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Fernando Mendez, Mario Mendez and Vasiliki Triga

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## Introduction

In paving the way for the entry into force of the Lisbon Treaty, the second Irish referendum of October 2009 brought to an end a constitutional saga that had occupied EU elites for the best part of a decade. The institutional crisis had been provoked by the two negative popular votes in France and the Netherlands on a major treaty reform, the Constitutional Treaty. The crisis was exacerbated when the Irish electorate delivered a “no” vote in 2008 on the carefully repackaged version of the failed Constitutional Treaty, the Lisbon Treaty. The respite from the European Union (EU) constitutional odyssey was short-lived, however. Within months of the entry into force of the new constitutional settlement the EU was plunged into a financial crisis that threatened the future of its flagship policy, the single currency. The new Lisbon institutional machinery had been operative for barely a few months when the financial crisis exposed the serious inadequacies of its institutional arrangements for economic governance. The ensuing euro clash exposed a new cleavage between creditor and debtor euro partners as well the potential for a growing divergence between euro members and non-euro member states.

Greece was to be the first, and most dramatic, case in a series of emergency “bail-outs” for euro member states afflicted by the financial crisis. During the critical negotiations for its second emergency “bail-out” – one of the many peaks of the Eurozone crisis – the Greek Prime Minister unexpectedly announced that, in addition to a parliamentary vote of confidence, a referendum would be held to legitimate the painful terms and conditions of the bail-out. The referendum was swiftly abandoned though this was not before the idea had triggered a global market panic and an instant condemnation from Greece’s euro-area partners, which led to the Prime Minister’s resignation within a few days. Yet, despite the many problems afflicting the euro between 2009 and 2014, the currency

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area was able to enlarge its scope of membership by incorporating Estonia and Latvia. What is no doubt most surprising about this particular euro enlargement, given the juncture at which it took place, is the fact that elites from the two Baltic states were able to resist calls for a referendum.

The other side of the euro clash was an equally fierce backlash in the creditor countries who appeared to be pressurised into agreeing to bail-outs against the wishes of many voters and political parties. To give but one example, repugnance to the bail-outs led to the formation of a new anti-bail-out German party (Alternative for Germany) which called for 'back to Maastricht' (i.e., no bail-outs) and a referendum for further transfers of power to the EU. Indeed, the creditor countries in the eurozone were the driving force behind treaty reform proposals to bolster fiscal discipline which were pursued via a separate international treaty (the Fiscal Compact) following the veto wielded by the UK Prime Minister in December 2011. Had the proposed EU treaty not been vetoed, Prime Minister Cameron's government would have come under considerable pressure during the domestic ratification process to submit the treaty to a referendum. Indeed, given the significant constraints on the economic autonomy it entailed, the Fiscal Compact generated calls for referendums across a number of member states. Eventually, only Ireland held a referendum. Yet, in a novel twist, the consequences of this treaty rejection by a single popular vote would not derail the ratification process.

The Fiscal Compact envisaged its eventual incorporation into the EU treaty framework by 2017. The year is important because it coincides with a pledge made by Prime Minister Cameron in 2013 to hold a referendum in 2017 on the UK's continued membership of the EU. As with the UK's first EU-related referendum in 1975, the motive behind the referendum pledge was driven by partisan considerations. Paradoxically, whether the UK retains its current composition is a matter that will be decided in yet another referendum scheduled for 2014, when Scotland decides on whether it secedes from the Union. Those developments are being closely monitored in another region of the EU, Catalonia, which has also pledged to hold its own popular consultation on secession from Spain in the same year. Both developments would have immediate consequences for the EU, not least in terms of the number of constituent units of the EU. Unlike the most recent EU enlargement to incorporate Croatia, which was legitimated via a referendum, should Scotland or Catalonia ever decide to secede it is doubtful that they would hold referendums to join the EU.

This brief tour of a period that largely overlaps with the seventh legislature of the European Parliament (2009–14) illustrates some of the

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referendum dynamics at the core of this book. What is clear from the outset is the sheer variability of those referendum dynamics: from the various types of referendums, such as those that deal with treaty ratification or those related to questions of membership, through to the multiple reasons for holding a referendum, which can range from being constitutionally mandatory or the outcome of pledges undertaken for mostly partisan motivations. Yet, at a broader level, what these examples underscore is the nexus between the need for constitutional adaptability in response to a changing environment and the veto point of popular votes. How to reconcile this dilemma in a multi-layered polity such as the EU is the central research question underpinning this book.

This book's overriding concern is with the institutional impact of direct democracy on the European integration process. This means devoting our attention to a specific instrument of direct democracy, the referendum, and in particular referendums related to the EU integration process. The book's central thesis is that the EU polity is faced with a direct democratic dilemma. This stems from a classic dilemma affecting all democratic polities, which is how to ensure system effectiveness while allowing for meaningful citizen participation. Our argument is that in the EU this tension is increasingly becoming a direct democratic dilemma. How this dilemma is addressed will significantly affect the course of the integration process. Two interrelated questions are raised: first, how can we account for the rise and present impact of referendums on matters related to European integration; and, second, what is the likely institutional impact of these referendums on the future of the European integration process? Much of the book is dedicated to the first question and traces the specific evolution of this form of direct democracy on EU matters. It investigates how the EU referendum has been incubated in various member and candidate states, and its impact on the European integration process. However, in accounting for the rise and present impact of referendums on matters related to European integration we also take a look at how other multi-level political systems have accommodated (or not) direct democracy. The dilemmas of direct democracy are not necessarily unique to the EU and important comparative lessons can be drawn. Both perspectives, we maintain, are necessary for addressing the forward-looking question of the likely future impact of referendums on the integration process.

What, then, are the institutional implications of the rise of direct democracy for a multi-level polity such as the EU? *Grosso modo* there are three logical answers to this central research question. One is that the rise of referendums may not matter much. In the future EU political

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elites might avoid issues such as controversial enlargements or the negotiation of new treaties that activate the referendum threat. Another scenario is that the referendum device continues to be used, thereby impacting directly on the integration process. Here, the effects could be positive or negative for the polity. In terms of positive effects a strong case can be made on legitimacy and accountability grounds for removing certain types of decisions from representative institutions altogether and allowing the people a direct say on issues that matter to them. Negative effects would accrue to the extent that the referendum threat induces institutional paralysis. Thus framed, we appear to be confronted with a significant research puzzle at the core of the EU integration process.

A multitude of contextual factors are likely to affect the various referendum scenarios and their impact on European integration. The key is to tease out and investigate the conditions likely to produce the various outcomes. There is ample empirical material to draw on with over fifty referendums held since the first popular vote in 1972. Thus, most of the book is dedicated to a systematic analysis of the available material. What such an analysis reveals in the chapters to come is the sheer variability of *ex ante* conditions and outcomes produced. Over time the functional properties of the referendum on European integration, what it is about and which constituency it ultimately affects, have varied. Whilst the first referendum was by a member state on a specific policy issue – whether enlargement should take place – referendums have since proliferated in number and scope to include the ratification of new treaties and popular votes by candidate states on joining the EU. How these referendums pertaining to European integration are constitutionally accommodated across the member states (and candidate states) also varies in important ways. So too do the motives for holding a referendum in the first place – constitutionally mandatory in some cases, or at least perceived to be so, and at the whim of governing elites in others. This, in turn, could affect the democratic-ness of the decision to hold a referendum. And lastly there are the direct effects of referendums, which can be manifold. Sometimes notable extraterritorial effects beyond the particular member state holding the referendum are produced, as demonstrated by the various referendums on the Constitutional Treaty and the Lisbon Treaty (not to mention Maastricht and Nice beforehand). In other cases, the effects of the referendum are primarily limited to the member state or a candidate state holding the referendum. The cumulative impact of these developments and the various interactions, between member states and the EU as well as between citizens and elites, have informed the central research

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goal of this book: to analyse systematically the evolution and institutional impact of referendums on European integration. In tracing these developments we may be offered clues as to the future role of the referendum in the European integration process.

There are five sequential steps to the analysis contained in the various chapters. Step one involves outlining our methodology and developing an organising framework for analysing the empirical material. We do this by offering a classification of the various types of referendums based on their functional properties. The organising framework draws on, and further develops, the various classification schemes identified in the literature. This is done in Chapter 1.

In step two, we use this framework to analyse the EU-related referendum experience. Since our goal is to provide a systematic analysis of referendums pertaining to European integration, we analyse all referendums that have been held between 1972 and 2013. Given that there is no EU-level referendum this entails conducting cross-national analyses of the member states as well some non-EU states where the referendum has been deployed on EU matters. In particular, we focus on two dimensions. First, the constitutional setting and legal basis for holding referendums related to European integration. This is dealt with in Chapter 2. In the second instance we focus on the political context in which the decision to hold referendums took place. Whether any patterns of association can be established between the various motives of political elites, the type of referendum issue and the outcomes produced is the subject of Chapter 3.

In step three, the analysis shifts to the EU level where the picture is also equally varied. To begin with, it can be argued that not all referendums have the same democratic credentials nor, crucially, do they have the same polity-wide impact. In particular, there is a class of referendum that has considerable extraterritorial effects. It is the product of the EU's specific constitutional set-up and it ensures that the EU is especially vulnerable to a referendum veto under certain conditions. Part of the threat is the result of a double unanimity requirement for treaty change, including enlargement, that has been woven into the EU's constitutional DNA. Added to these constitutional constraints is the apparent rise in plebiscitary politics across many EU member states. How these two dimensions interact has shaped the contours of the EU's direct democratic dilemma. This is the central topic of Chapter 4.

In step four, we make a horizontal move. It parts from the simple premise that other multi-level political organisations, namely federal systems, are likely to have had to deal with similar problems in

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accommodating direct democracy. In the EU demands for popular input have arisen in areas that raise fundamental questions about how a polity adapts its constitutional framework, accommodates its territorial adjustments or decides on contentious issues of policy. To this end, in Chapter 5 we investigate the dynamics across five classic federal systems. Our argument is that in highlighting similarities and differences in institutional configurations for accommodating direct democracy we are offered insights of potential applicability to the EU.

Step five attempts to offer an institutional prognosis. Having analysed the evolution of direct democracy in the European integration process, including the specific interactions between member state and EU-level dynamics, as well as drawing insights from how other federal systems have accommodated direct democracy, the last step in the analysis is to apply these findings to various empirical propositions concerning viable models of constitutional design. We do this by outlining four models of constitutional design (beyond the existing status quo model) for accommodating direct democracy in a multi-level polity such as the EU. Each model has varying institutional implications and raises significant normative considerations with regard to the loci of legitimacy and mechanisms of accountability. Which model the EU adopts, if at all, will depend on how the direct democratic dilemma evolves. This is the central concern taken up in Chapter 6.

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# 1 Direct democracy, referendums, and European integration: a conceptual framework

This chapter has three aims: first, to provide a synoptic review of the academic literature; second, to situate the scope of the book and its approach within the broader literature; and, third, to offer an organising framework for structuring the empirical analysis in the chapters that follow. In addressing the first and second aims, we intend to flag the most salient controversies in the academic debates. Since this book is about referendums related to European integration a first, albeit brief, port of call will be the broader academic literature on direct democracy and the latter's treatment of the referendum in particular. This literature has had an obvious influence on how scholars have analysed referendums on European integration. In providing a synoptic review of the key questions shaping the debates on the referendum and its impact on European integration our aim is to also situate the approach adopted in this book within the broader scholarly literature and to distinguish our comparative, interdisciplinary approach from others in the field. We address our third aim in the last section of this chapter by offering a typology of referendums on European integration held thus far.

A small note on terminology is in order before proceeding. This book is about referendums related to European integration. However, as a shorthand we shall employ the less wordy term "EU referendum(s)" to cover all the types of national-level referendums on the topic of European integration while acknowledging that, strictly speaking, there is no EU referendum since the procedure does not exist at the EU level.

## Direct democracy and its critics

Over the past decade a burgeoning literature on various aspects of the EU referendum experience has emerged.<sup>1</sup> Most of the chapter is devoted to

<sup>1</sup> See, e.g., Hug (2002); Albi (2003); Szczerbiak and Taggart (2005); Dehousse (2006); Hobolt (2006, 2009); Kaddous and Auer (2006); Auer (2007); Barrett (2009); Mendez *et al.* (2009);

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discussing this literature which has manifold strands, each influenced by different disciplinary inclinations, methodological approaches and normative considerations. In recent years it has evolved into an increasingly specialised area of research – a fact not unconnected to the current proliferation of referendums on integration matters. Nonetheless, until relatively recently referendums attracted scant scholarly attention in the field of EU studies. In fact, referendums did not figure in any of the dominant theories of European integration. This has now changed with a recent attempt at grand theorising of the European integration process making explicit mention of the referendum.<sup>2</sup> More generally, there is increasing engagement among EU scholars on the relative merits and demerits of referendums on European integration, an obvious consequence of the negative referendums on the Constitutional Treaty and the Lisbon Treaty. It is important to underscore that the EU debate on referendums has been directly influenced by the broader field of direct democracy research. This is especially the case with the political science literature which borrows heavily from this more established scholarship. To trace these connections is among the considerations of this chapter.

We begin with the elusive concept of direct democracy. The reason is straightforward: it is difficult to isolate current discussions about EU referendums – whether by academic analysts or by political pundits – from more general and normative attitudes towards direct democracy. The two are intimately connected such that many critical evaluations, i.e. arguments posed in favour of or against EU referendums, are simply rehearsing an age-old debate. In commenting on the lesson of recent EU referendums, a noted scholar of the EU, Andrew Moravcsik, rehearses one of the classic arguments against direct democracy, voter competence. Referendums, Moravcsik argues, produce “unstable plebiscitary politics in which individuals have no incentive to reconcile their concrete interests with their political choices” and he goes on to suggest that in the 2008 Irish Lisbon Treaty referendum “[i]gnorance was so great that the slogan ‘If you don’t know, vote “no”’ carried the day”.<sup>3</sup> This line of argumentation is not new, though it has an interesting EU twist – if only the issues were salient and mattered to citizens, then perhaps they would bother to get informed and deliberate intelligently. Another classic argument is that of the manipulation of citizens by demagogues. This argument is taken up by Hooghe

Qvortrup (2009); Mendez and Mendez (2010); de Búrca (2010); Quermone (2010); Arnall (2011); Trechsel and Glencross (2011); Tierney (2012; Chapter 6).

<sup>2</sup> Hooghe and Marks (2009). <sup>3</sup> Moravcsik (2008) p. 178.

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and Marks<sup>4</sup> who consider EU referendums as a response to populist pressures which intensify and legitimate populism. One timeless argument, that of expert judgment, is aptly articulated by the EU legal scholar, Renaud Dehousse, who warns against the use of “pseudo-simplifying mechanisms” such as the referendum on treaty ratification in which coalitions of heterogeneous groups “can imperil patiently negotiated compromises even when they are incapable of proposing an alternative”.<sup>5</sup> As a last example, the size of the EU has also been pointed to as a reason why EU-wide referendums are considered particularly inappropriate.<sup>6</sup> None of these arguments are really new, though they can acquire a particular resonance in the EU context.

If the arguments against direct democracy follow classic lines of argumentation, so too do those in favour. The German philosopher, Jürgen Habermas, provides a succinct articulation of the reasons for such a device. Three months before the December 2001 Laeken Declaration on the Future of Europe, he called for a pan-European referendum on a constitution for Europe. He justified the device in terms of its catalytic effect in arousing a Europe-wide debate and its potentially positive impact on that elusive European public sphere.<sup>7</sup> A standard argument in favour of direct democracy is its educational and self-improving value, sometimes referred to as its positive effect on political efficacy. Another prominent scholar of the EU, Philippe Schmitter, argued for a polity-wide referendum in an important book on how to democratise the EU.<sup>8</sup> Although ostensibly framed in terms of the EU’s alleged democratic deficit, the referendum proposal (one of various “modest” proposals) is justified in terms of providing new channels of representation and potentially positive spillover effects on deliberation and the quality of participation more generally. More recently, Schmitter implicitly drew on the feasibility argument to argue that new technologies have made the marginal cost of organising and participating in a continental polity-wide e-referendum much lower for both the authorities and the voter.<sup>9</sup> For some, such as Richard Rose, only the bold step of introducing a new institution, an EU-wide referendum, can achieve the goal of fostering greater democratic legitimacy in the EU.<sup>10</sup> An EU-wide referendum would, according to this understanding, provide an additional mechanism for making state executives more accountable to their electors. Again, this is a typical claim made in the

<sup>4</sup> Hooghe and Marks (2009).    <sup>5</sup> Dehousse (2006) p. 161.

<sup>6</sup> An argument noted by Weiler (1997).    <sup>7</sup> Habermas (2001).

<sup>8</sup> Schmitter (2000) p. 36.    <sup>9</sup> Schmitter (2005) p. 195.    <sup>10</sup> Rose (2013).

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general referendum literature – i.e., that direct democracy is a median-reverting institution that pushes policy towards the centre of public opinion when representatives deviate too far from citizens' preferences.<sup>11</sup> In emphasising the virtues of referendums as viable instruments of legitimation that could both strengthen democracy and have a positive impact on opinion formation, these scholars have drawn on classic arguments of the direct democracy debate.<sup>12</sup>

The examples above illustrate how classic lines of argumentation on direct democracy are drawn upon, often implicitly, and deployed in connection with the EU referendum. It seems fitting, therefore, to focus first on this wider debate before moving on to consider those lines of argumentation that may be peculiarly specific to the EU context. The obvious starting point is to try and pin down what we mean by direct democracy since, ultimately, the debate surrounding EU referendums is one about the practice of direct democracy. In an abstract but practical sense direct democracy is simply a regime in which citizens as a whole debate and vote on the most important decisions, and where their vote determines the action to be taken.<sup>13</sup> Such a conception of democratic governance has some potent normative implications which have fuelled lively debates in democratic theory.<sup>14</sup> From a normative perspective, direct democracy is equated with a political ideal in which an active citizenry is engaged in the process of self-government. There are manifold strands to this particular conception of democracy, many of which draw inspiration from classical variants of Athenian democracy and Roman (or Renaissance Italy) republicanism. In its modern formulation it is frequently referred to as participatory democracy.<sup>15</sup>

Critics have long pointed out that whilst direct democracy is certainly normatively appealing, it seems mostly suited to the city state rather than the modern national state. This feasibility argument rests on the difficulties of face-to-face debate and enlightened deliberation beyond a certain population threshold or geographic size. The argument is especially appealing for continental-sized polities such as the US or, more recently, the EU. Indeed, it is precisely because direct participation in the modern state is impractical for reasons of size and scope of policy-making

<sup>11</sup> Lupia and Matsusaka (2004) p. 474.

<sup>12</sup> The most recent proposal for a pan-EU referendum has been put forward by Richard Rose (2013).

<sup>13</sup> Budge (1996) p. 35. <sup>14</sup> For a recent overview, see Fung (2007).

<sup>15</sup> See, in particular, Pateman (1970) and Barber (1984).