Popular Sovereignty vs. the Rule of Law? Defining the Limits of Direct Democracy

Results in Brief

Unlawful ballots? Defining the limits of direct democracy

Should there be a limit on what policy changes can be put to a referendum? Who should review compliance with such limits? These are the questions that the EU-funded LIDD project aims to answer.

To use an American aphorism: democracy is messy, and never easy. Take the concept of direct democracy, where citizens vote on policy initiatives themselves, rather than deferring to elected officials. It may sound like democracy at its purest – but it comes with its own problems.

“Citizens across Europe are being increasingly asked to vote on proposals that are problematic from the perspective of the rule of law, such as immigration restrictions or the prohibition of same-sex marriage,” says Daniel Moeckli, a professor of Public Law with a focus on international and comparative law at the University of Zurich in Switzerland.

According to Moeckli, referendums such as these are creating tension between popular sovereignty and the rule of law. “Where should the legal limits of direct democracy be drawn and who should be responsible for ensuring compliance with
Europeans at the ballot box

To start, Moeckli and a team of researchers undertook the daunting task of collecting and categorising information on all direct-democratic instruments that exist in the 46 member states of the Council of Europe.

“We wanted to find out whether, in terms of practice, there is agreement on certain minimum standards related to direct-democratic instruments,” explains Moeckli.

The team found a great diversity of direct-democratic instruments used across Europe, far greater than was commonly perceived. Nonetheless, says Moeckli, all states struggle to meaningfully define the limits that should be imposed on such instruments. They also have difficulty devising efficient, rule of law-based frameworks for maintaining compliance with these limits.

The LIDD project, which received support from the European Research Council, is compiling its research into three different databases, which researchers plan to use to gain deeper insights on the topic.

One of these includes information on legal regulations of direct-democratic instruments in all Council of Europe member states, while another includes all the referendums held in these states since 1990. This year was chosen as a starting point for the analysis, as it correlates with the fall of Communism and democratic reforms of government in eastern European states.

A third database, which remains under construction, will cover all citizen initiatives launched in these states since 1990.

“With these databases, we now have the basis for analysing individual referendums and popular initiatives, checking whether legal limits have been violated and finding out whether there are court decisions on such violations,” adds Moeckli.

The data has been verified by constitutional law experts from across Europe, and is publicly available through an online tool that provides various ways of analysing the information.

Implications for direct democracy
LIDD researchers are currently analysing the gathered data to identify issues that can be regarded as off limits to direct-democratic decision-making across Europe.

The project also aims to elaborate best practices that states can use to define and apply reasonable limits to direct democracy in a sensible – and democratic – way. These could include, for example, establishing minimum standards that the institutional and procedural systems for reviewing compliance with these limits must satisfy.

“Our research holds important implications for how direct-democratic instruments can be used in the future as a means for upholding – not challenging – established democratic ideals,” concludes Moeckli.

Keywords

LIDD, vote, rule of law, direct democracy, democracy, referendums, Council of Europe, constitutional law

Project Information

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