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The Missing Link between Self-Determination and Democracy: The Case of East Timor

Hua Fan*

I. INTRODUCTION

¶1 Even though the right to self-determination has only “vague and imprecise” “meaning and content,”¹ it has been invoked by numerous groups² as a vehicle to achieve various ends, the majority of which relate to freedom.³ Alternatively, these groups may achieve greater freedom by pressing for democracy.⁴ The relationship between self-determination and democracy is complex. On the one hand, democracy may be an alternative to self-determination, i.e. a minority or unrepresented people may attain equal rights with the majority or the represented and thus become “self-governing” through a struggle for democracy. In this way the attainment of democracy may eliminate the need for pursuing self-determination.⁵ On the other hand, democracy may be a component of self-determination. In the Wilsonian formulation, self-determination includes an internal aspect of democracy, because, as self-rule, self-determination “implies meaningful participation in the process of government.”⁶ This aspect of self-determination is commonly referred to as “internal self-determination.”⁷

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¹ HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 27 (rev. ed. 1996).

² See, e.g., Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 *STAN. J. INT'L L.* 255, 258-59 (1996) (“The right to self-determination is invoked in international law more often than any other collective human rights. . . . At a political level, it is proclaimed by, and on behalf of, non-state populations as diverse as the Kurds, the Quebecois, the Basques, the Scots, the Palestinians, the East Timorese and the Tamils.”).

³ See, e.g., *id.* at 286 (listing various “interpretations and results of movements in the name of self-determination”, including “the West European search for union, indigenous demands for autonomy, feminist claims to participation, liberal theories of democracy or internal self-determination, reunification agreements, the criminalization of colonial domination, declarations on partial sovereignty, and the reconstruction of failed states, . . .[e]ven secession. . .”).

⁴ According to Amartya Sen, democracy entails “voting and respect for election results, . . . , the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment.” Amartya Sen, *Democracy as a Universal Value*, 10 *J. DEMOCRACY* 3, 9 (1999). This comment will follow this concept of democracy.

⁵ See Simpson, *supra* note 2, at 279 (“The Kantian view . . . envisages a federation of sovereign states in which each state holds regular, public, universal, and free elections. In this way, each person is secured his or her right to personal political self-determination.”).

⁶ HANNUM, *supra* note 1, at 30.

⁷ MORTON H. HALPERIN ET AL., *SELF-DETERMINATION IN THE NEW WORLD ORDER* 17 (1992). In contrast, external self-determination represents the idea that people have the right to free from external coercion or alien domination. *Id.* See also Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 *COLUM. J. TRANSNAT'L L.* 601, 617 (2003) (“[T]he external dimension or aspect [of

¶12 However, internal self-determination was disregarded from the beginning of the modern concept of self-determination.⁸ Only in the post-decolonization era did the international community begin to recognize the importance of internal self-determination.⁹ In 1990, the Conference on Security and Cooperation in Europe explicitly associated internal self-determination with Western-style democracy.¹⁰ In the final days before the dissolution of the Soviet Union and Yugoslavia, the European Community and the United States openly conditioned their recognition of the republics of the Soviet Union and Yugoslavia on the realization of the internal self-determination of their peoples.¹¹ All the republics of the Soviet Union and four of the six Yugoslav republics accepted such a condition and gained recognition of the international community soon after.¹²

¶13 However, the United Nations (“U.N.”) failed to emphasize internal self-determination in its intervention in the self-determination efforts of East Timor. The U.N. granted East Timor independence from Indonesia and then carried out an expensive nation-building mission there.¹³ However, the U.N. civil authority in East Timor was not representative of, or accountable to, the East Timorese people and could be characterized as “benevolent despotism.”¹⁴ In addition, East Timor’s political leaders built “few bonds with average [East] Timorese” and made decisions with little interaction with the

self-determination] defines the status of a people in relation to another people, State or Empire, whereas the democratic or internal dimension [of self-determination] should concern the relationship between a people and its own State or government.” (quoting Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101 (Christian Tomuschat ed., 1993)).

⁸ The states created after First World War “undertook no specific obligation to ensure a democratic form of government” save for “various minority guarantees.” HANNUM, *supra* note 1, at 30. In the de-colonization era, “between 1945 and 1979, seventy territories achieved independence without regard to the nature of the relationship between the governing institutions of the newly independent states and the people over which they exercised their sovereign authority.” Miller, *supra* note 7 at 622 (quoting ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 339 (1995)).

⁹ Miller, *supra* note 7, at 624.

¹⁰ *Id.*

¹¹ See *id.*; Halperin, *supra* note 7, at 27-38 (describing international community’s reaction to the breakup of the Soviet Union and Yugoslavia). Four days after the leaders of Russia, Ukraine and Belarus declared the dissolution of the Soviet Union, the United States designated the commitment to democratic political process as one of the basic principles for its overall approach to the self-determination claims of the Soviet republics. *Id.* at 31. Soon after, the European Community announced that to gain its recognition, the republics of both the Soviet Union and Yugoslavia would have to “respect the provisions of the U.N. Charter, Helsinki Final Act, and Charter of Paris, particularly with regard to the rule of law, democracy and human rights.” *Id.* at 33.

¹² *Id.* at 30-31, 35-37. The four of the six republics of the Socialist Federal Republic of Yugoslavia (the “SFRY”) that accepted the conditions of the United States and the European Community and gained their recognition were Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. *Id.* at 35. The remaining two republics, Serbia and Montenegro, formed a new federation of Yugoslavia, the Federal Republic of Yugoslavia, which “regarded the disintegration of the SFRY as a process of serial secession” and “claimed to be the exclusive legal and political continuator of the SFRY.” Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT’L L. 379, 379-80 (2002).

¹³ Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT’L L. & POL. 1101, 1102-04 (2001); Jane Perlez, *Ramos-Horta is Appointed New Premier of East Timor*, N.Y. TIMES, July 8, 2006, at 14 (“Several billion dollars in international aid was spent to help East Timor build its own army, police force and judicial system, and on the United Nations peacekeeping force that came to East Timor after a vote in favor of independence in 1999.”).

¹⁴ Beauvais, *supra* note 13, at 1114.

people.¹⁵ Although East Timor has shown some remarkable improvements since the end of Indonesian occupation,¹⁶ its people actually became poorer, especially after the U.N. downsized its mission.¹⁷ Months before the U.N.'s planned end of its nation-building mission, the newborn state descended into chaos again.¹⁸ Four years after its independence, people were still "asking whether East Timor ha[d] any future at all as an independent nation."¹⁹

¶4 This article uses the East Timor case to illustrate the importance of the link between self-determination and democracy. Built upon the notion that only democracy validates governance,²⁰ it argues that democracy is an indispensable complement for self-determination, and offers three reasons. First, only through popular participation can the will of the "self," i.e. the will of a group of people that is entitled to self-determination, be ascertained. Second, the right to democracy is the natural bridge between self-determination as a group right and the well-being of individual group members. Only through democratic process can any individual meaningfully participate in the realization of self-determination. Third, only democracy can minimize the transaction costs associated with self-determination and make it an efficient outcome for the society.

¶5 Part II of this Article provides some background information on the self-determination movement of East Timor and the recent outbreak of violence in the spring of 2006. Part III reviews international scholars' discourses on the relationship between democracy and self-determination and argues that their approval or disapproval of the right to self-determination correlates with their understanding of the relationship between democracy and self-determination. In turn, Part IV through VI discusses how democracy can ascertain the true will of a group, individualize the right to self-determination, and make self-determination an efficient outcome. Part VII concludes.

II. EAST TIMOR: BACKGROUND

¶6 The island of Timor was divided into East and West Timor by the Portuguese and Dutch colonists.²¹ When West Timor gained independence from the Netherlands as part of Indonesia in 1949, East Timor remained a Portuguese colony.²² After Portugal became a democracy in 1974, it accelerated the decolonization of East Timor²³ and evacuated its

¹⁵ Joshua Kurlantzick, *The U.N. Success Story That Wasn't*, WASH. POST, June 4, 2006, at B4.

¹⁶ *Id.*

¹⁷ Jane Perlez, *Poverty and Violence Sink Grand Plans for East Timor*, N.Y. TIMES, May 30, 2006, at A3.

¹⁸ Jane Perlez, *East Timor's Capital Spirals into Violence, Despite U.N. Peacekeepers*, N.Y. TIMES, May 27, 2006, at 16.

¹⁹ Jane Perlez, *A Nation-Building Project Comes Apart in East Timor*, N.Y. TIMES, July 14, 2006, at A3.

²⁰ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46-49 (1992).

²¹ Herbert D. Bowman, *Letting the Big Fish Get Away: the United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371, 374 (2004).

²² Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 324 (1993-1994). In 1960 the United Nations recognized East Timor as a non-self-governing territory with the right to self-determination and granted Portugal the administering power of East Timor. Roger S. Clark, *East Timor, Indonesia, and the International Community*, 14 TEMP. INT'L & COMP. L. J. 75, 78 (2000).

²³ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIAL 673 (2000).

forces from East Timor in August 1975.²⁴ In the subsequent power vacuum came a civil war among pro-Portuguese, pro-Indonesia, and pro-independence forces.²⁵ The pro-independence party won the war²⁶ and announced the independence of East Timor in November 1975, while the other East Timor political parties announced East Timor's integration with Indonesia.²⁷ In December 1975, the Indonesian army invaded East Timor and took substantial control of the territory.²⁸

Under the military regime of President Suharto, Indonesia formally integrated East Timor in July 1976.²⁹ This move met with strong disapproval from the international community. The U.N. condemned the illegal invasion and repeatedly requested Indonesia's withdrawal.³⁰ On the ground, armed resistance continued to challenge Indonesia's effective control.³¹ Nevertheless, Indonesia stood firm on its position until Suharto stepped down in May 1998.³² His successor, President Habibie, proposed a grant of special autonomy to East Timor in June 1998.³³ Much negotiation ensued.³⁴ In May 1999, Indonesia, Portugal and the U.N. signed agreements authorizing the U.N. to help the East Timorese choose between autonomy and independence via a popular consultation (the "1999 Agreements").³⁵ In August 1999, at the popular consultation conducted by the United Nations Mission to East Timor ("UNAMET"), 78.5% of those who voted disfavored the autonomy proposal³⁶ despite intimidation by the pro-Indonesia militias.³⁷ The international community read this as a clear expression of the will of East Timorese for separation from Indonesia.³⁸

Displeased by this result, the pro-Indonesia militias, with the acquiescence and even support of the Indonesian military, "launched a massive campaign of violence."³⁹ The escalation in violence led the U.N. to authorize a multinational force to restore peace and security in East Timor in September 1999.⁴⁰ The violence also resulted in the departure of Indonesian civil administrators from East Timor.⁴¹ In October 1999, the

²⁴ HALPERIN, *supra* note 7, at 136.

²⁵ *Id.* Both the pro-Portuguese party, the Democratic Union of East Timor ("UDT"), and the pro-independence party, the Revolutionary Front for an Independent East Timor ("FRETILIN"), sought eventual independence. However, UDT "favored a transitional period," in which Portugal would keep participating in the governance of East Timor, while FRETILIN called for immediate independence. Jennifer Toole, *A False Sense of Security: Lessons Learned from the United Nations Organization and Conduct Mission in East Timor*, 16 AM. U. INT'L L. REV. 199, 207 (2000).

²⁶ Clark, *supra* note 22, at 79.

²⁷ Jani Purnawanty, *Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT'L & COMP. L. J. 61, 65 (2000); Toole, *supra* note 25, at 208.

²⁸ Clark, *supra* note 22, at 79.

²⁹ Purnawanty, *supra* note 27, at 61.

³⁰ *Id.* Additionally, the U.N. continued to regard Portugal as East Timor's administrative power. *Id.*

³¹ *Id.* See also Clark, *supra* note 22, at 79.

³² Purnawanty, *supra* note 27, at 61.

³³ *Id.* at 66.

³⁴ *Id.* See also Toole, *supra* note 25, at 214-15.

³⁵ Purnawanty, *supra* note 27, at 66-67.

³⁶ *Id.*

³⁷ Toole, *supra* note 25, at 215.

³⁸ Purnawanty, *supra* note 27, at 67.

³⁹ Toole, *supra* note 33, at 204, 216.

⁴⁰ STEINER & ALSTON, *supra* note 23, at 674.

⁴¹ Mark Rothert, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257, 261 (2000).

Indonesian legislature formally recognized the result of the popular consultation⁴² and repealed the legislation that declared East Timor a province of Indonesia.⁴³ The Indonesian military withdrew the last of its personnel in late October.⁴⁴ In the same month the U.N. set up the United Nations Transitional Administration in East Timor (“UNTAET”) to administer East Timor during its transition to independence,⁴⁵ with a mandate to exercise all legislative and executive powers in East Timor, including the administration of justice.⁴⁶

¶9

Under U.N. administration, East Timor adopted a Constitution,⁴⁷ which “provides for a unitary democratic State, based on the rule of law and the principle of separation of powers.”⁴⁸ East Timor became an independent country on May 20, 2002.⁴⁹ The U.N. then ended the UNTAET mandate and established the United Nations Mission of Support in East Timor (“UNMISSET”) to continue its nation-building assistance in East Timor.⁵⁰ After three years of service, UNMISSET was downsized and renamed the United Nations Office in Timor Leste (“UNOTIL”), which had a mandate to carry out peace-building activities until May 19, 2006.⁵¹ The international community had regarded East Timor’s nation-building since the popular consultation as a success story until the spring of 2006.⁵² Among the major achievements in East Timor were peaceful politics, a functioning civil society and the foundations of a vibrant economy.⁵³ However, several problems gradually became salient. First, the country’s political leaders “built few bonds with average [East] Timorese” and were unresponsive to the needs of the people.⁵⁴ Second, the leaders relied on their personalities, rather than institution-building, to solve the problems their country faced.⁵⁵ Third, the leaders had the country’s international relations take priority over domestic issues.⁵⁶ Fourth, with an already weak private sector, the leaders failed to provide enough public-works programs to counter the U.N. mission’s downsizing and resulting cut in local jobs.⁵⁷ Fifth, the ethnic conflicts among people from different parts of the country, especially between the military and police, gradually intensified.⁵⁸

⁴² STEINER & ALSTON, *supra* note 23, at 674.

⁴³ Clark, *supra* note 22, at 85.

⁴⁴ *Id.*

⁴⁵ STEINER & ALSTON, *supra* note 23, at 674.

⁴⁶ Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623, 628 (2002).

⁴⁷ The Secretary-General, *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, ¶4, delivered to the Security Council, U.N. Doc. S/2002/432 (Apr. 17, 2002).

⁴⁸ *Id.* at ¶5.

⁴⁹ Jane Perlez, *Impoverished East Timor Exults Over Independence*, N.Y. TIMES, May 20, 2002, at A6.

⁵⁰ S.C. Res. 1410, ¶1-2, U.N. Doc. S/RES/1410 (May 17, 2002).

⁵¹ S.C. Res. 1599, ¶1-2, U.N. Doc. S/RES/1599 (Apr. 28, 2005).

⁵² Kurlantzick, *supra* note 15. As an example of this reliance on the personality of leaders, the president, Xanana Gusmao, visited many military officials to ask them to cool off after the rumors of a possible fight among soldiers spread out in March 2006, without the government addressing the core demand of the soldiers. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Perlez, *supra* note 17; Emily Messner & J.J. Messner, *A Lesson in How Not to Leave*, WASH. POST, June 10, 2006, at A19.

⁵⁸ Perlez, *supra* note 17. See also, Alan Sipress, *In. E. Timor, an Optimistic Enterprise Turns to Ashes*,

¶10 When East Timor built its armed forces, the soldiers from the anti-Indonesia guerrillas, who came mostly from the easternmost part of the country, took the senior positions, while the lower ranks were recruited from the western part of the country.⁵⁹ Meanwhile, the police mainly consisted of people who served as policemen during Indonesian occupation,⁶⁰ with its senior officers mostly coming from the western part of the territory.⁶¹ The guerrilla-turned-military personnel hated the ex-Indonesian police officers.⁶² The U.N.'s favoritism towards the police exacerbated the situation.⁶³ In January 2006, about 400 soldiers from the western part of the country complained about ethnic discrimination and poor treatment.⁶⁴ Their complaints ignored, the western soldiers took to the streets in February 2006.⁶⁵ Rather than addressing the grievances, the military fired nearly 600 westerners, or about 40% of the armed forces, and nearly all of its western members in March 2006.⁶⁶ The dismissed soldiers staged another demonstration in late April 2006.⁶⁷ This protest led to clashes among dismissed soldiers, the soldiers loyal to the government, and the police,⁶⁸ which in turn provoked conflicts between gangs of easterners and westerners.⁶⁹ The conflicts escalated into May 2006.⁷⁰ Unable to contain the extensive violence, the government called in an Australia-led force.⁷¹ Accused of "form[ing] a hit squad to kill his political opponents," the Prime Minister Mari Alkatiri resigned in June 2006.⁷² The crisis was considered by some as "the worst" since 1999 and as a "serious setback" to the U.N.'s nation-building efforts in East Timor.⁷³ Before delving into the implication of this crisis with regard to the understanding of the integral link between democracy and self-determination, the next section will review relevant literature.

III. DEMOCRACY AND SELF-DETERMINATION: FRIEND OR FOE

¶11 The relationship between democracy and self-determination has received significant academic attention. Thomas M. Franck argues that the right to self-determination evolved from "a principle of exclusion" to "one of inclusion" (the right to "free, fair and open participation" in the democratic governance of each state).⁷⁴ He regards self-determination as a building block of democratic entitlement, his notion that

WASH. POST, June 2, 2006, at A13; Jane Perlez, *Australian Forces in Timor Capital to Deter Warring Sides*, N.Y. TIMES, May 27, 2006, at A7.

⁵⁹ Sipress, *supra* note 58.

⁶⁰ Kurlantzick, *supra* note 15.

⁶¹ Sipress, *supra* note 58.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Alan Sipress, *E. Timor Premier Bows to Pressure, Submits Resignation – Alkatiri Allegedly Formed Death Squad*, WASH. POST, June 27, 2006, at A17.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Franck, *supra* note 20, at 46, 59.

only democracy validates governance,⁷⁵ and sees reciprocity between democracy and self-determination. Self-determination is “the historic root from which the democratic entitlement grew.”⁷⁶ On the other hand, since self-determination is implemented selectively, it lacks coherence and must merge with other components of democratic entitlement to increase its legitimacy.⁷⁷ He envisions that “collective international processes” will let democracy become a “global entitlement.”⁷⁸

¶12 Amitai Etzioni is not so optimistic about self-determination’s capacity of advancing democracy. He believes that “with rare exceptions,” self-determination movements actually “undermine the potential for democratic development in non-democratic countries and threaten the foundations of democracy in democratic ones.”⁷⁹ He argues that, historically, the moral approval self-determination movements enjoyed was based on the belief that self-determination would bring more responsive and democratic government to the oppressed minority people.⁸⁰ He proposes that only those self-determination movements that will enhance democracy be supported.⁸¹

¶13 Unlike Franck or Etzioni, who both ignore the variability of democracy, Russell A. Miller’s assessment of self-determination relies on the same concept of democracy that the self-determination movement uses. He argues that what Franck sees as a strong link between democracy and self-determination is actually “limited to the common use of majority rule plebiscites and referendums in the process by which states have achieved self-determination.”⁸² Behind this guise of democracy often hides ethnic-nationalism, which has led to the creation of numerous undemocratic states in the names of fulfilling democratic ideals by self-determination.⁸³ Miller proposes to free democracy from the usurpation of ethnic-nationalism so that self-determination will not lead to the “demise of democracy.”⁸⁴ He ultimately believes that, with an emphasis on internal self-determination and an enriched concept of democracy, self-determination movements can bring about the advancement of democracy.⁸⁵

¶14 Whereas Franck, Etzioni and Miller evaluate self-determination based on its effects on democracy, Gerry J. Simpson worries that democracy cannot meet the diverse needs of those who seek to self-determine.⁸⁶ Simpson argues that the purpose of the right to self-determination is “to protect the collective human and democratic rights of minorities and unrepresented peoples.”⁸⁷ Simpson doubts that the group self-determination can “be satisfied by the majoritarian model, even in the presence of minority rights.”⁸⁸ Simpson’s mistake is that he equates democracy with mere majority rule and fails to appreciate the

⁷⁵ *Id.* at 46, 52.

⁷⁶ *Id.* at 52.

⁷⁷ *Id.* at 86.

⁷⁸ *Id.* at 46.

⁷⁹ Amitai Etzioni, *The Evils of Self-Determination*, 89 FOREIGN POL’Y 21, 21 (1992-1993).

⁸⁰ *Id.* at 35.

⁸¹ *Id.* at 21.

⁸² Miller, *supra* note 7, at 610.

⁸³ *Id.* at 608, 610, 633

⁸⁴ *Id.* at 647.

⁸⁵ *Id.*

⁸⁶ Simpson, *supra* note 2, at 280.

⁸⁷ *Id.* at 258.

⁸⁸ *Id.* at 279.

full potential of democracy. As Miller suggests, “nearly all” Western democracies have “abandoned or opted against winner-take-all, majority rule system of representation.”⁸⁹

¶15 Just as Simpson argues that democracy is insufficient to protect the democratic rights of minorities,⁹⁰ Amy E. Eckert claims that “[t]o promote democracy as the only legitimate result of self-determination” fails to satisfy “the requirements of liberal democracy,”⁹¹ because the right to self-determination demands a free determination of political status, but the right to democracy entails a determination to be free.⁹² She alleges that Franck confuses the means of self-determination with a particular end.⁹³ To equate self-determination with “one particular political outcome,” democracy or any other, “misconstrues the content of self-determination,” because “[m]andating that a people must determine to be free . . . significantly constrains their right to” self-determination.⁹⁴ Therefore, “the right to democracy is not equivalent to self-determination.”⁹⁵ Eckert concludes that “a people could freely choose to organize itself undemocratically,” “[a]s long as the determination itself is freely made,” and that such a determination “must receive the same respect as a determination to be free.”⁹⁶

¶16 The problem with Eckert’s reasoning is that nothing in self-determination implies that it can only be exercised once and for all. To what extent can one generation’s decision bind the future generations? What if a people decide not to be free and then change their minds in four years? Do they still have the right to revise their political status? In a sense, every electorate in every liberal democracy periodically chooses not to be free by electing a set of people to hold public offices for a fixed term. The need to have repeated and unconstrained exercise of the right to free determination necessarily leads to the determination to be free. Democracy may not be as irrelevant or incompatible to self-determination as Eckert supposes.

¶17 As discussed above, scholars’ attitudes towards self-determination correlate with their understanding about the link between self-determination and democracy. On the one hand, Franck, Etzioni and Miller evaluate self-determination from the perspective of democracy. While Franck promotes self-determination as an integral part of democratic entitlement and Etzioni denounces self-determination for damaging the advancement of democracy, Miller tries to reconcile the two by differentiating democracy. On the other hand, Simpson and Eckert appraise democracy in light of the need for self-determination. Simpson argues that democracy is inadequate for self-determination, while Eckert suggests democracy is irrelevant to self-determination. Their disassociation of democracy from self-determination contributes to their ambivalence toward the latter. However, their arguments are untenable as Simpson oversimplifies democracy and Eckert misconstrues self-determination. Therefore, this article further investigates Franck’s perception of the integral link between self-determination and democracy through empirical study and ultimately finds strong support for it. The next section will

⁸⁹ Miller, *supra* note 7, at 639.

⁹⁰ Simpson, *supra* note 2, at 258.

⁹¹ Amy E. Eckert, *Free Determination or the Determination to be Free? Self Determination and the Democratic Entitlement*, 4 UCLA J. INT’L L. & FOREIGN AFF. 55, 78 (1999).

⁹² *Id.* at 62.

⁹³ *Id.*

⁹⁴ *Id.* at 57.

⁹⁵ *Id.*

⁹⁶ *Id.* at 71.

use the case of East Timor to illustrate why true self-determination should start from ascertaining the will of the “self” through democratic means.

IV. DEMOCRACY, SELF, AND DETERMINATION

¶18 Most discussions of self-determination begin with an attempt to break the concept into what is the “self” and what is “determination”.⁹⁷ The first step, the identification of a “self” (a group of people entitled to self-determination), includes both an objective element (whether the group has “certain objectively determinable common characteristics”) and a subjective element (whether the group considers itself “distinctive”).⁹⁸ Although this identification usually is a difficult task,⁹⁹ it is somewhat easier in the case of East Timor. Objectively, East Timor is geographically separate from Portugal, and East Timorese are ethnically different from Portuguese; thus, the U.N. recognized East Timor as a non-self-governing territory with the right to self-determination in 1960.¹⁰⁰ Subjectively, East Timor’s self-awareness may be established by its prolonged resistance throughout Indonesian occupation and eventual vote to separate from Indonesia. This led the U.N. to reaffirm its recognition that East Timor had the right to self-determination after Indonesia’s invasion of East Timor¹⁰¹ and to ultimately grant East Timor independence.

¶19 A feature of the establishment and maintenance of East Timorese as a “self” with the right to self-determination relates to the disconnection between the objective and the subjective elements of a distinctive East Timorese people. The East Timorese’s objective uniqueness was validated vis-à-vis the Portuguese,¹⁰² while their subjective self-awareness was established vis-à-vis the Indonesians. In other words, among the two elements necessary to establish the existence of an East Timorese people distinct from Indonesians, the objective element was carried over from the East Timorese’s geographic separateness and ethnic difference from the Portuguese, which they no longer had vis-à-vis the West Timorese. Surely it would not be impossible to establish an objective distinction between East and West Timorese. But the point here is that this objective element is simply taken as a given, even though it led to a decision affecting the lives of all East Timorese.

¶20 This disconnect leads to two problems. First, the maintenance of East Timorese in 1999 as the same “self” as East Timorese in 1960 overemphasized the country’s colonial origin at the expense of its more recent history. Like the Indonesians, the Portuguese came uninvited and maintained a repressive regime in East Timor.¹⁰³ As a result, the East Timorese asked for, and the U.N. recognized, their right to self-determination from

⁹⁷ HANNUM, *supra* note 1, at 30.

⁹⁸ *Id.* at 30-31.

⁹⁹ *Id.* at 31.

¹⁰⁰ Clark, *supra* note 22, at 78.

¹⁰¹ *Id.* at 78, 81.

¹⁰² Throughout Portugal’s colonial control, East Timorese nationalist groups demanded independence. Purnawanty, *supra* note 27, at 63. This may serve as evidence that East Timorese people regarded themselves as a distinctive group vis-à-vis the Portuguese. Therefore, before the Portuguese evacuated themselves in 1975, both the objective and subject distinctiveness of East Timorese was well-established vis-à-vis Portuguese. However, as argued below, it is problematic to have the objective distinctiveness simply carried over to later generations of East Timorese.

¹⁰³ *Id.*

Portugal. However, the East Timorese people in 1999, although direct descendants of East Timorese in 1960, were arguably a different group of people as they now speak Indonesian.¹⁰⁴ Further, they are now divided into easterners and westerners, with westerners less antagonistic toward Indonesian occupation.¹⁰⁵ However, they are still recognized as the same “self” as their forefathers. This bequest limited the new generation’s freedom of choice and tilted the population’s will toward independence. This arguably also contributed to the pro-Indonesia militias’ violent behavior.

¶21 Second, the maintenance of the East Timorese in 1999 as the same “self” as East Timorese in 1960 unduly eliminated the right of any sub-groups of East Timorese to the right to self-determination. In 1960, any differences within East Timorese were dwarfed by their difference from the Portuguese and they were more resolute in seeking independence.¹⁰⁶ However, the intra-group differences became more salient as East Timorese’s differences from Indonesians were much smaller and different groups had dissimilar attitudes towards Indonesia. The dilemma that one group’s exercise of the right to self-determination may deny another group the same right thus became a bigger problem. In view of these two problems, a fresh exercise in determining their objective distinctiveness before the 1999 popular consultation may well have helped the East Timorese discover who they are, what they share with the Indonesians, and what differentiates them. Such reflection could have helped them make a more informed decision.

¶22 After the identification of a “self,” the next step is to decide what and how to “determine.” Per the 1999 Agreements, the future of East Timor was decided by East Timorese people through a popular consultation in the form of a universal, direct and secret ballot organized and conducted by the U.N.¹⁰⁷ However, Miller suggests that the “rigid use of the majority rule, self-determination referendum is an example of . . . ‘institutional fetishism,’”¹⁰⁸ and could not serve as the “democratic” element of a self-determination.¹⁰⁹ He argues that this might be because in Western democracies “winner-take-all, majority decisions are radically circumscribed” out of a concern about the “tyranny of the majority,” while in self-determination referendums this consideration is ignored.¹¹⁰ In East Timor’s case, there is evidence of what Miller calls the “ethno-nationalist and inherently undemocratic repercussions”¹¹¹ of the referendum. The political leaders inaugurated upon independence remained distant from the people and relied more on personalities than institutions to govern.¹¹² The Prime Minister Mari Alkatiri “changed the rules on voting” of his political party to suppress intra-party

¹⁰⁴ Kurlantzick, *supra* note 15.

¹⁰⁵ See *supra* notes 58-61 and accompanying text.

¹⁰⁶ As discussed in *supra* note 25 and accompanying text, all the political forces emerged at the end of Portuguese colonial regime, i.e. the pro-Portuguese, the pro-Indonesia, and the pro-independence parties supported separation from Portugal.

¹⁰⁷ Purnawanty, *supra* note 27, at 67.

¹⁰⁸ Miller, *supra* note 7, at 644-45.

¹⁰⁹ *Id.* at 634.

¹¹⁰ *Id.* at 634-35.

¹¹¹ *Id.* at 634.

¹¹² See *supra* notes 54-55 and accompanying text.

criticism, “passed a law making defamation” a serious crime,¹¹³ and “was accused of forming a hit squad to kill his political opponents.”¹¹⁴

¶23 The use of the referendum as a self-determination device had several other problems. First, the popular consultation was organized and conducted by an alien organization within only two months¹¹⁵ in a largely illiterate society¹¹⁶ with no democratic legacy. The short time frame limited the East Timorese’s participation in the process. They hardly had time to have orderly debate about the pros and cons of either choice and to persuade each other. This promoted simplistic and confrontational interpretations. The two months’ time also ruled out any give-and-take between Indonesia and East Timor on the condition of the autonomy. Second, this arrangement put too much stake in a single vote and thus encouraged pro-Indonesia militias to use violence to intimidate East Timorese. If the decision to separate had been made gradually in a series of events over a longer period, the pro-Indonesia forces may well have diverted their resources to political campaigning. However, left with a referendum in two months, they may have found the threat of violence to be a shortcut. Third, the referendum encouraged people who merely sought to change the status quo to vote for separation because the ballot offered only two choices, autonomy or independence.

¶24 The anatomy of “self” and “determine” in the context of East Timor illustrates the importance of democracy in ascertaining the meaning of these two concepts in any self-determination movement. In identifying a “self,” democracy requires that the subjective and objective elements of the required distinction match each other because a people’s preference cannot be established through the expression of another. In deciding the manner of “determine,” democracy emphasizes the process by which the preferences of the members of the people are mapped onto the collective preference of the group. Here majority referendum is not enough. The people must have the opportunity to freely participate, scrutinize their options, and persuade themselves and each other. Only through an unconditional acceptance of these requirements of democracy can the true will of a people be ascertained. The next section will turn to the question of how democracy can bridge the group right of self-determination and the right of individuals.

V. SELF-DETERMINATION AS A GROUP RIGHT

¶25 Self-determination is a right of “peoples.”¹¹⁷ No matter how “peoples” are defined, they must be collectivities consisting of more than one individual.¹¹⁸ James A. Graff asserts that one’s view of the right to self-determination depends ultimately on how one understands “the relations between the rights of collectivities and the rights of individuals who comprise them.”¹¹⁹ He finds that in reality the “tendency to think and talk about

¹¹³ Kurlantzick, *supra* note 15.

¹¹⁴ Niniek Karmini, *E. Timor Premier Sworn In*, WASH. POST, June 10, 2006, at A11.

¹¹⁵ The U.N. mission organizing and conducting the popular consultation was established on June 11, 1999 and the East Timorese voted on August 30, 1999. See Toole, *supra* note 25, at 215; Rothert, *supra* note 41, at 260.

¹¹⁶ Perlez, *supra* note 19 (“[M]uch of the population [of East Timor] is illiterate.”).

¹¹⁷ International Covenant on Civil and Political Rights, art. 1, Mar. 23 1976, 999 U.N.T.S 171.

¹¹⁸ James A. Graff, *Human Rights, Peoples, and the Right to Self-determination*, in GROUP RIGHTS 186, 186 (Judith Baker ed., 1994).

¹¹⁹ *Id.* at 187.

peoples as if they were individuals” is central to the right of self-determination.¹²⁰ In the case of East Timor, the maintenance of the East Timorese people in 1999 as the same “self” as those in 1960, discussed in the previous section, is clearly an example of treating an abstract collectivity as if it were “a clearly identifiable, single spatiotemporal agent.”¹²¹

¶26 Three other features of the U.N.’s nation-building efforts in East Timor confirm that the U.N. regarded self-determination as a right belonging to an abstract “East Timorese people” rather than to any living East Timorese.

¶27 First, if self-determination is regarded as a collective right independent of the rights of any individuals that constitute this group, there would be less incentive to consult any of the individuals in the implementation of this right, so long as the right is implemented in good faith for the benefit of this abstract “group.” Therefore, although UNTAET was “charged with preparing the East Timorese for democratic self-government,”¹²² it operated “in an autocratic manner itself”¹²³ or, as its head Special Representative Sergio Vieira de Mello put it, “by means of a style of ‘benevolent despotism.’”¹²⁴ U.N. Security Council Resolution 1272, in establishing UNTAET, did not provide for local participation in the transitional administration directly or through freely chosen representatives.¹²⁵ Although it did require UNTAET to “consult and cooperate closely with the East Timorese people,” “sustained criticism suggests that UNTAET’s ‘consultation’” through the two local advisory bodies it appointed “was cursory rather than genuine.”¹²⁶ The lack of local participation may explain why UNTAET ignored those issues most pressing for local East Timorese. For example, “[a]lthough most East Timorese are dirt-poor farmers” and the productivity of the rural economy “is the lowest in Asia, . . . little effort was made to improve basic agriculture during the United Nations administration.”¹²⁷

¶28 Second, if self-determination is regarded as a right belonging to an abstract group above and beyond any individual member of this group, there would be less incentive to make its implementation accountable to any of the individuals. This may be why UNTAET regarded itself as “immune from local jurisdiction,”¹²⁸ and chose to follow the custom that “[the] international staff of the U.N. mission [wa]s immune from prosecution in the country of deployment,”¹²⁹ even though the usual justification for such immunity, i.e. “functional necessity,” did not apply in East Timor.¹³⁰ Under this immunity

¹²⁰ *Id.* at 194.

¹²¹ *Id.* at 211.

¹²² Beauvais, *supra* note 13, at 1108.

¹²³ Ralph Wilde, *Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor*, 7 ILSA J. INT’L & COMP. L. 455, 458 (2001).

¹²⁴ Bongiorno, *supra* note 46, at 656.

¹²⁵ *See generally*, S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

¹²⁶ Bongiorno, *supra* note 46, at 657.

¹²⁷ Perlez, *supra* note 19.

¹²⁸ Wilde, *supra* note 123, at 456.

¹²⁹ Bongiorno, *supra* note 46, at 661-62. The “general immunity of the U.N. and its personnel derives from the U.N. Charter” and is provided in the Convention on the Privileges and Immunities of the United Nations of 1946. *Id.* at 662-63. However, that convention “does contain provisions on mandatory waiver for personnel” “in cases where the assertion of immunity would be an impediment to justice and can be waived without prejudice to the U.N.’s interest.” *Id.* at 665.

¹³⁰ *Id.* at 663.

UNTAET personnel committed human right abuses, including arbitrary detention.¹³¹ This deficit of accountability may have undermined, by setting a precedent for “unaccountable, centralized and autocratic” governance in East Timor, UNTAET’s own objective of preparing East Timor for democratic self-government.¹³² In addition, it may also have resulted in local people’s perception that accountability applies only to them, but not to the U.N. officials, which may create the impression that the U.N. mission is “a paternalistic, imperialist endeavor.”¹³³

¶29 Third, if self-determination is regarded as a collective right that belongs to a group with a much longer lifespan than any individual member of the group, there would be less incentive to prioritize the realization of this right over other more visible short-term duties. Thus, UNTAET’s nation-building efforts emphasized the minimization of “short-term risk of failure” and the maximization of “short-term visible gains” over the “long-term strategic objective of preparing the East Timorese for democratic self-government.”¹³⁴ From its beginning, UNTAET found a fundamental tension between its two mandates—administrating East Timor and preparing it for self-government.¹³⁵ Although the U.N. administration of East Timor was “not an end in itself, but a means to achieve . . . East Timorese self-government,” UNTAET’s “initial approach was biased heavily toward the short-term goals associated with” the U.N. administration and “effectively deprioritiz[ed] the move toward independent East Timorese statehood.”¹³⁶ Under intense pressure from the East Timorese, UNTAET gradually switched gears to focus more on preparation for East Timorese self-government.¹³⁷ However, whether this shift was authentic or symbolic is still in dispute.¹³⁸ The emphasis on U.N. administration and the inadequacy of UNTAET’s preparation for East Timorese self-government may explain why East Timor was a success story under UNTAET’s administration and UNMISSET’s considerable assistance to East Timorese government, but then returned to chaos soon after the largely ineffective UNOTIL began to help.

¶30 The problems with the U.N.’s treatment of East Timor’s right to self-determination as a group right without regard to the individual rights of East Timorese demonstrate the importance of justifying the group right to self-determination by the rights of individuals and implementing the right to self-determination with the welfare of each individual in mind. The conception that the right to self-determination belongs to an abstract “people” is a fiction.¹³⁹ The East Timor case further illustrates the potential of democracy to link the group right to self-determination with the rights and well-beings of individuals. Graff argues that if individuals are to be treated as equal and their human rights honored, the group right of self-determination must ultimately give way to a wide range of “democratic, political and legal rights” of the individuals.¹⁴⁰ This suggests that an individual’s democratic rights should serve as the bridge between self-determination and

¹³¹ *Id.* at 630, 666-76.

¹³² Wilde, *supra* note 123, at 458.

¹³³ *Id.* at 459-60.

¹³⁴ Beauvais, *supra* note 13, at 1106.

¹³⁵ *Id.* at 1107.

¹³⁶ *Id.* at 1114.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Graff, *supra* note 118, at 194.

¹⁴⁰ *Id.* at 187-88, 91.

the rights of individuals. To become the true beneficiary of self-determination, each and every East Timorese must be consulted and afforded the opportunity to actively participate in the implementation of self-determination. The implementation must be made accountable to them and sufficient priority must be given to the capacity-building for their self-government. Such participation and accountability requirements naturally demand that democracy serve as the bridge between self-determination as a group right and the rights of those individuals that constitute the group. The next section will discuss how democracy can make self-determination an efficient outcome for those who seek it using economic analysis.

VI. SELF-DETERMINATION AND THE COASE THEOREM

¶31 Self-determination has a huge impact upon the welfare of countries. Some of them, such as South Korea, have achieved substantial economic growth since independence.¹⁴¹ Others, such as India, may have eliminated famine thanks to an independent statehood.¹⁴² However, economics, a powerful tool for many other legal questions, has yet to be applied to self-determination.¹⁴³ This section will try to fill in that gap by examining self-determination by applying the Coase Theorem.

¶32 The Coase Theorem provides that if property rights are well-defined and transactions are costless, among the many competing uses of a property the most productive use will ultimately prevail, no matter what the initial allocation of a property right may be.¹⁴⁴ Daron Acemoglu examines an extension of the Coase Theorem to the political field, i.e. the proposition that regardless of the allocation of political powers, the

¹⁴¹ In terms of international Geary-Khamis dollars of 1990, South Korea's per capita income had grown from \$770 to \$12,152 between 1950 and 2001. Daron Acemoglu, *Why not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620, 631-32 (2003). Another example would be Singapore, whose per capita income had grown from \$1,600 to \$11,700 between 1960 and 1990 in terms of 1985 dollars. Susan M. Collins, Barry P. Bosworth, Dani Rodrik, *Economic Growth in East Asia: Accumulation versus Assimilation*, 1996 BROOKINGS PAPERS ON ECON. ACTIVITY 135, 136 (1996). The average GDP growth rate of Singapore was 8.3% between 1960 and 1994. *Id.*

¹⁴² Amartya Sen took this view in a series of works. Sen, *supra* note 4, at 8 (“[W]hile India continued to have famines under British rule right up to independence . . . they disappeared suddenly with the establishment of a multiparty democracy and a free press.”). Sen has further asserted that “no substantial famine has ever occurred in any independent and democratic country with a relatively free press.” *Id.* at 7-8. He suggested this was because “a democratic government, facing elections and criticisms from opposition parties and independent newspapers, [could not] help but make” a serious effort to prevent famine. *Id.* See also, Amartya Sen, *Development: Which Way Now*, 93 ECON. J. 745, 757 (1983); Amartya Sen, *Rationality and Social Choice*, 85 AM. ECON. REVIEW 1, 16-17 (1995).

¹⁴³ In fact, economic analysis has played a very limited role in international law in general. Jeffrey L. Dunoff and Joel P. Trachtman note that “the law and economics revolution,” the movement that applied “economic theories and methodologies to legal issues,” “has, with few exceptions, bypassed international law” and investigated “the applicability of economic analysis to the allocation of prescriptive jurisdiction, the law of treaties, and the competences of international organizations. Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 2 (1999). They also provide a bibliography of academic pieces on economic analysis on international law, but most of those works were on private international law. *Id.* at 56. By far the only treatise on economic analysis of law, Posner’s *Economic Analysis of Law*, has just added some discussion on economics and the law of war in its most recent (sixth) edition. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 136-41 (6th ed. 2003). A notable example of applying economic analysis to international human rights law is Jeffrey L. Dunoff and Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 A.J.I.L. 394 (1999).

¹⁴⁴ Posner, *supra* note 143, at 7; Acemoglu, *supra* note 141, at 621.

policies and institutions ultimately established in a society under these powers should be the most efficient ones given the diverse needs of the society.¹⁴⁵ He rejects this Political Coast Theorem (“PCT”) because, while the Coase Theorem relies on enforceable contracts, the “inherent commitment problems associated with political powers” destroy the enforceability of contracts between the state and the citizens.¹⁴⁶

¶33 According to the PCT, the exercise of the right to self-determination, like any other political or economic transaction, should lead to the best outcome given the various needs and preferences of the society.¹⁴⁷ Suppose that self-determination, by enabling East Timorese to “freely determine their political status and freely pursue their economic, social and culture development,”¹⁴⁸ increases their wealth¹⁴⁹ by \$6 billion but decreases that of Indonesia by \$4.5 billion.¹⁵⁰ If East Timor has an enforceable right to self-determination, it will go forward and use it. If instead Indonesia has sovereignty over East Timor, East Timor will offer to pay, and Indonesia will accept, an amount between \$4.5 and \$6 billion, and both will be better off. Likewise, if self-determination is actually not a good idea for East Timor and will increase the wealth of East Timorese by \$4.5 billion, but decrease that of Indonesia by \$6 billion, Indonesia will either (1) hold on if it initially has the sovereignty over East Timor, or (2) pay between \$4.5 and \$6 billion to get the sovereignty over East Timor if it initially does not have it. No matter where the sovereignty of East Timor initially stayed, it will end up with the party who has the more productive use for it.

¶34 But this kind of transaction has never happened. Instead, Indonesia chose to spend a large amount of resources maintaining its occupation of East Timor¹⁵¹ and East Timor

¹⁴⁵ Acemoglu, *supra* note 141, at 621. Commitment problems arise when “parties holding political power cannot make commitments to bind their future actions.” *Id.* at 620.

¹⁴⁶ *Id.* at 622.

¹⁴⁷ *Id.* In this section the words “good” and “efficient” are used interchangeably. The concept of efficiency used here is the same as that used by Donald A. Wittman, i.e. efficiency means wealth-maximization. DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* 3 (1995).

¹⁴⁸ International Covenant on Civil and Political Rights, art. 1, Mar. 23 1976, 999 U.N.T.S 171.

¹⁴⁹ Alternatively, we can also use “utility” here. Economists define utility as “the level of happiness or satisfaction that a person receives from his or her circumstances.” N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 439 (2006). Utility captures the subjective dimension of what people pursue. On the other hand, it is more straightforward to assign a dollar amount to wealth and compare the wealth that different people have. In the case of self-determination, peoples may attach huge subjective value to an independent statehood or whatever other political status they may prefer. However, how much welfare improvement or other economic benefits self-determinate may bring to people depends on many circumstantial factors and is therefore more objective. In view of this, the section chooses to use “wealth” to develop the PCT analysis of self-determination. In addition, the wealth increase here should be understood as the net increase or net decrease.

¹⁵⁰ These numbers, 6 billions and 4.5 billion, are arbitrarily chosen here to exemplify a different value of the territory of East Timor to East Timorese as compared to the value Indonesians attach to the territory. Although arbitrary, they may not be totally out of scale. The GDP of East Timor, using the purchasing power parity method, was estimated to be around 370 million U.S. dollars in 2004. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2006* (2006), available at <https://www.cia.gov/cia/publications/factbook/geos/tt.html>. The real GDP growth rate in 2005 was estimated at 1.8%. *Id.* Assume that the opportunity cost of capital is 10%, the value of a perpetuity consisting of East Timor’s future GDP’s would be about \$4.5 billion U.S. dollars. If East Timor were able to double its real growth rate once they became more proficient in self-governing, the value of the perpetuity would be about \$5.8 billion U.S. dollars.

¹⁵¹ Indonesia had spent \$832 million U.S. dollar to develop East Timor during its occupation of the latter. Purnawanty, *supra* note 27, at 69. Maintaining a troop in East Timor was not cheap either. For example,

suffered tremendously from its strife against Indonesia¹⁵² until Indonesia withdrew after the U.N.-sponsored popular consultation.¹⁵³ This appears to be an outcome inefficient to both parties. One potential explanation for this is what Acemoglu labels as modified PCT.¹⁵⁴ This modification tries to save PCT by arguing that political leaders may hold different beliefs about which political actions lead to the best outcome for the society.¹⁵⁵ Therefore, the leaders of Indonesia may have thought that the value of East Timor was \$9 billion when the true value was \$4.5 billion. They insisted on retaining the sovereignty of East Timor because they thought they could make more productive use of it. However, Acemoglu argues that the difference in beliefs cannot sufficiently rationalize the inefficient outcome when the leaders have maintained the inefficiency for an extended period.¹⁵⁶ Even if the Indonesian leaders asserted their initial claim over East Timor out of mistaken beliefs, they had two decades to update their beliefs and change their inefficient policies. Their steadfastness indicates that the modified PCT cannot explain their behaviors.

¶35

Acemoglu instead suggests that such sustained inefficiency might be explicated by a social conflict theory (“SCT”). According to this theory, political decision-makers choose policies and institutions to maximize their own benefits, rather than the aggregate welfare of the society.¹⁵⁷ Indeed, the Indonesian leader behind the invasion and occupation of East Timor, Mohamed Suharto,¹⁵⁸ has been listed as the world’s most corrupt leader.¹⁵⁹ Some observers even claim that the established investments in East Timor from the families of Suharto and certain elites in the Indonesian military are the true reason that Indonesia’s military was involved in the post-referendum violence.¹⁶⁰ Acemoglu further proposes that, under SCT, political elites do not corrupt efficiently because of the inherent commitment problem attached to political powers.¹⁶¹ If one were to put Acemoglu’s theory into practice, Suharto could have used his authority to strike a deal with East Timor and put the amount East Timor would be willing to pay for

Indonesia spent \$2.25 million U.S. dollars on “routine armed forces expenditure in East Timor” in the fiscal year 1977-78 alone. George J. Aditjondro, *Prospects for Development in East Timor after the Capture of Xanana Gusmao*, in *International Law and the Question of East Timor* 50, 54 (CIIR/IPJET ed., 1995). In addition, the current President of East Timor, Xanana Gusmao, once estimated that between 25,000 and 30,000 Indonesian soldiers had died in East Timor. *Id.*

¹⁵² It is estimated that from 1975 to the early 1990s, 250,000 East Timorese, about a third of East Timor’s population, died as a result of the fighting between Indonesian military and East Timor resistance. Bongiorno, *supra* note 46, at 625.

¹⁵³ See *supra* notes 37-46 and accompanying text.

¹⁵⁴ Acemoglu, *supra* note 141, at 621.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 632-33.

¹⁵⁷ *Id.* at 621.

¹⁵⁸ See *supra* notes 29-32 and accompanying text.

¹⁵⁹ TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2004 1 (2004), available at http://www.transparency.org/publications/global_corruption_report__1/download_gcr/download_gcr_2004. Transparency International alleged that Suharto embezzled between \$15 to 35 billion U.S. dollars during his 31 years’ rule of Indonesia, when the GDP per capita of his country was less than \$700 U.S. dollars. *Id.* This is far more than what most other dictators siphoned off from their countries. Ferdinand Marcos, regarded as the second most corrupt leader by Transparency International, looted between \$5 to 10 billion U.S. dollars during his 14 years’ rule of the Philippines. *Id.*

¹⁶⁰ Purnawanty, *supra* note 27, at 67-68.

¹⁶¹ Acemoglu, *supra* note 141, at 622. If political elite were to corrupt efficiently, it would “make a deal with the rest of the society to choose the policies and institutions that maximize output or social welfare, and then redistribute part of the gains to themselves.” *Id.*

independence into his own pocket. If such a deal had gone through, it could have led to an outcome as efficient for the East Timorese as if they paid the Indonesian treasury. Such a deal did not happen because it was not enforceable. Suharto could not commit to granting East Timor independence, because as the dictator of Indonesia he could easily renege after receiving a bribe. On the other hand, Suharto also had reason to doubt whether East Timorese would make the payments if he first granted them independence and thus lost control of them.

¶36 The international community did not provide alternative enforcement mechanisms sufficient for the prevalence of an efficient outcome in East Timor either, although the U.N. has provided enforcement assistance to other kinds of state-citizen commitments.¹⁶² Before the U.N.'s enforcement of the 1999 Agreements, it limited its role in the resolution of the East Timor question to that of a mediator and almost entirely delegated that task to Portugal.¹⁶³ As it turned out, the Portuguese, as ex-colonists, failed to bring enough credibility to the table, and the implementation of the 1999 Agreements still needed the U.N. to supervise.¹⁶⁴ On the other hand, the international community's selectivity in implementing the right to self-determination brought ambiguity and uncertainty to that right.¹⁶⁵ This destroyed a prerequisite for PCT, as well as the Coase Theorem, i.e. a well-defined legal right,¹⁶⁶ and further exacerbated the problem.

¶37 Acemoglu suggests that autocratic leaders might solve the commitment problem by democratization because by giving up power they could gain credibility.¹⁶⁷ Douglass C. North and Barry R. Weingast demonstrate how "the fundamental institutions of representative government emerging out of the Glorious Revolution" made the English Crown's commitment to honor its debts creditable and therefore significantly improved its ability to borrow.¹⁶⁸ These, if applied to East Timor's self-determination, would suggest that democratization of Indonesia would solve the commitment problem of Indonesian leaders and would more likely lead to an efficient solution of the East Timor question. This was precisely what happened. After Suharto stepped down, Habibie, who initiated Indonesia's transition to democracy,¹⁶⁹ proposed granting special autonomy to East Timor within a month and later agreed to let East Timorese decide their future by referendum to relieve Indonesia of the heavy political and economic burden of East Timor.¹⁷⁰ Besides solving the commitment problem, democracy guarantees the free

¹⁶² For example, since the early 1990s the U.N. has provided electoral monitoring to many independent member states whose domestic political process couldn't lead to free elections. The U.N. conducted its first election supervision in Nicaragua in 1990. Franck, *supra* note 20, at 71-72. During that mission, U.N. observers "mediated disputes between candidates concerning access to funding, the media and even the streets," "oversaw the rights of political parties to organize and campaign," and "investigated numerous charges of abuses and irregularities." *Id.* at 72.

¹⁶³ Toole, *supra* note 25, at 213-15; Rothert, *supra* note 41, at 259.

¹⁶⁴ See *supra* notes 35-46 and accompanying text.

¹⁶⁵ See *supra* notes 1, 77 and accompanying text.

¹⁶⁶ Acemoglu, *supra* note 141, at 621.

¹⁶⁷ DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* 176 (2005).

¹⁶⁸ Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HISTORY 803 (1989).

¹⁶⁹ Seth Mydans, *Indonesia's Presidential Flash in the Pan*, N.Y. TIMES, May 28, 200, at 13 ("[Habibie] pursued a remarkably steady course toward democracy, . . . freed the press, the labor unions and the political parties, and began the slow process of pulling the military out of politics.").

¹⁷⁰ Purnawanty, *supra* note 27, at 65-66.

discussion and distribution of information and “helps society to form its values and priorities.”¹⁷¹ Therefore, under democracy, Indonesians and East Timorese could more easily discover the most efficient solution of the East Timor question. This would promote the mutual understanding between the two peoples and reduce the risk of violent conflict.

¶38

The end of autocracy in Indonesia led to the secession of East Timor. Unfortunately, for East Timor, an independent statehood did not signify the end of inefficiency. Since being in power, the political leaders of East Timor have set up many seemingly unproductive policies. First, the leaders chose Portuguese as the official language, even though only 5% of the population speaks it; most East Timorese speak Indonesian, and the local language is Tetum.¹⁷² As a result, East Timor had to import hundreds of elementary school teachers from Portugal.¹⁷³ Choosing Portuguese as the official language also impeded the establishment of a functioning judiciary, as few local judges were proficient in Portuguese.¹⁷⁴ Second, the leaders set the fee for registering a business higher than the annual per capita income of \$370, which discouraged private enterprise.¹⁷⁵ Third, the leaders built an army not to provide self-defense, but to create jobs for the ex-freedom fighters and to prevent them from joining the militia.¹⁷⁶ This was seen as a “fatal flaw” in East Timor’s nation-building¹⁷⁷ and eventually led to the riot in 2006.¹⁷⁸ Again, only democracy could bring efficient policies and institutions to East Timor as an independent state. Donald A. Wittman argues that in democracies “political entrepreneurs are rewarded for efficient behavior” and that “democratic political markets” are efficient¹⁷⁹ because “[d]emocratic political markets are structured to reduce transaction costs” and low transaction costs bring efficiency.¹⁸⁰ Although East Timor is a democratic state under its Constitution, it is very young and still suffers from the undemocratic elements it inherited from its preexistence as a Portuguese colony and an Indonesian province.¹⁸¹ Only through further nation-building and democratic consolidation can it begin to reap the efficiency that democracy may provide.

¶39

In sum, self-determination has significant instrumental value to societies besides its intrinsic value for peoples.¹⁸² An economic analysis of East Timor’s self-determination

¹⁷¹ Sen, *supra* note 4, at 10.

¹⁷² Kurlantzick, *supra* note 15; Perlez, *supra* note 49.

¹⁷³ Perlez, *supra* note 19.

¹⁷⁴ *Id.*; Messner & Messner, *supra* note 57.

¹⁷⁵ Perlez, *supra* note 17. Economists generally see such high entry barrier as inefficient. Acemoglu, *supra* note 141, at 627-28. In comparison, “the total cost of opening a medium-size business in the United States is less than 2 percent of GDP per capita in 1999.” *Id.* at 628.

¹⁷⁶ Perlez, *supra* note 19.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* notes 59-71 and accompanying text.

¹⁷⁹ Wittman, *supra* note 147, at 2.

¹⁸⁰ *Id.* at 31-32.

¹⁸¹ See *supra* notes 54-55, 111-14 and accompanying text.

¹⁸² According to Amartya Sen, the intrinsic value of things is “their value as ends on their own right,” while the instrumental value of things is their value “as means to other ends.” Amartya Sen, *Freedom of Choice: Concept and Content*, 32 EUROPEAN ECON. REVIEW 269, 270 (1988). Under this conception, the intrinsic value of self-determination is its value as an end in its own right. On the other hand, the instrumental value of self-determination is its value as a means to other ends, such as the improvement of social welfare or the maximization of wealth. This article takes self-determination’s potential effect on the improvement of social welfare and wealth maximization as one of its instrumental values and argues that self-determination should be engineered so as to maximize this instrumental value to the extent possible. It assumes the

and beyond shows that self-determination alone does not necessarily lead to improvement in social welfare, but that democracy can help. Before self-determination, democracy can solve the commitment problem that may obstruct the political elite from instituting efficient policies regarding self-determination claims. Democracy can also help people discover the best outcome for themselves. After self-determination, democracy can reduce the transaction costs of political actions in the new state and bring efficiency to its policies and institutions. Additionally, self-determination's potential for confrontation or even armed conflicts makes the synergy of democracy and self-determination all the more imperative.

VII. CONCLUSION

¶40 This article demonstrates the enormous value-adding potential of democracy to the right to self-determination through the case study of East Timor. First, democracy can help identify: (1) whether a group qualifies for the right to self-determination by better ascertaining its members' subjective beliefs and matching those with its objective distinctiveness; and (2) whether and how a group wants to exercise that right by better aggregating the individual preferences to a collective choice. Second, democracy can better deliver and individualize the group right of self-determination and ensure that the respect for the rights and well-being of each individual serves as a guiding principle for the implementation of self-determination. Third, democracy can augment the instrumental value of self-determination and promote more efficient policies and institutions, both during self-determination by discerning whether self-determination is welfare-improving and after the entrenchment of the new political status by reducing political transaction costs. Dozens of self-determination movements have been achieved without any pressure for democracy,¹⁸³ but democracy is the force that elevates self-determination into something truly appealing.

¶41 This, however, does not imply that democracy is always secondary to self-determination or that democracy is only the second best thing that a people can hope for with regard to the protection of human rights. Independent statehood is not necessarily the best vehicle to protect the rights and interests of minority peoples. The cases of Belgium and Switzerland show that a "truly democratic state" must be responsive to any minority groups and be capable of preserving separate "culture, tradition, religion, or language."¹⁸⁴ A larger society is more conducive to pluralism because it is more likely to have multiple social cleavages that cut a higher share of the population into minorities. In such a setting, the commitment from any group in power to protect the minority rights is more credible because any member of the group in power may find itself likely to be a minority in the future. For example, the East Timorese may have allied with the Acehnese and Irian Jaya,¹⁸⁵ or Indonesia's religious minorities, such as the atheists,¹⁸⁶ to

existence of the intrinsic value of self-determination and argues for a more balanced approach to the two values with regard to self-determination, i.e. to take one into sufficient consideration when trying to maximize the other. Of course, if the intrinsic value of self-determination does not exist, the argument of this article that self-determination should be engineered so as to maximize its instrumental values will be even stronger.

¹⁸³ See *supra* note 8 and accompanying text.

¹⁸⁴ *Id.* at 26-27.

¹⁸⁵ Aceh and Irian Jaya are the two Indonesian provinces that have active claims to self-determination.

gain equal rights for all minorities. On the other hand, self-determination has put into power some of the most predatory and oppressive regimes in recent history.¹⁸⁷ Thus, democracy should not give way to self-determination or wait until after self-determination.

¶42

In conclusion, there is a strong link between democracy and self-determination, as demonstrated by the pre- and post-independence experiences of East Timor. Democracy is the catalyst for self-determination to bring about the advancement of human rights and the improvement of the general welfare of societies. To fully contribute its benefits, self-determination must be implemented strictly according to the requirements of democracy. Only then will the full potential of self-determination be unleashed, in East Timor and beyond.

Halperin, *supra* note 7, at 136.

¹⁸⁶ DEP'T OF STATE, THE INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006 (2006), *available at* <http://www.state.gov/g/drl/rls/irf/2006/71341.htm> ("Atheists or persons of nonrecognized faiths frequently experienced official discrimination . . .").

¹⁸⁷ Such as Kim Il Sung's dictatorship in North Korea and Mobutu Sese Seko's dictatorship of Zaire. For North Korea, *see* Acemoglu, *supra* note 141, at 631. For Zaire, *see* PAUL BROOKER, NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT AND POLITICS 150 (2000).