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# **Regulating Referendums: An international survey of democracies**

Matt Qvortrup

# Regulating Referendums: An international survey of democracies

A survey of 34 countries' regulation of referendums shows that worldwide, regulation is minimal and open to abuse. Countries everywhere need urgent reforms of their institutions of direct democracy to ensure that direct democracy is not taken over by the wealthy.

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**Cover page photo:** A woman casts her ballot during the Greek referendum in Athens, Greece on July 5, 2015. Alexandros Michailidis / Shutterstock

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Adelaide rally to support Marriage Equality. Crowd with Yes posters in front of South Australian Parliament. Mastersky / Shutterstock

## Executive summary

Direct democracy is in danger of being taken over by the wealthy. A survey of 34 countries' regulation of referenda shows that worldwide, regulation is minimal and open to abuse. Countries everywhere need urgent reforms of their institutions of direct democracy to ensure that it is not taken over by the wealthy.



**Online campaign regulation:** Online campaigning has become a prominent and controversial part of referendum campaigns. The case of Cambridge Analytica's use of personal data during the United Kingdom's Brexit referendum campaign is an illustration of this. However, most countries do not provide any regulation at all of online campaigns. Eleven countries (or 29 per cent) have rules and regulations that pertain to online campaigning. These include, above all, the Baltic States, Iceland, and Brazil, and to a limited degree, Greece. To make referendums free, fair and transparent similar regulations ought to be introduced.

**Campaign spending limits:** One of the most frequently criticised aspects of referendums is the role that money plays. This notwithstanding, only very few countries have limits on campaign spending. Of these, the United Kingdom, Brazil, Slovakia, Slovenia, Lithuania and Canada are the only democratic countries to have strict limits on how much money campaigns may spend during referendum campaigns. However, even these rules are often circumvented. For example, the Canadian regime is weakened by the provision that spending is limited for each of the participants and not for each of the sides in the campaign. Likewise, the Lithuanian and Brazilian rules give richer citizens a distinct and unfair advantage, as campaign contributions are limited to a percentage of the individual's income. Indexed limits - like in the United Kingdom - would make referendums more legitimate.

**Limits on government spending:** The limits on government spending during referendum campaigns are, at best, patchy. The result of a referendum can be questioned if the administration is able to spend taxpayers' money on an outcome they seek. There is an urgent need to introduce rules that regulate and limit this practice.

**Media balance:** Overall, 41 per cent (or 14 countries) require balance or equal airtime to both sides in referendum campaigns by law. However, the problem is that many regulations assume that the parties in the respective parliaments reflect the sides in referendums. This is often far from the case. It would be far better to adopt rules like those in Iceland where the public broadcaster, RÚV, must ensure a fair and balanced representation of rules. However, to require parity in privately owned media may not be desirable as it is likely to infringe on free speech.

**Women and marginalised groups:** In most countries efforts to ensure the engagement of women and minority or other marginalised groups are extremely rare. Only Italy and Poland (and the Canadian province of Quebec) have explicitly addressed this concern in primary legislation. Active efforts to involve and engage women and marginalised groups should be prioritised.

**Overall regulation:** Most countries have very little regulation of referendums. Australia, Brazil, France, Lithuania and Poland are the countries with the most extensive schemes of regulation. Despite the enactment of the Political Parties, Elections and Referendum Act 1999, Britain is one of the relatively underregulated countries. However, many established democracies (such as the Scandinavian countries) have similarly low levels of regulation for referendums.

**Special majority requirements:** Some have raised concerns that low turnout can lead to the enactment of controversial policies. For example, the fact that only 37 per cent of those eligible voted for Brexit meant the result was regarded by some as illegitimate. While special majority requirements exist in some countries (in Australia and Switzerland for constitutional amendments, for example), such mechanisms are not the norm. It is not imperative to introduce these.



## Introduction

*The people are always right, but they are often misled.*  
Jean-Jacques Rousseau<sup>1</sup>

Referendums are in vogue. In recent years, there have been public votes on a peace plan in Colombia (2016), a new constitution for Turkey (2018) – and of course Brexit in the United Kingdom (2016). But in addition to these highly publicised exercises in direct democracy, there has been an explosion in other referendums. In 2019 alone there were 15 nationwide referendums around the world.<sup>2</sup>

To name but a few: in Belize a referendum on the territorial dispute with Guatemala resolved the matter when voters endorsed a decision by the International Court of Justice; in Ireland a majority of voters supported a liberalisation of the divorce laws; the citizens of Uruguay voted on whether life sentences should be imposed for the most serious crimes; and in Moldova voters endorsed a proposal that will allow citizens to recall members of parliament. Even in countries with less than perfect democratic credentials, voters were called to the polls in referendums, as was the case in Cuba and Egypt (in both cases on a new constitution).



Matt Qvortrup, photo courtesy of the author.



This trend raises several interesting questions of democratic theory. But they also, at a more practical level, raise fundamental questions about regulation and administration. Often referendums have been called at short notice and occasionally the debate has been polarising. These developments beg the question if the process could be improved if it were better regulated? Yet, there has been surprisingly little written about the regulation (or otherwise) of referendums. And, for this reason, the evaluations of the conduct of referendums has been sparse. Given the role referendums seem set to play in the future, there is an urgent need to map, understand and evaluate the regulatory and legal practices of referendums. This report is a first step towards this. Thus, globally there has been a shift towards more referendums. Perhaps reflecting citizens demand for more choice, this has even been described as democracy “on demand”.<sup>3</sup>

Referendums should be about deliberation and open debate before a vote is taken. In short, “widespread citizen involvement is therefore only a starting point”.<sup>4</sup> Spanish writer José Ortega y Gasset’s dictum remains correct: “The health of democracies, of whatever type or range, depends on wretched technical detail ... all else is secondary”.<sup>5</sup> There have been other reports on referendum regulation in recent years,<sup>6</sup> however, these were largely based on secondary data. By contrast, the present publication is based on a survey of practitioners and analysis of primary and secondary legislation in democratic countries (as defined by Freedom House). This report deals with the legal regulation of referendums.

However, the law is not always a reflection of political practice. And sometimes political institutions and rights are mere words. To take an infamous example: The Constitution (Fundamental Law) of the Union of Soviet Socialist Republics 1936 guaranteed “a) freedom of speech; b) freedom of the press; c) freedom of assembly, including the holding of mass meetings; [and] d) freedom of street processions and demonstrations”; and, at a time when millions were carried off to the Gulag camps and Josef Stalin’s word was law, it stipulated that (Art. 32) “the legislative power of the USSR is exercised exclusively by the Supreme Soviet of the USSR”. One need not look only at totalitarian states to conclude that norms occasionally are more important than mere institutions. (In the 19th century a famous analysis showed that American democracy was shaped more by “customs, opinions and social habits”,<sup>7</sup> than by the letter of the law).

Still, as nations have developed legal systems (and courts to police legal regimes), statutory rules and legislation have become increasingly important and it is now the general consensus in political science that formal rules constrain actors and have an impact on public policymaking.<sup>8</sup> This is not the place for a learned exposition of political theory; rather, the aim of this report is merely to map the landscape and to record the facts. The aim of the report is to determine which countries regulate referendums. The audience is intended to be policymakers, though of course theoreticians are welcome to use the evidence in their search for theories and in their scholarly pursuits. What we hope, above all, is that this report may provide those organising a referendum with an overview of how these institutions of direct democracy are administered and regulated in other jurisdictions.

In such endeavours as this one it is always important to compare like with like. It makes no sense to compare democratic norms between countries that fall short of the ideals of free and fair elections. Hence, in carrying out this survey we have included only countries that are categorised as “free” by Freedom House. Admittedly, we could have used other measures, however, the Freedom House scores are perhaps the most commonly used measure of democratic freedom, and we have concluded that this is sufficient reason for using it as our benchmark.

Operationally, we sent surveys to embassies of 37 countries and experts to map the level of regulation. Of these countries, we received answers from 34. Hence the survey is not universal, yet still large enough for us to draw valid conclusions. The survey we sent to the respondents is reproduced as Appendix B.

The report covers issues such as: campaign spending limits, media objectivity, regulation of government involvement, regulation of online campaigning, grants to campaigns to ensure a level playing field, and mechanisms to increase the participation and involvement of marginalised groups. In addition, the report develops an Index of Referendum Regulation (IRR).

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Referendum campaign posters in Leith ahead of the 2014 referendum on Scottish independence. Abo Photography / Shutterstock

## Chapter one: Campaign spending

The risk that the richer side will win a referendum by outspending the poorer is one of the main concerns in direct democracy campaigns. In an editorial arguing for regulation of the process ahead of a planned referendum on the Japanese constitution, *The Japan Times* expressed concern that “the side with more funding can have a big impact on the voters’ decisions”.<sup>9</sup> And, in an official report by the Venice Commission (formally European Commission for Democracy Through Law) it was stressed that “the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal’s supporters and opponents”.<sup>10</sup> For this reason, one would have expected rules ensuring parity of contributions.

Yet, **based on the legislation analysed from 34 democracies for this report, only a small minority of nine countries (26 per cent) have limits on campaign spending.** The situation in Austria is typical of many countries. A country expert reports:

In Austria, there are no limits on campaign spending in referendums. The relevant laws on binding referendums (*Volksabstimmungsgesetz*) and consultative referendums (*Volksbefragungsgesetz*) contain no material provisions on the way the campaigns should be conducted. The lack of a campaign spending limit is even more remarkable as there is one in place for elections. The law on party finance (*Bundesgesetz über die Finanzierung politischer Parteien*) dictates that political parties may not spend more than €7 million during the campaign for local, regional, national or European elections. There is no mention of referendums in this law.<sup>11</sup>

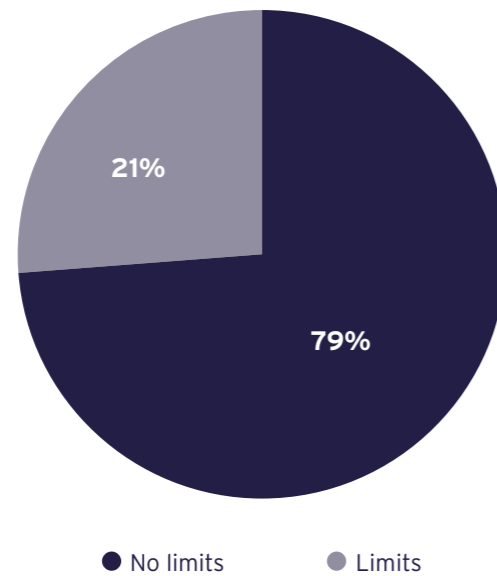
The countries in question have little in common. They include: Brazil, Canada, Lithuania, New Zealand, Portugal, Slovenia, Slovakia, Taiwan\*, United Kingdom. In addition to these countries, some Australian states have limits.

The United Kingdom is an example of a country where there are the strictest limits on how much money each side can spend. The Political Parties, Elections and Referendums Act 2000, (the act is also known as PPERA) provides that any individual or organisation wishing to spend more than £10,000 during the designated 10-week “referendum period” must register with the Electoral Commission. The act also provides the two designated groups on either side of the referendum can spend up to £5,000,000, and that political parties taking part have limits worked out in proportion to the votes they received at the last general election. The absolute limit for any political party is £5,000,000.



These relatively strict limits on campaign spending, which were first used in the referendum on a regional assembly in the North East in 2004,<sup>12</sup> are in sharp contrast to the rules introduced for the 1975 referendum, in which the “Remain” side outspent their opponents by a factor of 10:1.<sup>13</sup> The new regime, which in a modified form was applied in Scotland’s 2014 independence referendum, provided for a level playing field. In that contest, the two official campaigns, Better Together and Yes Scotland (which advocated independence), spent a total of £1,422,602 and £1,420,800 respectively.<sup>14</sup>

Figure 1. Proportion of countries surveyed which have limits on campaign spending during referendum campaigns



Thus, while the PPERA rules do not guarantee strict mathematical parity, they ensure that both sides have an opportunity to put their respective cases to the voters.

Because smaller organisations can spend money in addition to that spent by the two designated campaigns, there can be some disparity between the two sides notwithstanding the restrictions on campaign spending. Thus, it is instructive to note that, according to official data by the Electoral Commission, “registered participants” supporting Remain spent £19,309,588, whereas those supporting Leave only spent a total of £13,332,569.<sup>15</sup>

Perhaps, surprisingly, other established democracies have far fewer rules limiting campaign spending in referendums.

The Scandinavian and Nordic countries often pride themselves on being model democracies.<sup>16</sup> In terms of direct democratic regulation, they are not. Denmark, Finland, Iceland and Norway do not have restrictions on campaign spending, and none of the countries has rules prohibiting foreign donors from contributing (unlimited) funds to campaigns.<sup>17</sup> (Though it should be noted that in Denmark there is a similar ban on foreign donations. Thus *Partiregnskabsloven* (The Law on Party Budgets) contains a ban on anonymous contributions of over DKK 20,900 (£2,000)).<sup>18</sup>

And in Sweden “it is unclear whether the new laws of campaign financing of parties apply at times of referendum. As long as the financing of referendum campaigning is channelled through parties, the rules apply. But it is unclear if this is true for campaign organisations”.<sup>19</sup>

Other **countries with a reputation of high levels of democracy are likewise unregulated as regards to limits on campaign spending and donations.** And some have even gone in the other direction. Australia is a case in point. The cap on campaign spending was repealed in 1980 – perhaps interestingly as the voters had recently approved four constitutional amendments, in a country where most referendums are lost. Yet, unlike the Scandinavian countries, Australia is not completely unregulated. Thus, the Referendums (Machinery Provisions) Act 1984 (Cth) places obligations on entities which spend above A\$13,800 (indexed annually, as per the Commonwealth Electoral Act 1918 (Cth)) in promoting “referendum matters” (defined as “any

matter which is calculated to affect the result of a referendum”). Henceforth, entities spending more than A\$13,800 in promoting a referendum matter had to include the name of the person promoting the material, the relevant town of the entity and the name of the natural person responsible for giving effect to the authorisation.

However, while there are no longer limits on campaign spending in federal referendums in Australia, there is an extensive regime to ensure parity of expenditure in state referendums.<sup>20</sup>

In Queensland, the current government has planned to impose restrictions on electoral expenditure by 2020 but has delayed action until 2024.<sup>21</sup> In South Australia, any party that has opted into the public funding scheme will face expenditure caps.<sup>22</sup> Of the three states which restrict electoral expenditure, South Australia is the only state which does not apply restrictions to third parties or associated entities.<sup>23</sup> In New South Wales, all parties are subject to a cap of A\$122,900 multiplied by the number of districts in which they are endorsed, indexed annually.<sup>24</sup> In the Australian Capital Territory there is a cap of A\$40,000 per candidate, indexed annually.<sup>25</sup> Victoria, Western Australia, Northern Territory and Tasmania do not have caps on electoral expenditure.

Likewise, in the United States attempts to introduce limits on campaign spending in referendums and initiative campaigns have been reversed by the courts<sup>26</sup>. The lack of limits on campaign spending is a result of judicial review. In 1976, the Massachusetts legislature enacted the Massachusetts General Laws which (Chapter 55, Para 8) disallowed the use of “corporate funds to purchase advertising to influence the outcome of referendums elections unless the corporation’s business interests were directly involved”. This legislation was challenged in the courts. While the plaintiffs were initially unsuccessful at the Supreme Court of Massachusetts,<sup>27</sup> the US Supreme Court (SCOTUS) ruled in their favour in *First National Bank of Boston v. Bellotti*.<sup>28</sup> Writing for the five-to-four majority, Justice Lewis F. Powell Jr. held that limits to campaign spending introduced by the Massachusetts legislature were unconstitutional and that they:

... cannot be justified by the state’s asserted interest in sustaining the active role of the individual citizen in the electoral process and preventing diminution of his confidence in government. Even if it were permissible to silence one segment of society upon a sufficient showing of imminent danger, there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.<sup>29</sup>

This ruling was repeated in 1981 in *Citizens Against Rent Control v. City of Berkeley*, in which the SCOTUS overruled a decision by the Californian Supreme Court permitting local authorities to introduce limits on campaign spending. Writing for the majority, Chief Justice Rehnquist – who had been a dissenting voice in *First National* – held that “there is no significant state or public interest in curtailing debate and discussion of a ballot measure”. Though he added that “the integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed”.<sup>30</sup>

Thus, in America campaign contributions are treated as a first amendment right, a freedom of speech issue, and the only restrictions on campaign spending permitted are those rules that require participants to be transparent about their donations and contributions. Despite academic literature suggesting that “voting intentions coincide with disparities in campaign spending”,<sup>31</sup> the courts have allowed richer contributors to outspend their opponents.

The same situation exists in the Federal Republic of Germany. While there have been no federal referendums under the 1949 constitution, there has been an increased use of (and provisions for) referendums and initiatives in Germany after the fall of the Berlin Wall.

Apart from the United Kingdom, the list of countries that have introduced spending limits is low. In the following, the countries will be analysed in turn, and in alphabetical order.

## Brazil

Brazil – where there have been a been only two nationwide referendums since the fall of the authoritarian regime in the 1980s – is the only Latin American country to limit campaign spending in direct democracy campaigns. Countries with many more referendums, such as Uruguay (12 referendums since 1989) and Bolivia (seven referendums since 1989), are more frequent users of direct democracy, yet neither of the countries has introduced limits on the amount of money spent in ballot campaigns.

After a controversial referendum on a partial ban on firearms was rejected by 63 per cent of the voters in 2005, legislation was introduced to prevent the richer side from bankrolling a referendum. Henceforth, the Brazilian electoral authority (*Justiça Eleitoral*) was to decide the limits for campaign costs for each new election, referendum or plebiscite.<sup>32</sup>

While the Brazilian legislation has not been used at the federal level, it has been used in local or state referendums. Thus, in a referendum held on 11 December 2011, the voters of the state of Pará were asked to vote on proposals to split it into three parts: Carajás in the southeast, Tapajós in the west, and a rump Pará in the northeast. The proposal to create Carajás was defeated by a 67-33 margin, and the proposal to create Tapajós was defeated by a 66-34 margin. In the referendum, Superior Electoral Court (*Tribunal Superior Eleitoral*) ruled that each parliamentary front (known as *frente parlamentar*) could spend up to R\$10 million (the equivalent of US\$ 2.6 million) in campaign costs.<sup>33</sup>

In addition to this case, the Brazilian Supreme Court (*Supremo Tribunal Federal*) declared rules that allowed companies to donate to election campaigns unconstitutional in 2015.<sup>34</sup> At present, political parties can donate to parliamentary fronts, and voters can donate up to 10 per cent of their individual annual income in the previous year to referendum campaigns.<sup>35</sup>

## Canada

In Canada, where the number of referendums is much lower than in its southern neighbour, the 1992 federal law on referendums<sup>36</sup> limits the amount that can be spent by each referendum committee: “15 (1) No person or group, other than a registered referendum committee, shall incur referendum expenses during a referendum period that, in the aggregate, exceed five thousand dollars”.<sup>37</sup>

However, this limitation came with a caveat which was, perhaps, more than an oversight. There was no limit on the number of referendum committees that could be created on each side.<sup>38</sup> As a result, the richer side (the one advocating a “yes” to the Charlottetown Accord could consequently outspend the other.<sup>39</sup> And it did, “the YES committees spent 13 times as much as the NO committees”.<sup>40</sup> In spite of this, the ‘yes’ side lost by a 10 per cent margin on a 75 per cent turnout.<sup>41</sup>

## Ireland

In Ireland, “there are no limitations on campaign spending at referendums”, but there are “strict limits on donations to candidates, political parties and other groups involved in campaigns”. In the Republic of Ireland, “donations within legal limits can be accepted and must be declared in annual statements. This legislation applies to political campaigns at referendums”.<sup>42</sup> However, the Electoral Act 1997 put in place prohibitions on donations from abroad “to protect against interference by foreign individuals or entities in Ireland’s domestic political processes”, including elections and referendums. These have often been criticised for not taking into account developments of the digital age. For example, the Irish Standards in Public Office Commission issued a report in 2017 in which it expressed concern that “Facebook campaigns are not regulated by this legislation - meaning individuals or groups from anywhere can pay for Facebook advertising targeting certain demographics of Irish voters”.<sup>43</sup>

## Lithuania

One of the most comprehensive regimes in place is in Lithuania (which is one of the highest users of direct democracy instruments<sup>44</sup>). Republic of Lithuania Law on Funding of, and Control over Funding of, Political Parties and Political Campaigns, 23 August 2004 No. IX-2428<sup>45</sup> provides (Art. 3) that only “independent and represented political campaign participants” may contribute to referendum campaigns. These are defined, per Section 2 of the act, as: 1) a political party; 2) a potential candidate; 3) a self-nominated candidate; 4) referendum initiators; 5) referendum opponents; and 6) a public election committee.

Art. 10 of said act provides that “each independent political campaign participant [may make] a donation which does not exceed the amount of 10 average monthly earnings valid in the fourth quarter of the previous calendar year ... During a calendar year the total amount of donations by one natural person for independent political campaign participants may not exceed 10 per cent of the amount of the annual income declared by the natural person for the previous calendar year”. The act also states (Art. 10 (s)11) that “[a] political campaign participant shall not have the right to use for funding the political campaign the received monetary donations which are not entered on the accounting records of political campaign funding and sets lower limits under which donations need not be declared” (Art. 11(2)). However, these - unlike in the United Kingdom - must allow “the controlling authorities of financing of political campaigns to identify the donor”. Perhaps, interestingly, the

act also stipulates (Art. 11(10)) that “not more than 10 per cent of the fixed maximum permitted amount of political campaign expenses may be funded with small donations”. Further, Art. 12 states that only citizens of Lithuania and residents in the country may contribute to campaigns. This rule is unique internationally.

Thus while Lithuania does not have limits on campaign spending, the upper limits on donations effectively acts as such.

## New Zealand

Like Britain, New Zealand does not have a written constitution. This means that parliament is supreme and that all referendums are advisory only. Since the 1990s there have been a number of changes to the constitutional system in the country. The change from a first-past-the-post to a mixed-member electoral system in the 1990s coincided with the introduction of the Citizens Initiated Referendum Act 1993.<sup>46</sup> Since then, there have been 10 referendums (of which four were citizen-initiated. See Appendix A).

The regulation of campaign finance has not been consistent. Thus, recent referendums in New Zealand have had their own enabling legislation passed, for example “the New Zealand Flag Referendums Act 2015 (on the flag) and the Electoral Referendum Act 2010 (on the voting system). These rules included regulation of advertising, but there is not a standing *status quo* that would apply to all referendums. The voting system referendum had restrictions on campaign spending, but the flag referendums did not”.<sup>47</sup>

## Portugal

Portugal is an example of referendum regulation by default. The so-called Legal Regime Governing Referenda (known as LORR)<sup>48</sup> provides, in Art. 72 on campaign expenses, that the rules governing the campaign expenses of parties and groups of registered electors “*mutatis mutandis*, is that governing expenses in campaigns for elections to the Assembly of the Republic, including that regarding the limits on the expenses incurred by each party or group of registered electors”.<sup>49</sup>

According to the act, expenditures of less than €435.76 do not need to be declared. Each candidate is allowed to spend a maximum of €20,916. In referendums, this figure is multiplied by the number of possible candidates in a national legislative election, typically by 320 (or 328 in cases where Portuguese electors living abroad can vote). The maximum expenditure is €6,693,120.<sup>50</sup>

## Slovakia

Slovakia has a very light regime of referendum regulation, despite this being one of the countries that have used mechanisms of direct democracy frequently.<sup>51</sup> Yet, the “Slovak legislation does not directly regulate pre-referendum campaigns and therefore the situation is rather ambiguous”.<sup>52</sup> Thus, while “there are no explicitly mentioned spending limits for political parties during pre-referendum campaign (even though the limits for various pre-electoral campaigns are set), the legislation also recognizes third parties (*i.e.* registered subjects willing to conduct a political campaign before elections or a referendum) for which the spending limit is set to €100,000.

## Slovenia

In Slovenia, the law on electoral and referendum campaigns (*Zakon o volilni in referendumski kampanji*<sup>53</sup>) contains strict and detailed limits concerning campaign spending in referendums. Only physical persons can contribute financially to referendum campaigns. The highest possible contribution amounts to 10 average gross monthly salaries (approximately €17,000). There has to be a special bank account for each campaign. Campaign expenditure may not exceed €0.25 per eligible voter (approximately €425,000). The Court of Auditors is entitled to carry out a review of the organisers six months after the closing of the bank account and publishes a report. Foreign physical and juridical persons are neither allowed to finance nor to carry out campaigns. Those finance rules are subject to fines of up to €20,000.



## Taiwan

Arguably, one of the most democratic countries in Asia,<sup>54</sup> Taiwan has become one of the most frequent users of referendums, initiatives and recalls since the country became democratic. Beginning with the Election and Recall Act 1989, and continued with the Referendum Act 2003 which introduced the initiative,<sup>55</sup> a total of 15 nationwide polls have been held.<sup>56</sup> By contrast there has only been a single referendum in South Korea in the same period.

Article 20 of the Referendum Act sets out a relatively detailed regulation but there is no limit on campaign spending. The restrictions on spending mostly pertain to foreigners. Not surprisingly, given Taiwan's status and its relations *vis-à-vis* the People's Republic of China, the Referendum Act stipulates, Art. 20 (1-2), that campaign groups "may not accept donations from foreign associations, juridical persons or individuals, or associations or juridical persons mainly composed of foreign members, individuals, juridical persons, associations or other institutions in the People's Republic of China, or the juridical persons, associations or other institutions mainly composed of the citizens of the People's Republic of China". It is also stipulated, Art. 20(4), that "public enterprises or incorporated foundations receiving donations from the government" are prohibited from making donations.

While, there are no upper limits to donations, contributions of more than NT\$2,000 must be declared.<sup>57</sup>

## Greece

While being the original democracy and the birthplace for "government by the people" Greece, has not held many referendums. After the fall of the military junta in the mid-1970s, there was a referendum to abolish the monarchy. It took almost 40 years before the next referendum was proposed. In 2011 then Prime Minister George Papandreou proposed a referendum on the European Union (EU) rescue package for Greece's troubled economy. While this referendum was never held, legislation regulating future referendums was passed. This legislation was used in 2015 when the left-wing *Syriza* held a plebiscite on the EU Bailout Plan.

According to the Greek Law 4023/2011, Art. 6.1, campaign spending is defined by the electoral law 3023/2002 (A 106). The referendum law states that political parties' spending should not exceed the 30 per cent of the state funding that was allocated in the last general/parliamentary elections. Similarly, the spending limit for associations, people, scientific, professional or trade unions is defined to be 50 per cent of the amount that is considered the spending limit for political parties (acc. Art. 2). All the actors that participate in the referendum and are eligible for receiving state funding are obliged to conduct and publish a special report of income and spending (Art. 2 and 3).<sup>58</sup>

## Summing up

Overall, very few countries meet the requirement of the Venice Commission that "equality should be ensured between a proposal's supporters and opponents".<sup>59</sup> Whether this is a problem is widely debated. Limits of campaign spending are, as one classic study put it, "more heavily criticised than any other form of regulation. Their critics make two main charges. First the limits are almost always set far below what is necessary to mount even what most campaign organisers feel is a minimum campaign...Second, the more effectively ceilings are enforced the more they favour ... the *status quo* in referendums".<sup>60</sup> Whether this charge can be sustained today is questionable. There were no expressions from senior politicians that the limits were too low in the Brexit campaign, and there is no clear empirical evidence to support the second charge. The only major argument against campaign spending limits or limits on donations is that it is debatable if money makes a difference. There are, as we saw, several examples of campaigns that lost despite having the lion's share of the financial resources. However, gross disparities would seem to run counter to natural justice and the deep sense of fair play that is essential for running a credible democracy.

The United Kingdom, Brazil, Greece, Lithuania and Canada are the only democratic countries to have strict limits on campaign spending. Of these, the Canadian system is undermined by the rule that spending is limited for each of the participants and not for each of the sides, and the Lithuanian and Brazilian systems are arguably unfair as contributions are limited to a percentage of the donor's income - something that gives richer individuals an advantage. **Based on this survey, rules regulating campaign spending remain unfair. A much-cited study stated that "the most frequently heard criticism of the referendum is the role that big money plays in direct democracy campaigns".<sup>61</sup> The evidence in this chapter suggests that little has changed.**

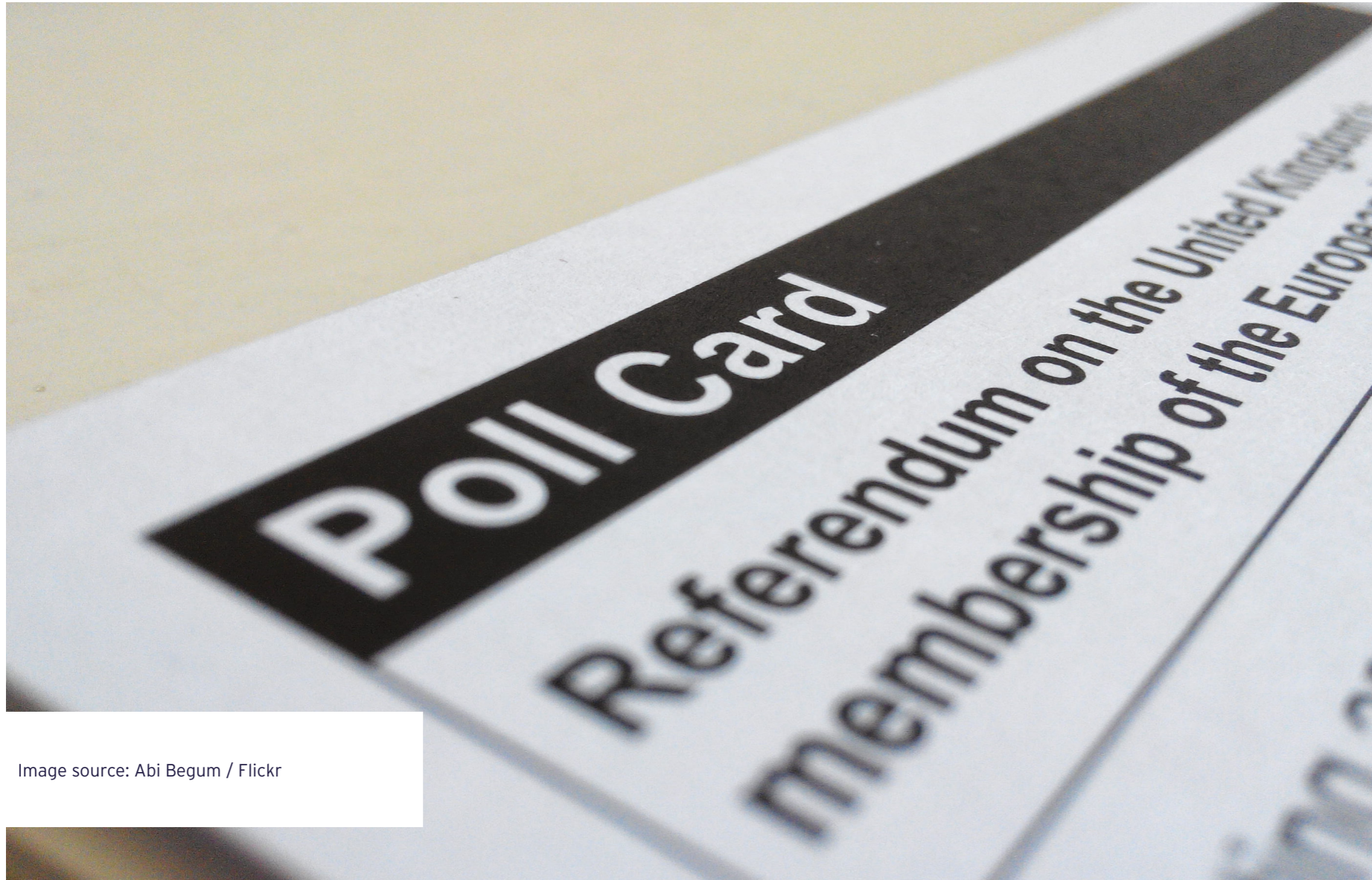


Image source: Abi Begum / Flickr

## Chapter two: Subsidies to campaigns

**Democracy requires a level playing field. If extreme disparities are in place, there is a danger that the poorer side loses access to the media and to advisors with expertise in referendum campaigns.** To limit this danger, some countries have introduced grants to ensure that referendum campaigns are not unduly dominated by those with the deepest pockets.

While restrictions on campaign spending in some countries might be perceived to impinge on the freedom of speech, according to the responses to this survey government grants to ensure parity have not been ruled to be inconsistent with First Amendment rights or equivalent in non-US jurisdictions. There are strong reasons for providing public subsidies or expenditure floors. Austin Ranney noted:

The absence of parties and party labels in referendum campaigns means that voters enter campaigns with less information and fewer guide posts than in candidate elections, and the campaigns are therefore significantly more important as suppliers of information and arguments that make for interested voters and informed votes. Accordingly, the prime object of government regulation of referendum campaigns should be to ensure that both the proponents and opponents of each proposition should have enough resources to make at least adequate presentations of their cases.<sup>62</sup>

Yet, while a few countries provide grants for campaigns in referendums, most countries do not. The total number is eight out of the 34 countries in the survey, or 23 per cent. There are thus fewer now than there were in the 1980s, when eleven countries provided some form of assistance.<sup>63</sup>



In contrast to the rules limiting campaign spending, the three Scandinavian countries (Denmark, Norway and Sweden) provide grants to both sides during referendum campaigns. The same is true for the Netherlands, the United Kingdom and Japan. In Germany there are provisions for reimbursements of some expenditure incurred during state-level referendums. In France and in Australia *ad hoc* funding has been provided for campaigns to provide a level playing field. In some countries, referendum campaign organisations (as opposed to political parties) are explicitly excluded from reimbursements of campaign expenditure. This is the case in Slovenia: “While there is a refund for campaign spending in electoral campaigns (€0.33 per vote in parliamentary elections), the law explicitly states that organisers of referendum campaigns are not entitled to any refund of their expenses”.<sup>64</sup>

## Australia

There is nothing to prevent the government from appropriating funds to support referendum campaigns – conversely, there is nothing that forces governments to do so. Before the referendum on the monarchy in 1999, there were no public grants to either side.

However, to inform the public of the two positions, the Liberal government headed by John Howard allocated A\$7.5 million to, respectively, the YES and the NO umbrella organisations. However, as these commissions are not provided for by legislation, they were not required by statute to meet minimum levels of fairness, accountability or objectivity.<sup>65</sup>

## Bulgaria

Bulgaria is a relative newcomer to the world of referendums. While there were dubious plebiscites during the years of communism, the country had fewer than the average number of referendums in the years immediately after the fall of the iron curtain. The regulations on national and local referendums passed in 2009. It was not until 2013 that the first referendums were held.<sup>66</sup> Another two national referendums were held in 2015 and in 2016. Partly as a consequence of this, amendments of the regulations of the process of direct democracy were introduced in 2015. One of the regulations is a provision for (partial) government funding of direct democracy campaigns. Thus:

The Direct Citizen Participation in State and Local Government Act stipulates that (Art. 16 (1)) the Election Code shall apply in respect of information and explanatory campaign, where equal opportunities shall be guaranteed for the different opinions on the referendum subject to be presented.<sup>67</sup>

The act specifies (Art.16 (1)) that parties, coalitions and initiative committees which are not entitled to a state subsidy under the Political Parties Act shall be entitled to receive funds for media representation packages in the amount of BGN 40,000. However, the act does not specify if the money can be given to umbrella organisations. Thus, the recipients of government grants are parties and not campaign organisations. This creates a problem as referendums do not always have the opposition pitted against the government.

## Denmark

In an answer to a written question by the MP Alex Ahrendtsen (from the Danish People’s Party), the Danish Ministry of the Interior and Economics (*Indenrigs og Økonomiministeriet*) responded that “while generic legislation did not exist”, funds had been allocated to referendum on an *ad hoc* basis. Thus, in:

The 2015 referendum ... the Folketinget had granted DKK 20.8 million for a public information. This grant was raised to DKK 15 million, with a view to distribution among the parties elected to the Folketing and the European Parliament, and DKK 10 million to information activities, which were distributed after organisations applied for funds. In addition, the Ministry of Justice distributed a further DKK 3.5 million for information activities.<sup>68</sup>

## France

France, like Denmark, is one of the more frequent users of referendums. In addition to mandatory referendums on constitutional changes (Art. 89), the president may “on the joint proposal of the two assemblies, published in the *Journal Officiel* ... submit to a referendum any government bill dealing with the organisation of the public authorities, approving a community agreement or authorising the ratification of a treaty which [is] not in conflict with the constitution” (Art. 11). This provision has been used eight times. There has only been one constitutional revision referendum under the Fifth Republic, namely the 2002 referendum on reducing the presidential term from seven to five years. In addition, France has the “shared initiative”, which can be initiated by “one-fifth of the members of parliament, supported by one-tenth of registered voters”.<sup>69</sup> This provision has hitherto not been used.<sup>70</sup> Despite these relatively extensive provisions for referendums, the process is somewhat unregulated. As noted in the previous section, there are no limits on campaign spending. Further, grants to individual campaigns were unknown until the beginning of the 21st century, though, “at the last referendum (2005) for the first time the government provided some financial help to parties and groups allowed to campaign. But this was an *ad hoc* decision”.<sup>71</sup>

## Italy

Italy proves to be a special case in that national referendums can be initiated by a certain number of voters, which is normally the case for the referendums aiming to repeal legislation. At the national level, the Italian constitution stipulates that referendums can be held either:

1. To repeal legislation or sections thereof (known as *Referendum Abrogativo*), upon proposal of at least 500,000 voters or of five regional councils (Art. 75) or;
2. When a constitutional revision is not approved by a majority of two-thirds of the members of each house of the parliament in the second voting, within three months from the publication of the constitutional amendment one-fifth of the members of a house, at least 500,000 voters or five regional councils can ask to hold a referendum within three months of parliament voting for a change of the constitution (Art. 138).

It should be noted that national referendums in Italy could be held only since the adoption of the relevant framework legislation (Law No. 352 of 1970).

There are mechanisms for reimbursement of expenditures, though there are limits to these. These are set out in Art. 1(4) of Law No. 157 of 1999<sup>72</sup> and are linked to the number of signatures collected to validly present a proposal for a referendum. A committee established to promote a constitutional referendum or a referendum aiming to repeal legislation qualifies for a reimbursement equal to the amount determined by multiplying €1 per the number of signatures collected in support of the referendum (the minimum being 500,000 as highlighted above) up to the maximum threshold of €2,582,285 a year. A committee promoting a referendum to repeal legislation gets the reimbursement only if two requirements are met: i) the Constitutional Court has declared admissible the question(s) to be put to a vote in the referendum, and ii) the quorum for the validity of the referendum – the majority of those eligible to vote has voted – is reached. By contrast, neither the quorum of participation nor an admissibility check by the Constitutional Court are required for the validity of constitutional referendums.

## The Netherlands

Between 2015 and 2019, voters in the Netherlands could request a referendum on an enacted law. According to the Advisory Referendum Act (*Wet raadgevend referendum*), a referendum would be called if citizens were able to muster the support of 10,000 petitioners within four weeks, and subsequently 300,000 petitioners within four weeks once the initial threshold had been crossed. At the subsequent referendum, the parliament only needs to take notice of the referendum if the turnout is above 30,000. In the 2016 referendum on the Ukraine Agreement with the EU, turnout was 32 per cent, of whom 61 per cent voted against the agreement.<sup>73</sup> The government allocated a total of €25 million for the first referendum.<sup>74</sup>

Pursuant of the act, the Referendum Committee (*De referendumcommissie*) provided subsidies of a total of €600,000 for the pro-agreement camp, the same amount for opponents and a total of €800,000 for neutral information activities. In addition, individuals could apply for a maximum of €5,000 and organisations for a maximum of €50,000.<sup>75</sup>

## Germany

Germany provides a special case. As in the United States, direct democracy is mostly a state matter.

Since its founding in 1949, the German political system has rested firmly on the principles of representative democracy... Today, however, the concepts of representative democracy and the “the party state” are under stress and participatory concepts are gaining ground. Although there are no direct democratic instruments at the national level, the situation looks quite different at the level of states and municipalities. Since the 1990s, all German federal states (*Bundesländer*) have introduced referendums at the state and local levels that can be launched by respective authorities and citizens.<sup>76</sup>

One of the main developments in these *Länder* is reimbursements of campaign expenditure - in effect a retrospective grant. Thus, in Hamburg and Schleswig-Holstein, costs for a referendum campaign are reimbursed. In Hamburg, €0.10 per vote (limited to €40,000) will be reimbursed, in neighbouring Schleswig-Holstein significantly more (€0.28 per Yes vote).<sup>77</sup>

In other states, it is even possible to reimburse expenditure at the earlier stages of a petition drive. Thus, the state of Lower Saxony refunds €0.10 per valid signature for a petition for a referendum that has been concluded. And, in Rhineland-Palatine, a state currently governed by a coalition of the Greens and the centre-right Christian Democratic Union, there are reimbursements of both the expenses incurred during the signature gathering and during the actual campaign.

## United Kingdom

In the United Kingdom, contributions to campaign organisations is organised into designated participants, or umbrella organisations. According to Art. 110 of the Political Parties, Elections and Referendum Act 2000, the Electoral Commission may provide support up to a maximum of £600,000 to each designated organisation. In addition, these organisations are entitled to “(a) the sending of referendum addresses free of charge; (b) the use of rooms free of charge for holding public meetings; and (c) referendum campaign broadcasts”.





Five proposed flags of New Zealand that were included in the 2015 flag referendum.  
Image source: glasnevinz / Wikimedia Commons

## Chapter three: Online campaigning regulation

In the aftermath of the 2016 Brexit referendum there was considerable controversy over the use of social media. Using state of the art technology, the Leave campaign effectively targeted swing voters and citizens who rarely voted but who would be likely to vote for leaving the European Union. While there was some controversy over the involvement of the company Cambridge Analytica,<sup>78</sup> Vote Leave did not break the law. There was a simple reason for this: there was not much of a law to be broken. According to Dr Andrew Blick of *Kings College London*,

In the period since the 2000 Act [Political Parties, Elections and Referendums Act] was passed, online campaigning has become far more important and sophisticated, leaving the legislative framework out of date. There is currently a widely voiced view that the 2000 Act needs to be amended to reflect this development; but at present regulations in this area are considered inadequate. While within the UK, it is subject to the EU GDPR regime, something that the UK intends to preserve if and when it leaves the EU.<sup>79</sup>

This is not a unique situation, though **out of the 34 countries eleven (or 29 per cent) have rules and regulations that pertain to online campaigning**. Australia is a good example of the dearth of regulation, a fact that has been mentioned by local experts.<sup>80</sup> An expert took the view that:

The Referendums (Machinery Provisions) Act 1984 (Cth) famously has seldom been updated. In outline it is roughly unchanged from the early part of the 20th century. In particular, the legislation does not reflect the current prevalence of the internet. In 2013, the act was amended to allow the Electoral Commissioner to email commissioned pamphlets to voters; however, the act does not otherwise directly regulate online campaigning.<sup>81</sup> The only reference to online campaigning is a reference by exclusion - online communication falls under "other communication" as per s110C(5) item 2. Moreover, none of its provisions bear on the use of personal data. This area of law is also left unaddressed by the Privacy Act 1988 (Cth).<sup>82</sup>



This lack of regulation is pronounced even in countries where almost everyone is online. Although Japan is a country where over 90 per cent of the population uses the internet,<sup>83</sup> there is no regulation. Mitsuhiro Okamoto reported that “the national referendum law also does not cover online campaigns. The law does not assume online (internet) campaign[s]”.<sup>84</sup>

This is also true for countries which often pride themselves on – and score highly in league tables of – the quality of their democracies. Thus Canada, Denmark, the Netherlands, Norway and Sweden have no regulation of online campaigning in referendums.

However, this absence of regulation is not universal. A number of smaller countries have regulations. These include the Baltic countries (Estonia, Latvia and Lithuania), Slovakia, Iceland and New Zealand, as well as larger countries like France and Brazil.

In addition to these countries, there is some regulation of online campaigning in Switzerland, though this is due to the court’s interpretation of existing statute law regarding general advertising.<sup>85</sup> The Federal Act on Political Rights (Art. 11 (2)) contains a “disclaimer” with regard to the official explanatory pamphlet (in which the initiative or referendum committee is allowed to place some information of their own). It reads:

References to electronic sources may be included in the explanatory statement only if the author of the references declares in writing that none of the content of the sources is illegal and that the sources are not linked to electronic publications with illegal content.<sup>86</sup>

This regulation has been followed up by recent explanatory guidance by the government. Generally speaking, the federal council is of the opinion that existing regulation is sufficient also for the use of social media in referendum campaigns.<sup>87</sup>

## The Baltic States<sup>88</sup>

The countries with the most up-to-date regulation of online campaigning exist in the Baltic states. These are countries that reportedly have been targeted in “hybrid warfare” attacks that are believed to have come from Russia.<sup>89</sup> However, this vulnerability is especially considerable in Latvia and Estonia (due to their large Russian-speaking populations).

In Lithuania, there is not a complete ban on online campaigning, but many of the issues that caused concern during the Brexit referendum have been regulated in this country. According to a country expert:

Law No. 13,488 of 2017 and the Superior Electoral Court ruling discipline online campaigning. Parliamentary fronts can have websites, blogs or profiles in social media. Content boosting in social media and others is allowed, but the use of fake profiles or robots is illegal. The use of personal data in campaigning is also illegal. Companies, upon users’ consent, can only collect data that is related to their services and cannot transfer users’ personal data to third parties with only a few exceptions (Law No. 13,709 of 2018).<sup>90</sup>

A similar level of regulation exists in Estonia. As far back as 2008, the parliament of Estonia introduced the Advertising Act which bans political advertising on the internet, including “subliminal techniques”.<sup>91</sup> This regulation has been up-dated yearly since its promulgation. While comprehensive, the Estonian legislation pertaining to online advertising is even more detailed in Latvia, where the Law on National Referendum, Legislative Initiative and European Citizens’ Initiative has been updated continuously to take into account new developments in online advertising.<sup>92</sup> Chapter VI of the act (Campaigning Before a National Referendum, Campaigning for a Legislative Initiative and Campaigning for the Initiative to Revoke the Saeima) provides a ban on “hidden campaigning”, and explicitly cites advertising on the internet. Thus, “hidden campaigning before a national referendum, hidden campaigning for a legislative initiative or hidden campaigning for the initiative to revoke the Saeima is prohibited” (Art. 31(3)).

## Iceland

Other countries have similarly sought to regulate online campaigning. One of these countries is Iceland. Until the financial collapse of the island nation’s economy in 2008, there had been no nationwide referendums since 1944 when the country voted to sever ties with Denmark. However, as a consequence of the political crisis and massive debt caused by the bankruptcy of the *IceSave* and *Kaupthing* banks, the Icelandic president took the unusual and unprecedented step of vetoing the agreement the government had made with the country’s international creditors.<sup>93</sup> This resulted in two referendums, in respectively 2010 and 2011, in which the government’s plans were rejected by over 90 per cent of the voters. Following this referendum, the voters approved six amendments to the constitution in a non-binding referendum in 2012.

This upsurge in the use of the referendum in Iceland was accompanied by a detailed set of regulations of online campaigning. While not as detailed as that of the Baltic states, “the Icelandic government recently implemented a law on online anonymous campaigning. Political bodies are prohibited from financing or taking part in the publishing of any campaign-related material without making their affiliation public”.<sup>94</sup>

## Portugal

In Portugal, similar legislation pertaining to the use of the internet is subject to the same regulations as in other media. These regulations are laid down in Lei n.º 72-A/2015. According to the act, the media must ensure (Art. 6), “balance, representativeness and equity in the treatment of news, reporting of facts or events of informative value”. Thus, (Art. 11.1), “in the use of the internet, the media observe, with due adaptations, the same rules to which they are obliged by this law in relation to the other means of communication”.

While all actors (att. 11.3) “shall at all times enjoy full freedom of use of social networks and other means of expression through the internet”, there are limits. Thus it is illegal to use these media “for the dissemination of campaign content on election days eve (reflexion day)”, and there is a ban on “the use of commercial advertising”. In cases of violations of these regulations, there is a sanctioning regime laid down in Art. 12 of the act, according to which a breach of rules pertaining to commercial advertising may result in fines of between €15,000 and €75,000.

## Slovakia

Slovakia is another European country that has seen an explosion in the use of referendums.<sup>95</sup> In Slovakia, “a referendum can be initiated either by a petition signed by at least 350,000 citizens, that is, around eight per cent of all eligible citizens, or by a resolution adopted by the national parliament. This allows both political parties and civic initiatives to pursue a referendum”.<sup>96</sup> At the time of writing, eight referendums have been held since the country split from Czechoslovakia in 1993. As a consequence of the political salience of the referendum, the *Národná rada* (parliament) has enacted legislation to prevent abuse of online campaigning. This “legislation stipulates that every single element of political advertising (including on social media) must clearly mention that it belongs to a political campaign.<sup>97</sup> In Slovakia all political advertisements are prohibited 48 hours before a referendum or an election is held.” However, unlike the detailed legislation in the Baltic states and Iceland, country experts have expressed concerns that the legislation still allows campaigners to circumvent the legislation so that posts on “social media which are not sponsored could be still released by campaigning parties”.<sup>98</sup>



## France

Traditionally France has had a low level of regulation of referendums. This has changed in recent years (see above). The recognition that referendums do not take place in a vacuum has led to the updating of legislation pertaining to online campaigning, thus “regulations of internet campaigns have been introduced for elections after the last referendum (2005) and should thus apply to referendums when applicable. They mainly reproduce however the regulations of traditional campaigns, with the addition of norms for personal data”.<sup>99</sup>

## Greece

Online campaigning is not specified as such but is included in the more generic term of “political communication” as described in a Decision by the Authority of Data Protection that was adopted by the state.<sup>100</sup> According to this, political communication with citizens, either postal or electronic, is allowed provided that recipients give their consent to have their personal data used for these reasons.

## Brazil

As noted in Chapter One, Brazil has an exceptionally high level of referendum regulation. This is also true for legislation of online campaigning. This is largely detailed in Law No. 13,488 of 2017 and the Superior Electoral Court’s (*Tribunal Superior Eleitoral*) rulings on online campaigning.<sup>101</sup>

While parliamentary parties can have websites, blogs or profiles in social media, the legislation and subsequent judgements limit their scope. Thus, while content boosting in social media and others is allowed, it is prohibited to use fake profiles or robots. Furthermore, the use of personal data in campaigning is also illegal. Companies, upon users’ consent, can only collect data that is related to their services and cannot transfer users’ personal data to third parties with only a few exceptions.<sup>102</sup>

## Summing Up

Cambridge Analytica’s controversial and very successful use of personal data during the 2016 Brexit referendum campaign caused understandable concern. The company harvested the personal data from millions of Facebook profiles without their consent and used it for political advertising purposes. At one level, it was a watershed moment for the public’s understanding of personal data use, and it caused a decline in Facebook’s stock price. Understandably, the revelation led to calls for tighter regulation around the use of personal data. Yet, based on the data and the legislation analysed in this section, there is reason to believe that similar abuses of personal data could easily happen again especially in developed democracies such as Britain and the Scandinavian and the Low countries.

**The almost complete lack of regulation of online campaigning makes this an urgent concern. The recommendation is that countries follow the lead of the Baltic countries and Brazil and introduce tight control of online campaigning.**



Campaign posters ahead of the Constitutional referendum in Italy in 2016. Stefano Guidi / Shutterstock

## Chapter four: Pre-election period: limits on government spending in referendum campaigns

Governments have to provide information to the people. But sometimes – especially during elections and referendums campaigns – there is a risk that the administration abuses its position and uses taxpayers' money on what is essentially advertising for the side they favour to win.

This was famously the case in Ireland in 1995. At the time the voters were asked to vote on an amendment to the constitution that would make divorce legal. The government decided to spend £500,000 to inform the voters about a yes-vote, but without spending anything to explain the no-position. Patricia McKenna, a Green MEP – who supported the amendment – found this unfair and undemocratic. She challenged the legality of the decision to promote one side only. The Supreme Court found in favour of the plaintiff. The court held that the constitution required equal treatment of each side in a referendum, and that:

Such expenditure also had the effect of putting the voting rights of those citizens in favour of the amendment above the voting rights of those citizens opposed to it [and that] as well as representing a breach of the constitutional right to equality [it] also represented an infringement of the constitutional right to freedom of expression and the constitutional right to a democratic process in referenda.<sup>103</sup>

In other countries there are similar rules that limit the involvement of governments. In Britain, for example, the word *purdah* is used to signify the time between the announcement of an election and the final election results.<sup>104</sup> In relation to referendum campaigns, Britain is one of the countries with the most extensive regulation of government behaviour during campaigns. In Britain there are limits on what the government can say during the referendum period and it must observe a strict parity in its spending. However, the British system does not entirely preclude the government from using its resources to influence the result. Thus, “there is not a specific prohibition on amount spent by government. But the 2000 act precludes local government and central government from issuing publishing ‘promotional material’ in connection with the referendum in a period of 28 days prior to the referendum”.<sup>105</sup> Moreover, the government may spend money before the referendum begins.



**Like with most other things pertaining to referendum campaigns, the role of the government and spending of taxpayers' money is largely unregulated.** Austria's referendum on EU membership is not an untypical example. The government spent ATS47 million on a media campaign - roughly 10 times that of the opposition. The campaign worked, and even the Austrian Chancellor admitted it was money well spent: "the work of the advertising agency has obviously not been wasted".<sup>106</sup> This is still the case in Austria. In answer to the question "Are there limits on how much money the government can spend during the referendum campaign?", the country's leading authority on referendums curtly responded "not at all".<sup>107</sup>

**Only 28 per cent of countries have rules that limit spending by the government.** A couple of examples will suffice. In Japan, "the government can spend the cost of public relations of television and newspaper concerning the referendum by the national referendum law";<sup>108</sup> likewise in Germany, where government spending during referendum campaigns "is not regulated in any federal state, there are no limits or regulations".<sup>109</sup>

The few countries with provisions that limit or regulate the amount spent by governments are Australia, Ireland, Latvia, Lithuania, the Netherlands, Poland, Switzerland, Taiwan and the United Kingdom. Though, as is inevitable, some countries have stricter rules than others.

Hence, Switzerland and the Netherlands have only limited regulations. In the case of the former, there are "not exact limits, but the governments (at both national and cantonal level) are bound by the principle of proportionality and there are numerous court rulings that clarify what/when/how/who may",<sup>110</sup> and in the Netherlands, the information campaign was outsourced but there were no formal upper limits on government information activity.<sup>111</sup>

The countries with the most thorough regulations are - once again - Latvia and Lithuania.

Latvia's Law on National Referendum, Legislative Initiative and European Citizens' Initiative is very detailed and serves as a good example. Art. 30 of the act reads:

Chapter VI: Campaigning Before a National Referendum, Campaigning for a Legislative Initiative and Campaigning for the Initiative to Revoke the Saeima, section 30: (1) The broadcasts on campaigning before a national referendum, campaigning for a legislative initiative and campaigning for the initiative to revoke the Saeima may not be included in the form of advertising in the news broadcasts of electronic mass media.<sup>112</sup>

The same level of regulation exists in Australia where the federal government is limited to providing a text-based, 2,000-word information booklet for the NO and YES sides.<sup>113</sup> Further, the Referendum (Machinery Provisions) Act 1984 (Cth) prevents any spending with respect to the delivery of pamphlets outside of that envisioned by the act.<sup>114</sup> This includes any positive advertising for either side.<sup>115</sup>

## Slovenia

In Slovenia, a country where there have been 19 referendums since the plebiscite on independence in 1990, the government is allowed to allot public money for referendum campaigns, but the amount allotted and spent may not exceed 25 per cent of the maximum for a referendum campaign (approximately €106,000). An interesting example is provided by the railway referendum in 2018. On 8 May 2017, the legislature (*Državni zbor Republike Slovenije*) enacted a law on the construction of the second railway track from Koper to Divača. The plan was opposed by Vili Kovačič, a civil activist who started a petition to hold a referendum on the project. The referendum was initially backed by 53 per cent of the voters. However, the High Court (*Vrhovno sodišče*) ordered a rerun of a referendum because of biased information by the government. The new vote took place later the same year. With a significantly lower turnout, there was a slight majority against the proposal (the proponents of the veto won), contrasting the first referendum when there was a clear majority of yes votes. But this was only a symbolic win for the opponents, as the participation quorum (the majority of votes cast against the law has to represent 20 per cent of the total electorate) was clearly missed.

## Taiwan

According to Article 20 of the Referendum Act, the government in Taiwan can only spend money on holding referendums and the related presentations or debates. However, the regulation is in some ways patchy. Thus, there "are no other rules that regulate how much money the government can spend providing the representatives of positive and negative opinions with time to present their opinions or debate through national broadcast TV channels".<sup>116</sup> The competent authority is only required to (Art. 17, 1-4):

Make the following matters known to the public through public notice 28 days before the day of the referendum:

1. The date of voting for the proposal of a referendum and the times of commencement and termination of voting.
2. The serial number, main text and statement of reasons for the proposal of the referendum.
3. The position papers raised by the government agencies on the proposal of the referendum.
4. The scope and method of executing the right of referendum. Referendum Act, Art. 17 (1-4) Article 17.

While there are no court cases, the consensus seems to be that the government is prohibited from using public money in pursuit of its policies during referendum campaigns.

While Australia, Britain, Latvia and Taiwan have statutory limits on campaign spending, other countries (most notably Ireland) have limits on government spending as a result of litigation. The main case is the aforementioned McKenna judgement of 1995. The situation in Ireland has been summed up as follows by a country expert:

The government may not use public funds in support of either side in a political campaign at a referendum. This requirement is the result of a Supreme Court decision known as the McKenna judgment which dates from 1995. The government makes a financial allocation to establish a Referendum Commission for each referendum and this statutory body is responsible for providing information on the referendum question and promoting turnout.<sup>117</sup>

Yet, while rules exist, they are sometimes circumvented. This is what the David Cameron government (controversially) did before the 2016 Brexit referendum. Only two days before the campaign period began, HM Treasury spent "more than £9 million on ... a leaflet to every UK household setting out the case for remaining in the European Union".<sup>118</sup>

**The limits on government spending during referendum campaigns is, at best, patchy. The result of a referendum can be questioned if the administration is able to spend taxpayers' money on an outcome they seek. There is an urgent need to introduce rules that regulate and limit this practice.**



Campaign posters ahead of the 2018 referendum in Ireland. D. Ribeiro / Shutterstock

## Chapter five: Equal access to mass media in referendum campaigns

A survey carried out by BMG Research on behalf of the Electoral Reform Society put the BBC as one of their three most valued sources on the Brexit debate.<sup>119</sup> A total of 34 per cent found the BBC to be the most important source of information (with the figure being 41 per cent for those over the age of 64). This was far ahead of other broadcasters (17 per cent) and social media (16 per cent). For those aged 18 to 24, the BBC (at 24 per cent) was less important than social media (33 per cent). Notwithstanding the differences between the cohorts, television is still a very important source of information. While one cannot extrapolate from the EU referendum, television also helped set the agenda in the 2014 Scottish independence referendum.<sup>120</sup>

**Despite this, in most countries broadcast media are not statutorily required to provide equal time and space to all sides in the referendum. Fourteen countries (41 per cent) require balanced or equal airtime for both sides in referendum campaigns by law.** Among these are: Australia, Brazil, Bulgaria, Cyprus, Estonia, Greece, Iceland, Japan and Poland. A further six (France, Finland, Sweden, Switzerland, Romania and Hungary) require, by law, that the mass media provide opportunities for a fair presentation of the views of each side.

Once again, Austria is a good example. In response to the question "Are print, broadcast or online media required to provide equal time and space to all sides in the referendum?", Dr Stefan Vospornik responded: "There are no regulations or laws in this regard, as there are no such provisions for elections. Referendums are treated by the media in a similar way as elections, with the parliamentary parties having the main say in the media coverage".<sup>121</sup>

A few countries provide regulations to ensure a level playing field. Below are some of them.



## Bulgaria

The Direct Citizen Participation in State and Local Government Act stipulates that (Art. 16 (1) the Election Code shall apply in respect of information and explanatory campaigns, where equal opportunities shall be guaranteed for the different opinions on the referendum subject to be presented.

## Portugal

In Portugal, a country that otherwise does not have much regulation of referendums and relatively few opportunities for engagement in direct democratic processes,<sup>122</sup> there is extensive regulation of the mass media. Pursuant of *Lei n.º 15-A/98, Lei Orgânica do Regime do Referendo*, media are required to observe the core “principles of equal opportunities and treatment of campaigners”.<sup>123</sup> This is set out in the act, (Art. 44), which stipulates that “the parties and groups of registered electors that are campaigning in a referendum have the right to equal opportunities and treatment in order to undertake their campaign activities freely and under the best conditions”. More specifically, the act provides “access to specific resources” (Art. 46), which include (Art. 46.2):

The use, in accordance with the present law, of news publications, broadcasts by public and private radio and television stations with a national or regional scope, and public buildings or enclosed spaces, shall be free of charge to parties and groups of registered electors that intervene in a referendum.

As regards radio and television stations, Art. 57 stipulates that these are “obliged to give equal treatment to the parties and groups of registered electors ... in the referendum” and Art. 58 says “during the campaign period, radio and television stations shall reserve 15 minutes between 7.00pm and 10.00pm”; “on Saturdays and Sundays - 30 minutes between 7.00pm and 10.00pm to presenting their views ahead of the vote”. These rules also apply to “private radio stations with a national scope” (Art. 57.2c). According to Art. 61, these broadcasts shall (Art. 61.1):

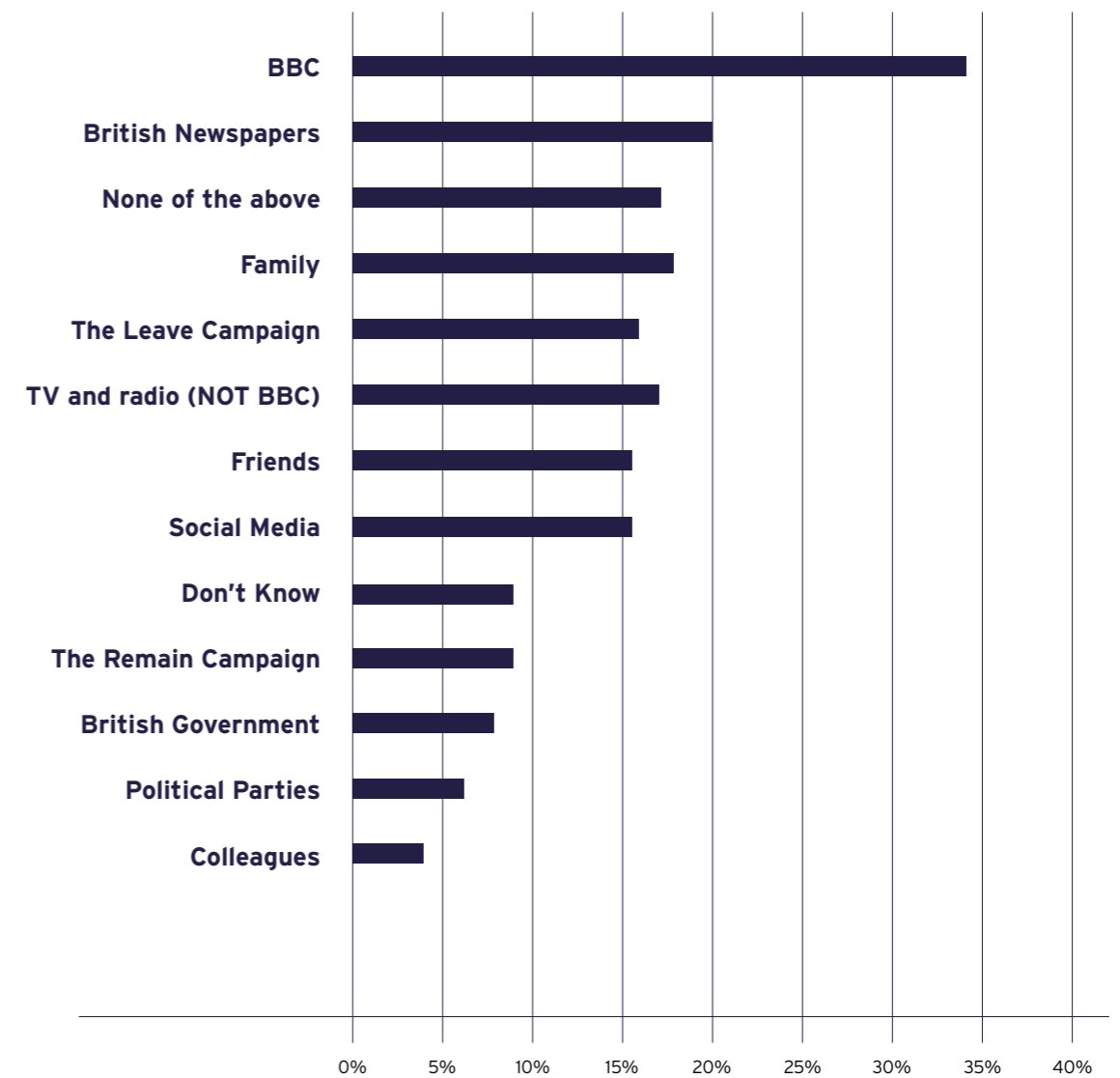
... be divided up between the entities that are intervening in the referendum equally in two blocks: one part between the parties for which one or more members of the assembly of the republic were elected in the last legislative elections, to be allocated jointly when parties ran in coalition; and another part between the other parties and groups of registered electors that have been lawfully formed for the purpose.

Further, Art. 61.2 states:

In the case of a popular referendum initiative, the group of registered electors that initiated the referendum shall share the first block of broadcasting time in a position equivalent to that of the parties referred to in the first half of the previous paragraph.

In addition, the National Electoral Commission (Art. 62) “shall distribute radio and television broadcasting times by lottery at least three days before the campaign begins and shall communicate the result of the distribution to the broadcasting stations within the same time limit”. While extensively regulated, the Portuguese provisions do not provide mathematical parity of views. The same is true for Estonia.

Figure Two: Information Sources in the UK Brexit Referendum 2016



**Source:**

BMG Research, N: 1638, Available at <https://www.bmgresearch.co.uk/bbc-important-referendum-information/>

## Estonia

In Estonia, regulation is likewise extensive. According to the Estonian Public Broadcasting Act 2007, Art. 6 stipulates that “broadcasting shall be politically balanced”. Hence, according to the same article:

Public broadcasting shall give equal opportunities to all the candidates participating in the elections .... Similarly to the elections of local governments, equal opportunities shall be created in the event of referendums. The rules for reflecting elections in the programme services of public broadcasting shall be approved by the Public Broadcasting Council and such rules shall be disclosed not later than within a week after the date of announcement of the elections.

However, in practice this does not mean equal opportunities for presenting all views. According to an expert, “there is no absolute requirement of equal time for each political force which results from the multiplicity of various political options. Public media should provide time for as many political forces as possible”.<sup>124</sup> Other countries have less detailed legislation. In Iceland, there are rules intended to ensure parity, however, “this only applies to the publicly owned media, RÚV [the national broadcaster]. RÚV is obliged to ensure equal representation of all sides of a referendum”.<sup>125</sup>

In the Czech Republic, the “general requirement for news is that it must provide space to all involved parties. If it fails to do so, the media outlet can be fined”.<sup>126</sup> In Spain, the act on referendum modalities, the *Ley Orgánica 2/1980, de 18 de enero, sobre la regulación de las distintas modalidades de referendum.*, states that (Art. 14) “public media must offer free information spaces to each political group represented in the regional or national parliament (depending on the referendum). These ... have to be proportional to the number of seats of each political group in parliament”. However, in the latter case, there is no guarantee that these will give proportional voice to parties that are outside parliament. Thus, in the 2005 referendum on the European constitution both of the larger parties were in favour while only Izquierda Unida, the successor to the Communist Party, campaigned for a “no”.

## Greece

During the period from the publication of the presidential decree announcing the referendum until the Friday before the vote, public and private radio and television stations as well as pay-television providers and television services are required to broadcast messages to those who participate in the referendum.<sup>127</sup> The length of time for the transmission of messages shall be determined by a joint decision of the Minister of the Interior and the minister responsible for overseeing the mass media, following the opinion of the National Council of Radio and Television. The time allocated is split evenly between those who advocate for or against the issue in the referendum. By the same decision and under the same conditions, time is allocated evenly during news reports of public and private radio and television stations. The transmission of messages and the presentation of the activity is free of any charges and any fees.

## Cyprus

In Cyprus statutory legislation stipulates that equal time should be provided to all political parties, actors and organisations during the pre-electoral period, which is three months before any electoral event.<sup>128</sup> Political advertisements (in any election, although the referendum is not mentioned clearly in any article of the respective law) are also regulated and, according to the same law on radio and television stations, the time allocated by candidate/party in any election should not exceed 60 minutes including all media. This covers the 40 days of the electoral campaign. This legislation was enforced during the 2004 referendum.

## Romania

In Romania, the regulation is left to judicial bodies. Thus, Decision No. 441/2018 of the National Audio-visual Council (CNA) on the coverage of the national referendum on the revision of the constitution on radio and television stations on 6 and 7 October 2018 held that the media must provide balanced coverage.<sup>129</sup> However, in Romania there is also a considerable body of statutory legislation. This was repeated in the Decision of the National Audio-visual Council No. 220/2011 on the Audio-visual Content Regulatory Code. According to Art. 3. of this decision:

In the debates, the broadcasters must ensure equal opportunities between supporters and opponents of the referendum; if one of the guests does not participate, this must be mentioned on the post; the absence of the point of view of one of the parties does not exonerate the creator/moderator from ensuring impartiality.

Further, Art. 4 states “broadcasters must ensure a balance in reflecting the campaign activities of the partisans and opponents of the issue subject to the referendum”. This reflects Art. 42 of the General Audio-visual Law No. 54/2002 stating that “in order to encourage and facilitate the pluralist expression of opinion streams, broadcasters have the obligation to reflect electoral campaigns in a fair, balanced and impartial manner”.<sup>130</sup>

**Overall, there are several countries that provide mechanisms for ensuring a fair balance of views. However, the problem is that many regulations are assuming that the parties in the respective parliaments reflect the sides in referendums. This is far from always the case.** It would be far better to adopt rules like those in Iceland where the public broadcaster RÚV must ensure a fair and balanced representation. However, to require parity in privately owned media may not be desirable as it is likely to infringe on free speech.



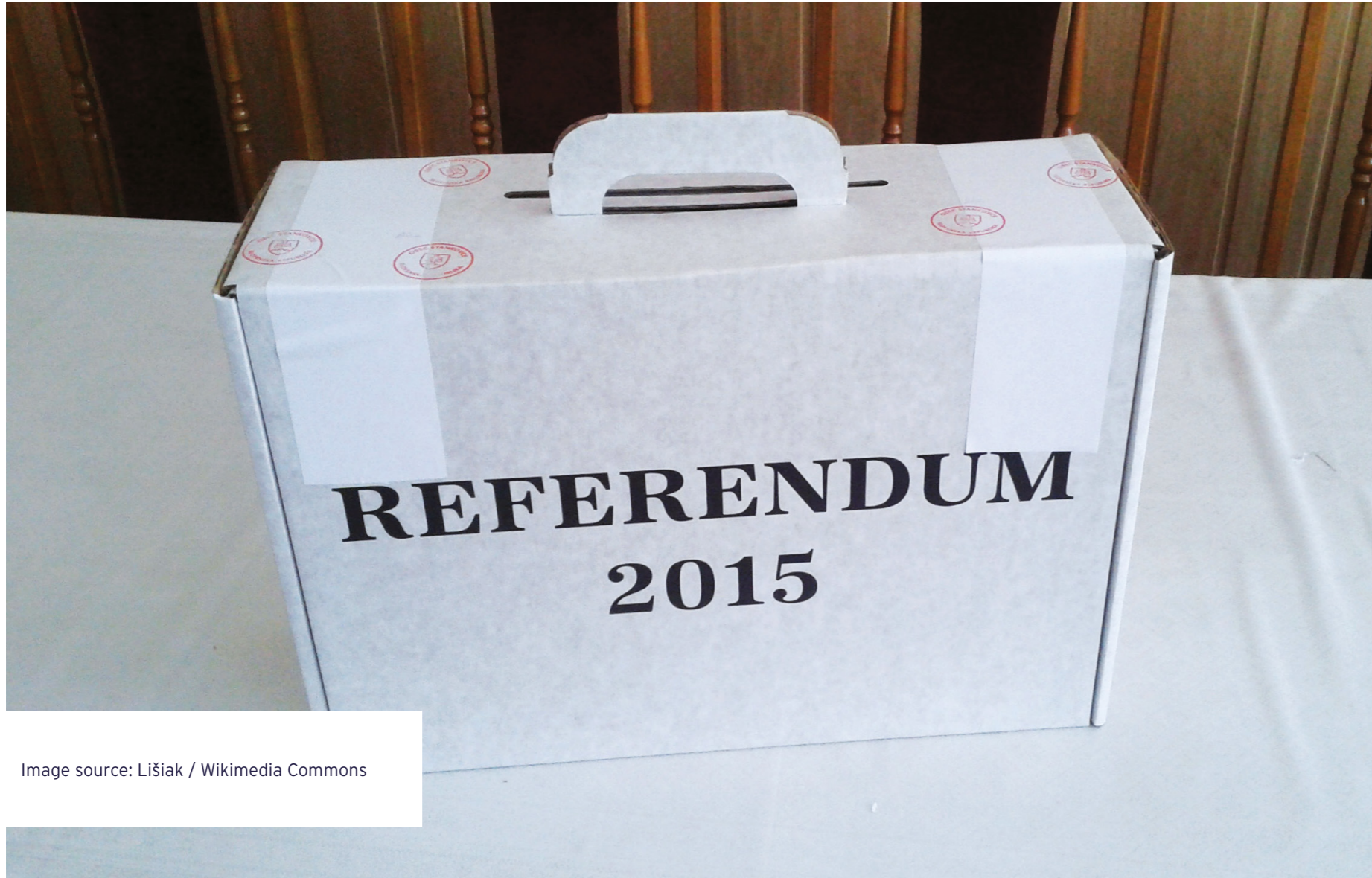


Image source: Lišiak / Wikimedia Commons

## Chapter six: Engagement of women and marginalised groups

There is a considerable body of academic literature that suggests that women and minority groups are underrepresented in developed democracies.<sup>131</sup> This tendency has led to concerted efforts to address this concern through quotas and shortlists for these groups. This tendency has also been noted in referendums.<sup>132</sup> For example, it has been suggested that public debates in, respectively, the Scottish and Catalan independence referendums “suffered in both countries from the absence of women’s voices and gender equality discussions”.<sup>133</sup>

In the survey for this report, we asked respondents the following question: “Does the government actively seek to engage women and marginalised groups to ensure equal and inclusive participation in referendums? Please provide details of any relevant initiatives, regulations or legislation and a brief description”.

It is fair to say that the response was underwhelming. **Mechanisms to ensure the involvement of women and minority groups are almost non-existent. Only a few countries provide for such measures - most notably Italy and Poland.** These two countries constitute a mere six per cent of the polities in this survey.

## Baltic States

In Estonia, there are - under The Referendum Act, Chapter 7: Voting Procedure - provisions to help voters who are not able to get to the polls, but there are no specific policies aimed at marginalised groups or women. Thus:

The Estonian government has implemented numerous solutions to support turnout in referendums. These solutions include: voting in custodial institutions, hospitals and 24-hour social welfare institutions, electronic voting, home voting, voting on board ships flying the national flag of Estonia and located in international waters or waters of foreign states, as well as electronic voting (e-voting).<sup>134</sup>

And similar provisions exist in Latvia<sup>135</sup> and Lithuania where the Referendum Law of the Republic of Lithuania, 4 June 2002 No. IX-929, provides for postal voting (Art. 54), hospital patients voting (Art. 58) and even voting in prisons (Art.60). But these provisions - which are similar to those that exist in most democracies - are not explicitly aimed at groups who, for social, economic or cultural reasons, are likely to be (or feel) politically excluded from the referendum process.

## Poland and Ireland

It is somewhat paradoxical therefore that Poland, one of the most conservative countries in Europe, is one of the only ones to acknowledge the exclusion of women and minority groups, and one of the only countries surveyed in which addressing this concern has led to legislation.<sup>136</sup> Ireland, traditionally another country with conservative attitudes, also acknowledges the problem. Participation of men and women in voting has been equal over long periods of time. While “there are no specific campaigns directed at women, marginalised groups are targeted in voting registration drives and some additional information is provided by the Referendum Commission for some groups but these are quite limited”.<sup>137</sup>

## Italy

In Italy, Constitutional Law No. 1/2003 modified Article 51 of the constitution with a view to “adopt specific measures to promote equal opportunities between women and men”. However, this provision appears as primarily referred to electoral campaign and to the access to public offices and to elective positions rather than to referendum campaigns. In this context, Article 1, section 2-bis of Law No. 28 of 2000, introduced in 2003, affirms that information channels and media are bound to respect and promote equal opportunities between men and women in the framework of broadcasting for political communication but without clear references to referendums. In a similar way, while Article 6 of the Italian constitution, amongst the fundamental principles, prescribes that the Italian republic protects “linguistic minorities by means of appropriate measures”, those minorities do not appear to be subject to special rules with regard to referendum campaigns.

Special protection, however, is normally guaranteed during the referendum campaigns in favour of voters with disabilities through public video broadcasting, in particular for deaf people (see Article 9 of the deliberation of the parliamentary committee of 3 March 2016 with regard to the referendum of 17 April 2016 and Article 10 of the deliberation of the parliamentary committee of 11 October 2016 in relation to the constitutional referendum of 4 December 2016).

## Quebec

While there are no federal laws or regulations to promote the involvement and engagement of marginalised groups in Canada, there were efforts to address this concern in the 1995 independence referendum in the francophone province of Quebec. Thus, “the Quebec government was quite concerned to get women engaged in the 1995 referendum. In the months prior to the 1995 referendum, many groups were engaged to increase the participation rate of women and all groups”. Since then, special measures have been put in place over time by the Chief Electoral Officer of Quebec to facilitate the exercise of voting during elections and referendums. These include, “voting by inmates”, “information for voters of native communities, information for voters of cultural communities [and] special procedures for remote regions”.<sup>138</sup>

However, in most countries these efforts are at best *ad hoc*. New Zealand is an example. There, “the Independent Electoral Commission promotes enrolment and voter turnout especially for those groups less likely to participate”.<sup>139</sup>

**Active efforts to involve and engage women and marginalised groups are extremely rare. In order to ensure a well-functioning democracy that is open to all, addressing this is a major concern.**





Image source: Jean-Pierre Dalbéra / Wikimedia Commons

## Chapter seven: Overall levels of regulation

As the foregoing sections show, the levels of regulation of referendums differ considerably. Some countries have virtually no regulation (even countries with strong democratic traditions such as Denmark and Uruguay). Conversely, there are strong regimes of regulation in other countries including polities with a chequered democratic history (such as Brazil).

Overall, and based on the previous chapters, we can establish a crude ranking of referendum regulation by giving one point for each of the areas that are regulated. We call this measure the Index of Referendum Regulation (IRR). Thus, a country like France gets the score "4" as there are regulations in four out of the five areas.



**Table 3: Index of Referendum Regulation**

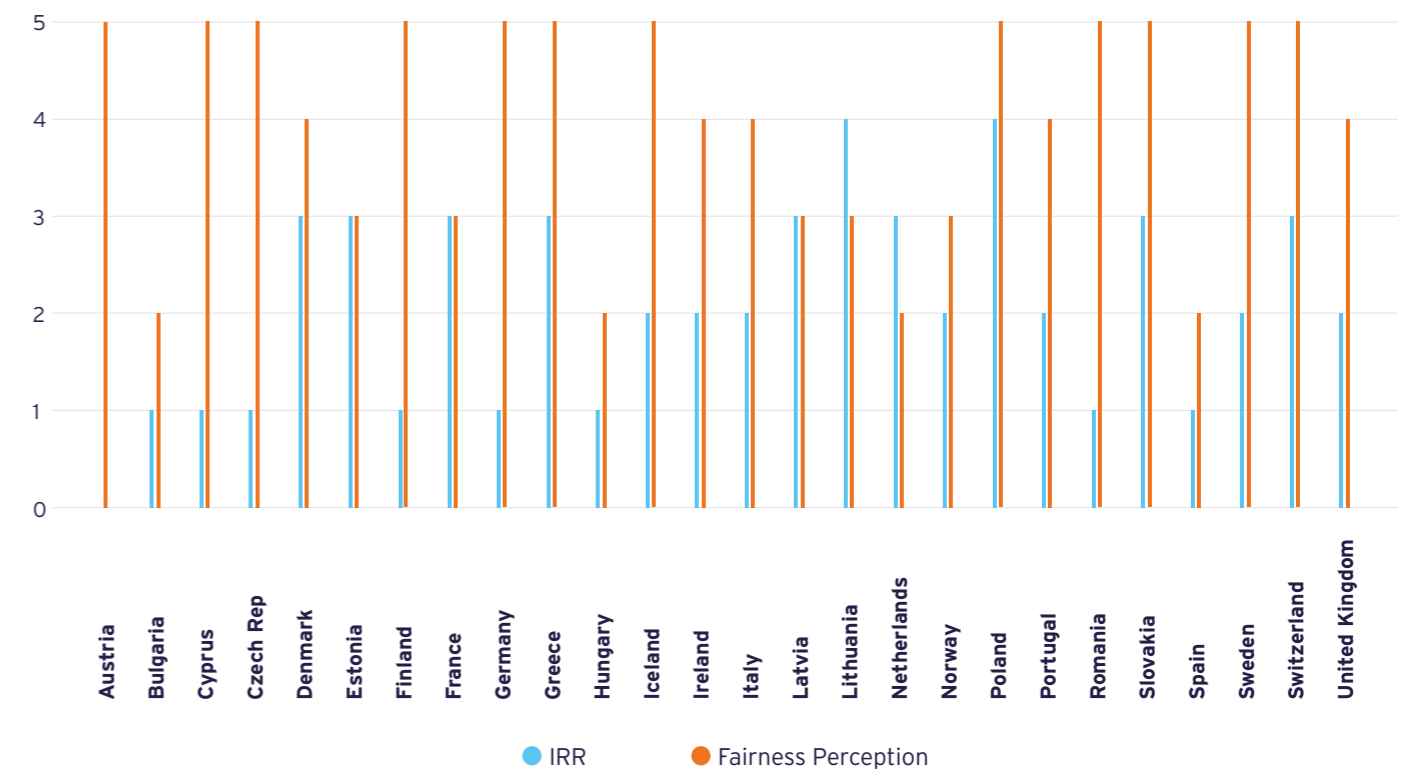
Country	IRR
Lithuania	4
Brazil	4
Poland	4
Estonia	3
Latvia	3
France	3
Slovakia	3
Switzerland	3
Denmark	3
Taiwan	3
Netherlands	3
Greece	3
Portugal	2
Iceland	2
Italy	2
Norway	2
Ireland	2
New Zealand	2
Canada	2
Japan	2
Sweden	2
United Kingdom	2
Slovakia	2
Bulgaria	1
Germany	1
Romania	1
Czech Rep	1
Spain	1
Finland	1
Hungary	1
Cyprus	1
Uruguay	0
Austria	0
USA	0

As the index shows, three countries score the highest: Poland, Brazil and Lithuania - all polities that have recently become democratic. Thus, in general, there is a slight negative correlation between the number of years a country has been democratic and the levels of regulation, though this is not statistically significant (-0.09, Sig. Two Tailed .61). Further, there is no significant correlation between the number of referendums held and the levels of regulation.

The question is, however, if these levels of regulation have any effect on the actual fairness of the referendum campaigns in the respective countries. To a degree this is a subjective question. However, with the caveat that perceptions may be biased we asked the respondents to the questionnaire to give their assessment of the levels of fairness of the referendum process in their countries.

Figure 3 contrasts the experts' perception of the fairness of referendums in their country (the orange columns) with the IRR index for the countries (the blue columns). As the figure shows, there is generally a perception that the process is fair, even in countries that have low levels of regulation. For example, the expert from Austria "strongly agreed" with the statement that referendums in that country were "free and fair" notwithstanding their lack of regulation.

**Figure 3: Perceptions of the fairness of referendums compared to Index of Referendum Regulation (IRR) score by country**



This conclusion comes with a caveat. Experts are not oracles and their perceptions may be a result of political bias or misperception. Still, it is interesting that no overall pattern can be found. One school of thought might suggest that countries with fewer democratic traditions may in fact have more regulations as they have yet to develop the norms and the sense of fair play that are essential for any functioning democracy. French President Charles de Gaulle once observed that "une Constitution, c'est un esprit, des institutions, une pratique".<sup>140</sup> In this report, we have focused mainly on "the institutions", and to a certain extend on "the practice"; however, we have not looked so much at "the spirit". The fact that many experts tend to agree with the statement "referendums in my country are free and fair and the outcomes reflect the views of a majority of the electorate" might be seen as an indication that the increasing number of referendums are relatively fair and democratic notwithstanding their levels of regulation. Maybe Rousseau was wrong that the people are often misled?



## Conclusion

The regulation of referendums is patchy. **At a time when concerns are raised over foreign influence, “fake news” and abuse of online campaigning, it is a cause for considerable concern that the referendum process remains unregulated in many countries.**

In most countries (countries like Slovenia and the UK are two of the exceptions), campaigns can spend as much money as they like - and it is only in exceptional cases that they have to declare the source of their spending. While it is not a proven fact that money determines the outcome of referendums, the perception that the “deeper pockets” win makes the lack of spending limits a concern.

The same dearth of regulation exists in the field of media balance. Only a minority of the countries have statutory regulation of the role of the public broadcaster. And in many countries, the political parties (irrespective of their stance in the referendum) are given airtime. This creates a very real possibility of biased information.

Some might argue that the traditional media play a subordinate role. Recent evidence does not support this assertion overall - though for younger voters, the internet is the main source of information. As the traditional media (especially television) still provides information to voters, there is still a need to regulate this.

However, as alluded to, online media campaigns are increasingly important. Yet, in most countries social media and online activities are completely unregulated. Britain is a glaring example of this, while other countries such as France and Estonia have enacted legislation. Other countries urgently need to follow the lead of the latter two countries lest referendum results lose legitimacy.

Another often-voiced concern during referendums is that the governments can use their privileged position to influence the result. This includes spending taxpayers’ money in pursuit of victory in a referendum. Such practices are not uncommon. Yet only a few countries ban governments from doing so. Ireland was a notorious example of this until the McKenna judgement in the 1990s. This judgement limited the government’s ability to influence the outcome by placing strict limits on government campaign spending. The Irish example ought to be emulated in other countries.

There is legitimate concern that women and marginalised groups are alienated by adversarial referendum campaigns. However, very few countries have addressed this concern. The only two countries that have enacted legislation to address this concern are Italy and Poland. While these two countries are to be commended for legislation on this, they too need to do more about this. More work is needed to ensure that the marginalised are included and do not feel alienated by the process. Democracy is government by all the people - not just for the most vocal section thereof.



A woman casts her ballot during the Greek referendum in Athens, Greece on July 5, 2015. Alexandros Michailidis / Shutterstock

## Appendix A: Special Majority Requirements

In the wake of the 2016 referendum on continued membership of the European Union some concern was expressed that a vote of this importance could be carried by a simple majority. For example, the economist Kenneth Rogoff opined:

The real lunacy of the United Kingdom's vote to leave the European Union was not that British leaders dared to ask their populace to weigh the benefits of membership against the immigration pressures it presents. Rather, it was the absurdly low bar for exit, requiring only a simple majority. Given voter turnout of 70 per cent, this meant that the Leave campaign won with only 36 per cent of eligible voters backing it.<sup>141</sup>

Superficially, this critique would appear to have some merit. In Australia a double majority (of voters and of states) is required to carry constitutional changes, and the same requirement exists in Switzerland. In addition, the Danish constitution (*Grundloven*) stipulates that constitutional changes must be approved by 40 per cent of the eligible voters (a requirement that also existed for the 1979 votes on devolution for Scotland and Wales). Overall, one can distinguish between different types of special majority requirement. One can distinguish between four pure types (See Table 4.)

**Table 4. Types of Special Majority Requirements**

Types of Special Majority Requirements	Examples
Double majority requirements	(Switzerland and Australia)
Majority of the eligible voters requirements	(Denmark on constitutional changes)
Super-majority	(Montenegro 2006)
Turnout requirements	(Bulgaria, Hungary, Italy, Latvia, Lithuania, Netherlands, Slovakia, Taiwan, Uruguay)

Source: Individual Constitution and Qvortrup.<sup>142</sup>

The fact that a majority of Australian referendums have failed - only five out of 24 since 1945 have been carried - has been blamed on the double majority requirement.<sup>143</sup>

In reality, only two of the referendums have failed as a result of the provision in Art. 128 of the constitution which stipulates that constitutional reform requires that "a majority of the states ... and a majority of electors voting also approve the proposed law". The two votes in question being simultaneous elections for the House of Representatives and the Senate (1977) and a similar proposal in 1984.<sup>144</sup>

In Switzerland, similarly, very few referendums have failed due to the double majority requirement. Out of an astounding 413 referendums held between 1866 and 2015, 228 resulted in defeat but only nine failed due to the *doppelte Mehrheit* requirement.<sup>145</sup>

Super-majority requirements, such as existed in Montenegro (where 55 per cent had to vote for independence for this to take effect) are extremely rare in developed democracies.

In general, **special majority requirements are rare, and - paradoxically - they tend to be more common for less controversial referendums and especially for initiatives.** In Italy, where voters can abrogate laws if they can gather 500,000 signatures and win a majority on a plus-50-per-cent turnout, only two of the 26 abrogative referendums held between 1997 and 2011 were valid.<sup>146</sup> Similarly, a majority of the initiatives failed due to turnout requirements.

**Table 5. Invalidation Rates for Initiatives, 1990-2019**

Country	Total Number of Initiatives	Invalid due to Turnout Requirements
Bulgaria	3	3
Croatia	1	0
Hungary	8	1
Latvia	3	2
Lithuania	10	9
New Zealand	3	0
Slovakia	17	17
Taiwan	13	3
Uruguay	4	4
<b>Total</b>	<b>62</b>	<b>35</b>



## Appendix B: Survey of democracy regulation, circulated in April 2019

Survey of Direct Democracy Regulation  
22 April 2019

In collaboration with the Westminster Foundation for Democracy, I am undertaking research to identify an international best-practice model for the conduct of referendums.

Referendums are increasingly used to resolve controversial and politically sensitive issues of public policy: our Brexit referendum, the vote on a peace plan in Colombia, and countless others. As the number of referendums grows, questions over their fairness have increasingly been raised; for example, does government spending influence the result? Are there limits on campaign contributions? And, should the media be regulated to secure a fair outcome?

As part of our project we are mapping existing rules in different countries and we would be grateful if you could answer a few questions about the regulation of referendums in your country.

Please return to [research@wfd.org](mailto:research@wfd.org) at your earliest convenience.

The questions are as follows:

1. Are there limits on campaign spending in referendums in your country? Please provide details of any relevant regulations or legislation and a brief description.
2. Are there regulations or laws that cover online campaigning (Including restrictions on the use of personal data)? Please provide details of any relevant regulations or legislation and a brief description.
3. Does the government provide grants to referendum campaigns during the referendum period? Please provide details and a brief description.
4. Are there limits on how much money the government can spend during the referendum campaign? Please provide details of any relevant regulations or legislation and a brief description.
5. Are print, broadcast or online media required to provide equal time and space to all sides in the referendum? Please provide details of any relevant regulations or legislation and a brief description.
6. Does the government actively seek to engage women and marginalised groups to ensure equal and inclusive participation in referendums? Please provide details of any relevant initiatives, regulations or legislation and a brief description.
7. Overall, do you agree with the statement: "Referendums in my country are free and fair and the outcomes reflect the views of a majority of the electorate."

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree

Thank you very much for your participation. We will provide you a copy of our completed research and corresponding report when available.

Yours Sincerely,

**Matt Qvortrup**  
Coventry University

**Professor Matt Qvortrup**

Matt Qvortrup is Professor of Applied Political Science and International Relations at Coventry University. He served as a Specialist Advisor to the House of Commons Public Administration and Constitutional Affairs Committee, and he served as a special adviser for the US State Department on the Referendum in South Sudan in 2011.

**Renata Lodge**

Renata Lodge is the Senior Programme Officer in the Technical Advisory Unit at WFD.

# Endnotes

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4. Levy, R. (2017). "Deliberative Voting: Realising Constitutional Referendum Democracy" *Public Law*, Vol. 47 (4) p. 555-574, at p. 556.
5. Ortega y Gasset, José (1932). *The Revolt of the Masses*, New York, W.W. Norton & Co, p. 158.
6. See e.g. Independent Commission on Referendums (2018) *Report of the Independent Commission on Referendums*. London: The Constitution Unit and Andrew Ellis (2018) *Administration of Referendums: A Comparative Study of Independence Referendums*, Port Moresby: The National Research Institute. Earlier studies include Ranney, A. (1981). *Regulating the Referendum*, in A. Ranney (editor), *The Referendum Device*, Washington DC, The American Enterprise Institute, pp. 89-98.
7. de Tocqueville, Alexis (2003). *Democracy in America*: London, Penguin, p. 276.
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20. The following section draws on personal communication with Professor Ron Levy, Australian National University.
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23. Electoral Act 1992 (ACT) s 205G; Electoral Funding Act 2018 (NSW) s 29.
24. Electoral Funding Act 2018 (NSW) s 4, ss 27-35.
25. Electoral Act 1992 (ACT) 205D, F, G.
26. America is one of a handful of democracies never to have held a nationwide referendum (others include India, Israel and Japan). Yet, at the state level, referendums and initiatives are common and in some states they are held even more frequently than in Switzerland. See: Cronin, T. E. (1999). *Direct democracy: The Politics of Initiative, Referendum, and Recall*. Cambridge, MA, Harvard University Press.
27. *First National Bank of Boston v. Attorney General*, 359 N.E.2d 1262 (Mass. 1977).
28. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
29. *Ibid.*
30. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).
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32. Law No. 13,488 of 2017.
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42. Dr Theresa Reidy, personal communication. See <http://www.sipo.ie/en/reports/register-of-third-parties/explanatory-note-for-third-parties.pdf> for further information.
43. See: <https://www.thejournal.ie/kanto-vote-referendum-3914073-Mar2018/> (Accessed 20 July 2019).
44. There have been 14 initiatives and referendums since 1991. See also, Auers, D., Ruus, J., and Krupavicius, A. (2010). "Financing Referendums and Initiatives in the Baltic States". In Lutz, K. G., and Hug, S. (Eds.). (2009). *Financing Referendum Campaigns*, London, Palgrave Macmillan, pp. 81-106.
45. Republic of Lithuania Law on Funding of, and Control over Funding of, Political Parties and Political Campaigns, 23 August 2004 No. IX-2428, as amended 6 December 2011 - No XI-1777.
46. See: Morris, C. (2004). "Improving our Democracy or a Fraud on the Community? A Closer Look at New Zealand's Citizens Initiated Referenda Act 1993". *Statute Law Review*, 25(2), pp. 116-135
47. Personal Communication, Benjamin Baker, NZ Electoral Commission, May 2019.
48. Law no. 15-A/98 of 3 April 1998 (amended several times)
49. Personal Communication, Dr Tiago Tiburcio, University Institute of Lisbon (ISCTE-IUL).
50. See Please see article 19.º and 20.º of the law on the Financing of Political Parties and Electoral Campaigns (LORF). Further, accounts are submitted to the National Election Commission (CNE) by each party or group of electors within a maximum time limit of 90 days after the results have been proclaimed (Article 74 of the LORF).
51. Eleven issues were put to a public vote on seven occasions since the country split from Czechoslovakia in 1992.
52. Personal communication with Miroslav Nemčok, Masaryk University.
53. Zakon o volilni in referendumski kampanji (Uradni list RS, št. 41/07, 103/07 - ZPoIS-D, 11/11, 28/11 - odl. US in 98/13).
54. Taiwan has a Freedom House rating of 97 - marginally ahead of Japan (96) and significantly higher than South Korea (83). See [www.freedomhouse.org](http://www.freedomhouse.org).
55. Reilly, Shauna (2018). *Direct Democracy: A Double-Edged Sword*, Boulder, Lynne Rienner Publishers, p. 56.
56. The recall is used more sparingly. An attempt to recall President Chen Shui-bian - the first non Kuomintang president - got a million signatures but parliament (with a Democratic Progressive Party majority) did not authorise the recall. In 2015 Kuomintang (KMT) representative Alex Tsai faced recall: although 97 per cent of those voting supported the recall, the turnout of 24 per cent fell well short of the 50-per-cent turnout requirement. Taipei Times, "Alex Tsai Vote Reveals Recall Flaws", 15 February 2015.
57. Regulations on Licensing and Management on Funding for Referendums (lately amended date: 2018-05-11), Article 8.
58. Vicky Triga, Cyprus University of Technology, Personal Communication 8 October 2019.
59. European Commission for Democracy Through Law (Venice Commission) (2007), *Code for Good Practice on Referendums, Study No. 371/ 2006CDL-AD*, p. 20.
60. Ranney, "Regulating the Referendum", op. cit, p. 92.
61. Bell, Charles, and Price, Charles (1988). *Californian Government Today: Politics of Reform*, Chicago, University of Chicago Press, p. 103.
62. Ranney, "Regulating the Referendum", p. 95.
63. *Ibid.*
64. Stefan Vospernik, written evidence, 8 September 2019.
65. Kildea, Paul, and Williams, George, (2010). "Reworking Australia's Referendum Machinery", *Alternative Law Journal*, 35(1), pp. 22-26. (n 1) 25.
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67. Written evidence from Petia Gueorgieva, 3 May 2019.
68. Sagnr 2019-1780 Økonomi- og indenrigsministeren, Spørgsmål nr. 430. Information provided by Alex Ahrendtsen, MF (11 April).
69. Art. 11, Loi constitutionnelle no 2008-724 de modernisation des institutions de la Ve République.
70. An attempt to block the privatisation of airports was underway as this report was being written. See: <https://www.monde-diplomatique.fr/2019/06/ENDEWELD/59940> (Accessed 20 July 2019).



71. Personal Communication, Professor Laurence Morel, University of Lille.
72. The title of the law is Legge 3 giugno 1999, n. 15 “Nuove norme in materia di rimborso delle spese per consultazioni elettorali e referendarie e abrogazione delle disposizioni concernenti la contribuzione volontaria ai movimenti e partiti politici. Gazzetta Ufficiale n. 129 del 4 giugno 1999” (in English, new rules on the reimbursement of expenses for electoral and referendum consultations and repeal of the provisions concerning the voluntary contribution to political movements and parties).
73. Hollander, Saskia (2019). *The Politics of Referendum Use in European Democracies*, Basingstoke, Palgrave, pp. 233.
74. “Kabinet: niet nóg meer geld naar referendum”, NOS, 11 November, 2015.
75. See: <https://www.referendum-commissie.nl/subsidie/subsidieregeling> (Accessed 19 July 2019).
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81. Referendum (Machinery Provisions) Amendment Act 2013 (Cth) s 4.
82. Written evidence from Ron Levy, 21 May 2019.
83. See: <https://data.worldbank.org/indicator/IT.NET.USER.ZS>, (Accessed 22 August 2019).
84. Mitsuhiro Okamoto, written evidence 12 June 2018.
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87. Bericht des Bundesrates vom 10.5.2017, Rechtliche Basis für Social Media: Erneute Standortbestimmung.
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96. *Ibid*, p. 759.
97. Written evidence by Miroslav Nemčok, Ph.D, 26 March, 2019.
98. Written evidence by Miroslav Nemčok, Ph.D, 26 March, 2019.
99. Written evidence by Laurence Morel, 3 May, 2019.
100. See: Απόφαση Α.Π.Δ.Π.Χ. Αριθμ. Γ/ΕΞ/7526/2010, ΦΕΚ 1982/Β/21-12-2010.
101. We have only touched upon electoral courts in passing. However, their role cannot be underestimated. The composition of them can be a cause for controversy. The Tribunal Superior Eleitoral strikes a fair balance and might be a candidate for the best practice model. The composition of the court is ruled by Article 119 of the Brazilian constitution. This stipulates that the court shall be composed by seven members. Three of them shall be elected by secret vote from among the Justices of the Supreme Federal Court and two other judges shall be elected by secret vote from among the Justices of the Superior Court of Justice. The remaining two shall be appointed by the Federal President from among six lawyers of notable juridical knowledge and good moral reputation nominated by the Supreme Federal Court.
102. Written evidence from Professor Octavio Amorim Neto, 16 May 2019.
103. Patricia McKenna v. An Taoiseach and Others (No. 2) [S.C. Nos. 361 and 366 of 1995].
104. The word comes from the Urdu word purdah which translates as “curtain” or “veil”.
105. Andrew Blick, written evidence, 12 June 2019.
106. Franz Vranitzky quoted in Qvortrup, M. (2005). *A Comparative Study of Referendums*, Manchester, Manchester University Press, p. 154.
107. Stefan Vospernik, written evidence, 28 August 2019.
108. Mitsuhiro Okamoto, written evidence, 12 June 2019.
109. Caroline Verneilen, written evidence, 11 June 2019.
110. Uwe Serdühl, personal communication, June 2019.
111. Written evidence from Saskia Hollander, 3 June 2019.
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113. Referendum (Machinery Provisions) Act 1984 (Cth) s 11(b)(i)-(ii).
114. *Ibid*, s. 11(4)(a).
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127. See Referendum Law 4023/2011, Art. 9, par. 2, 3, 4. We are grateful to Vicky Triga for this information.
128. Art. 45, The Law on Radio and Television stations (7(I)1998).
129. Written evidence from Dr Veronica Anghel, 13 May 2019.
130. These rulings are based on statutory law. Thus, in national referendums in Romania both public and private radio and television stations must according to Law No. 3/2000 (Legea nr. 3/2000 privind organizarea și desfășurarea referendumului) and according to the subsequent Audio-visual Law (Legae nr. 504/2002) provide a fair balance of views.
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