

MAXIMISING CONSENT: OPERATIONALISING RECIPROCITY IN SECESSION REFERENDA

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I INTRODUCTION

A constitutional referendum on secession from Indonesia was held in East Timor in 1999, with a pro-independence vote triggering widespread violence by the Indonesian army and pro-union militia.¹ Montenegro underwent a similar process in 2006, also opting for independence but with much smoother results.² This article will suggest that the deliberative democratic principle of reciprocity can help deliver referendum law based on justifications that can be accepted by all parties concerned. In particular, it proposes that reciprocity can be operationalised in referendum law if the participants in the negotiations that formulate the laws accept fair terms of social cooperation (FTSCs) and resolve disagreements using economy of moral disagreement (EMD). Respectively, these mean parties to negotiations should be willing to justify their position in mutually acceptable terms and if consensus is impossible, agreements should minimise their rejection of other parties' views. This argument will be made using the negotiations that created East Timor and Montenegro's referendum laws as case studies.

Secession referenda are a timely issue. They have become the default mechanism for founding new states, triggering secession for Eritrea (1993), East Timor (1999), Montenegro (2006) and South Sudan (2011).³ Earlier this year, a referendum was used to justify Crimea's transfer from Ukraine to Russia,⁴ and another was held to determine whether Scotland should remain part of the UK.⁵ A referendum on Iraqi Kurdish secession planned for 2014 was recently postponed,⁶ while Bougainville and New Caledonia are also expected to vote on independence later this decade.⁷ Their

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¹ Jarat Chopra, 'Building State Failure in East Timor' 33(5) *Development and Change* 979, 983.

² Karsten Friis, 'The Referendum in Montenegro: The EU's Post-Modern Diplomacy' 12 *European Foreign Affairs Review* 67, 68.

³ Stephen Tierney, 'Whose Political Constitution? Citizens and Referendums' 14(2) *German Law Review* 2185, 2188.

⁴ William W Burke-White, 'Crimea and the International Legal Order' (2014) 56(4) *Survival: Global Politics and Strategy* 65, 70.

⁵ Pierre Schmitt, 'Member States, Aspiring States and the European Union' (Working Paper no 143, Leuven Centre for Global Governance Studies, July 2014) 4. <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp141-150/wp143-schmitt.pdf>.

⁶ Roy Gutman, 'Kurds agree to postpone independence referendum', *The Star* (online), 5 September 2014 <http://www.thestar.com/news/world/2014/09/05/kurds_agree_to_postpone_independence_referendum.html>.

⁷ Homa Khaleeli, 'Beyond Scotland: four more potential independence referendums', *The Guardian* (online), 9 September 2014 <<http://www.theguardian.com/politics/2014/sep/08/scotland-four-more-potential-independence-referendums>>.

frequency, along with their potential to stir up division and inflame differences in volatile circumstances,⁸ makes secession referenda an important area for investigation.

This article will use secession referenda in East Timor and Montenegro as case studies to suggest that the micro-level negotiations which often create referendum law can achieve outcomes that are consistent with the deliberative democratic principle of reciprocity if parties accept FTSCs and if the negotiations include a wide range of participants and are firmly moderated by an impartial third party.

Broadly speaking, reciprocity as described by Gutmann and Thompson aims to facilitate political agreement on the basis of principles that are mutually justifiable to all parties concerned.⁹ Tierney identifies two key stages besides voting when citizens engage with constitutional referenda: micro-level participation, or small-group deliberation when legal guidelines for the referendum are being established; and macro-level participation, meaning engagement during the campaign period through considering and debating the relevant issues.¹⁰ To try to ensure the process is accepted even by those who disagree with the result, Tierney suggests that decision-making during micro-level negotiations should aim to build up openness and goodwill between the parties, and to reach agreement through discussion wherever possible.¹¹ However he does not clearly outline practical steps for achieving these goals.¹² This paper aims to flesh out Tierney's ideas by outlining a theoretical framework that merges Gutmann and Thompson's principle of reciprocity with Tierney's suggestion that popular participation should be incorporated into micro-level participation in constitutional referenda.

The first section will engage with these theories at a broad level, concluding that micro-level negotiations can create laws based on reciprocity if the parties accept FTSCs and resolve fundamental disagreements using EMD, and that these can be encouraged through representative participation and impartial mediation. This is a novel response to gaps in Tierney's ideas. Ensuring parties accept FTSCs and resolve disagreements using EMD offers a pragmatic scheme for reaching mutually justifiable solutions using Tierney's framework.

To establish a base for analysis, the second section will summarise the contents of the May 5 Agreement that established East Timor's referendum law, as well as the *Law on the Referendum on State Legal Status (LRSLS)* which served the same role in Montenegro. Both of these were formed through negotiation – between Indonesia, Portugal and the UN for Timor,¹³ and between pro-independence and pro-union politicians in Montenegro, moderated by the European Union (EU).¹⁴

The third section will apply the theory to the law, focusing on reciprocity in micro-level participation. It will argue that micro-level negotiations can achieve solutions based on reciprocity if parties accept FTSCs and resolve fundamental moral disagreements using EMD. These can be encouraged by representative participation

⁸ Sumantra Bose, *Bosnia After Dayton: Nationalist Partition and International Intervention* (Hurst and Company 2002) 51.

⁹ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996) 52-3.

¹⁰ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 51.

¹¹ *Ibid* 205.

¹² *Ibid* 53.

¹³ Kirsten E Schultze, 'The East Timor Referendum Crisis and its Impact on Indonesian Politics' 24 *Studies in Conflict and Terrorism* 77, 80.

¹⁴ Consiglio Di Nino, 'Report of the Canadian parliamentary delegation of the OSCE-Canada-Europe Parliamentary Association to the Observation Mission of the Referendum of the OSCE Parliamentary Assembly, Serbia and Montenegro' (Report, Organisation for Security and Cooperation in Europe, May 2006) 3.

and impartial mediation in negotiations. The application section will use key components of East Timor and Montenegro's referendum laws to demonstrate that these principles can work in practice. Campaign regulations during each referendum will be discussed because they were relatively detailed in both cases and thus permit direct comparisons. Negotiations on the most controversial issues – security arrangements in East Timor and the supermajority requirement in Montenegro – will also be considered because they provide the clearest examples of good or bad practice. Negotiations on East Timor's referendum law did not achieve reciprocal results because they lacked East Timorese input and were dominated by Indonesia which was enabled to thwart negotiations by a weak United Nations (UN) mediation effort. Conversely in Montenegro, negotiations yielded highly-appropriate and effective referendum laws based on reciprocity. Representative participation from both sides of the debate, and the EU's role as a neutral facilitator, were crucial to achieving this outcome. These case studies demonstrate reciprocity's potential to guide micro-level participation if FTSCs and EMD are encouraged through assertive, impartial mediation and if a representative range of participants is included.

II RECIPROCITY'S PLACE IN CONSTITUTIONAL REFERENDA

This section will first describe various criticisms of constitutional referenda. It will then outline the principle of reciprocity and its potential benefits. Next, it will set out Tierney's suggestion for micro-level participation in referenda, and suggest that orienting this framework to achieve outcomes that are based on reciprocity could mitigate many of the weaknesses of constitutional referenda. Finally, it will argue that this could be accomplished in micro-level negotiations if parties accept FTSCs and reach agreements based on EMD, both of which can be encouraged by representative participation and impartial mediation.

A *Criticisms of Referenda*

Scholars have identified a number of problems with constitutional referenda. They fall generally under three categories: elite control, a deliberation deficit and majoritarianism.

The first criticism suggests referenda are undermined by elite control. Their organisation is generally the responsibility of elites, who deploy them as a convenient solution to constitutional or political problems, or to legitimise a change of regime.¹⁵ Elite groups' power to influence whether referenda are held, and determine the wording of the question and rules governing the referendum process makes most referenda 'controlled and pro-hegemonic'.¹⁶ When key powers over referenda are controlled by a small elite, referenda can be criticised for reinforcing the status quo rather than reflecting the popular will or public interest.¹⁷ Qvortup recently disputed this elite control criticism on the basis that elite groups often have no discretion

¹⁵ Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) 122.

¹⁶ Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984) 203.

¹⁷ Tierney, *Constitutional Referendums*, above n 10, 24.

regarding whether referenda are held.¹⁸ However important decisions, such as the referendum question, media and campaign regulations and eligibility requirements for participation, among others, are still made by elite groups.

An associated problem ensues: elite control of constitutional referenda contributes to a deliberation deficit, with the public failing to fully engage with the issues.¹⁹ For instance, they are generally held quickly; the question presented to voters can be confusing; and voters rarely have the time or interest in the relevant issues to properly understand and engage with referenda.²⁰ If there is little possibility that voters will formulate opinions based on a careful consideration of the issues at stake, a referendum's result might not reflect the public interest. For instance, the 1906 Australian referendum on changing the beginning of Senators' terms from 1 January to 1 July was easily carried since 'the average voter ... does not care how frequently a senator rotates'.²¹ Because there was limited debate leading up to the referendum, some of its consequences – such as forcing incoming senators to wait long periods of time before taking up their seats – were unintended.²²

Finally, as a majoritarian mode of decision-making, constitutional referenda have the potential to marginalise minorities and dissenting individuals. Majorities participating in referenda tend to disregard the interests of minority groups,²³ if only in referenda that concern minority rights where minority and majority interests directly conflict.²⁴

Additionally, unlike general elections, where parties will consider minority perspectives on issues that are particularly significant to them, referenda place no weight on the intensity of participants' beliefs.²⁵ The majority will always decide matters raised in referenda – even those they are largely ambivalent about, but which minorities consider extremely important.²⁶ As a result, referenda have the potential to discriminate against minority interests. For instance, Gamble examined 74 civil rights initiatives voted on in state or local ballots in the United States between 1959 and 1993, and found that those aiming to protect minority interests were defeated 78% of the time.²⁷

Addressing these issues is particularly important in secession referenda. Compared to ordinary constitutional referenda, secession referenda are particularly

¹⁸ Mads Qvortrup, 'Research Note: Are Referendums Controlled and Pro-Hegemonic?' 48 *Political Studies* 821, 823.

¹⁹ Stephen Tierney, *The Referendum in Multi-Level States: Fracturing or Fostering Federal Models of Government?* (March 2014) The Federal Idea, 9 <http://ideefederale.ca/documents/Tierney_ang.pdf>.

²⁰ Tina Nabatchi, 'Addressing the Citizenship and Democratic Deficits: The Potential of Deliberative Democracy for Public Administration' 40(4) *American Review of Public Administration* 376, 379.

²¹ Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Casswell, 1967) 14.

²² Scott Bennett, 'The Politics of Constitutional Amendment' (Research Paper no 11, Politics and Public Administration Group, 23 June 2003) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11>.

²³ Priscilla F Gunn, 'Initiatives and Referendums: Direct Democracy and Minority Interests' (1981) 22 *Urban Law Annual* 135, 137.

²⁴ Zoltan L Hajnal, Elizabeth R Gerber and Hugh Lough 'Minorities and Direct Legislation: Evidence From California Ballot Proposition Elections' (2002) 64(1) *The Journal of Politics* 154, 1.

²⁵ Gunn, above n 23, 141.

²⁶ *Ibid.*

²⁷ Barbara S Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41(1) *American Journal of Political Science* 245, 254.

divisive and likely to inflame differences. Furthermore, secession is a difficult process to undo. The finality of the referendum results amplifies the majoritarian danger – if a referendum is irreversible, special care should be taken to ensure it does not adversely impact minority rights.²⁸

As Tierney suggests, there is a pressing need to respond to these issues. The next section will describe the principle of reciprocity, which has the potential to address many of these shortcomings.

B *What is Reciprocity?*

Broadly speaking, ‘reciprocity holds that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact’.²⁹ It aims to facilitate political agreement on the basis of principles that are mutually justifiable to all parties concerned.³⁰ Principles are mutually justifiable if they appeal to reasons that all similarly-motivated parties can accept.³¹ Parties will not be similarly motivated if they reject FTSCs by refusing to press their claims in terms that are accessible to their fellow citizens.³² For example, asserting that a law should be passed because God commands it is not an accessible reason to citizens who do not share the same connection with that particular deity.³³ So reciprocity is based on the substance of the reasons given in support of a position.³⁴ It requires that these reasons are both mutually acceptable and widely-distributed.³⁵

An example from US politics illustrates reciprocity: during the 2010 Republican primaries, conservative politician Ken Buck suggested Coloradoan Republicans should vote for him because ‘I do not wear high heels. She [an opposing candidate] has questioned my manhood and I think it’s fair to respond. I have cowboy boots’.³⁶ If his statement is seen as compelling people to vote for him because of his cowboy boots, this justification lacks reciprocity. It relies on assumptions that could not be reasonably accepted by people who attach less importance to footwear. Conversely his arguments in favour of raising the retirement age do not violate the principle of reciprocity: ‘as

²⁸ Ibid 265.

²⁹ Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 98.

³⁰ William Galston, ‘Democracy and Disagreement: A Review’ (1998) 108(3) *Ethics* 607, 608.

³¹ Iris Marion Young, ‘Justice, Inclusion and Deliberative Democracy’ in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press 1999) 151, 152.

³² Robert P George, ‘Democracy and Moral Disagreement: Reciprocity, Slavery, and Abortion’ in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press 1999) 184, 188.

³³ Dennis F Thompson, ‘Public Reason and Precluded Reasons’ (2004) 72(5) *Fordham Law Review* 2073, 2084.

³⁴ Alan Wertheimer, ‘Internal Disagreements: Deliberation and Abortion’ in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 170, 181.

³⁵ Gutmann and Thompson, above n 29, 98.

³⁶ Janie Lorber, ‘In Colorado Race, a Focus on Footwear’, *The New York Times* (online), 22 July 2010 <http://thecaucus.blogs.nytimes.com/2010/07/22/in-colorado-race-a-focus-on-footwear/?_php=true&_type=blogs&_r=0>.

life expectancy increases, the retirement date for benefits increases also'.³⁷ This justification appeals to practical concerns about funding retirement benefits that a reasonable person could accept, even if they do not agree with the result.

Rawls' idea of public reason is similar to Gutmann and Thompson's principle of reciprocity. Like Gutmann and Thompson, Rawls considered the sorts of justifications that citizens should provide for the policies they support. He concluded that citizens should rely on public reason, 'appealing only to a public conception of justice'.³⁸ This is similar to Gutmann and Thompson's description of reciprocity as the principle that citizens should provide one another with mutually acceptable justifications for the binding laws and policies they enact.³⁹ Yet the two concepts remain distinct. Gutmann and Thompson are more flexible, allowing some appeals to moral values that would be rejected by Rawls.⁴⁰ They emphasise accessibility, suggesting that citizens should be able to appeal to the truth as they see it, 'as long as it is a truth that others can appreciate (but not necessarily accept)'.⁴¹ Conversely, Rawls' strictest approach states that citizens should appeal 'only to a public conception of justice, and not the whole truth as they see it'.⁴²

As a consequence, Rawls does not address what Gutmann and Thompson call 'deliberative disagreements'.⁴³ Deliberative disagreements are conflicts based on moral reasons that are so deeply divisive that agreements cannot be reached despite both parties accepting FTSCs.⁴⁴ For instance, both sides in the abortion debate can provide mutually accessible justifications for their positions – either that fetuses are human beings with rights that should be protected, or that women should be free to live their own lives and control their own bodies.⁴⁵ Faced with this disagreement, Rawls insists persevering with public reason will eventually yield an overlapping consensus based on a 'morally significant core of commitments common to the reasonable fragment of each of the comprehensive doctrines in society'.⁴⁶ On the other hand, Gutmann and Thompson permit moral justifications so long as their proponents accept FTSCs, phrasing them in terms that are accessible to fellow citizens.⁴⁷ To resolve deliberative disagreements, Gutmann and Thompson devised a series of 'principles of accommodation' based on mutual respect.⁴⁸ Accommodation aims to achieve solutions that are mutually agreeable to conflicting parties despite their ostensibly contradictory positions.⁴⁹

In seeking a negotiation, these principles of accommodation require listening to other parties, open-mindedness, trying to acknowledge and understand their position, and seeking solutions based on EMD.⁵⁰ EMD means that justifications for policies

³⁷ John King, *Interview with Colorado Senate Candidate Ken Buck* (August 11 2010) <http://www.realclearpolitics.com/articles/2010/08/11/interview_with_colorado_senate_candidate_ken_buck_106728.html>.

³⁸ John Rawls, *Political Liberalism* (Columbia University Press, 1996) 217.

³⁹ Gutmann and Thompson, above n 9, 52-3.

⁴⁰ Thompson, above n 33, 2083.

⁴¹ *Ibid* 2084.

⁴² Rawls, above n 38, 217.

⁴³ Thompson, above n 33, 2084.

⁴⁴ Christopher Wolfe, *Natural Law Liberalism* (Cambridge University Press, 2006) 45.

⁴⁵ Wertheimer, above n 34, 172.

⁴⁶ Fred D'Agostino, 'Original Position' (2003) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/sum2003/entries/original-position/>>.

⁴⁷ Thompson, above n 33, 2084.

⁴⁸ Gutmann and Thompson, above n 9, 79.

⁴⁹ Ron Levy, 'The Law of Deliberative Democracy: Seeding the Field' (2013) 19(4) *Election Law Journal* 355, 366.

⁵⁰ Gutmann and Thompson, above n 9, 82-4.

should minimise their rejection of the opposing position.⁵¹ Returning to the abortion debate, an example would be restricting abortion to a certain period after conception. This allows women to terminate unwanted pregnancies, but also considers the pro-lifers' stance, preventing more developed foetuses from being aborted. Larmore's universal norm of rational dialogue covers similar ground to EMD, proposing that two parties in disagreement should seek solutions that the other does not reject.⁵² However unlike Larmore, who seeks a neutral solution that parties do not disagree with, Gutmann and Thompson's EMD aims to find common ground between the parties.⁵³ Imagine two people sharing a dinner – one enjoys shellfish and dislikes carrots, while the other loves retro food but dislikes basil. Applying Larmore, the diners could decide on any meal that does not contain carrots or basil, while applying Gutmann and Thompson's EMD might lead them to settle on common ground: oysters kilpatrick.

C *Benefits of Reciprocity*

An important quality of successful negotiations is provisionality, meaning parties should be open to considering others' suggestions and modifying their own positions. Reciprocity can help achieve this. Endeavouring to give reasons that could be reasonably accepted by others implies also considering reasonable suggestions offered by others.⁵⁴ As a result, participants in negotiations should be more willing to change their views. Encouraging the provisionality of beliefs by promoting reflection and the consideration of alternative arguments is one of reciprocity's main benefits.

Reciprocity can also improve policy-making. Augmenting decision-making with an ongoing process of mutual reason-giving has instrumental benefits: reciprocity tends to deliver successful policies because they must be justified in terms that are mutually acceptable.⁵⁵ Reciprocity can encourage citizens and government officials to use substantive principles to understand, rethink and resolve moral disagreement in politics.⁵⁶ By doing so, it can help prevent unrealistic or contradictory preferences.⁵⁷ The result is more effective, inclusive policies. This will be seen later in relation to East Timor and Montenegro's referendum laws.

Another of reciprocity's primary strengths is its expressive value.⁵⁸ This means that it encourages citizens to treat one another with mutual respect despite inevitable political disagreements.⁵⁹ Justifying outcomes in mutually acceptable terms encourages a constructive approach to interaction with, and a favourable attitude towards, people with whom you disagree.⁶⁰ Furthermore, because it ensures policies are debated and implemented with respect for differing perspectives, reciprocity fosters democratically

⁵¹ Ibid 83-4.

⁵² Charles Larmore, *Patterns of Moral Complexity* (Cambridge University Press, 1987) 53.

⁵³ Gutmann and Thompson, above n 9, 377.

⁵⁴ Gutmann and Thompson, above n 29, 110.

⁵⁵ Jane Mansbridge, 'Everyday talk in the deliberative system' in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 211, 211.

⁵⁶ Nabatchi, above n 20, 377.

⁵⁷ Ron Levy 'Breaking the Constitutional Deadlock: Lessons From Deliberative Experiments in Constitutional Change' (2010) 34 *Melbourne University Law Review* 805, 823.

⁵⁸ Mansbridge, above n 55, 222.

⁵⁹ Ibid.

⁶⁰ Gutmann and Thompson, above n 9, 79.

permissible coercion.⁶¹ In other words, basing policies on reciprocity can help legitimise decisions that were not made unanimously.

D *Micro-Participation in Referenda*

Departing briefly from reciprocity, this paper will now outline Tierney's suggestions for facilitating popular participation in constitutional referenda. Tierney notes that voting alone does not necessarily encourage active and meaningful citizen engagement with referenda.⁶² As a result, he investigates other forms of popular participation that could easily be incorporated into the referendum process. There are two key stages: micro-level participation at the issue-framing and question-setting stage; and macro-level participation during the referendum campaign.⁶³ This section will focus on micro-level deliberation.

In micro-level citizen participation, small groups of citizens with some claim to being representative of the wider public are convened to discuss significant issues surrounding a referendum.⁶⁴ This form of participation is best suited to the issue-framing and question-setting stage of the referendum.⁶⁵ For instance, Canada's 'Citizens' Assemblies' gathered over 100 randomly-selected voters to participate in several months of learning, public consultation and debate before issuing a recommendation for new provincial electoral systems.⁶⁶ Representative small-group deliberation encourages public reasoning and debate, promoting the consideration of and acceptance or rejection of ideas.⁶⁷ It also enables minority perspectives to be voiced.⁶⁸ Tierney suggests micro-level participation is well-suited to deciding how the referendum issue to be put to the people should be framed as well as to formulating fair guidelines for the referendum process.⁶⁹ This precludes the usual elite dominance of referendum organisation.

There are practical difficulties inherent in micro-level deliberation. The legitimacy of the process depends on some form of large-scale participation.⁷⁰ As Benhabib writes, 'legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about all matters of common concern'.⁷¹ One method of dealing with this problem is by choosing representative participants for small-scale deliberation through popular elections.⁷² This approach was taken in Montenegro, where the referendum law was devised by a representative panel

⁶¹ Emily Hauptmann 'Deliberation = Legitimacy = Democracy' (1999) 27 *Political Theory* 857, 863.

⁶² Tierney, above n 10, 24.

⁶³ Ron Levy, "'Deliberative Voting': Realising Constitutional Referendum Democracy' (2013) *Public Law* 555, 558.

⁶⁴ Tierney, above n 10, 188.

⁶⁵ Paul Kildea, 'Worth Talking About? Modest Constitutional Amendment and Citizen Deliberation in Australia' (2013) 12(4) *Election Law Journal* 524, 537.

⁶⁶ Levy, above n 63, 558.

⁶⁷ Ibid.

⁶⁸ Tierney, above n 10, 204.

⁶⁹ Ibid 205-11.

⁷⁰ John Dryzek, 'Legitimacy and Economy in Deliberative Democracy' (2001) 29(5) *Political Theory* 651, 651.

⁷¹ Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 67, 68.

⁷² Cass Sunstein, 'Deliberation, Democracy, Disagreement' in Ron Bontekoe and Marieta Stepaniants (eds) *Justice and Democracy: Cross-Cultural Perspectives* (University of Hawaii Press, 1997) 93, 94.

of democratically-elected politicians.⁷³ Alternatively, random sampling could be used to create representative groups for small-scale deliberation.⁷⁴

E *Reciprocity in Micro-Level Participation*

1 *Reciprocity and the Weaknesses of Referenda*

A stronger emphasis on reciprocity in the referendum process could address many of the drawbacks of constitutional referenda. One example would be the majoritarian problem described earlier. Tierney suggests that for a referendum to be genuinely inclusive of minority groups, deliberation must be non-coercive and non-domineering, meaning genuine attempts are made to reach agreements that are acceptable to all parties.⁷⁵ However he does not specify how this ideal should be implemented. Gutmann and Thompson fill this void. As will be demonstrated in the third section, their principle of reciprocity forms the basis for a practical framework that minimises coercion in micro-level negotiations. Depending on how participants are selected, reciprocity at the micro level could also mitigate the majoritarian problem by giving minorities a chance to express their views without being drowned out by the majority in aggregative voting.

The problem of elite control over referenda can also be addressed by reciprocity. For decisions in small-group deliberation at the issue-framing or question-setting stage to be based on reciprocity, they must provide sufficient opportunities for parties affected to provide and discuss justifications for their views, and these contributions should be taken into account when the final decision is made.⁷⁶ This requirement would weaken elite groups' otherwise wide discretion to decide whether or when referenda are held, the wording of the question and the rules governing the procedure.⁷⁷ Furthermore, reaching decisions based on EMD ensures all positions – including those of minorities – are considered.

2 *Reciprocity Within Tierney's Framework*

More specifically for this paper, reciprocity can flesh out Tierney's ideas on micro-level deliberation. Tierney does briefly raise the issue of reciprocity, but in relation to decision-making through voting rather than negotiations early in the referendum process.⁷⁸ This overlooks its potential to guide micro-level participation. Although Tierney establishes a framework for incorporating participation into the referendum process, he offers few guidelines for effectively conducting this participation. In particular, he laments that micro-level deliberation must end in

⁷³ 'Republic of Montenegro, Serbia and Montenegro: Referendum 21 May 2006' (Needs Assessment Mission Report, OSCE Office for Democratic Institutions and Human Rights, 9 March 2006) 1 <<http://www.osce.org/odihr/elections/montenegro/18431?download=true>>.

⁷⁴ See, eg, James Fishkin and Robert Luskin, 'Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion' (2005) 40 *Acta Politica* 284, 287.

⁷⁵ *Ibid* 53.

⁷⁶ Gutmann and Thompson, above n 29, 168.

⁷⁷ Frederick Schauer, 'Talking as a Decision Procedure' in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 17, 23.

⁷⁸ Tierney, above n 10, 263.

decisions that are unlikely to be unanimous,⁷⁹ but does not explain how disagreements between parties in micro-level discussions should be overcome to reach more consensual decisions. Similarly, he describes various goals for micro participation, like formulating agreement through discussion and promoting openness and goodwill between participants,⁸⁰ but does not articulate a detailed vision for how these should be achieved. Reciprocity can fill this gap. Unlike the majority of the relevant literature, Gutmann and Thompson focus on procedural constraints on deliberation.⁸¹ They stress that participants in discussions must actually give reasons that can be accepted by other participants.⁸² From this assertion they extrapolate two procedural ideals: parties to negotiations should accept FTSCs, and should resolve deliberative disagreements through EMD. This adds detail to Tierney's framework, explaining how disagreements in micro-level participation can be overcome to achieve the consensus-based decisions he favours.

Endeavouring to promote reciprocity in micro-level negotiations should facilitate the openness, goodwill and consensus-building Tierney seeks. As discussed earlier, reciprocity's expressive value means that it promotes mutual respect between citizens and helps them to understand each other's positions.⁸³ Micro-level negotiations can be consciously structured to encourage reciprocal outcomes. Participants' roles and interactions in a decision-making process can be set up to promote characteristics of effective deliberation, such as reciprocity.⁸⁴ The third section will argue that representative participation and firm but impartial mediation can help ensure micro-level negotiations reach solutions that are based on reciprocity. Representative participation implies that two conditions are met: a wide spectrum of affected interests should be represented,⁸⁵ and participants should be able to present their views and contribute to solutions on approximately equal footings. As will be seen later, the negotiations that created Montenegro's referendum law were characterised by the exchange of justifications on FTSCs, with deliberative disagreements resolved through compromises based on EMD. By contrast, negotiations on the East Timorese referendum law lacked reciprocity. Indonesia's overbearing approach rejected FTSCs, and the absence of East Timorese representatives meant that no attempts were made to justify policies from a Timorese perspective.⁸⁶ The third section will explore these examples in more detail.

III REFERENDUM LAWS IN EAST TIMOR AND MONTENEGRO

This section will summarise the laws that applied to East Timor and Montenegro's referenda, and will briefly outline how they will be discussed in the application section.

⁷⁹ Ibid 205.

⁸⁰ Ibid.

⁸¹ Schauer, above n 77, 21.

⁸² Ibid.

⁸³ Mansbridge, above n 55, 222.

⁸⁴ Levy, above n 49, 368.

⁸⁵ Hauptmann, above n 61, 869.

⁸⁶ Kumiko Mizuno, *Indonesia's East Timor Policy: 1998-2002* (PhD Thesis, Australian National University, 2003) 108
<<https://digitalcollections.anu.edu.au/bitstream/1885/49412/4/01front.pdf>>.

A *East Timor*

Before East Timor's Fretilin party unilaterally declared independence in 1975, Timor had formed part of the Portuguese empire for over 400 years.⁸⁷ Citing concern at the prospect of having a potentially unstable neighbour, Indonesia invaded Timor 9 days after the declaration of independence.⁸⁸ When he replaced Suharto as Indonesia's President in 1998, Habibie agreed to hold a referendum to settle Timor's status.⁸⁹ During the referendum almost 80% of East Timorese voted in favour of independence.⁹⁰

There were three primary legal documents that established guidelines for the 1999 referendum in East Timor. They were each formed by negotiation between the UN, and the Portuguese and Indonesian governments. It will later be argued that the outcome of these negotiations suffered from a lack of reciprocity. The first legal document was a basic agreement that covered the broad political issues. It was supplemented by two more specific agreements: one established more detailed requirements for the referendum process, including the campaign period; and the other concerned security arrangements during the referendum.⁹¹ They are known collectively as the 5 May Agreement.

The *Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor (East Timor Agreement)* established the basic framework for East Timor's constitutional referendum.⁹² It requested that special autonomy for East Timor be determined through 'popular consultation on the basis of a direct, secret and universal ballot',⁹³ organised by 'an appropriate United Nations mission in East Timor ... [established] to effectively carry out the consultation'.⁹⁴ If the East Timorese people rejected its proposal for special autonomy within Indonesia, the *East Timor Agreement* proposed a 'peaceful and orderly transfer of authority in East Timor' from the Indonesian government 'to the United Nations ... enabling East Timor to begin a process of transition to independence'.⁹⁵

The details were laid out more specifically in the *Agreement regarding the modalities for the popular consultation of the East Timorese through a direct ballot (Modalities Agreement)*.⁹⁶ It deals with two primary areas: the campaign period and referendum procedure.

⁸⁷ Raviprasad Narayan, 'The East Timor Crisis' (2000) 36(1) *China Report* 93, 93.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Geoffrey Robinson, 'East Timor Ten Years On: Legacies of Violence' (2011) 70(4) *Journal of Asian Studies* 1007, 1008.

⁹¹ Jamsheed Marker, *East Timor: A Memoir of the Negotiations for Independence* (McFarland, 2003) 144.

⁹² *Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor*, Indonesia-Portugal, 2062 UNTS 8 (signed and entered into force 5 May 1999) ('*East Timor Agreement*').

⁹³ *Ibid* art 1.

⁹⁴ *Ibid* art 2.

⁹⁵ *Ibid* art 6.

⁹⁶ *Agreement regarding the modalities for the popular consultation of the East Timorese through a direct ballot*, Indonesia-Portugal, 2062 UNTS 39 (signed and entered into force 5 May 1999) ('*Modalities Agreement*').

1 Campaign Stage

The *Modalities Agreement* established rules controlling the distribution of information during the campaign, both by the United Nations and by parties for or against the proposal for special autonomy. It stated that the United Nations should make the text of the main agreement and autonomy document available in Tetum, Bahasa Indonesia, Portuguese and English, and ‘disseminate and explain ... [them] in an impartial and factual manner’.⁹⁷ Additionally, it should ‘explain to voters the process and procedure of the vote’.⁹⁸ Under the agreement, this information would be distributed through ‘the radio stations and newspapers in East Timor as well as other Indonesian and Portuguese media outlets ... [or] other appropriate means of dissemination ... as required’.⁹⁹ Finally, the *Modalities Agreement* obliged the United Nations to ‘provide equal opportunity for both sides to disseminate their views to the public’.¹⁰⁰

As well as information distribution by the United Nations, the *Modalities Agreement* regulated campaigning by supporters or opponents of the autonomy proposal. It compelled them to ‘campaign ahead of the vote in a peaceful and orderly manner’¹⁰¹ in accordance with a code of conduct ‘proposed by the United Nations and discussed with the supporters and opponents of the autonomy proposal’.¹⁰² The code of conduct called for both sides to allow the other to campaign free from disruption or obstruction, and to avoid inflammatory language and defamation.¹⁰³

Because there were no East Timorese representatives in the negotiations, parties were not required to accept FTSCs by attempting to justify their position from a Timorese perspective. The third section will argue that this meant the campaign laws were not based on reciprocity, and hence damaged their effectiveness by limiting voter education to largely procedural content and by weakening the laws’ suitability for local conditions.

2 Referendum Procedure

Regarding the referendum procedure, the 5 May Agreement’s most significant provisions prescribed a referendum question, the prerequisites for voting eligibility, and security arrangements during the referendum. The application section will only discuss security arrangements, but all three areas will be briefly summarised. The question to be put to voters was:

Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia? OR do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?¹⁰⁴

Adults over 17 were eligible to vote if they were born in East Timor, had at least one parent born in East Timor, or were married to someone from either category.¹⁰⁵

⁹⁷ Ibid art E(a).

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid art E(c).

¹⁰² Ibid.

¹⁰³ ‘JSCFADT – Visit to East Timor’ (Report, Joint Standing Commission on Foreign Affairs, Defence and Trade, December 2009) 43 <http://www.aphref.aph.gov.au-house-committee-jfadt-army-et_appc.pdf>.

¹⁰⁴ *Modalities Agreement* art B.

The final major agreement concerned security. Under its terms, Indonesia, Portugal and the United Nations agreed that responsibility for ensuring a free and fair referendum in East Timor ‘rests with the appropriate Indonesian security authorities’.¹⁰⁶ It made the Indonesian police ‘solely responsible for the maintenance of law and order’ during the referendum, as well as for supervising the transport of ballot papers to and from polling sites.¹⁰⁷ The application section will suggest these security arrangements were ineffective, and would have been improved by a stronger emphasis on reciprocity in the negotiations, achieved through Timorese representation in the discussion, along with impartial mediation to offset Indonesia’s strong bargaining position.

B Montenegro

Montenegro was recognised as an independent state in 1878, but was incorporated into Yugoslavia following the First World War.¹⁰⁸ As rising nationalism and a series of political and economic crises triggered Yugoslavia’s breakup, Montenegro voted in a 1992 referendum to remain part of Yugoslavia, which created the less centralised union of Serbia and Montenegro in 2002.¹⁰⁹ Nevertheless there were tensions within the federation,¹¹⁰ and a 2006 referendum eventually affirmed Montenegro’s independence with 55.5% support.¹¹¹

Unlike the case of Timor, Montenegro’s referendum laws were generally based on reciprocity, having used defensible justifications that could be accepted by all reasonable citizens. This reciprocity can be attributed to the parties’ willingness to accept FTSCs and to accommodate their opponents’ views using EMD, encouraged by representative participation and the EU’s impartial moderation of the negotiations. This section will broadly summarise the laws’ content, as well as identifying more specific provisions that will be discussed in the application section.

The laws that apply to Montenegro’s referendum came from negotiations between pro-union and pro-independence groups, with the European Union as an interlocutor.¹¹² These negotiations produced the *Law on the Referendum on State Legal Status (LRSLs)*, which the Montenegrin Parliament adopted on 1 March 2006.¹¹³ This superseded the older *Law on Referendum of the Republic of Montenegro (Law on Referendum)*.¹¹⁴ The new legislation was strongly influenced by an opinion on the old

¹⁰⁵ Ibid art C.

¹⁰⁶ *East Timor Popular Consultation Agreement regarding security*, Indonesia-Portugal, 2062 UNTS 49 (signed and entered into force 5 May 1999) art 1 (*Agreement Regarding Security*).

¹⁰⁷ Ibid art 4.

¹⁰⁸ US Department of State, *Montenegro* (April 18 2012) Proquest <<http://search.proquest.com.virtual.anu.edu.au/docview/1545340827?pq-origsite=summon>>.

¹⁰⁹ Ibid.

¹¹⁰ ‘Montenegro: Resolving the Independence Deadlock’ (Report No 114, International Crisis Group Balkans, 1 August 2001) 8 <<http://www.crisisgroup.org/~media/files/europe/montenegro%208.pdf>>.

¹¹¹ ‘Serbia Accepts Montenegro Result’, *BBC News* (online), 23 May 2006 <<http://www.news.bbc.co.uk/2/hi/europe/5009242.stm>>.

¹¹² Tim Judah, ‘Divorcing Serbia: The Western Balkans in 2006’ 30(2) *Fletcher Forum of World Affairs* 213, 218.

¹¹³ Di Nino, above n 14, 3.

¹¹⁴ *Law on Referendum of the Republic of Montenegro 2001* (Serbia and Montenegro) [European Commission for Democracy through Law trans, *English Translation of Law on*

legislation's compatibility with international standards for referendum organisation issued by the Venice Commission, an EU advisory body on constitutional matters.¹¹⁵ As in East Timor, the relevant legal provisions can be broadly separated into those covering the campaign period, and those concerning the referendum procedure.

1 Campaign Stage

At the campaign stage, the *LRSLs* primarily addressed campaign financing, both sides' conduct during the campaign, and media coverage. The Montenegrin government gave parties in favour of each referendum option €1 million to finance their campaign. Private donations were capped and their disclosure made mandatory.¹¹⁶ Campaign conduct was regulated by the requirement that they refrain from 'defamation and libel, infringement of the rules of decency, and insults to the public feeling'.¹¹⁷ Media coverage was compelled to 'assist voters during the referendum process in making an informed choice... in particular by means of specific information programs and public debates involving both referendum options'.¹¹⁸ The aim was to uphold the citizens' right to be informed about both referendum options in 'a truthful, timely and unbiased manner'.¹¹⁹ Public television and radio were required to report major developments for both referendum options, including press releases, major speeches and debates.¹²⁰

The *LRSLs*'s broad contents have been described for context. In the application section, the process leading up to two specific provisions will be analysed more closely. Firstly, the *LRSLs* established a public media monitoring body to report on media independence. The body was evenly composed of both referendum options' supporters,¹²¹ and was not granted coercive powers.¹²² Secondly, the *LRSLs* specified that the chairperson of the referendum's final appeal board would come from overseas, 'appointed by the Assembly from amongst the relevant European organisations'.¹²³ As the third section will demonstrate, both of these provisions resulted from a mutual exchange of reasons and agreement based on EMD, facilitated by EU mediation.

3 Referendum Procedure

The *LRSLs* provisions on the referendum procedure emphasised having a clear question, and requiring a clear majority.¹²⁴ It said the question would be 'do you want the Republic of Montenegro to be an independent state with full international and legal personality?'.¹²⁵ Other provisions defined the requirements for voting. Article 3 limited

Referendum of the of the Republic of Montenegro (18 October 2005) Venice Commission <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2005\)076-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2005)076-e)>].

¹¹⁵ Zoran Oklopcic 'Constitutional Politics of Secession: Travelling from Quebec to Montenegro (and back?)' in Aleksander Pavkovic and Peter Radan (eds) *The Ashgate Research Companion to Secession* (Ashgate Publishing, 2011) 131, 140.

¹¹⁶ *Law on the Referendum on State-Legal Status 2005* (Serbia and Montenegro) [OSCE/ODIHR trans, *English Translation of Law of on the Referendum on State-Legal Status* <www.legislationonline.org/documents/id/3935>] art 34.

¹¹⁷ *Ibid* art 44.

¹¹⁸ *Ibid* art 43.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* art 46.

¹²¹ *Ibid*.

¹²² *Ibid* art 53.

¹²³ *Ibid* art 11.

¹²⁴ *Ibid*.

¹²⁵ *Ibid* art 5.

referendum participation to citizens who had voting rights under the pre-existing referendum law.¹²⁶ This included Montenegrin citizens over 18 who had lived in Montenegro for at least two years leading up to the polling date, but not non-residents.¹²⁷

Finally, as will be discussed in the next section, it also entrenched a 55% vote as the necessary majority for independence.¹²⁸ The application section will suggest this was an effective outcome, and was based on reciprocity as a result of both sides' willingness to accept FTSCs and employ EMD. To a large extent this was due to the EU's role as facilitator.

IV APPLICATION – DRAFTING REFERENDUM LAWS BASED ON RECIPROCITY IN EAST TIMOR AND MONTENEGRO

This section's objectives are twofold. Its primary aim is to demonstrate that representative participation and impartial mediation in micro-level deliberation can facilitate the FTSCs and EMD that help to achieve resolutions that are based on reciprocity. In doing so, the discussion will also fulfil a secondary purpose: cautiously to affirm reciprocity's instrumental benefits; in other words, that reciprocity can help improve policy-making. These arguments are made using two case studies: East Timor's referendum, where an absence of reciprocity in negotiations, caused by Indonesia's strong bargaining position and the lack of East Timorese representation, thwarted the effectiveness of the agreement's terms; and Montenegro, where negotiations resolved disagreements in accordance with the principle of reciprocity. This will be illustrated with reference to the campaign regulations during each referendum, and the negotiations on security arrangements in East Timor and the supermajority requirement in Montenegro. The scarcity of material concerning the negotiation processes that created each case's referendum law means that these conclusions can only be tentative, establishing correlation rather than clear causation. However various measures have been adopted to maximise the accuracy of any conclusions. These include discussing two case studies, and using multiple examples from each. Nevertheless, further empirical work – potentially including additional case studies – should be conducted to follow up on the theoretical framework developed here.

Obviously circumstances in Montenegro and East Timor were quite different, complicating the comparisons between the two. The intention is not to compare them directly. Rather, this section will discuss factors contributing to reciprocity's presence or absence in each case's referendum law individually.

However there are a number of similarities between the two cases that make it reasonable to discuss them together. Both were small, historically-independent states, seceding from linguistically and ethnically-distinct, newly-democratic regimes.¹²⁹

¹²⁶ Ibid art 3.

¹²⁷ *Law on the Election of Councillors and Representatives 2002* (Serbia and Montenegro) art 11 [Organisation for Security and Cooperation in Europe trans, *English Translation of Law on the Election of Councillors and Representatives* (12 September 2002) <<http://legislationonline.org/documents/id/4165>>].

¹²⁸ Ibid art 6.

¹²⁹ Zoran Oklopcic, 'Independence Referendums and Democratic Theory in Quebec and Montenegro' (2012) 18(1) *Nationalism and Ethnic Politics* 22, 24; *The United Nations and East Timor: Self-determination Through Popular Consultation* (United Nations Department of Public Information 2000) 3-8.

Additionally both were facilitated largely by impartial international organisations – the UN in East Timor, and EU in Montenegro.¹³⁰ Finally, although the East Timorese referendum was clearly more volatile with hindsight, this was not always apparent. Fears that Montenegrin political and social divisions could escalate into violent conflict were primarily responsible for the EU's intervention in Montenegro's referendum.¹³¹ In 2002 EU officials warned that a vote for secession would destabilise the region and suggested considering measures to slow progress towards a referendum.¹³² Meanwhile, the UN Mission in East Timor commenced with a sense of optimism. For instance, Portuguese Foreign Minister Jaime Gama called early developments in the negotiation process 'very, very positive'.¹³³

One key difference between the two cases was that East Timor's micro-level participation was not representative, with no Timorese participants and Indonesia wielding disproportionate bargaining power.¹³⁴ Conversely, Montenegro's negotiations included representatives from all major political parties, split evenly between pro and anti-independence parties.¹³⁵ The other key difference was the role of impartial mediation. In the Timorese negotiations, weak mediation allowed Indonesia to dictate terms, whereas the EU's mediation during negotiations on Montenegro's referendum law forced both sides to accept FTSCs and seek solutions based on EMD. These factors meant Montenegro's referendum law was more strongly founded in reciprocity than East Timor's.

A East Timor

The negotiations that generated East Timor's referendum law lacked East Timorese input and were dominated by Indonesian representatives. A UN General Assembly resolution calling for 'the Secretary-General to initiate consultations with *all* [emphasis added] parties directly concerned'¹³⁶ formed the early basis for negotiations on East Timor's future.¹³⁷ The subsequent 5 May Agreement was negotiated between representatives of the UN and the Portuguese and Indonesian governments. There was no East Timorese input – a problem acknowledged by Australian Prime Minister John Howard in his letter to the Indonesian President Habibie: 'negotiations with the Portuguese do not give an adequate role for the East Timorese themselves... the issue can be resolved only through direct negotiations

¹³⁰ Jure Vidmar, 'Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition' (2007) 3(1) *Hanse Law Review* 73, 98; 'Observing the 1999 Public Consultation Process in East Timor' (Report, The Carter Centre, July 2000) 16-17.

¹³¹ Kenneth Morrison, *Montenegro: A Modern History* (I. B. Tauris, 2009) 205.

¹³² Italian Ministry of Foreign Affairs, *GOI Worried About Montenegrin Referendum; Looking Forward to Working With SA Holmes* (6 February 2002) Wikileaks, [3] <http://www.wikileaks.org/plusd/cables/02ROME585_a.html>; Alan Mlatisuma 'Montenegrin officials stick to independence policy despite EU warnings', *Associated Press* (online), 6 February 2002, <<http://www.highbeam.com/doc/1P1-49997592.html>>.

¹³³ Marker, above n 91, 89.

¹³⁴ Mizuno, above n 86, 108.

¹³⁵ Jean-Charles Gardetto, 'Observing the conduct of the referendum on state status of the Republic of Montenegro (Serbia and Montenegro) on 21 May 2006' (Report no 10969, Council of Europe Parliamentary Assembly, 26 June 2006) [10] <<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11276&Language=EN>>.

¹³⁶ *Question of East Timor*, GA Res 37/30, UN GAOR, 37th sess, 77th plen mtg, UN Doc A/37/623 (23 November 1982).

¹³⁷ Astri Suhrke 'Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor' (2007) 8(4) *International Peacekeeping* 1, 3.

between Indonesia and East Timorese leaders.’¹³⁸ Portugal was the closest party to representing East Timor’s interests, repeatedly expressing its position that any settlement should have full respect for the ‘legitimate rights of the [East Timorese] people’ and reach a ‘just, comprehensive and internationally acceptable’ result.¹³⁹ As will be demonstrated below, this was insufficient to make the negotiations’ outcomes reciprocal, or based on mutually acceptable justifications. As well as the lack of East Timorese representation, an additional factor harming reciprocity during the negotiations was Indonesia’s dominant position. Fears that it would withdraw from negotiations gave it a de facto veto power,¹⁴⁰ precluding the effective exchange of mutual justifications and the reaching of solutions based on EMD. This will become particularly clear in the discussion of negotiations on security arrangements during East Timor’s referendum. Although Indonesia seemed unwilling to justify its position or accommodate alternative perspectives, firmer mediation that leveraged Indonesia’s reliance on foreign economic aid could have encouraged it to accept FTSCs and employ EMD, creating more reciprocal outcomes.

1 *Campaign Regulations*

In line with the approach taken by the *Modalities Agreement*, campaigning generally focussed on encouraging and instructing people how to vote, at the expense of substantive debate. Additionally information distribution methods were ill-suited to achieving their purpose. Both of these hindered the campaign period’s potential to promote mutual understanding and respect between opposing sides. Although little material is available on the negotiations about guidelines for the campaign period, it is reasonable to infer that representative participation during negotiations could have boosted reciprocity, averting or softening these deficiencies.

Although the UN acknowledged ‘the pressing need for reconciliation between the various competing factions in East Timor’,¹⁴¹ the *Modalities Agreement* contained no provisions to promote reconciliation through spreading knowledge or promoting debate. As the UN Secretary-General’s special representative in East Timor wrote, the United Nations Mission in East Timor (UNAMET) believed it was ‘evident that the voter population was already highly motivated [regarding their voting preference].’¹⁴² As a result, the information it provided to voters during the referendum focussed mainly on teaching people how to participate, and encouraging them to vote despite security fears. As an example, a UN-commissioned poster told voters their vote was secret, and that there would be one ballot box in each polling station, one counting place in Dili where the votes were tallied, and one final result announced by the UN.¹⁴³ However it entirely avoided substantive debate on the merits of either voting option. Similarly, as evidence of the success of their information campaign, UN officials focus overwhelmingly on quantitative indicators related to information distribution, rather

¹³⁸ Letter from John Howard to B J Habibie, 19 December 1998 <<http://press.anu.edu.au/apps/bookworm/view/Crisis+Policymaking%3A+Australia+and+East+Timor+Crisis+of+1999/7091/appedix.xhtml>>.

¹³⁹ Letter from Joao de Deus Pinheiro to Boutros Boutros-Ghali, 13 January 1992 in Ali Alatas, *The Pebble in the Shoe: The Diplomatic Struggle for East Timor* (Aksara Karunia 2006) 65.

¹⁴⁰ Mizuno, above n 86, 108.

¹⁴¹ SC Res 1246, UN SCOR, 54th sess, 4013th mtg, UN Doc S/Res/1246 (11 June 1999).

¹⁴² Ian Martin, *Self-Determination in East Timor: The United Nations, the Ballot and International Intervention* (Lynne Rienner, 2001) 55.

¹⁴³ Marker, above n 91, 149.

than on voters' internalisation of the substantive content regarding the referendum issues. For instance, the UN Department of Public Information celebrates producing over 750,000 pieces of printed material and more than 300 hours of television and radio programs, but does not discuss their contents or whether the distribution methods were successful.¹⁴⁴ This reflects the low significance the *Modalities Agreement* placed on educating voters about the referendum issues.

The *Modalities Agreement* does include a token acknowledgement of substantive debate, requiring the United Nations to 'provide equal opportunity for both sides to disseminate their views to the public',¹⁴⁵ and asking both sides to avoid defamation or the use of inflammatory language.¹⁴⁶ In practice this had little effect. Pro-independence campaigners were so convinced of majority support for independence that they did not believe campaigning was necessary.¹⁴⁷ The lack of substantive debate was exacerbated by militia attacks on pro-independence advocates – for instance, several newly-opened National Council of Timorese Resistance offices were attacked and subsequently closed.¹⁴⁸ Rather than robust debate on the relevant issues, information provided during the East Timorese referendum's campaign period was overwhelmingly dominated by dry UN materials that emphasised voting procedure.

A stronger focus on reciprocity could have helped. The justification provided for weak campaign laws – that a pro-independence vote was a foregone conclusion – could not be accepted by anyone interested in conducting an informed, fair and legitimate referendum.¹⁴⁹ Thus it was not an argument that accepted FTSCs.¹⁵⁰ Including participants in negotiations who had a clearer interest in the referendum's legitimacy, like the Timorese people who would be bound by it, would probably have yielded more reciprocal campaign laws. If participants in micro-level negotiations accept that the outcome should be justifiable to those who would like to conduct a widely-accepted referendum, campaign laws that promote well-informed, considered voting are the likely result. Montenegro's laws, for example, gave both voting options €1 million to finance their campaign,¹⁵¹ and required that media coverage assist voters to make an informed decision by reporting major developments on both sides truthfully without bias.¹⁵² Applying similar requirements in Timor, tailored to local conditions, could have increased acceptance of the referendum's result by boosting provisionality and mutual respect between the relevant parties.¹⁵³ Indonesian and pro-union East Timorese were heavily influenced by censorship and propaganda under Suharto's authoritarian government.¹⁵⁴ They often had no idea about the real reasons behind East Timor's push for independence.¹⁵⁵ Circulating material on the history of East Timor, including its occupation by Indonesia and the accompanying human rights abuses could have helped the pro-integration faction accept the referendum's outcome by

¹⁴⁴ *The United Nations and East Timor: Self-determination Through Popular Consultation*, above n 129, 23.

¹⁴⁵ *Modalities Agreement* art E(a).

¹⁴⁶ *Ibid* art E(c).

¹⁴⁷ Martin, above n 142, 63.

¹⁴⁸ *The United Nations and East Timor: Self-determination Through Popular Consultation*, above n 129, 37.

¹⁴⁹ Martin, above n 142, 63.

¹⁵⁰ Thompson, above n 33, 2084.

¹⁵¹ *Law on Referendum of the Republic of Montenegro* art 34.

¹⁵² *Ibid* art 43.

¹⁵³ Gutmann and Thompson, above n 9, 79-80.

¹⁵⁴ Hanja Eurich, *Factors of Success in UN Mission Communication Strategies in Post-Conflict Settings: A Critical Assessment of the UN Missions in East Timor and Nepal* (Logos Verlag 2010) 138.

¹⁵⁵ *Ibid* 129.

countering its supporters' misconceptions.¹⁵⁶ It is likely that more reciprocal negotiations, with the parties required to justify their positions in mutually acceptable terms, would have reached this conclusion.

Besides lacking substantive content, campaign materials were also distributed in a manner that was poorly-suited to local conditions. Again, this could have been avoided by representative negotiations, which would have been more likely to deliver reciprocal outcomes that were justifiable from a Timorese perspective. The *Modalities Agreement* decreed that information would be distributed through 'the radio stations and newspapers in East Timor as well as other Indonesian and Portuguese media outlets ... [or] other appropriate means of dissemination ... as required'.¹⁵⁷ This was not effective in practice. As the International Organisation for Migration noted, voter education materials were of reasonable quality but needed to be adapted to local conditions.¹⁵⁸ In 2001 only 2% of the East Timorese population spoke English and only 5% Portuguese,¹⁵⁹ with monolingualism extremely rare.¹⁶⁰ This meant it was probably unnecessary for the law to require that all campaign materials be translated into Indonesian, Tetum, Portuguese and English.¹⁶¹ As specified by the *Modalities Agreement*, distribution took place primarily through newspapers and radio. In a country with a 50% illiteracy rate, distribution through newspapers could not have been very effective, nor could the UN's 700,000 pieces of printed materials.¹⁶² Radio and television materials were also problematic. The Indonesian invasion and subsequent 24 year occupation destroyed the majority of East Timor's already limited infrastructure,¹⁶³ meaning television and radio could only be received in certain parts of the country.¹⁶⁴ Information was also distributed orally in person, but this was outside the scope of the *Modalities Agreement*.¹⁶⁵ The absence of East Timorese representatives during negotiations on the *Modalities Agreement* meant participants were not required – or perhaps even able – to consider whether their approach could be justified under local conditions. Thus the inadequacies of campaign information distribution in Timor stemmed from a lack of reciprocity caused by unrepresentative participation in negotiations.

2 Security Arrangements

Although it seems likely that the East Timor's campaign laws suffered because the negotiations that formulated them did not aim to achieve resolutions based on reciprocity, insufficient evidence remains from the negotiations conclusively to link the two. There are no such problems in establishing that a lack of reciprocity contributed to

¹⁵⁶ Ibid 158.

¹⁵⁷ *Modalities Agreement* art E(a).

¹⁵⁸ 'Final Report: External Voting for East Timor Popular Consultation' (Report, International Organisation for Migration, September 1999) 30 <<http://www.geneseo.edu/~iompress/Archive/External%20Voting%20East%20Timor.pdf>>.

¹⁵⁹ Eurich, above n 154, 106.

¹⁶⁰ J Ramos-Horta 'Timor Leste, Tetum, Portuguese, Bahasa Indonesia or English?' *Jakarta Post* (online) 20 April 2012 <<http://www.thejakartapost.com/news/2012/04/20/timor-leste-tetum-portuguese-bahasa-indonesia-or-english.html>>.

¹⁶¹ *Modalities Agreement* art E(a).

¹⁶² Eurich, above n 154, 142.

¹⁶³ Ibid 130.

¹⁶⁴ Ibid 142.

¹⁶⁵ Martin, above n 142, 55.

the May 5 Agreements' most significant failing:¹⁶⁶ delegating security arrangements to the Indonesian police and army.¹⁶⁷ As with East Timor's campaign guidelines, the absence of reciprocity – here created by Indonesia's strong bargaining position and overbearing approach to negotiations – resulted in outcomes that were unsuccessful in practice. This section will also suggest that outcomes based on reciprocity could have been achieved by firmer mediation that aimed to encourage FTSCs and EMD.

The *Agreement Regarding Security* allocated responsibility for ensuring a free and fair referendum to 'the appropriate Indonesian security authorities'.¹⁶⁸ The Indonesian government did not fulfil its mandate to maintain law and order in East Timor during the referendum. During a visit to Dili in 1999, Irish Foreign Minister David Andrews witnessed 'savage and outrageous brutality against innocent civilians' and noted the Indonesian authorities' failure 'despite repeated representations to them, to fulfil their obligation to provide adequate security'.¹⁶⁹ This prediction was borne out in practice, with security arrangements proving to be inadequate. The Australian volunteer observer group overseeing the referendum noted it was 'conducted in an atmosphere of fear and uncertainty, largely sponsored by militia violence and threats to use force'.¹⁷⁰ Indonesian involvement was not merely passive – the East Timorese Commission for Reception, Truth and Reconciliation identified a number of mass atrocities committed by anti-independence militias with direct support from the Indonesian military.¹⁷¹ This support included arming militia groups, along with providing logistical help in organising them.¹⁷² The Indonesian security authorities failed to discharge their responsibility to maintain law and order during the referendum.

If negotiations on security arrangements were justified using reasons that were acceptable from an East Timorese perspective, the Indonesian authorities would not have been made responsible for security. Jose Ramos-Horta, then a leading spokesperson in favour of East Timorese independence, summarised the prevailing view in a letter of protest to Kofi Annan: 'Our people ... are expected to vote on their future with 'protection' provided by the very same army and gang of criminals that have turned the country into a hell far worse than Kosovo and apartheid's South Africa.'¹⁷³ Instead, he suggested that both the Indonesian military presence and pro-Independence FALINTIL guerrilla forces should be reduced to beneath 1000 troops, with the United Nations made solely responsible for security.¹⁷⁴ According to him, failing to do so would be a 'recipe for disaster'.¹⁷⁵

¹⁶⁶ Eurich, above n 154, 146.

¹⁶⁷ *Agreement Regarding Security* art 1.

¹⁶⁸ *Ibid.*

¹⁶⁹ David Andrews 'Andrews Expresses Concern over Security Situation in East Timor' (Press Release, 3 September 1999) <<http://web.dfa.ie/home/index.aspx?id=26739>>.

¹⁷⁰ Sue Downie and Damien Kingsbury, 'The independence ballot in East Timor: Report of the Australian volunteer observer group' (Working Paper No 113, Monash Asia Institute, 2001) 35.

¹⁷¹ Justice Shane Marshall 'Justice or Appeasement – Human Rights in East Timor' (Speech delivered at Meeting of the United Nations Association of Australia, July 2006) <<http://www.austlii.edu.au/au/journals/FedJSchol/2006/28.html>>.

¹⁷² Commission for Reception, Truth and Reconciliation in Timor-Leste, 'Chega! The Report of the East Timorese Commission for Reception, Truth and Reconciliation in Timor-Leste: Part 3 – The History of the Conflict' (Report, 2005) 128 <<http://www.cavr-timorleste.org/chegaFiles/finalReportEng/03-History-of-the-Conflict.pdf>>.

¹⁷³ Letter from Jose Ramos Horta to Kofi Annan, April 28 1999 in Joseph Nevins, *A Not-so-distant Horror: Mass Violence in East Timor* (Cornell University Press 2005) 117.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

The probable inadequacy of security arrangements was a known issue during negotiations. The UN's original draft of the *Agreement Regarding Security* required the Indonesian government to disband all pro-integration militia groups and withdraw the majority of its troops from East Timor, confining those that remained to barracks from one month before the referendum.¹⁷⁶ The Indonesian government merely deleted these sections, and Indonesian military leaders refused to meet a UN negotiating team sent to Jakarta to discuss the issue.¹⁷⁷ Portugal's later suggestion that negotiations be reopened to add provisions requiring militia disarmament was abandoned for fear that Habibie would withdraw Indonesia from the process.¹⁷⁸ In discussing security arrangements, Indonesia did not meet the most basic requirement for reciprocity: accepting FTSCs.¹⁷⁹ It refused to justify its position in mutually accessible terms. Additionally, attempting to give reasons that others could reasonably accept implies also being open to considering reasonable reasons offered by others.¹⁸⁰ Indonesia was not open to considering alternative suggestions on security arrangements. This reluctance to accept fair terms of social cooperation meant negotiations on security arrangements were unlikely to achieve mutually-justifiable solutions.

In fact, there were mutually accessible reasons the Indonesian government could have used to support its stance: relinquishing responsibility over security in East Timor would have been extremely unpopular domestically. Having an international security force on Indonesian soil was seen to encroach on Indonesia's sovereignty.¹⁸¹ However, Indonesia did not appear to have accepted FTSCs, merely threatening to withdraw from negotiations if it did not get its way.¹⁸² As described in the theory section, if it did attempt to give mutually accessible reasons, that would have made negotiations a deliberative disagreement, meaning a resolution based on moral accommodation and EMD might have been sought.¹⁸³ Finding common ground between the Indonesian government's desire to save face and the importance of effective, non-partisan security arrangements could probably have achieved an effective compromise. For instance, one possibility that could have provided effective security without embarrassing Indonesia or intruding on its sovereignty was building East Timor's capacity to deliver its own security by offering it military training and supplies.¹⁸⁴ Mutually-justifiable solutions to Timor's security dilemma based on accommodation were achievable, but Indonesia's high-handed approach to negotiations precluded this possibility.

Although the Indonesian government did not seem willing to consider alternative perspectives, there were no significant attempts to encourage it to find more reciprocal solutions. A variety of levers were available to encourage the Indonesian government to soften its position on security, in favour of a new stance that could be justified in mutually acceptable terms. Indonesia's reliance on foreign economic aid in the aftermath of its 1997 financial crash made it sensitive to foreign opinion.¹⁸⁵ Nevins

¹⁷⁶ Joseph Nevins, *A Not-so-distant Horror: Mass Violence in East Timor* (Cornell University Press, 2005) 116.

¹⁷⁷ Ibid.

¹⁷⁸ *East Timor in Transition 1998-2000: An Australian Policy Challenge* (Department of Foreign Affairs and Trade 2001) 84.

¹⁷⁹ George, above n 32, 188.

¹⁸⁰ Gutmann and Thompson, above n 29, 110.

¹⁸¹ Mizuno, above n 86, 118.

¹⁸² *East Timor in Transition 1998-2000: An Australian Policy Challenge*, above n 187, 84.

¹⁸³ Gutmann and Thompson, above n 9, 73.

¹⁸⁴ Martin, above n 142, 29.

¹⁸⁵ Vidmar, above n 130, 'Observing the 1999 Public Consultation Process in East Timor' 21.

suggests this could have been exploited to persuade Indonesia to consider alternative perspectives.¹⁸⁶ An impartial mediator, like the UN, would have been well-placed to leverage Indonesia's sensitivity to global opinion and reliance on foreign funds to encourage it to be more accommodating, resulting in more mutually justifiable laws. As will soon be discussed, the EU successfully employed a similar approach during negotiations on Montenegro's referendum law.

B Montenegro

By contrast, both sides during negotiations on the Montenegrin referendum were prepared to justify their beliefs and accommodate the other's views. Unlike in East Timor, where Indonesia wielded disproportionate power, the European Union had the strongest bargaining position during drafting negotiations for Montenegro's *LRSLs*. The two other groups involved in the negotiations were a coalition of representatives from pro-independence parties in Montenegro, and another equally-sized group composed from pro-union parties.¹⁸⁷ The EU's patient, determined use of soft power – including its discretion over Serbia and Montenegro's future EU membership – gave it leverage over both sides' conduct in negotiations.¹⁸⁸ The power to order the Organisation for Security and Cooperation in Europe's withdrawal from observing the referendum, thereby undermining the referendum's legitimacy, also enhanced the EU's clout.¹⁸⁹ As a neutral arbiter, it used this influence to encourage the parties to engage in quasi-reciprocal negotiations. The EU's mediation was vital – it was clear that the two sides alone could not agree on referendum ground rules or the vote threshold necessary to trigger secession.¹⁹⁰ Pressure exerted on both sides to reach an agreement forced them to seek mutually-acceptable terms, and the effective negotiation outcomes demonstrate the potential for representative participation and independent mediation in negotiations to deliver results based on reciprocity. Although some minor parties from each bloc were obstructive,¹⁹¹ the majority on both sides generally sought to abide by FTSCs, meaning each side sought to justify its positions in terms that could be accepted by the other.¹⁹² In circumstances where this failed, such as negotiations on the necessary majority requirement, EMD was employed to reach solutions based on moral accommodation.

The negotiation process sought political common ground between the sides. It began with an EU-authored document that outlined key points for negotiations to address, and continued with both parties supplying the EU with their positions on each point.¹⁹³ Based on these responses, the EU endeavored to find common ground between pro-union and pro-independence blocs during the subsequent negotiations.¹⁹⁴

¹⁸⁶ Nevins, above n 176, 119.

¹⁸⁷ Di Nino, above n 14, 3.

¹⁸⁸ Judy Batt, 'Montenegro and Serbia After the Referendum' (European Union Institute for Security Studies, 1 May 2006) <<http://www.iss.europa.eu/publications/detail/article/montenegro-and-serbia-after-the-referendum/>>.

¹⁸⁹ Judah, above n 112, 218.

¹⁹⁰ Srdjan Darmanovic, 'Montenegro: A Miracle in the Balkans?' 18(2) *Journal of Democracy* 152, 155.

¹⁹¹ Batt, above n 188.

¹⁹² Gutmann and Thompson, above n 9, 79.

¹⁹³ Friis, above n 2, 81.

¹⁹⁴ *Ibid* 82.

The eventual 2006 special referendum law was based on a consensus in negotiations, and was adopted by the Montenegrin Parliament with bipartisan support.¹⁹⁵

The potential for mediation and representative participation to promote FTSCs and EMD, consequently delivering more reciprocal outcomes in micro-level participation will now be discussed in relation to laws governing Montenegro's campaign period and supermajority requirement.

1 Campaign Period

Unlike in Timor, participants in Montenegro's more representative and firmly moderated negotiations were made to accept FTSC and resolved disagreements using EMD. As a result, the laws that applied to its campaign period were more reciprocal, grounded in justifications that could be accepted by all reasonable citizens. Examples that will be discussed included compromises on the composition of referendum administration bodies and the regulating of state media.

A compromise on state media regulation provides one example of the potential for economy of moral disagreement, encouraged through mediation, to resolve disputes in line with reciprocity. Going into negotiations, the pro-union faction was concerned that the ruling pro-independence parties would use their influence over state media to advocate their position.¹⁹⁶ This concern was based partly on experiences during the 1992 referendum that created the union between Serbia and Montenegro, which was strongly influenced by media propaganda.¹⁹⁷ On the other hand, pro-independence parties feared that adopting the pro-unionists' suggestion for an ad-hoc parliamentary body to be granted powers to regulate media content would politicise public broadcasting, which was supposed to be independent.¹⁹⁸ Shuttleing between pro-independence and pro-union representatives, EU mediators found a compromise based on EMD.¹⁹⁹ A parliamentary body was established to monitor media content, but not given coercive powers.²⁰⁰ Furthermore it would be evenly composed of representatives from both sides of the referendum debate.²⁰¹ This delivered a mutually-acceptable solution. It enabled pro-unionists' desired oversight over public media, but without triggering pro-independence politicians' fears that media outlets' independence might be compromised.²⁰²

Both sides' acceptance of FTSCs and the pursuit of resolutions based on EMD can also be seen in relation to disputes over the nature of bodies that would administer the referendum. Once again, this achieved resolutions consistent with reciprocity. Initially, the EU proposed that both sides of the referendum debate be represented equally on administrative bodies, but the pro-independence bloc objected that this

¹⁹⁵ OSCE/ODIHR, 'Referendum Observation Mission Final Report' (Report, Office for Democratic Institutions and Human Rights, 21 May 2006) 1 <<http://www.osce.org/odihr/elections/montenegro/20099?download=true>>.

¹⁹⁶ William Montgomery, 'Montenegro's Referendum', *B92* (online), 31 July 2005 <<http://www.b92.net/feedback/misljenja/press/william31-07-05.php>>.

¹⁹⁷ Friis, above n 2, 69.

¹⁹⁸ *Ibid* 82.

¹⁹⁹ US Embassy Belgrade, *Montenegrin Independence Referendum Reform Notes: EU Envoy Lajcak Proposes 'Key Principles'* (17 January 2006) [2] <https://wikileaks.org/cable/2006/01/06BELGRADE54.html#help_1>.

²⁰⁰ *Law on the Referendum on State Legal Status* art 53.

²⁰¹ *Ibid* art 52.

²⁰² Friis, above n 2, 82.

would allow pro-unionists to undermine the referendum by boycotting the bodies.²⁰³ Earlier on, the pro-independence parties had expressed the opinion that international involvement should be minimal, while the pro-union bloc requested that international representatives should fill important positions in administrative bodies to ensure democratic standards were observed.²⁰⁴ Following negotiations the pro-independence parties overturned their initial objection to international involvement, agreeing that the chairman of the final appeal board for administrative disputes be drawn from overseas.²⁰⁵ This averted fears that opposition parties could undermine the referendum by boycotting administrative bodies, and ensured there would be independent oversight over democratic standards during the referendum campaign, without unduly intruding on Montenegro's sovereignty. Although neither party was willing to compromise on its own initiative, EU mediation ensured a solution based on EMD that balanced all participants' interests.

Montenegro's referendum law maintained a generally dignified and respectful campaign on both sides. In line with the *LRSLS*, campaigning was generally civil.²⁰⁶ Claims made by the pro-independence campaign were viewed as credible.²⁰⁷ Although it appealed to romantic historical notions of regaining the independence their forefathers lost during World War I, it also made more contemporary, pragmatic arguments for independence.²⁰⁸ For instance, it proposed that Montenegro's subservient role in the federation with Serbia meant its interests were sidelined, including that an independent Montenegro with full fiscal powers would be best able to fulfil its economic potential.²⁰⁹ Pro-independence campaigns also argued that Montenegro's union with Serbia associated it with Serbia's refusal to cooperate with the international community on a number of issues, harming Montenegro's aspirations to join the EU.²¹⁰ Similarly, the pro-union side's campaign was also largely respectful and informative. Momir Bulatovic, leader of the People's Socialist Party of Montenegro, which formed part of the pro-union bloc, pledged to campaign without 'inciting hatred and nationalistic divisions' to 'enable citizens' peaceful and tolerant voting for either option'.²¹¹ Although they both ended up spending significantly more, the €1 million provided to both sides under the *LRSLS* gave them sufficient opportunities to campaign, including access to advertising.²¹² Montenegrin campaign laws generally upheld civil campaigning and equality of opportunity. There is insufficient evidence from negotiations to directly link this improved campaign tone to the principle of reciprocity.

However there does appear to be a correlation: Montenegrin negotiations proceeded on FTSCs with representative participation and the mutual exchange of justifications for stances, and created a legal framework that effectively maintained an ideal campaign environment. By contrast, negotiations in East Timor which were characterised by power imbalances, non-cooperation and unrepresentativeness created campaign laws that did not generate sufficient substantive debate and were

²⁰³ Ibid.

²⁰⁴ Ibid 83.

²⁰⁵ *Law on the Referendum on State Legal Status* art 11.

²⁰⁶ Ibid art 44.

²⁰⁷ Morrison, above n 131, 206.

²⁰⁸ Ibid.

²⁰⁹ Ibid 207.

²¹⁰ 'Montenegro's Independence Drive' (Report No 169, International Crisis Group, 7 December 2005) <
http://www.crisisgroup.org/~media/Files/europe/169_montenegro_s_independence_drive.pdf>.

²¹¹ Ibid 269.

²¹² OSCE/ODIHR, above n 195, 10.

inappropriate under local conditions. As described earlier, there are also more concrete examples. Negotiations on the regulation of state media and the design of referendum administration bodies demonstrate the potential for FTSCs and EMD, encouraged by independent mediators, to achieve mutually justifiable outcomes. Negotiations on Montenegro's supermajority requirement, discussed below, provide further support for this claim.

2 Supermajority Requirement

Montenegro's requirement that a pro-independence vote must achieve over 55% to have any effect is often cited as a major reason behind the referendum's smooth operation.²¹³ This was a figure reached through the exchange of mutually accessible justifications and EMD, enforced by EU mediation.

The original Montenegrin referendum law passed in 2001 required a simple majority vote for independence.²¹⁴ However when the new *LRSLS* was being drafted, the Venice Commission noted that a higher threshold could help the result 'command more respect'.²¹⁵ It was careful not to recommend an actual buffer without first receiving domestic input, stressing the importance of obtaining the widest possible domestic consensus.²¹⁶ Balancing the two sides' submissions in response to this recommendation, the EU recommended a 55% majority requirement to trigger secession that was 'tailor-made for Montenegro'.²¹⁷ The pro-independence bloc initially rejected this suggestion as unfair and undemocratic, since it would potentially allow a minority to dictate the result.²¹⁸ In response, it was noted that a 50% threshold is arbitrary, and should arguably be higher for significant changes like secession.²¹⁹ As an example, negotiations noted that the US Constitution can only be amended with a two thirds majority.²²⁰ On the other side, raising the threshold above 50% was enough to convince pro-union supporters that they had a chance, preventing them from boycotting elections.²²¹ Eventually the suggestion was accepted by both sides – albeit reluctantly by the pro-independence faction.²²² 55% satisfied pro-union parties' belief

²¹³ See, eg, Darmanovic, above n 190, 156.

²¹⁴ *Law on Referendum of the Republic of Montenegro* art 37.

²¹⁵ Anthony Bradley, Carlos Closa Montero and Kaarlo Tuori, 'Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organisation of Referendums With Applicable International Standards' (Opinion No 343, European Commission for Democracy Through Law (Venice Commission), 17 December 2005) 10[40] <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDLAD%282005%29041-e>>.

²¹⁶ Friis, above n 2, 77.

²¹⁷ *Ibid* 84.

²¹⁸ Oklopcic, above n 129, 'Independence Referendums and Democratic Theory in Quebec and Montenegro' 28.

²¹⁹ US Embassy Belgrade, above n 129, *Montenegrin Independence Referendum Talks: Politicians Begin to Discuss Required Majority* (10 February 2006) [2] <<https://wikileaks.org/cable/2006/02/06BELGRADE202.html>>; Oklopcic, 'Independence Referendums and Democratic Theory in Quebec and Montenegro' 27.

²²⁰ *Ibid*.

²²¹ Friis, above n 2, 84.

²²² 'International Referendum Observation Mission - Referendum On State-Status, Republic of Montenegro (Serbia and Montenegro)' (Report, Office for Democratic Institutions and Human Rights, 21 May 2006) 3 <<http://www.oscepa.org/publications/all>>

that something higher than a simple majority was necessary to approve major decisions like secession, but was not a prohibitively high figure for pro-independence parties to reach. It was the only threshold that both sides would accept,²²³ and was reached through a process that involved the exchange of reasons and solutions based on EMD, balancing both sides' positions. This was facilitated by the wide spectrum of affected interests represented in negotiations, along with firm and decisive, but impartial mediation by the EU.

In hindsight, the 55% threshold is viewed as a good decision. It was high enough to prevent a pro-unionist boycott, encouraged mobilisation on both sides due to the likelihood of a close result, and ensured a 10% buffer between the winning and losing sides, thereby boosting the result's legitimacy.²²⁴ Furthermore there was wide cross-party support for the agreed referendum law throughout the campaign.²²⁵ Thus Montenegro's supermajority requirement is an example of FTSCs and EMD delivering effective laws based on reciprocity, with widespread support.

V CONCLUSION

Tierney suggests decision-making processes should build openness and goodwill between the parties and reach agreement through discussion wherever possible, to ensure the process is accepted even by those who disagree with the result.²²⁶ Gutmann and Thompson's conception of reciprocity – that laws should be defensible using justifications that can be accepted by all reasonable citizens – can help accomplish this. Mutually-justifiable outcomes can be achieved if both parties accept fair terms of social cooperation, and resolve moral impasses using economy of moral disagreement. These ideals can be promoted by impartial mediators, as well as by ensuring participation in micro-level negotiations is representative.

East Timor's campaign regulations were not based on reciprocity. Neither its focus on teaching people about the voting process rather than promoting substantive debate on the relevant issues, nor its information distribution methods, could be justified from a Timorese perspective. These issues would probably have been resolved if negotiations were more representative. Conversely in Montenegro, negotiations included a wide range of participants and were effectively mediated by the EU. They built a legal framework that generated laws based on reciprocity. Although there is insufficient evidence available conclusively to link these more reciprocal campaign laws to representative participation and effective mediation in negotiations, there is a clear correlation. East Timor's negotiations were unrepresentative and weakly mediated, meaning parties were not required to accept fair terms of social cooperation. They also generated campaign laws that were not mutually justifiable. On the other hand, participants in Montenegro's more representative and firmly moderated negotiations accepted fair terms of social cooperation and resolved disagreements using economy of moral disagreement. They also created a legal framework for the campaign period that was more reciprocal, grounded in justifications that could be accepted by all reasonable citizens. It is conceivable – even likely – that the exchange of ideas and the resultant deliberation and modification of views were responsible for Montenegro's more reciprocal campaign laws. Montenegrin negotiators' compromises

documents/election-observation/past-election-observation-statements/montenegro/statements-17/2111-2006-referendum/file.

²²³ Friis, above n 2, 84.

²²⁴ Darmanovic, above n 190, 156.

²²⁵ OSCE/ODIHR, above n 195, 4.

²²⁶ Tierney, above n 10, 205.

on the composition of referendum administration bodies and the regulating of state media provide concrete examples of this.

More material is available concerning negotiations on the most controversial issue in each referendum: security arrangements in East Timor and the supermajority requirement in Montenegro. In these cases, there is a clear link between FTSCs, EMD, and the law's reciprocity. The lack of East Timorese representation and Indonesia's unwillingness to accept fair terms of social cooperation, facilitated by the UN's reluctance to impose itself as an impartial third-party mediator, were responsible for the East Timor referendum's non-reciprocal security arrangements. On the other hand, mutual reason-giving and the eventual adoption of a solution that was acceptable to both sides, enabled by representative participation and encouraged by EU mediation, created a supermajority requirement in Montenegro that was grounded in reciprocity.

