Choice Perspective' (1991) 67 Chicago-Kent Law Review 707; Barbara S Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41 American Journal of Political Science 245; Bruno S Frey and Lorenz Goette, 'Does The Popular Vote Destroy Civil Rights?' (1998) 42 American Journal of Political Science 1343; Don P Haider-Markel et al., 'Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights' (2007) 60 Political Research Quarterly 304; Daniel C Lewis, *Direct Democracy and Minority Rights: A Critical Assessment of the Tyranny of the Majority in the American States* (Routledge 2013); Dinan (n 1) 88–89.

11 Cf Ellen D B Riggle et al., 'The Marriage Debate and Minority Stress' (2005) 38 Political Science and Politics 221.

12 Altman (n 1) 88–89.

create situations of 'we' against the 'others', and to keep politics in a constant campaign mode not allowing for deliberation and compromise.

Obviously, these risks are hard to gauge. They are not the same in every country. They depend on many factors – the historic experience, the party system, the political culture, the media landscape of the respective political community, to name just a few. For a constitutional lawyer, though, the risk is serious enough to take a look at the question – much the more because the risk of a tyranny of the majority also depends on the legal design of direct democracy. To avoid misunderstandings I should add that the following considerations are not meant to water down direct democracy to a meaningless ritual but to strengthen it by identifying instruments to protect it against populistic abuse.

2 Designing Direct Democracy in a Minority-Friendly Way

Of the many instruments of direct democracy,[13] I focus on the popular initiative, ie, a citizen-initiated proposal for legislation; as government-induced referendums require additional considerations they are not covered here. Legal options of regulating popular initiatives include limiting their possible content, providing chances for deliberation, mitigating their effects, and fine-tuning court control.[14]

2.1 Limiting the Subject Matter

Many countries exclude certain subject matters form the scope of popular initiatives. With a little simplification we can distinguish three types of such limitations.

The first type has to do with jurisdiction: It excludes all subject matters the respective political entity is not competent to legislate on.[15] An initiative is a

13 For a typology, see Altman (n 1) 7–8.

14 For a general list of possible safeguards, see Cronin (n 9) 232–233; Stephen Tierney, 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox' (2013) 12 Election Law Journal 508; for the constitutional initiative, see Dinan (n 1) 93–94; for an overview of various mechanisms for the adaptation of direct-democratic instruments to representative systems, see Wilfried Marxer and Zoltán Tibor Pállinger, 'System contexts and system effects of direct democracy – direct democracy in Liechtenstein and Switzerland compared', in Zoltán Tibor Pállinger et al (eds), *Direct Democracy in Europe* (Verlag für Sozialwissenschaften 2007) 12 (15).

15 eg, Article 8 (2) of the Hungarian Constitution; Article 2 (1) and Article 4 (2b) of the Regulation 211/2011/EU on the citizens' initiative in the European Union.

legislative proposal. In federal systems and in the EU, legislative powers are divided between the respective levels of sub-state entities, the state and the EU. From a legal perspective it does not make sense to deal with a proposal which cannot be realized under the respective constitution, and from a democratic perspective political questions should not be decided by the 'wrong' people, thus excluding others who are equally concerned. From a political perspective, however, using the 'wrong' level to build up pressure on the 'right' level can be a promising strategy. The mentioned Hungarian referendum on the distribution of refugees in the EU[16] is a good example, the recent regional referendum on the independence of Catalonia[17] another one. Therefore, binding initiatives to the distribution of legislative powers stands to reason in a federal entity.

The second type is concerned with the stability and consistency of political decisions. Typically, initiatives are isolated interventions in a political process. They can disturb a political program, and in a certain sense, this is just their purpose. So sometimes one can find rules meant to limit possible disrupting effects. These rules include certain delays before a parliamentary or ballot decision can be reconsidered in a popular initiative.[18] In many countries the budget cannot be a subject of direct democracy,[19] and in some instances even decisions with considerable financial effects are excluded[20] (while elsewhere exactly the financial effect can trigger an obligatory referendum on the respective measure[21]).

More relevant for us is the third type: restrictions meant to avoid grave mistakes. Above all, these are rules excluding from initiatives constitutional matters,[22]

16 See supra n 3.

17 Daniel Turp et al, *The Catalan Independence Referendum: An Assessment of the Process of Self-Determination* (Institut de recherche sur l'autodétermination des peuples et les indépendances nationales 2017); André Lecours, 'The Political Consequences of Independence Referenda in Liberal Democracies: Quebec, Scotland, and Catalonia', 50 *Polity* (2018) 243, <www.journals-uchicago-edu.uaccess.univie.ac.at/doi/pdfplus/10.1086/696709> (accessed 25 May 2018).

18 eg, Article 99 (2) of the Slovakian Constitution; Article 151 (3) of the Albanian Constitution.

19 eg, Article 75 (2) of the Italian Constitution; Article 93 (3) of the Slovakian Constitution; Article 73 of the Latvian Constitution; Article 115 (4b) of the Portuguese Constitution; Article 8 (3b) of the Hungarian Constitution; Article 90 (2) of the Slovenian Constitution; Article 151 (2) of the Albanian Constitution; Article 69 of the Constitution of the Canton of Genf (Switzerland).

20 eg, Article 167 (2 and 3) of the Portuguese Constitution; Article 151 (2) of the Albanian Constitution. For examples from the USA, see Dinan (n 1) 103.

21 eg, in Swiss cantons: Article 47 (1) of the Constitution of St. Gallen and Articles 9–11 of the implementing statute of 17 June 1929; Article 77 (d), (e), and (f), and Article 78 (b), (c), and (d) of the Constitution of Jura; Article 16 (4) of the Constitution of Grisons.

22 eg, Article 115 (4a) of the Portuguese Constitution; Article 8 (3a) of the Hungarian Constitution; Article 90 (2) of the Slovenian Constitution.

or, even more specifically for us, fundamental rights[23] and duties under international law,[24] but also important political decisions such as the declaration of war and the emergency state[25] or sensitive fields of policy, eg, defense, citizenship and constitutional justice,[26] ratification of treaties,[27] elections[28], or train tariffs and obligatory military service.[29,30]

I did not find an explicit exclusion of minority issues.[31] In some cases, the exclusion of constitutional amendments, fundamental rights or duties under international law should provide protection, though: Minority rights are entrenched in the freedoms of the constitutions and international human rights instruments, and they include specific prohibitions of discrimination.[32] The mentioned ban on minarets or the expulsion of criminal aliens without consideration of proportionality is in conflict with the European Convention of Human Rights and the constitutions of most European states. But in many instances protection by these rules is less certain. It may be unclear whether the prohibitions also apply to measures which are not explicitly introduced as amendments to the constitution. Contradictions to fundamental rights or duties under international law are rarely as obvious as they are in the cited examples. And, of course, not all questions concerning minorities touch upon higher echelons of law. So an explicit ban of

23 eg, Article 93 (3) of the Slovakian Constitution; Article 151 (2) of the Albanian Constitution; Article XLVIII Section 2 of the Constitution of Massachusetts; Article XV Section 273 (5) (a) of the Constitution of Mississippi.

24 eg, Article 139 of the Swiss Constitution; Article 73 of the Latvian Constitution; Article 8 (3d) of the Hungarian Constitution; Section 87 (3) of the Spanish Constitution.

25 eg, Article 73 of the Latvian Constitution; Article 115 (4c) of the Portuguese Constitution; Article 151 (2) of the Albanian Constitution.

26 Article 115 (4 d) of the Portuguese Constitution.

27 Article 90 (2) of the Slovenian Constitution.

28 Article 8 (3 f) of the Hungarian Constitution.

29 Article 73 of the Latvian Constitution.

30 For more examples, *see* Virginia Beramendi et al, *Direct Democracy. The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance 2008) 6; Council of Europe, European Commission for Democracy through Law (Venice Commission), *Referendums in Europe - An analysis of the legal rules in European States*, CDL-AD (2005)034 (Strasbourg, 2 November 2005) 8–9; for the USA, see Portia Pedro, 'Making Ballot Initiatives Work: Some Assembly Required' (2010) 134 Harvard Law Review 959 (960).

31 The prohibition for any 'measure that relates to religion, religious practices or religious institutions' in Article XLVIII Part II Section 2 of the Constitution of Massachusetts comes close to it.

32 See, eg, Article 14 of the European Convention of Human Rights and Article 21 of the Charter of Fundamental Rights of the EU. In Slovakia, a proposed referendum directed against the official use of minority language was not admitted in 1999, because the constitution did not allow referendums on basic rights and freedoms: see Erik Láštic, 'Referendum experience in Slovakia: a long and winding road', in Pállinger et al. (n 14) 189 (194).

respective initiatives could be wise: it would apply to any proposal impairing the position of a minority irrespectively of its compliance with constitutional and international law.

Such a ban could be justified even better than most of the existing limitations of scope: Whereas one might take object to the distrust of the people expressed by the other examples, or doubt the consistency of excluding complex thematic decisions while allowing elections, a ban of minority issues can be grounded on the essential unfairness of 'filterless' majority decisions on minorities.

2.2 Providing Chances for Deliberation

A different approach to the problem could focus on supplementing filters. A first measure would try to improve the information. Usually, initiators of ballot measures are required to provide just a draft and a reasoning for it,[33] and all the remaining questions are left open for the political debate. The Brexit referendum teaches us that we should maybe ask for more: for information on the people behind the initiative, its funding[34] and its advertising, including social media techniques. The democratic quality of the decision may be further improved by independent information on the content and probable effects of the proposed measure; the Swiss 'voting booklets'[35] give an example.

Timing is another important factor for deliberation. Democratic voting is not just an opinion poll but the last step in a longer process which is meant to give the people the chance to form opinions. As a rule, the gatherings of the necessary support and registration procedures are slow enough anyway to provide for a cooling-off period after a spectacular event or a scandal.[36] But also the voting act as

33 eg, Article 41(2) of the Austrian Constitution and Section 3 (3) and (7) of the implementing statute BGBl I 2016/106.

34 For ballot measures in the USA, see the National Institute on Money in Politics's database at <www.followthemoney.org/tools/ballot-measures> (accessed 23 July 2019). For a discussion of the literature, see, eg, Cronin (n 9) 99–100 and 212–213; Elizabeth Garrett and Daniel A. Smith, 'Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy' (2005) 4 Election Law Journal 295; Wolf Linder, *Swiss Democracy* (3rd edn., Palgrave Macmillan 2010) 123–124; Richard Briffault, 'Campaign Finance Disclosure 2.0' (2010) 9 Election Law Journal 273; Altman (n 1) 52–53.

35 The 'voting booklets' from 1977 up to the present are published by the Swiss Federal Government at <www.bk.admin.ch/bk/de/home/dokumentation/abstimmungsbuechlein.html> (accessed 28 June 2018). For 'ballot pamphlets' from California from 1911 up to the present, see the UC Hastings College of the Law's collection at https://repository.uchastings.edu/ca_ballot_pamphlets/ (accessed 22 August 2018).

36 See also Dinan (n 1) 98–99, for requiring constitutional initiatives to be approved by voters in consecutive elections.

such should not be too easy. Thus e-voting rises not only security concerns but needs some reflection on how to maintain the seriousness of the voting act between video streaming and a pizza order.

Creating alternatives might help deliberation, too. Some voting regimes, the Swiss among them again, allow the government and/or parliament to put a counterproposal on the ballot.[37] This way, the voters escape the strict yes-no-alternative and get an additional option to choose from. As a rule, it will be less radical than the original proposal of the initiative or provide a different framing of the decision. In any event, it will enrich the political debate.

A similar effect can be achieved if a referendum is not the automatic consequence of an initiative with a defined support. In this model, a referendum is only held if the initiators are not satisfied with legislative measures parliament can take as a response to the initiative within a certain delay.[38] Involving the legislative body makes the initiative less antagonistic to traditional politics. It opens up a room for negotiations and compromise, between the initiators and the legislators as well as between the parliamentary parties themselves, and it lets initiatives benefit from the virtues of parliamentary debate.[39] The initiative may not be upheld if parliament fulfills at least some of its wishes. If, on the other hand, the initiators insist on a referendum the voters can choose again between two measures to solve a problem after an enhanced debate.

2.3 Mitigating Legal Effects

As we have just seen there is no automatic sequence of initiative and referendum in each system, and neither is there a given relation of initiatives to parliamentary politics. Only the strongest version of the initiative leads to a binding and self-

37 On the federal level: Article 139 (5) of the Swiss Constitution and Article 101 of the Swiss Bundesgesetz über die Bundesversammlung; for the cantons: eg, Article 76 (3) of the Constitution of Jura; Article 75 (3) of the Constitution of Geneva; Article 22 (3c) of the Constitution of Lucerne; Article 30 of the Constitution of Zurich.

38 eg, Articles 78 and 79 of the Latvian Constitution; Article 70 of the Constitution of Styria (Austria). For this type of 'indirect initiative', see Cronin (n 9) 241; Beramendi et al (n 30) 61 and 72; Dinan (n 1) 100–101.

39 See also Pedro (n 30) for the importance of face-to-face communication (and using an assembly instead of parliament); for mini-publics of random samples of eligible voters to discuss ballot measures and advance counterproposals, see James Fishkin, 'Deliberation by the People Themselves: Entry Points for the Public Voice' (2013) 12 Election Law Journal 490 (499–502); David Altman, *Strengthening Democratic Quality: Reactive Deliberation in the Context of Direct Democracy* (Kellogg Institute for International Studies 2014), https://kellogg.nd.edu/sites/default/files/old_files/documents/400_0.pdf (accessed 23 July 2019); and Tierney (n 14) 511–514.

executing popular decision bypassing the legislative body.[40] Because it allows lawmaking without or against the will of parliament this version most likely needs safeguards, at least a certain voter turnout at the referendum[41], or is even deemed unconstitutional in some countries.[42]

There are other models, though. The weakest among them constructs initiatives as mere proposals for parliament to consider.[43] If we disregard for a moment the possible negative effects of campaigning this model needs no limitations: Parliament can rectify all legal mistakes and mitigate political exaggerations or just reject the initiative and that's it; that is, until the next elections. As they may be far away, this model is often criticized as dysfunctional.[44]

Between those extremes we find many different solutions. For our purposes, two elements are of specific interest: Referendums on initiatives may be obligatory yet of a mere consultative nature;[45] or legally binding for parliament but not self-executing[46]. A consultative referendum is much more than an initiative alone. Even if an initiative enjoys large support, it does not clarify political majorities. A referendum does so, and therefore exerts more pressure on a legislative body. In many cases, but not always,[47] a consultative referendum will have the same political impact as a legally binding one.

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40 eg, Article 139 (5) of the Swiss Constitution; Article IV Section 1 (2) of the Constitution of Oregon (USA).

41 eg, Article 98 (2) of the Constitution of Slovakia.

42 In its decision Slg 16.241/2001, the Austrian Constitutional Court voided a respective provision of the Constitution of the State of Vorarlberg as incompatible with the principle of parliamentary democracy allegedly enshrined in Article 1 of Austria's Federal Constitution. For the inadmissibility of binding referendums in the Netherlands, see Leonard Besselink, 'Niederlande' in Armin von Bogdandy et al (eds), *Handbuch Ius Publicum Europaeum Vol 1* (CF Müller 2007) 327 (369–370).

43 Sometimes called 'agenda initiative': see Beramendi et al (n 30) 61 and 83–84; eg, Article 41 (2) of the Austrian Constitution. The EU's citizens' initiative is even less: a mere invitation of the European Commission to submit a proposal to the Council and the European Parliament; see Article 11 (4) TEU, Regulation 211/2011/ EU and ECJ 23 April 2018, Case T-561/14, *European Citizens' Initiative One of Us and Others* v *Commission*.

44 Altman (n 1) excludes these 'legislative popular initiatives' without a popular vote from his typology (at 17) and calls them 'popular placebos' (at 7).

45 eg, the Citizens Initiated Referenda Act 1993 of New Zealand; see Helena Catt, 'Citizens Initiated Referenda' in Raymond Miller (ed), *New Zealand Government and Politics* (Oxford University Press 2001) 386; Ben Goschik, 'You're the Voice – Try and Understand It: Some Practical Problems of the Citizens Initiated Referenda Act' (2003) 34 Victoria University of Wellington Law Review 695; Beramendi et al (n 30) 74–74. For American examples of advisory initiatives, see James D Gordon and David B Magleby, 'Pre-Election Judicial Review of Initiatives and Referendums' (1989) 64 Notre Dame Law Review 298 (303 n 39).

46 eg, Article 76 (4) of the Constitution of the Canton of Jura (Switzerland).

In extraordinary circumstances a binding referendum may pave the way to a constitutional court which might void insufficient implementation statutes or declare a failure of action. But even if there is a court with jurisdiction on the matter it cannot substitute the implementation. So as a rule, for both the consultative and the binding referendum the ultimate sanction lies in the verdict of the voters at the next elections.

For us, another common feature is more important: In both cases there is a need for implementation and therefore a chance for adaptation and moderation.

2.4 Fine-Tuning Court Control

Any limitations of initiatives cannot be fully understood without regard to court control.[48] Here we should distinguish two elements: the normal judicial review of statutes and the specific control of initiatives.

Judicial review of parliamentary statutes does not exist everywhere, and there are many variants to it. But whatever type of review there is, legal measures are not per se exempted from it just because they have been enacted by or on the basis of a referendum. So if a constitution provides so for parliamentary acts, acts of direct democracy van be voided or declared unconstitutional, too.[49] This is important to guarantee constitutional minority rights. It may not suffice, though.

For one, the constitutional standard to which ballot measures are held may be looser than that of parliamentary legislation.[50] And secondly, the review of the enacted statute could come too late: In principle, it could cover not only the result

47 Compare the (government-initiated) Brexit referendum with New Zealand's citizens-initiated referendums (see supra n 45).

48 For judicial review of direct democracy in European countries see, eg, Beramendi et al. (n 30) 71–72; Anna Gamper, 'Ni la force, ni la rigueur? Judicializing Direct Democracy' (2015) 1–2 *Percorsi Costituzionali* 125–139; for the USA, eg, Mathew Manweller, *The People versus The Courts: Judicial Review and Direct Democracy in the American Legal System* (Academia Press 2005); Kenneth P Miller, *Direct Democracy and the Courts* (Cambridge University Press 2009) and the Rose Institute of State and Local Government's updated database on the basis of Millers book <roseinstitute.org/initiatives/post-election-challenges/> (accessed 22 August 2018).

49 Cf Article 24 of the Hungarian Constitution ('any piece of legislation'); Article 280 and 281 of the Portuguese Constitution ('any rule').

50 For a discussion on the appropriateness of looser or stricter standards, see Eule (n 10); Baker (n 10) 752–775; Robin Charlow, 'Judicial Review, Equal Protection and the Problem with Plebiscite' (1994) 79 Cornell Law Review 527; Mark Tushnet, 'Fear of Voting: Differential Standards of Judicial Review of Direct Legislation' (1997) 1 New York University Journal of Legislation and Public Policy 1; Miller (n 48); Jane S. Schacter, 'Ely at the Altar: Political Process Theory through the Lens of the Marriage Debate' (2011) 109 Michigan Law Review 1363.

but all aspects of the act, including eventual prohibitions of subject matters and procedural requirements. However, a court holding that a certain initiative should not have been admitted in the first place can hardly be considered effective if it comes *post festum*, maybe years after the referendum and the enactment of the respective statute. Moreover, it brings the referendum majority and the court in antagonistic positions; a temptation for demagogues and not a very good idea for maintaining the respect courts need to function.

So if there is no general preventive judicial review in a system, one might think of moving forward parts of the review. Most systems contain a formal admission of the initiative, anyway, if only to check the necessary number of voter signatures. Content limitations and other demands at that stage, such as disclosure and transparency requirements, could be included in the conditions for admission.[51] In order to avoid an unnecessary juxtaposition of court and initiators, the admission decision could be left in the first instance to an administrative authority or an independent body; courts would decide on remedies, though. This way, illegal initiatives could be stopped rather early. They would neither waste the efforts of all stakeholders in a useless procedure nor receive the democratic blessing and the political weight of a successful referendum.

Two more remarks are necessary here. The described model would only function properly if remedies against the admission decision are available not only to the initiators but also to the opponents of the initiative. And if compliance with constitutional or international law is required for admitting the initiative, courts could only take up *obvious* infringements at this stage. For one, a full examination takes a while, and a court could not sit on the case for a long time without damaging the initiative by taking the wind out of it. Secondly, judicial review of statutes depends on cases; without them, when a statute is not yet applied, it is hardly possible to foresee all the questions it raises. Therefore the ex-ante review in the admission procedure would only be very rough and preliminary; it should not preempt a full ex-post review generally provided for by the respective constitution.[52]

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51 See the recommendations of the Venice Commission: Council of Europe, European Commission for Democracy through Law (Venice Commission), *Code of Good Practice on Referendums*, CDL-AD(2007)008 (Strasbourg, 25 October 2018) 18; for an implementation, see, eg, Article 4 of the Regulation 211/2011/EU on the citizens' initiative. For an (unsuccessful) example in Hungary, see Halmai (n 3).

52 Thus, the core arguments against pre-election review, raised, eg, by Gordon and Magleby (n 45) or Eule (n 10, 1585–1586), no longer apply.

3 Conclusive Remarks

Respecting limitations under constitutional and international law, facilitating deliberation and extending checks and balances to initiatives and referendums improves the quality of direct democracy in general. For minorities, a specific ban of subject matters could be added.

This is just a toolbox. The described measures can be combined in different ways; to a certain degree, they are exchangeable. There is not a single best solution; what works in one place might be useless or superfluous elsewhere.

Thinking about limitations we must not forget the positive effects of direct democracy. Any measures taken should still allow for a meaningful democratic process. As there is no universal standard for the appropriate strength of direct democracy within a political system, either, every system will have to find a design of its own. It should make an informed choice, though.

Finally, law can help but law alone cannot guarantee a liberal democracy.