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Commentary on *The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania*

Daniel Halberstam

Kennedy Gastorn, *The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania*, 2 J. L. PROP. & SOC'Y 181 (2016), <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Gastorn.pdf>.

This commentary is in a series on the Indigenous Peoples Movement. See the introduction to this series and links to its other articles: <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-HardinAskew.pdf>.

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Commentary on *The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania**

Daniel Halberstam**

In his response, Professor Halberstam posed three questions to Professor Gastorn concerning equality, safeguarding civil rights, and accommodating differing conceptions of rights.

Let me briefly raise three lines of inquiry you might further pursue in this paper: power sharing models for divided polities; institutional capacity in the development and enforcement of rights; and limits of the language of rights.

First, there is a longstanding debate in comparative federalism literature about how best to structure government in multinational polities. These are diverse polities in which the various social groups understand themselves as nations, i.e. as peoples with a history or aspiration of self-governance. In such multinational systems, such as Belgium, Canada, the European Union, or Nigeria, to name a few, the question becomes whether to grant such national minority groups autonomy to govern their own territorial subunit or to guarantee them participatory rights in government, or both.¹

* Kennedy Gastorn, *The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania*, 2 J. L. PROP. & SOC'Y 181 (2016), <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Gastorn.pdf>.

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¹ See, e.g., Sujit Choudhry, *Does the World Need More Canada – the Politics of the Canadian Model in Constitutional Politics and Political Theory*, 5 INT'L J. CONST. L. 606 (2007); BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF

Gastorn's paper raises the question whether any of these approaches can be adapted to fit the relevant populations here. One difficulty that arises from the description provided in this piece is that there seem to be no recognized tribal lands or leaders in Tanzania. The social substrate of traditional federalism, at least in its autonomy version, may therefore be lacking here. In terms of a possible autonomy approach, there may be the further problem that several of Tanzania's ethnic groups may not consider themselves tied to any particular region. All this suggests that a territorially based autonomy approach, i.e. classic federalism, seems inapt.² At the same time, consociationalism may be difficult to implement as well. Granting minorities co-decision may breed resentment. In particular, as Will Kymlicka has suggested,³ such arrangements can cause intractable tension when a single minority or a single component state of a federation views itself as a co-founding nation of equal status seeking equal decision rights alongside other, more numerous population groups or component states taken as a whole. Again, based on the description in the paper, this might be of particular concern here. The challenge of asymmetry may therefore pose significant obstacles to the kinds of consociational arrangements Tanzania can successfully pursue.

The second way to improve equality is by not by structuring the polity as such, but by improving (individual) civil and political

MULTICULTURALISM (Cambridge, Mass: Harvard Univ. Press, 2001); Donald Horowitz, *Ethnic Groups in Conflict* (2d. ed Berkeley, CA: Univ. of California Press, 2000) (1985); WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* (New York: Oxford Univ. Press, 1998).

² For an overview, see Daniel Halberstam, *Federalism: Theory, Policy, Law* in Michel Rosenfeld and Andras Sajó, *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 577 (Oxford: Oxford University Press, 2012) (expanded version available as "Federalism: A Critical Guide" at SSRN.com).

³ Will Kymlicka, *Is federalism a viable alternative to secession?*, in Percy B. Lehning, ed., *THEORIES OF SECESSION* 109 (London: Routledge, 1998).

rights. Here, the paper could be developed considerably by elaborating on the institutional mechanisms for the protection of civil and political rights that do or could exist in Tanzania. All three branches of government can help advance a rights-protecting agenda. In the United States, for instance, we have seen the ebb and flow of legislative and executive powers over civil and political rights, as those powers have become confined, enlarged, and then confined again by a high court with varying commitments to the protection of rights. India has seen a strongly rights-protective court based on a rights protective constitution. And in South Africa, the Constitutional Court has, on occasion, led the entire country on foundational questions of rights absent much guidance in the constitution itself. So a second question would be to clarify the extent to which the paper looks to courts, legislatures, and executives in advancing the agenda of civil and political rights.

The enforcement of rights raises a related issue – the question of “hard” versus “soft” law. Here the question is, to what extent are rights merely aspirational guides and to what extent are they enforceable, say, in court? For instance, in addition to providing for food stamps, the Indigenous Peoples Policy Framework (“IPPF”) seems to promise participation rights. The IPPF declares that certain policies not be created absent participation of the affected groups. This seems fine as an aspiration. But to allow for legal and, especially, judicial enforceability, it may be useful to have specific some hard law components – even with a goal as modest as the general participation of a minority group. Take Article 46, for instance, which demands that “[t]he country authority shall put in place a legal procedure that will enable minority groups to participate in the authority of the country...” The word “shall” sounds hard, but a court might find “a legal procedure” and “participate” just too vague to adjudicate. To be sure, Tanzania’s Supreme Court could follow

some enterprising courts around the world, such as the European Court of Justice, which has drawn some hard conclusions from vague phrases mandating cooperation among various institutions of government. But with vague provisions like this, enforceability is at the mercy of the enforcing tribunal.

Finally, and most speculatively, let me ask about the limits of law and legal language to mark and defend certain rights. Put another way, can we properly grasp the rights we want to defend in the language of the law? Might it be possible that by speaking about the emerging “property rights” in Tanzania, as the paper does, and analogizing these rights to Western-style property rights, we might not be doing violence to the self-conception of certain indigenous peoples and to how they would choose to conceptualize these norms? Does giving “property rights” to hunter-gatherers and pastoralists, as the paper describes the beneficiaries, reflect these newly minted rights-owners’ own perception of their relationship to land? Does the beneficiaries’ internal view of that normative relationship stand in tension with the idea of Western-style property rights?

There may ultimately be limits to the law as it stands – not limits to the law if we were to start afresh from a wholly new perspective, but limits to the law as currently understood by the relevant officials – in granting a given minority group rights that properly reflect that minority group’s internal view of their own tradition. To be sure, granting rights in terms the majority can understand may be the only practicable measure to take. And some minority rights may be a better starting point for a trans-cultural conversation about values and norms than no rights at all. Nonetheless, whether we put the question in terms of asking about shared ideologies or shared lifeworlds, it seems nontrivial to ask whether the rights a particular minority demands can truly be found anywhere in the taxonomy of rights a particular majority is willing to grant.

Thank you.