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HUMAN RIGHTS REFERENDUM: DISSONANCE BETWEEN ‘THE WILL OF THE PEOPLE’ AND FUNDAMENTAL RIGHTS?

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Abstract: Referendums and popular initiatives have proliferated in many parts of the world as part of the effort to improve the quality of democracy and enhance citizen participation in policy making. However, even before the surge of populist nationalism in the 2010s, referendums have become a sort of weapon to restrict various rights. Furthermore, the juxtaposition between ‘the will of the people’ and human rights has once again brought back the classical criticism against direct democracy that it constitutes ‘a tyranny of the majority’ that could erode minority rights. With these concerns in mind, this paper is written to analyse the dissonance between human rights referendums and international human rights law through a positivist lens. The overall goal is to determine whether States have an *ex ante* obligation to prevent a referendum on a subject matter that is contrary to human rights.

Keywords: referendum, plebiscite, popular initiative, citizen-initiated mechanism, International Covenant on Civil and Political Rights

1. INTRODUCTION: THE DILEMMA OF DIRECT DEMOCRACY *VIS-À-VIS* HUMAN RIGHTS

On 7 November 2000, the people of Alabama cast their ballot to decide whether they would be in favour of a constitutional amendment repealing the prohibition of interracial marriage in the constitution. Although this prohibition was already rendered obsolete by the US Supreme Court in *Loving v Virginia*,¹ the referendum was still required by law to remove the provision from the constitution. In the end, the majority supported the amendment. However, it is worth noting that 40.51% voted against interracial marriage, which is quite a significant percentage.²

This was not the first time a referendum on human rights was held. In Liechtenstein, voters rejected women’s suffrage three times in 1968, 1971 and 1973.³ Finally, in 1984, the effort to enfranchise women in that principality passed with a narrow margin of 119 votes.⁴ There were even

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¹ *Loving v Virginia*, 388 U.S. 1 (1967).

² ‘Alabama Interracial Marriage, Amendment 2 (2000)’ (*Ballotpedia*) <[ballotpedia.org/Alabama Interracial Marriage, Amendment 2 \(2000\)](http://ballotpedia.org/Alabama_Interracial_Marriage_Amendment_2_(2000))> accessed 18 June 2019.

³ Dieter Nohlen, Philip Stöver, *Elections in Europe: A Data Handbook* (Nomos 2010) 1173-1174.

⁴ *ibid* 1174.

referendums with a subject matter that is flagrantly intended to limit the exercise of a certain right, such as the 2009 Swiss minaret referendum in which a large majority of 57.51% supported a constitutional ban on the construction of new minarets.⁵ Furthermore, in recent times, there are various referendums being held on human rights matters that are still subject to extensive controversy under the jurisprudence of international human rights law, such as the 2015 Slovenian same-sex marriage referendum,⁶ the 2018 Irish abortion referendum,⁷ and the 2018 Irish blasphemy referendum.⁸

When the result of these sort of referendums is favourable in the eyes of human rights defenders, it will usually be applauded.⁹ However, ‘the will of the people’ does not always align with international human rights law. Furthermore, referendums may also intentionally be called by a populist party to provoke a clash with international law, including international human rights jurisprudence.¹⁰ Back in 1992, the Swiss Democrats launched a popular initiative titled *für eine vernünftige Asylpolitik* (‘for a sensible asylum policy’) to summarily deport asylum seekers who entered the country in a clandestine manner without any possibility of appeal. This initiative was later invalidated by the Swiss Federal Parliament due to the finding that it violates the prohibition of *refoulement*.¹¹

This raises the issue of whether States are legally allowed to hold a referendum whose subject matter could lead to a direct violation of international human rights law. When such a proposition is approved by the majority, it would create a dissonance between ‘the will of the people’ and human rights. The State will consequently face a predicament. On the one hand, ‘the people have spoken’ and States are at least politically bound to adhere to the result, if not legally in the case of a binding referendum. On the other hand, States are also under the international obligation to respect human rights, and they are not allowed to invoke domestic provisions (including referendum results) to justify an infringement. In fact, human rights activists have begun to adopt

⁵ Thomas Stephens, ‘Minaret result seen as “turning point”’ (*Swissinfo*, 29 November 2009) <www.swissinfo.ch/eng/minaret-result-seen-as--turning-point-/7793740> accessed 18 June 2019.

⁶ Marja Novak, ‘Slovenia rejects same-sex marriages in a referendum’ (*Reuters*, 20 December 2015) <www.reuters.com/article/us-slovenia-rights-idUSKBN0U30BS20151220> accessed 18 June 2019.

⁷ Jon Henley, ‘Irish abortion referendum: yes wins with 66.4% – as it happened’ (*The Guardian*, 30 May 2018) <www.theguardian.com/world/live/2018/may/26/irish-abortion-referendum-result-count-begins-live> accessed 18 June 2019. See also Giulia Santomauro, ‘Referendum as an Instrument of “Policy Change” on a Crucial Bioethical Issue: A Comparative Case Study on Abortion in Italy and Ireland’ (2019) 1 *Nomos: Le attualità nel diritto* 1.

⁸ Emma Graham-Harrison, ‘Ireland votes to oust ‘medieval’ blasphemy law’ (*The Guardian*, 27 October 2018) <www.theguardian.com/world/2018/oct/27/ireland-votes-to-oust-blasphemy-ban-from-constitution> accessed 18 June 2019.

⁹ See ‘Ireland: Marriage Equality Affirms Inclusion’ (*Human Rights Watch*, 23 May 2015) <www.hrw.org/news/2015/05/23/ireland-marriage-equality-affirms-inclusion> accessed 18 June 2019. See also Aisling Reidy, ‘Ireland Votes Overwhelmingly to Repeal Abortion Ban’ (*Human Rights Watch*, 26 May 2018) <www.hrw.org/news/2018/05/26/ireland-votes-overwhelmingly-repeal-abortion-ban> accessed 18 June 2019.

¹⁰ See Maya Hertig Randall, Eleanor McGregor, ‘Reconciling Direct Democracy and Fundamental Rights: The Case of the Swiss Minaret Initiative’ (2010) *Tijdschrift voor Constitutioneel Recht* 428.

¹¹ *ibid* 431.

a sceptical approach towards human rights referendums in general, since in their view human rights should not be subject to the whim of the people.¹²

With this dilemma in mind, the goal of this article is to analyse the dissonance between referendums and international human rights law through a positivist lens. For this reason, the term ‘human rights’ in this article refers to rights that are enshrined and protected by international human rights treaties. While this particular issue could also be tackled from a normative perspective, there is still a lack of scholarly literature that approaches the dissonance from a purely legal angle. This article intends to not only fill this particular gap, but also initiate a discussion on how human rights referendums need to be tackled from the perspective of international human rights law.

As a note, the subject matter of a referendum might have either *direct* or *indirect* impact on human rights. The former refers to immediate impact emanating from the implementation of the subject matter itself.¹³ For instance, a subject matter proposing the automatic expulsion of clandestine asylum seekers would immediately impact the rights of undocumented migrants if it were to be implemented. Meanwhile, the latter means that the impact is not an immediate result of the implementation of the subject matter in question. The impact is often regarded as unintentional and it could be generated through a complex pathway.¹⁴ As an illustration, in 2018, the Taiwanese electorate voted against the planned nuclear power phase-out.¹⁵ While the implementation of the result could conceivably have a nonimmediate impact on, for example, the right to private life or health of various individuals near existing power plants, an immediate impact would not be produced the moment the planned phase-out was cancelled. This article only covers referendums whose subject matter could lead to a direct detrimental impact on human rights, and thus the term ‘human rights referendums’ in this article refers to such a measure.

This article is structured as follows. It starts by laying out a typology for human rights referendums in Section 2. In Section 3, the article clarifies why human rights referendums are particularly problematic when compared with an ordinary legislative bill. Subsequently, Section 4 assesses the compatibility of referendums with international human rights law. It consists of the clarification of the status of referendums *per se* under international human rights law, the identification of legal complications that could arise in the compatibility assessment, and an analysis of these difficulties in light of the typologies of human rights referendums and the jurisprudence of international human rights law. Based on this, this article determines the scope of State obligation in the case of a human rights referendum: the primary question in this regard is whether they have an *ex ante* obligation to prevent a human rights referendum from happening or whether they are only bound *ex post facto*

¹² See, for instance, Graeme Reid, 'Cynical Romanian Referendum Tries to Redefine 'Family'' (*Human Rights Watch*, 3 October 2018) <www.hrw.org/news/2018/10/03/cynical-romanian-referendum-tries-redefine-family> accessed 18 June 2019.

¹³ cf. Todd Landman, *Studying Human Rights* (Routledge 2006) 135-136.

¹⁴ *ibid.*

¹⁵ See Nick Aspinwall, 'How Direct Democracy Went Nuclear in Taiwan' (*The Diplomat*, 18 January 2019) <thediplomat.com/2019/01/how-direct-democracy-went-nuclear-in-taiwan/> accessed 19 December 2019.

to not implement the detrimental result. The review is conducted on an abstract level; in other words, it clarifies the law in a generalised manner without focusing on a particular case.

2. TYPOLOGY OF HUMAN RIGHTS REFERENDUMS

Before digging into the main substance of the dissonance between human rights and *vox populi*, it is essential to clarify the typologies that are used for the legal analysis in this article. There are two sorts of typologies that will be laid out in this section: typologies for referendums in general and typologies that are specifically geared for human rights referendums. These typologies will be useful in encapsulating all the nuances that exist in the history of referendums.

2.1. GENERAL TYPOLOGY OF REFERENDUMS

The term ‘referendum’ has been loosely defined as ‘a device of direct democracy by which the people are asked to vote directly on an issue or policy’.¹⁶ It is different from elections that are organised to vote for a person or a party who will represent the people in decision-making.¹⁷ Historically, the practice of holding a public vote to determine the will of the people on a certain issue could be traced back to the *Landesgemeinde* system in Switzerland in the Middle Ages, or even further, to the practice of direct democracy in ancient Greek and Roman societies.¹⁸ With the increasing pace of democratisation in the 20th century, referendums have spread to many parts of the world.¹⁹ The number of referendums held also increased significantly during the Third Wave of Democratisation. Indeed, as was observed by Laurence Morel, there were almost 900 nationwide referendums held in 1980-2008, which is nearly three times higher than the number in the 1950-79 period (362 referendums).²⁰

At the same time, referendums have diversified to such an extent that the word has become a catch-all term for various forms of public vote.²¹ The terminologies themselves are rich in variety.²² As an illustration, various scholars distinguish the term ‘plebiscite’ from referendum, since it is deemed to be outside of the legal order, held only when it is convenient and characterised by the lack of free and fair competition between the different options (mostly due to its misuse by Napoleon and Hitler).²³ However, in Australia, the term ‘plebiscite’ simply means a public vote on

¹⁶ Laurence Morel, ‘Referendum’ in Michel Rosenfeld, András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 501.

¹⁷ *ibid.*

¹⁸ Markku Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff 1993) 40.

¹⁹ Morel (n 16) 512-513.

²⁰ *ibid.* 513.

²¹ Claes H. de Vreese, *The Dynamics of Referendum Campaigns: An International Perspective* (Palgrave Macmillan 2007) 2; Suksi (n 18) 3.

²² Suksi (n 18) 10.

²³ *ibid.* 10-11. See also Pier Vincenzo Uleri, ‘Introduction’ in Pier Vincenzo Uleri, Michael Gallagher (eds), *The Referendum Experience in Europe* (Palgrave Macmillan 1996) 3-4.

a matter that does not affect the national constitution, in contrast with referendums.²⁴ The term itself has been used in a neutral context, such as the Carinthian plebiscite in 1920 that was intended as an exercise of self-determination and led to the division of the former Duchy of Carinthia into Austrian and Slovenian zones.²⁵

Despite the lack of a uniform terminology for public vote, political scientists have developed various forms of typology to encapsulate the nuances that are present in different systems all over the globe.²⁶ Claes de Vreese adapted the existing typologies into one that includes four types: compulsory/binding referendum (referendum that must be held by law, such as referendums to amend the constitution or to join an international organisation), rejective/facultative referendum (referendum on a law that is already passed), initiative/direct referendum (referendum on a subject matter that was introduced by citizens) and advisory/plebiscite referendum (referendum initiated by the government for consultative purposes).²⁷ However, this typology might be criticised due to the possibility of an overlap. For instance, rejective referendums are often held after a group has collected enough signatures, and in that case such referendums could also qualify as initiative referendums.

Since this research is intended to assess State obligation with regard to human rights referendums, the typology choice needs to be narrowed down based on the binding nature of the referendum. There are two possible typologies in this regard: *ex ante* and *ex post facto* typologies. An *ex ante* typology is based on whether the government is legally bound under national constitutional law to hold a certain referendum. This typology consists of two types: ‘compulsory’ and ‘facultative’ referendum.²⁸ As explained by Maija Setälä, the former refers to referendums that are obliged by the constitution, whereas the latter is ‘triggered only at certain political actors’ request’, such as ‘by a certain number of citizens, by an actor in the representative government, or by local or regional governments’.²⁹ Meanwhile, *ex post facto* typology focuses on whether the government is legally bound to implement the result of the referendum. It also consists of two types: ‘binding’ and ‘consultative’ referendum.³⁰ Eventually, the particular typology that is used in the legal analysis of this article will depend on whether the state has an *ex ante* or *ex post facto* obligation.

²⁴ ‘Referendums and Plebiscites’ (Parliamentary Education Office) <www.peo.gov.au/learning/fact-sheets/referendums-and-plebiscites.html> accessed 18 June 2019.

²⁵ See Maria Isabella Reinhard, ‘“An Isolated Case”: The Slovene Carinthians and the 1920 Plebiscite’ (2016) *Sprawy Narodowościowe* 85.

²⁶ See, for instance, David Altman, *Direct Democracy Worldwide* (CUP 2011) 11; Suksi (n 18) 31-34; Morel (n 16) 508-509.

²⁷ de Vreese (n 21) 3.

²⁸ See Maija Setälä, *Referendums in Western Europe - A Wave of Direct Democracy?* (1999) 22 *Scandinavian Political Studies* 327, 328. cf. Altman (n 26) 13; Morel (n 16) 508.

²⁹ Setälä (n 28).

³⁰ *ibid* footnote 1.

2.2. TYPOLOGY SPECIFIC FOR HUMAN RIGHTS REFERENDUMS

The subject matter of referendums varies greatly. In the context of human rights referendums, it could range from women's rights to freedom of religion, LGB rights and migrant rights. There was also a referendum in Switzerland that could have led to the violation of the right to an effective remedy had it been approved, namely a 2008 initiative proposing to subject naturalisation decisions to a public vote.³¹ Due to this variety, a typology specifically tailored for human rights referendums is also required.

Based on the history of referendums, there are three types of human rights referendums that are currently possible: referendums with a subject matter incompatible with *jus cogens*, referendums with a subject matter limiting a certain right, and referendums with a subject matter repealing a limitation or emancipating a group. The first two types are concerned with negative obligations; in other words, if the proposition of the referendum were to be approved, it would have led to the violation of the obligation to respect a certain right. There is, however, a fundamental difference between the two, since *jus cogens* norms can never be derogated in any circumstances, whereas other human rights could be subject to a limitation if the legal grounds for it are fulfilled. Meanwhile, the third type is concerned with positive obligations to fulfil the right of a certain group. As an illustration, a compulsory referendum called to grant voting rights to a disenfranchised minority constitutes a positive measure intended to fulfil the right to political participation of a certain group.

3. HUMAN RIGHTS REFERENDUM: PARTICULAR SOURCE OF CONCERN?

Having clarified the typologies of human rights referendums, the question that needs to be addressed now is why a human rights referendum is particularly problematic when compared with an ordinary legislative bill detrimental to human rights. In the following section, it will be demonstrated that a human rights referendum is qualitatively different and thus it warrants special attention. First, a human rights referendum poses the risk of direct juxtaposition between the will of the people and human rights as a consequence of populism. Second, a human rights referendum lacks safeguards as compared to an ordinary parliamentary bill. Finally, the holding of a human rights referendum itself implies that human rights could be subject to the whim of the people.

3.1. POPULISM, *VOX POPULI* AND THE RISK OF DIRECT JUXTAPOSITION

Referendums have been touted as a way to enhance the democratic element in the decision-making process.³² However, even before the surge of populist nationalism in the 2010s,³³ referendums have

³¹ Daniel Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights' (2011) 11 Human Rights Law Review 774, 775.

³² See Altman (n 26) 2 and 59, where referendums are considered as 'safety valves against perverse or unresponsive behavior of representative institutions and politicians'. See also Suksi (n 18).

³³ See Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2018); Barry J. Eichengreen, *The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era* (OUP 2018).

already been misused by authoritarian leaders to legitimise their power, including Adolf Hitler in Nazi Germany and Saddam Hussein in Iraq.³⁴ In more recent times, referendums have been appropriated by populist actors to enter mainstream politics through the mantra of ‘returning power’ to the hands of the people.³⁵ Consequently, these sort of actors have deliberately launched referendums that pit the people not only against the ‘corrupt elite’, but also against the international legal order as a whole.³⁶ In Switzerland, for instance, right-wing populist parties (such as the Swiss People’s Party) have intentionally launched provocative popular initiatives with the goal of delegitimising international law and highlighting the ‘encroachment’ of ‘foreign judges’ upon national sovereignty.³⁷ This includes referendums whose subject matter could violate international human rights law.³⁸

Furthermore, populism appeals to the most primordial identity, and it has embraced the idea of ‘tribalism’ and ‘us vs. them’ mentality.³⁹ Consequently, populism has resulted in the holding of referendums with a subject matter that targets or erodes minority rights, particularly those that are deemed to be ‘unpopular’.⁴⁰ The 2009 Swiss minaret referendum is an example of a populist backlash against increasing Muslim immigration.⁴¹ Similarly, the 2018 Romanian same-sex marriage prohibition referendum has been alleged as an effort to divert attention from the anti-corruption effort in the country by harnessing populist conservative sentiment against LGBT minorities, although this referendum ultimately failed due to low turnout.⁴²

This sort of referendum practically puts the fate of a certain group in the hand of the majority of the electorate. In fact, one of the most commonly expounded criticisms of referendums is that such a practice could lead to the ‘tyranny of the majority’.⁴³ In Switzerland, a bastion of direct democracy, the approval of the 2009 minaret referendum has been regarded as an indication that the ‘wise’ rule of the majority could very well degenerate into a tyranny.⁴⁴ Maya Hertig Randall even observed that:

³⁴ Liubomir Topaloff, ‘The Rise of Referendums: Elite Strategy or Populist Weapon?’ (2017) 28 *Journal of Democracy* 127, 128-129.

³⁵ *ibid* 134-135.

³⁶ For the populist backlash against the international legal order, see Eric A. Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 *Arizona State Law Journal* 795.

³⁷ Randall and McGregor (n 10); see also Claus Offe, ‘Referendum vs. Institutionalised Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision’ (2017) 146 *Daedalus* 14, 17.

³⁸ Randall and McGregor (n 10) 428-429.

³⁹ William A. Galston, ‘The Populist Challenge to Liberal Democracy’ (2018) 29 *Journal of Democracy* 5, 11.

⁴⁰ Maya Hertig Randall, ‘Direct Democracy in Switzerland: Trends, Challenges and the Quest for Solutions’ in Alexis Chommeloux, Elizabeth Gibson-Morgan (eds), *Contemporary Voting in Europe: Patterns and Trends* (Springer 2017) 129, 134; Moeckli (n 31) 780. In the context of Europe, the targets could include Muslims, LGBT community, migrants, or ethno-linguistic minorities. See Offe (n 37) 17.

⁴¹ Randall (n 40) 130; Moeckli (n 31) 780.

⁴² Luiza Ilie, ‘Romanian constitutional ban on same sex marriage fails on low vote turnout’ (*Reuters*, 7 October 2018) <www.reuters.com/article/us-romania-referendum/romanian-constitutional-ban-on-same-sex-marriage-fails-on-low-vote-turnout-idUSKCN1MH0XI> accessed 18 June 2019.

⁴³ See, for instance, Richard Bellamy, ‘Majority Rule, Compromise and the Democratic Legitimacy of Referendums’ (2018) 24 *Swiss Political Science Review* 312.

⁴⁴ Randall (n 40) 130.

The acceptance of a series of popular initiatives clashing with the rule of law and Switzerland's human rights obligations or other international treaties of fundamental importance seems to be part of a general trend pointing to an increased success rate and a changing function of the popular initiative in the Swiss legal order.⁴⁵

Moreover, Barbara Gamble found in her study on the practice of initiative/direct referendum on civil rights in the United States in the years 1959-93 (including initiatives on housing, school desegregation and gay rights) that out of 74 civil rights referendums that were voted during that period, 78% lead to an outcome that restricted minority rights.⁴⁶

Thus, referendums pose the risk of juxtaposition between the will of the people and human rights (including minority rights). In this regard, what distinguishes referendums from a mere parliamentary bill is that there is a *direct* risk emanating from referendums, since they directly carry the weight of 'the will of the people' behind them. Few fully democratic governments dare to contravene the people's voice, even if the referendum itself is consultative,⁴⁷ as it could constitute a political suicide and a 'betrayal' of democracy. Furthermore, overturning the decision of the people would feed populist sentiment against 'the privileged elite' or 'the enemy of the people'. For instance, when the Federal Supreme Court of Switzerland refused to apply a new constitutional provision on the expulsion of foreign criminals that was voted by the majority, right-wing populist politician Christoph Blocher was quick to proclaim that '[T]he parliament, the people and the cantons have been deprived of their legislative power. It is a real silent coup'.⁴⁸ He also pandered to the populist sentiment by stating that 'direct democracy reduces the power of the political class, who is trying by all means to exclude the people'.⁴⁹ This example demonstrates the risk that referendums could be misused as a tool to legitimise the violation of human rights in case of a collision between the rule of law and direct democracy.⁵⁰

At the same time, one might retort that the juxtaposition risk is also present in ordinary legislative bill. Members of the legislature too are elected by the people, and thus an ordinary legislative bill is also supposed to be representative of the will of the people. Furthermore, an outcome detrimental to human rights could also emanate from an ordinary legislative bill. David Altman, for instance,

⁴⁵ *ibid.*

⁴⁶ Barbara Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41 *American Journal of Political Science* 245, 253-254. See also Donald P. Haider-Markel, Alana Querze, Kara Lindaman, 'Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights' (2007) 60 *Political Research Quarterly* 304.

⁴⁷ Compare to how the 2016 Brexit referendum is consultative and yet the government is still under immense pressure to implement the result. See 'Brexit secretary David Davis warns MPs: Don't obstruct the "will of the people"' (*The Herald*, 24 January 2017) <www.heraldscotland.com/news/15044065.brexit-secretary-david-davis-warns-mps-dont-obstruct-the-will-of-the-people/> accessed 27 December 2019.

⁴⁸ Original text in French: 'Le parlement, le peuple et les cantons sont privés de leur pouvoir législatif. C'est un vrai coup d'Etat silencieux.' See Christoph Blocher, 'Les manigances des juges pour mettre la Suisse sous le joug' (*Le Temps*, 22 March 2013).

⁴⁹ *ibid.* Original text in French: 'Mais la démocratie directe réduit le pouvoir de la classe politique, qui tente donc par tous les moyens d'écarter le peuple'. See also Claire Phipps, 'British newspapers react to judges' Brexit ruling: 'Enemies of the people' (*The Guardian*, 4 November 2016) <www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling> accessed 18 June 2019.

⁵⁰ cf. Randall and McGregor (n 10).

admitted that citizen-initiated mechanisms of direct democracy always have the risk of bringing ‘irresponsible results’, and yet ‘this can also be claimed with regard to representative democracy itself’.⁵¹

This research is not intended to delve into the empirical question of whether an ordinary legislative bill does truly represent the will of the people.⁵² It is also not the purpose of this article to empirically determine whether mechanisms of direct democracy are more reflective of the will of the people compared with legislative measures in a representative democracy.⁵³ Nevertheless, as observed by Liubomir Topaloff, ‘referendums produce a conflict between competing sources of legitimacy — elected representative bodies on the one hand, and direct popular votes on the other’.⁵⁴ In fact, an argument that is often espoused in favour of referendums is that ‘the popular will is more accurately expressed’ therein when compared with an ordinary legislative bill.⁵⁵ As a consequence, the juxtaposition risk seems to be much more pronounced in referendums, since citizens would have a *direct* say on a subject matter, and a proposition detrimental to human rights could then be legitimised through a *direct* appeal to *vox populi* as pronounced in the referendum result. Furthermore, members of a representative body are often branded as the ‘elites’ whose interests are not aligned with those of the people,⁵⁶ and thus an effort to legitimise a legislative bill violating human rights would face difficulty in *directly* appealing to *vox populi* in the way that a referendum could.

3.2. LACK OF POLITICAL SAFEGUARDS

Another fundamental difference between a referendum and a legislative bill is the existence of political safeguards. Such safeguards could normally be found in ordinary legislative procedures; as observed by Daniel Moeckli:

Decision-making in parliament is characterised by mechanisms of deliberation (such as commission meetings and expert hearings), bargaining processes promoting compromise, and further safeguards (such as public voting) that tend to protect the interests of minorities.⁵⁷

In other words, there are more possibilities to steer a parliamentary procedure so that the bill will be compliant with human rights law. The safeguard would even be more robust if there is an *ex ante* human rights control by a council of state or other independent body.

⁵¹ Altman (n 26) 59.

⁵² An example of such a research can be found in David Karlsson, ‘A Democracy of Scale. Size and Representative Democracy in Swedish Local Government’ (2013) 17 Scandinavian Journal of Public Administration 7.

⁵³ See the debate in Altman (n 26) 41-59.

⁵⁴ Topaloff (n 34) 128.

⁵⁵ See the example of the arguments in Altman (n 26) 43-44.

⁵⁶ Topaloff (n 34) 133-138.

⁵⁷ Moeckli (n 31) 777.

These sorts of safeguards are noticeably lacking (or at least insufficient) in a referendum. In Switzerland, for instance, the traditional *ex ante* political solutions are simply to hold a lively debate and bring forward parliamentary counter-proposals.⁵⁸ In Randall's view,

The approval of the 'anti-minaret initiative' has undermined the assumption that the political process offers sufficient safeguards to avoid collisions between popular sovereignty and the rule of law and to prevent direct democracy from degenerating into a tyranny of the majority⁵⁹

With regard to referendums in general, Claus Offe even argued that:

Plebiscitarian procedures (...) impoverish the tool box of democratic politics by eliminating the space for postvoting reasoning and compromise-finding in the institutional framework of representative democracy. They privilege the fast, impulsive snapshot reaction generated by passions and visceral instincts over the more time-consuming balancing of interests and the typically lengthier process of persuasion through argument. As a consequence, consistency is not required: voters can simultaneously opt for lower taxes and greater expenditures, or for cheaper gas and stricter environmental standards.⁶⁰

Based on these statements, it could be argued that referendums pose more risk to human rights, particularly when the subject matter is concerned with an 'unpopular' minority or if a vote detrimental against human rights is perceived as a protest vote against the 'established system'.⁶¹

3.3. SYMBOLIC POWER OF THE LAW

The problem with human rights referendums is not only concerned with the fact that they could lead to a detrimental outcome and that they could incur damage to the human rights system. The law is not a mere bundle of substantive and procedural rules that are intended as a system of control. It also has a symbolic element to it. As observed by Mauricio García-Villegas:

The law is [...] a cultural system of meaning as well as a system of instrumental controls. Its force lies not only in the threat or reward it promises but also in its ability to produce speech that people perceive as legitimate, true, and authoritative.⁶²

Consequently, when a human rights referendum is tabled, the impact will not be limited in terms of legal and political outcome. That government will also be sending a message to the public and to the international community as a whole that it is legitimate, true and authoritative to subject human rights under the whim of the majority.

⁵⁸ Randall (n 40) 140.

⁵⁹ *ibid* 130; Randall and McGregor (n 10) 428-429.

⁶⁰ Offe (n 37) 19.

⁶¹ Moeckli (n 31) 780.

⁶² Mauricio García-Villegas, *The Powers of Law: A Comparative Analysis of Sociopolitical Legal Studies* (CUP 2018) 20.

Based on this line of thought, it could also be argued that the holding of a referendum on minority rights would create a chilling signal that minorities are subject to the ‘tyranny of the majority’ and that they should just comply or even ‘assimilate’ in case the majority decide otherwise. The message becomes even more serious when the referendum is proposing a measure that is contravening a *jus cogens* norm. It would spread an unacceptable message from the perspective of the rule of law that it is legitimate to deviate from peremptory norms (such as the prohibition of torture or genocide) if the public dictate it to be that way.

4. COMPATIBILITY OF REFERENDUMS WITH INTERNATIONAL HUMAN RIGHTS LAW

Having explained why human rights referendums are particularly problematic from a political and legal perspective, this section will now turn to the assessment of the compatibility of human rights referendums with international human rights law.

4.1. STATUS OF REFERENDUMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The practice of holding a referendum is not precluded by international law.⁶³ It could even be assumed that international human rights law is friendly to the practice of holding referendums in general, since human rights favour citizen participation in the political sphere as enshrined in Article 21 of the Universal Declaration of Human Rights (‘UDHR’) and Article 25 of the International Covenant on Civil and Political Rights (‘ICCPR’) on the right to equal participation in political and public affairs.

Nevertheless, States are still required to adhere to international standards in holding free and fair referendums. Article 25(b) of the ICCPR states that every citizen has the right:

To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

While the term used in this Article refers to ‘elections’, the Human Rights Committee (‘UNHRC’) recognised in General Comment 25 that it also includes referendums.⁶⁴ The right to equal participation in referendums is further supported by provisions in several other conventions. Article 7(a) of the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) explicitly protects women’s right in participating in referendums,⁶⁵ whereas Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’) guarantees the political rights of all citizens ‘without distinction as to race, colour, or

⁶³ cf. Christian Marxsen, ‘The Crimea Crisis: An International Law Perspective’ (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) 367, 380-382. It contains an assessment of the legality of the 2014 Crimean Referendum *per se*.

⁶⁴ UNHRC, ‘General Comment No. 25’ (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 6, 19.

⁶⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

national or ethnic origin'.⁶⁶ Therefore, in holding referendums, governments are not allowed to exclude groups that are protected from discrimination under international human rights law.

4.2. DIFFICULTIES IN REFERENDUM REVIEW UNDER INTERNATIONAL HUMAN RIGHTS LAW

There are two difficulties that need to be addressed before assessing the compatibility of human rights referendums with international human rights law. The first difficulty is concerned with compulsory referendums. Various legal systems require approval by the electorate to effectuate an amendment to the constitution, and as a result the repeal of a constitutional provision violating human rights would also be subject to this requirement. If the electorate voted against it, the violation would persist. At the same time, under international law, it has long been established that States cannot invoke national law or even constitutions to justify infringement of international norms.⁶⁷ The Human Rights Committee also reaffirmed in General Comment 31 that:

Although article 2, paragraph 2 [of the ICCPR], allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.⁶⁸

Thus, the difficulty is concerned with the dissonance between 'the will of the people' as a requirement under national constitutional law and international human rights law's uncompromising approach with respect to compliance with the Covenant. This difficulty will be addressed in further detail in Section 4.5.

There is also a purely academic question that could arise in the case of a compulsory referendum. If it is assumed that Liechtenstein had ratified the ICCPR in 1976 and the CEDAW in 1981,⁶⁹ the 1984 Liechtenstein women's suffrage referendum would have constituted a violation of Article 25(b) of the ICCPR and Article 7(a) of the CEDAW, since only males were allowed to participate in the referendum.⁷⁰ However, such a referendum is constitutionally necessary to enfranchise women. This creates a paradox, since one has to hold a referendum in order to ensure compliance with these provisions, but at the same time the conduct of such a referendum is not in line with

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

⁶⁷ Article 27 of the Vienna Convention on the Law of Treaties: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. See also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* (Advisory Opinion) [1932] PCIJ Rep Series A/B no 44, para 62.

⁶⁸ UNHRC, 'General Comment No 31' (2004) UN Doc CCPR/C/21/Rev.1/Add.13.

⁶⁹ It only ratified the ICCPR on 10 December 1998 and the CEDAW on 22 December 1995. See '4. International Covenant on Civil and Political Rights' (*United Nations Treaty Collections*) <treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND> accessed 18 June 2019; '8. Convention on the Elimination of All Forms of Discrimination against Women' (*United Nations Treaty Collections*) <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 18 June 2019.

⁷⁰ For more information about this referendum and the fact that only men were allowed to participate, see David Beattie, *Liechtenstein: A Modern History* (Bloomsbury Academic 2004) 147.

international human rights law. Nevertheless, there is currently no concrete case where such a paradox is manifest, and thus it remains in the realm of academic speculation.

Meanwhile, the second difficulty relates to the question of whether States have an *ex ante* obligation of preventing a human rights referendum, or whether they only have an *ex post facto* obligation of not implementing a result that is detrimental to fundamental rights. This difficulty would especially affect civil rights referendums, as the holding of the referendum in itself has been claimed as a violation of the non-discrimination obligation or other civil rights obligations.⁷¹ At the same time, it could also be argued that it is not the referendum *per se* that is contrary to international human rights law, but rather one of the potential results. Based on this line of thought, it could be claimed that under international human rights law, a referendum only has to satisfy the requirements of Article 25(b) of the ICCPR and other related provisions to be legal. In order to tackle this particular difficulty, it is necessary to assess human rights referendums in light of their typologies and their compatibility with international human rights law, which will be explored in the following subsections.

4.3. REFERENDUM CONTRAVENING *JUS COGENS*

In July 1992, a popular initiative titled *für eine vernünftige Asylpolitik* was submitted to the Swiss Federal Government. It proposed a constitutional amendment that would summarily deport asylum seekers who entered the country in an irregular manner without any possibility of appeal. Such a subject matter is incompatible with the norm of *non-refoulement*, since the lack of appeal would leave no room for the refugees concerned to be protected from torture or inhumane or degrading treatment in the country where they would be deported back to.⁷²

Despite the debate among legal scholars,⁷³ the Swiss Federal Council considered the norm of *non-refoulement* to have attained a *jus cogens* status under international law.⁷⁴ Consequently, in 1996, this popular initiative was declared to be invalid by the Swiss Federal Parliament in accordance with the recommendation of the Swiss Federal Council.⁷⁵ In the view of the Council, peremptory

⁷¹ See, for instance, Reid (n 12).

⁷² Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implication for National and Customary Law' (2004) 15 *European Journal of International Law* 97, 101; Goran Seferovic, 'Direkte Demokratie und Völkerrecht in der Schweiz - Nationaler Identifikationsfaktor im Widerstreit mit internationalem Recht' in Sebastian Piecha et al (eds), *Rechtskultur und Globalisierung: 57. Assistententagung Öffentliches Recht* (Nomos 2017) 43.

⁷³ There is still no universal agreement among legal scholars on whether the norm of *non-refoulement* has attained *jus cogens* status. For an argument in favour, see Jean Allain, 'The *Jus Cogens* Nature of *Non-refoulement*' (2001) 13 *International Journal of Refugee Law* 533; Cathryn Costello, Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' in Maarten den Heijer, Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015* (Asser Press 2015) 273-323. For argument against, see Aoife Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 *International Journal of Refugee Law* 373.

⁷⁴ See Botschaft über die Volksinitiativen «für eine vernünftige Asylpolitik» und «gegen die illegale Einwanderung» vom 22. Juni 1994, BBl 1994 III 1486, 1498-1499.

⁷⁵ For the timeline of the popular initiative, see 'Eidgenössische Volksinitiative 'für eine vernünftige Asylpolitik'' (*Schweizerische Bundeskanzlei*) <www.bk.admin.ch/ch/d/pore/vi/vis223.html> accessed 19 June 2019.

norms are of ‘fundamental importance’ to the *Rechtsstaat*, and the violation of such a norm would undermine it and create irreparable damage.⁷⁶ To prevent this case from reoccurring, *jus cogens* as a limitation to popular initiatives was subsequently enshrined in Article 139(3) of the Swiss Constitution in 1999. Since then, a proposed popular initiative that is deemed to be incompatible with peremptory norms will be invalidated entirely or in part.⁷⁷ In the view of Erika de Wet, this provision serves as a ‘reliable way of protecting *jus cogens* norms of international law within the domestic legal order’, and it functions as an ‘emergency brake’ with the aim of ‘securing respect for core international obligations at all times’.⁷⁸

The *vernünftige Asylpolitik* case demonstrates an example of how ‘the will of the people’ and non-derogable fundamental rights could actually collide. Under Swiss constitutional law, the clash is handily avoided by the decision to invalidate the proposed popular initiative, although the Swiss practice is still striving for an international-law friendly interpretation in accordance with the *in dubio pro populo* principle (when possible, popular initiatives should be interpreted in such a way that its invalidation could be avoided).⁷⁹ Meanwhile, the enshrinement of the *jus cogens* emergency brake in the Swiss Constitution has guaranteed that, as observed by Erika de Wet, ‘the core values of the international community remain beyond the reach of the will of the people (unless the constitution itself is amended to reverse this position)’.⁸⁰

As for the approach of international human rights law to this matter, *jus cogens* norms can never be set aside in any situation no matter how many crowds could be mustered against them. Furthermore, if a State has become a persistent objector to a *jus cogens* norm (such as South Africa during the apartheid era), that State is still not exempted from that peremptory norm.⁸¹ Consequently, even if a human rights violation is constitutionalised through a referendum, it can never be invoked to derogate from *jus cogens*, and the uncompromising approach of international law in accordance with Article 27 of the Vienna Convention of the Law of Treaties (‘VCLT’) remains in place.⁸²

With regard to the question of *ex ante* or *ex post facto* obligation, international human rights conventions are silent on whether a referendum on peremptory human rights norms is permissible. Despite this, it is possible to invoke a *reductio ad absurdum* approach similar to the reasoning of

⁷⁶ BBl 1994 III 1486 (n 74) 1496.

⁷⁷ Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates vom 5. März 2010, BBl 2010 2263, 2313.

⁷⁸ Erika de Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 559. As a note, the existence of this ‘emergency brake’ did not prevent the holding of a referendum on the expulsion of foreign criminals in 2010. According to the advice of the Swiss Federal Council, the initiative could be implemented in a way that does not violate *jus cogens*. See Botschaft zur Volksinitiative «für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)» und zur Änderung des Bundesgesetzes über die Ausländerinnen und Ausländer vom 24. Juni 2009, BBl 2009 5097, 5103. However, there are also other rights that could be violated by the implementation of the subject matter (such as the right to respect for family and private life), and the removal needs to adhere to the principle of proportionality. See Randall (n 40) 136; *Emre v Switzerland* App no 42034/04 (ECtHR, 22 May 2008); *Emre v Switzerland (No 2)* App no 5056/10 (ECtHR, 11 October 2011).

⁷⁹ See BBl 2010 2263 (n 77) 2315-2316; Randall (n 40) 136.

⁸⁰ de Wet 2013 (n 78) 560.

⁸¹ *ibid* 543.

⁸² cf. *LaGrand Case (Germany v United States of America)* (Merits) [2001] ICJ Rep 466.

the International Court of Justice ('ICJ') in the *Bosnian Genocide* case. In that case, the ICJ was faced with the question of whether States are under the obligation to not commit genocide under the Genocide Convention. Article I of that Convention only requires States Parties to prevent and punish acts of genocide, and there is no explicit provision which binds States to refrain from committing genocide themselves.⁸³ Nevertheless, the ICJ ruled that:

It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.⁸⁴

The same line of thought could be applied to referendums contravening *jus cogens*. Suppose that a popular initiative on the summary deportation of asylum seekers without any possibility of appeal was approved by a rogue government. The existence of the stipulation 'without any possibility of appeal' could lead to an act of *refoulement*, which flagrantly breaches not only Article 7 of the ICCPR,⁸⁵ but also Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT').⁸⁶ The provisions themselves do not contain any explicit prohibition of a referendum on the principle of *non-refoulement*. However, Article 2(2) of the ICCPR enshrines that State Parties undertake to take the necessary steps to adopt measures that are necessary to effectuate the rights enshrined in the Convention.⁸⁷ Similarly, in Article 2(1) of the UNCAT, Member States of the UNCAT have committed themselves to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.⁸⁸ These instruments are created with the spirit to ensure an effective protection of fundamental rights. The holding of a referendum that could cause the violation of a *jus cogens* norm is completely antithetical to this. It would be paradoxical to claim that States are obliged to refrain from *refoulement*, yet at the same time are permitted to undertake legislative or administrative steps that could have led to such an outcome. Furthermore, as has been elaborated in Section 3.1, a referendum is even more problematic than a mere legislative proposal considering that the pressure to adhere to the outcome is much greater than usual. Therefore, it would be logical

⁸³ See Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26 *European Journal of International Law* 169.

⁸⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (2007) ICJ Rep 2, para 166.

⁸⁵ Although it is not explicit, the Human Rights Committee in its authoritative interpretation in General Comment 20 found that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end'. UNHRC, 'General Comment No 20' (1992) UN Doc HRI/GEN/1/Rev.1, para 9.

⁸⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 6 June 1987) 1465 UNTS 85 (UNCAT).

⁸⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁸⁸ UNCAT (n 86).

to infer that the obligation to respect *jus cogens* also includes an *ex ante* obligation to prevent a referendum whose result could facilitate the government to violate *jus cogens* norms, irrespective of whether it is a compulsory or facultative referendum. Such an obligation would entail the existence of an *ex ante* peremptory norms' control over referendums.

4.4. REFERENDUM LIMITING HUMAN RIGHTS

With respect to referendums with a subject matter limiting a right, the *Bosnian Genocide* argument could also be invoked to argue that States are obliged to prevent such referendums, including by introducing a mechanism of *ex ante* control.⁸⁹ In this case, however, there is a slight nuance. Under international human rights law, various rights are subject to limitation provided that the prerequisites of each individual article are fulfilled.⁹⁰ For instance, under Article 18(3) of the ICCPR, the right to freedom of religion could be restricted provided that the limitations 'are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁹¹ Hence, in addition to a *jus cogens* control, a referendum that is proposed to limit this right needs to be subject to a review of whether the grounds of limitation are fulfilled, regardless of whether it is a compulsory or facultative referendum. If the proposed subject matter is found to have satisfied the grounds of limitation, the referendum is compatible with international human rights law.

When the referendum has a subject matter that is discriminatory against a certain protected group, global human rights conventions other than the ICCPR will also apply simultaneously. Suppose that a referendum is proposed to ban interracial marriage in the constitution. The *Bosnian Genocide* argument could be invoked not only for the ICCPR, but also for Article 2(c) of the CERD to argue that there is an *ex ante* requirement to reject such a proposal. Under this Article, States Parties are bound to:

[...] take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.⁹²

It would be rather illogical if they are obliged to review and nullify discriminatory laws, yet at the same time they are allowed to introduce a measure that would facilitate racial discrimination. Similarly, if there is a referendum proposed to rescind women's suffrage, the *Bosnian Genocide* argument could be applied to Article 2(f) of the CEDAW, which binds States Parties to 'take all

⁸⁹ It might also be possible to raise this particular point to argue for an *ex ante* obligation to prevent a vote on legislative bills. However, since this paper has argued that ordinary legislative bills are qualitatively different from referendums, another legal research that takes the differences into account is required to prove this particular point.

⁹⁰ See Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, *International Human Rights Law* (OUP 2010) 141.

⁹¹ ICCPR (n 87).

⁹² CERD (n 66).

appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.⁹³

As a note, there are also referendums in which the subject matter is still controversial under international human rights law, such as abortion, same-sex marriage and blasphemy. This particular sort of referendum would be subject to a 'plurality of answers' from various judicial and quasi-judicial actors. In the jurisprudence of the European Court of Human Rights, these subjects would even fall under the margin of appreciation of States.⁹⁴ Consequently, it is rather difficult to contend against the legality of these sort of referendums under international human rights law, although the preceding arguments could still be invoked to argue for the existence of an *ex ante* human rights control for any sort of referendums.

4.5. REFERENDUM REPEALING LIMITATION/EMANCIPATING A GROUP

Meanwhile, for a referendum that is *compulsory* to set aside a limitation or to grant rights to a certain group (such as the 2000 Alabama interracial marriage referendum), international human rights law seems to be permissive of such a referendum. Article 2(2) of the ICCPR establishes that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, *in accordance with its constitutional processes* and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.⁹⁵

Important here is the use of the term 'in accordance with its constitutional processes'. As was observed by Anja Seibert-Fohr, this provision 'leaves the States parties so much leeway in the implementation of the Covenant'.⁹⁶ The existence of this phrase recognises the fact that States might need to follow national constitutional rules to secure a right, including by holding a referendum that is required by law to effectuate a repeal amendment. This fact is also recognised by the Human Rights Committee in General Comment 31:

Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure [...].⁹⁷

⁹³ CEDAW (n 65).

⁹⁴ Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018).

⁹⁵ ICCPR (n 87), emphasis added.

⁹⁶ Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2' (2001) 5 Max Planck Yearbook of United Nations Law 399, 402.

⁹⁷ General Comment 31 (n 68) para 13.

Therefore, a compulsory referendum that is organised to ensure compliance with the Covenant and to enhance protection of the rights that are contained within it is not precluded in principle.⁹⁸

However, as has been previously mentioned in Section 4.2, the effort to repeal a violation could reach an impasse if the electorate in a compulsory referendum voted against it. In order to tackle this difficulty, one would have to determine whether Article 2(2) of the ICCPR contains an obligation of means (requiring States to undertake certain steps irrespective of the outcome) or obligation of result (concerned with the attainment of a desirable outcome).⁹⁹ According to Manfred Nowak, the fact that this Article requires States to adopt legislative or other measures could imply that this Article contains an obligation of means. However, in his view, the provision is too vague and cautiously worded, and that it is not really different from an obligation of result, especially due to the presence of wordings such as ‘the necessary steps’ and ‘in accordance with its constitutional processes’.¹⁰⁰ Furthermore, the existence of the term ‘to give effect to the rights’ indicates a result that is to be achieved. Therefore, it seems that this Article is concerned with an obligation of result.

The consequence of this is that despite the ICCPR’s willingness to grant a leeway to States in adhering to national constitutional arrangements in the effort to give effect to a right, an impasse that is caused by it cannot be invoked as a justification for violation. The Human Rights Committee reaffirmed this uncompromising view in General Comment 31, in which they found that the obligation under Article 2(2) of the ICCPR is ‘unqualified’ and ‘of immediate effect’.¹⁰¹ Based on this, it could be maintained from a practical perspective that States need to avoid compulsory referendums in the effort to secure their obligations under the ICCPR. When such a referendum is unavoidable, they would have to vigorously campaign for human rights in order to avoid protracted violation.

As a comparison, at the Inter-American level, the Inter-American Court of Human Rights seems to be willing to grant more leeway. In its ground-breaking advisory opinion on 24 November 2017, the Court recognised same-sex marriage as a fundamental right.¹⁰² At the same time, the Court acknowledges the fact that States Parties might experience institutional and political difficulties in granting marriage equality. Consequently, States are not expected to legalise same-sex marriage

⁹⁸ The same argument could be invoked to argue for a compulsory argument to repeal a *jus cogens* violation in the constitution. However, this matter remains purely academic, and that is the reason that it is not addressed in the main body of the paper.

⁹⁹ See Rüdiger Wolfrum, ‘Obligation Of Result Versus Obligation Of Conduct: Some Thoughts About The Implementation Of International Obligations’ in Mahnouch H Arsanjani et al (eds), *Looking to the Future* (Martinus Nijhoff 2010).

¹⁰⁰ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) 57.

¹⁰¹ General Comment 31 (n 68) para 14.

¹⁰² See Inter-American Court of Human Rights *Opinion Consultiva OC-24/17 de 24 de Noviembre de 2017, Solicitada por la Republica de Costa Rica* (2017) <www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf> accessed 27 December 2019, para 218-220.

immediately as long as they continue to promote reforms ‘genuinely’ and ‘in good faith’.¹⁰³ This implies that a compulsory constitutional referendum to legalise same-sex marriage would be considered as part of the ‘reform’ needed to achieve marriage equality.¹⁰⁴ Even if the result is rejected, the Court could understand the arduousness in the endeavour as long as the referendum was held ‘genuinely’ and ‘in good faith’.

As for facultative referendums that are organised to propose the repeal of a limitation or the emancipation of a certain group, such referendums fall outside the scope of the term ‘in accordance with its constitutional processes’ under the ICCPR. While it could be argued that international human rights law is completely neutral on this matter, States remain subject to the obligation to repeal laws that are not in line with international human rights law as soon as possible,¹⁰⁵ and holding a non-compulsory referendum on this matter would simply prolong the violation and could put States in an unnecessarily awkward situation if the electorate voted against it.

Table 1: Referendums under International Human Rights Law

Type of Referendum	Incompatible with <i>jus cogens</i>	Limiting Human Rights	Repealing Limitation/Emancipating a Group
Compulsory referendum	Obligation to prevent such a referendum (including by introducing an <i>ex ante</i> peremptory norms review)	Obligation to prevent such a referendum, although it could still be held if the grounds of limitation are fulfilled	Allowed as part of the state’s constitutional processes, but rejection by voters cannot be invoked to justify violation
Facultative referendum			Not prohibited in principle, other recourse preferred and the result cannot be invoked to justify violation

5. CONCLUSION

¹⁰³ *ibid* para 226.

¹⁰⁴ In Bolivia, for instance, marriage is limited to heterosexual couple under Article 63 of the 2009 Bolivian Constitution, and partial reform of the constitution must be approved by a referendum under Article 411(II) of the Constitution. See ‘Bolivia (Plurinational State of)’s Constitution of 2009’ (*Constitute*) <www.constituteproject.org/constitution/Bolivia_2009.pdf> accessed 27 December 2019.

¹⁰⁵ This reading is supported by an examination of the drafting history of Article 2(2) of the ICCPR, in which the ‘within a reasonable time’ was deleted from the draft. According to Manfred Nowak, this indicates that Article 2(2) requires States to implement the Covenant ‘in as short a time as possible’. See Nowak (n 100) 60-61

The issue of the legality of human rights referendums under international human rights law is highly complex in nature. Nevertheless, this article has achieved its purpose in demonstrating States' obligations with respect to different typologies of human rights referendums. Based on these findings, it could be concluded that States need to undertake a more active approach towards human rights referendums. Human rights do favour popular participation and are friendly towards the holding of a referendum. However, when human rights or *jus cogens* norms are at stake, States cannot just sit idly by when a referendum proposing a violation is tabled. They would need to create an *ex ante* human rights review mechanism for all sorts of referendums. That review needs to be undertaken by an independent body, such as a council of state or an independent human rights commission or court.

An *ex ante* human rights review mechanism could further be strengthened by the introduction of a constitutional provision to outlaw referendums with a subject matter infringing *jus cogens*. One example is Article 139(3) of the Swiss Constitution, which prohibits the introduction of a popular initiative violating peremptory norms. On top of that, an *ex post facto* judicial mechanism is also highly essential as a last resort. In case there was an oversight during the *ex ante* procedure, independent judges could play a significant role by reviewing the legality of the referendum or the implementing measure.¹⁰⁶

The existence of these safeguards is necessary not only to ensure State compliance with its human rights obligations, but also to prevent an awkward situation where 'the will of the people' is directly juxtaposed with minority rights or even human rights law in general. As concluded by Moeckli, 'human rights are the lifeblood of democracy and their effective protection is a prerequisite for its very existence'.¹⁰⁷ If human rights can simply be quashed by the will of the majority, democracy would degenerate into an ochlocracy or 'government by mob'. Furthermore, such a juxtaposition creates a risk of dissonance between national constitutional law and international human rights law. Particularly awkward would be the scenario when the violation of a right or even *jus cogens* norm is being enshrined in the constitution; as was aptly concluded by the Swiss Federal Council, such a situation would undermine the *Rechtsstaat* itself.

¹⁰⁶ Back in 2011, Moeckli proposed that constitutions 'should be amended to make it explicit that, when it comes to the implementation of a constitutional norm approved in a popular vote, courts are not bound to apply that norm if, in the case at hand, this would lead to a violation of fundamental rights'. See Moeckli (n 31) 793.

¹⁰⁷ *ibid.*