

**Constitutionalism, Colonialism, and Cattle:
Towards a Deeper Understanding of Farmer-Herder Violence in Nigeria**

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ABSTRACT

Land use disputes between farming and pastoral communities in Nigeria have facilitated substantial violence. In response, the Federal Government of Nigeria has adopted a policy to transform the pastoralism that comprises the majority of the livestock sector into intensive, sedentary commercial cattle production. This thesis argues that violent conflict is a symptom of a fundamental tension in Nigerian society: the existence of alternative conceptions of constitutionalism. It will argue that Nigerian constitutionalism is a form of liberal constitutionalism and examine Fulani political community as a rooted constitutional order. Further, it will demonstrate that there is a foundational disconnect between them. Finally, it will critique the government's response to the conflict, arguing that the tension between these conceptions of constitutionalism undermines the efficacy of efforts to reduce violent conflict.

RÉSUMÉ

Les différends sur l'utilisation des terres entre les communautés agricoles et pastorales au Nigéria ont facilité une violence importante. En réponse, le gouvernement fédéral du Nigéria a adopté une politique visant à transformer le pastoralisme, qui constitue la majorité du secteur de l'élevage en une production de bétail commerciale, intensive et sédentaire. Cette thèse soutient que les conflits violents sont le symptôme d'une tension fondamentale dans la société nigériane: l'existence de conceptions alternatives du constitutionnalisme. On soutiendra que le constitutionnalisme nigérian est une forme de constitutionnalisme libéral et on examinera la communauté politique des Peuls en tant qu'ordre constitutionnel enraciné. En particulier, on démontrera qu'il existe une déconnexion fondamentale entre les deux. Enfin, on critiquera la réaction du gouvernement au conflit, en affirmant que la tension entre ces conceptions du constitutionnalisme compromet l'efficacité des efforts visant à réduire les conflits violents.

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INTRODUCTION

In 2018, more than 2,000 people in Nigeria were killed in violent conflicts between farmers and herders, with more than 1,300 deaths occurring in the first half of the year alone.¹ This violence is part of a larger trend across the region as environmental and population changes remake landscapes, disrupting relationships between peoples and between people and the land.² Rapid population growth generates concerns about land scarcity and reduced access, while also increasing anxieties about food production.³ Additionally, environmental changes in Nigeria's variable grasslands create concerns about access to resources and land degradation.⁴ As a result, land use patterns are changing and land uses themselves are seemingly in conflict with one another.⁵ Agricultural land use is exclusive and intensive, while pastoralism is often mobile, entailing extensive grazing of accessible pasture.⁶ As the population increases and agricultural production intensifies, pastoral migration corridors and grazing areas are increasingly altered by private land holdings.⁷

Also underlying the conflict are ethnic and religious tensions. Many pastoralists in Nigeria are Fulani (known outside Nigeria as Fulbe or Peul) whose ancestors migrated to the region over centuries and who often are considered to be settlers.⁸ Defined as an ethnic group, Fulbe identity

¹ Tim McDonnell, "Herders vs. Farmers: A Deadly Year in Nigeria", *NPR* (17 December 2018), online: <<https://www.npr.org/sections/goatsandsoda/2018/12/17/677482549/herders-vs-farmers-a-deadly-year-in-nigeria>>; Siobhan O'Grady, "This Little Known Conflict in Nigeria is now Deadlier than Boko Haram", *The Washington Post* (26 July 2018), online: <https://www.washingtonpost.com/news/worldviews/wp/2018/07/26/this-little-known-conflict-in-nigeria-is-now-deadlier-than-boko-haram/?utm_term=.f122b8d4c51d>.

² Jeffrey Gettleman, "Loss of Fertile Lands Fuels 'Looming Crisis' Across Africa", *New York Times* (29 July 2017), online: <<https://www.nytimes.com/2017/07/29/world/africa/africa-climate-change-kenya-land-disputes.html>>.

³ See for example, Krista Mahr, "Guns, Religion and Climate Change Intensify Nigeria's Deadly Farmer-Herder Clashes", *Los Angeles Times* (21 February 2019).

⁴ *Ibid.*

⁵ See Kathleen A Galvin, "Transitions: Pastoralists Living with Change" (2009) 38:1 *Annual Rev Anthropology* 185–198; Abubakar Suleiman, Elizabeth Louise Jackson & Jonathan Rushton, "Challenges of Pastoral Cattle Production in a Sub-humid Zone of Nigeria" (2015) 47:6 *Tropical Animal Health & Production* 1177–1185.

⁶ For an overview of property rights in Africa's drylands, see Esther Mwangi, "Property rights and governance of Africa's rangelands: A policy overview" (2009) 33:2 *Natural Resources Forum* 160–170 at 163–64.

⁷ See Suleiman, Jackson & Rushton, *supra* note 5 at 1180; Mark Davidheiser & Aniuska M Luna, "From Complementarity to Conflict: A Historical Analysis of Farmer-Fulbe Relations in West Africa" (2008) 8:1 *African J Conflict Resolution* 77–104 at 91.

⁸ Fulani is a term that generally is used in Nigeria. For reasons having to do with a history of conquest and settlement, Fulani peoples in Nigeria are often conflated with the indigenous Islamic Hausa people, resulting in the joint moniker of Hausa-Fulani. See E C Ejigou, *The Roots of Political Instability in Nigeria: Political Evolution and Development in the Niger Basin* (Burlington: Ashgate, 2011) at 111. Outside of Nigeria, the term Fulbe or Peul is often used. A person identifying as a member of the Fulani, Peul, or Fulbe would be referred to as Pullo (sing.). When referring to the people at large and to specific communities outside of Nigeria, this paper will use the term Fulbe. When referring to communities within Nigeria, it will use Fulani. Additionally, the distinction between

is incredibly complex and varied.⁹ Western academics and Fulbe communities propose many factors that purportedly make one Fulbe, including the possession of the Fulbe language, adherence to Islam, and a relationship with cattle.¹⁰ Today, they live in more than twenty countries spanning the Sudan and Sahel ecological zones.¹¹

As a people, Fulbe origins and early history are the subject of speculation, and theories about their origins have shifted over time. Early ethnographic investigations of the Fulbe mapped onto this group the Hamitic myth, proposing that their lighter skin evidenced a western migration from Asia and from which they purportedly brought elements of civilization.¹² A story supporting the theory of eastern origins can be found among some, but not all, Fulbe peoples. For example, among Wodaabe communities in northeastern Nigeria, Dennis Stenning reported Fulani legends describing the marriage of a Muslim Arab man to an indigenous African woman whose child (or children depending on the version told) became the original ancestors of the Fulani people.¹³

However, the general consensus in academia today is that the Fulbe originated from the Senegambia in the tenth century and migrated eastward through the Sahelian and Sudan ecological belts.¹⁴ Other Fulbe communities have origin stories which support this hypothesis. These stories vary, but the common thread between them is that the Fulbe became a distinct people upon receiving cattle from a spirit.¹⁵ Collectively, these divergent origin stories reveal two important elements of Fulbe identity today: relationships to cattle and Islam.

indigenes and settlers in Nigeria is complex and has significant legal connotations, which will be explored more fully in Chapter Two.

⁹ Some of the Fulbe communities that will be mentioned herein include Woodaabe (northeastern Nigeria and Niger), Gwande (northwestern Nigeria), Jafun (Nigeria), and Jelgobe (Burkina Faso).

¹⁰ See Charles Frantz, “Are the Mbororo’en Boring, and are the Fulbe Finished?” in Paul Kazuhisa Eguchi & Victor Azarya, eds, *Unity and Diversity of a People: The Search for Fulbe Identity* Senri Ethnological Studies 35 (Osaka: National Museum of Ethnology, 1993) at 12; Catherine Ver Eecke, *Pulaaku: Adamawa Fulbe Identity and Its Transformations* (PhD, University of Pennsylvania, 1988) [unpublished] at 40–44.

¹¹ Frantz, *supra* note 10 at 17.

¹² This myth imbued a sense of superiority over indigenous Africans. See Elizabeth Williams, “Ethnology as Myth: A Century of French Writing on the Peuls of West Africa” (1988) 24 *J History Behavioral Sciences* 363 at 372.

¹³ See Dennis Stenning, *Savanna Nomads* (London: Oxford University Press, 1959) at 19; A G Adebayo, “Of Man and Cattle: A Reconsideration of the Traditions of Origin of Pastoral Fulani of Nigeria” (1991) 18 *History in Africa* 1–21 at 4.

¹⁴ This consensus arose in part through linguistic analysis, which identified a significant relationship between Fulbe and the Serer and Wolof languages of the Senegambia region. See Adebayo, *supra* note 13 at 5 citing Joseph Greenberg, “Studies in African Linguistic Classification: The Classification of Fulani” (1949) 5:3 *Southwestern J Anthropology* 190–98.

¹⁵ See, for example, FW de St Croix, *The Fulani of Northern Nigeria* (Westmead: Gregg International Publishers Ltd, 1972) at 8. A settled woman gave birth to a son. After a fight with her husband, she went with her child into the bush and lost him. The child grew up in the bush. When he was older, a spirit told him that he would continue to live in the bush, but he would be wealthy. The spirit told him to go to the river and, when the child saw a white cow

Historically, Fulbe peoples have been pastoralists, engaged in raising livestock in general and cattle in particular. Often, they are associated with mobility, such as nomadic or transhumant migration.¹⁶ Over time, but particularly since the nineteenth century, many Fulbe have settled, although cattle remain important to settled Fulbe ways of life.¹⁷ Additionally, the literature suggests that there is a negative relationship between the persistence of pastoral practices and the adoption of and intensity of adherence to Islam.¹⁸

The early history of Fulbe conversion to Islam is difficult to ascertain. According to many reports, some Fulbe communities – particularly nomadic communities – did not appear to subscribe to Islam or did so only nominally.¹⁹ Islam likely was introduced by the trans-Saharan and trans-Saharan trade routes beginning in the eighth century.²⁰ One Fulbe community, the *Torodbe*, became Islamic clerics.²¹ Islam spread through West Africa in conjunction with Fulbe migration.²² As minorities living outside a homeland, Fulbe were often subject to the political authority of other, non-Fulbe peoples. Reportedly, the more Fulbe peoples converted to Islam, the

come out of the water, he was to walk away from the river. The cow would follow. The child walked a great distance, and when he turned around there were many cattle following him. After turning around, they stopped coming out of the water. See also, Adebayo, *supra* note 13 at 7. According to Adebayo, there are two main stories by which the Fulani are descended from the union of a water spirit and a human ancestor, Bajemongo. In both stories, the spirit gives cattle to Bajemongo's offspring.

¹⁶ Nomadic migration is often defined by the absence of a permanent settlement, while transhumant migration is the seasonal migration of herds.

¹⁷ It is important to note that settlement was likely always a factor of Fulani livelihood. Loss of herds to famine, drought, or disease might force a family to settle temporarily, until they could re-establish their herds. See C Edward Hopen, *The Pastoral Fulbe Family in Gwandu* (London: Oxford University Press, 1958) at 30; de St Croix, *supra* note 15 at 15. *Fulani Gida* (settled Fulani) having been settled in Hausaland for centuries. See Adebayo, *supra* note 13 at 14. For increased sedentarization since the nineteenth century, see Victor Azarya, "Sedentarization and Ethnic Identity among the Fulbe: A Comparative View" in Paul Kazuhisa Eguchi & Victor Azarya, eds, *Unity and Diversity of a People: The Search for Fulbe Identity* Senri Ethnological Studies 35 (Osaka: National Museum of Ethnology, 1993); Charles Frantz, "Contraction and Expansion in Nigerian Bovine Pastoralism" in Théodore Monod, ed, *Pastoralism in Tropical Africa: Studies Presented and Discussed at the XIIIth International African Seminar, Niamey, December 1972* African Ethnographic Studies of the 20th Century (Oxon: Oxford University Press for the International African Institute, 1975) 338 at 341.

¹⁸ Roger Blench, "Conflict and Co-operation: Fulbe Relations with the Mambila and Samba People of Southern Adamawa" (1984) 9:2 *Cambridge J Anthropology* 42–57 at 46; Yoshihito Shimada, "Jihad as Dialectical Movement and Formation of Islamic Identity among the Fulbe" in Paul Kazuhisa Eguchi & Victor Azarya, eds, *Unity and Diversity of a People: The Search for Fulbe Identity* Senri Ethnological Studies 35 (Osaka: National Museum of Ethnology, 1993) at 4; Frantz, *supra* note 17 at 345–48.

¹⁹ See for example, de St Croix, *supra* note 15 at 16; Ver Eecke, *supra* note 10 at 26.

²⁰ See Shimada, *supra* note 18 at 92; Fatou K Camara, "From Contemporary African Customary Laws to Indigenous African Law: Identifying Ancient African Human Rights and Good Governance Principles, A Tool to Promote Culturally Meaningful Socio-Legal Reforms" in J Fenrich, Paolo Galizzi & Tracy Higgins, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) 494 at 495.

²¹ See Azarya, *supra* note 17 at 42.

²² Frantz, *supra* note 10 at 17.

more resentment of their political subjugation grew.²³ In the seventeenth and eighteenth centuries, *Torodbe* clerics supported Fulbe *jihads* in Burkina Faso and Mali.²⁴ These *jihads* reportedly influenced the leader of the 1804 *jihad* in present day Nigeria, during which the former Hausa state of Gobir became the Fulani Sokoto Caliphate.²⁵

Many western scholars studying the Fulbe have also emphasized a distinction among Fulbe communities along religious and socioeconomic lines. In particular, academics have pointed to a correlation between adherence to Islam and the degree of urban settlement, marketization, and centralized governance.²⁶ Fulbe peoples living in remote areas distant from centers of commerce reportedly adopted Islam later and less strictly adhered to its tenets than those who lived in more urban, commercial areas.²⁷ Thus, at least historically, Islam purportedly was more prevalent among settled Fulani, while pastoral Fulani were more likely to ascribe to traditional religious, social, cultural, and legal beliefs and practices.²⁸ The latter group will be the focus of this paper.²⁹

In conflict with Fulani herders today are sedentary communities, many of whom practice agriculture, and who are often Christian and indigenous to the land contested.³⁰ Importantly, indigeneity is loosely defined in Nigeria and carries with it significant legal implications, in particular exclusive rights to administer land.³¹ Broadly, indigeneity entails belonging to a tribe with a clearly defined and exclusive homeland, though the definition has a complex colonial

²³ Azarya, *supra* note 17 at 43.

²⁴ *Ibid.*

²⁵ In particular, *Torodbe* were involved in *jihads* in Futa Bundu (c. 1690), Futa Jallon (c. 1770-80), and Futa Toro (c. 1798). See John Ralph Willis, "The *Torodbe* Clerisy: A Social View" (1978) 12:9 *J African History* 195–212 at 195.

²⁶ Frantz, *supra* note 17 at 345.

²⁷ Azarya, *supra* note 17 at 42; de St Croix, *supra* note 15 at 14; Ver Eecke, *supra* note 10 at 33.

²⁸ Azarya, *supra* note 17 at 42; de St Croix, *supra* note 15 at 14; Ver Eecke, *supra* note 10 at 33.

²⁹ Pastoral Fulbe may also be referred to as Fulbe *ladde*, Fulbe *na'i*, and *mbororo'en*. These are all terms that are used throughout the literature. They are often translated as bush Fulbe, cattle Fulbe, or pastoral Fulbe.

³⁰ See McDonnell, *supra* note 1; O'Grady, *supra* note 1; Max Bearak, "The Ordinary People Keeping the Peace in Nigeria's Deadly Land Feuds", *The Washington Post* (10 December 2018), online:

<https://www.washingtonpost.com/news/world/wp/2018/12/10/feature/the-ordinary-people-keeping-the-peace-in-nigerias-deadly-land-feuds/?noredirect=on&utm_term=.92eefc114a55>. Who counts as indigenous to an area is a highly complicated issue in Nigeria and is closely tied to colonial governance. Mamhood Mamdani has argued that British colonization created legal distinctions based on race and ethnicity in order to control and govern indigenous peoples in Africa. In so doing, it politicized ethnicity, such that only ethnic groups indigenous to an area were deemed to be citizens. Only indigenous citizens possessed customary rights to govern themselves – including rights to administer land and adjudicate internal disputes – within the colonial governance structure. See Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge, Mass: Harvard University Press, 2012) at 45–52.

³¹ See generally Ijeoma Nwachukwu, "The Challenge of Local Citizenship for Human Rights in Nigeria" (2005) 13:2 *African J Intl & Comparative Law* 235–261.

history and has been ambiguously constitutionalized.³² One's status as an "indigene" is determined by state and local government processes, reportedly in ways that are often arbitrary and discriminatory.³³ Given their mobility, pastoral communities may appear to lack a homeland, and some have been denied rights to land.³⁴

This delineation of rights on the basis of indigeneity establishes a tension and power imbalance in the relationships between indigenous farming communities and Fulani pastoralists, which historically were characterized by reciprocity.³⁵ For example, agricultural communities would grant grazing access on their lands in mutually beneficial exchanges for milk to supplement their diets and manure to fertilize their fields.³⁶ However, reciprocal relationships are in decline.³⁷ Growing human and livestock populations have facilitated greater competition over fixed areas of land.³⁸ Technological innovations have reduced the reliance of agricultural communities on Fulani milk and manure.³⁹ Simultaneously, settlement and income diversification have reduced Fulani reliance on agricultural communities.⁴⁰ Today, relationships are characterized more by competition and conflict.

The assumption explicitly underlying state and federal government responses to farmer-herder violence is that mobile pastoralism is no longer a legitimate or viable livelihood, leading to

³² *Ibid* at 239–42; Mamdani, *supra* note 30; *Constitution of the Federal Republic of Nigeria*, Act No. 24, Act No. 24 (5 May 1999) at §§ 25(1), 318(1).

³³ Nwachukwu, *supra* note 31 at 239–42; *Rethinking Nigeria's Indigene-Settler Conflict*, by Aaron Sayne, Special Report 311 (Washington, DC: United States Institute of Peace, 2012) at 3.

³⁴ See generally Wale Adebani, "Terror, territoriality and the struggle for indigeneity and citizenship in northern Nigeria" (2009) 13:4 *Citizenship Studies* 349–363; Chris C Ojukwu & C A Onifade, "Social Capital, Indigeneity and Identity Politics: The Jos Crisis in Perspective" (2010) 4:5 *African J Political Science & Intl Relations* 8.

³⁵ Hopen, *supra* note 17 at 151; Mwangi, *supra* note 6 at 163; Stenning, *supra* note 13 at 6; Wendy Wilson, "The Fulani Model of Sustainable Agriculture: Situating Fulbe Nomadism in a Systemic View of Pastoralism and Farming" (1995) 36/37 *Nomadic Peoples* 35–51 at 37.

³⁶ See Blench, *supra* note 18 at 42; Stenning, *supra* note 13 at 4; Wilson, *supra* note 17 at 37.

³⁷ See Ayodele O Majekodunmi, "Social Transitions in the Savannah: The Decline and Fall of Social Risk Management amongst Fulani in the Subhumid Zone of Nigeria" (2018) 45:3 *Int J Social Economics* 535–547; Mwangi, *supra* note 6; Charles Frantz, "Fulbe Continuity and Change Under Five Flags Atop West Africa: Territoriality, Ethnicity, Stratification and National Integration" (1981) 16:3/4 *J Asian & African Studies* 89–115. 2/28/20 3:11:00 PM

³⁸ John Unruh, "Integration of Transhumant Pastoralism and Irrigated Agriculture in Semi-Arid East Africa" (1990) 18:3 *Human Ecology* 223–246 at 224.

³⁹ Marie J Ducrotoy et al, "Patterns of passage into protected areas: Drivers and outcomes of Fulani immigration, settlement and integration into the Kachia Grazing Reserve, northwest Nigeria" (2018) 8:1 *Pastoralism* 1 at 3.

⁴⁰ Marie Ducrotoy, *Livelihoods of Fulani pastoralists and burden of bacterial zoonoses in the Kachia grazing reserve, Nigeria* (PhD, University of Edinburgh, 2014) [unpublished] at 220; Frantz, *supra* note 17 at 342; Ayodele O Majekodunmi et al, "Improved Productivity and Sustainable Pastoral Systems in an Era of Insecurity—Fulani Herds of the Southern Jos Plateau, North-Central Nigeria" (2016) 48:8 *Tropical Animal Health & Production* 1719–1728 at 1725; Majekodunmi, *supra* note 37 at 540.

policies that seek the settlement of Fulani herders.⁴¹ For example, two states in Nigeria enacted anti-grazing laws in 2016 in an effort to mitigate the growing violence.⁴² Additionally, the federal government has adopted a national plan to transform transhumance practices into sedentary commercial ranching.⁴³ Fulani herders argue that these responses are oppressive and discriminate against their culture.⁴⁴ However, the government position is that “practices [such as pastoralism] violating the rights and harming the livelihoods of other groups sharing the same geographical space must be modified.”⁴⁵ Ultimately, these perspectives reveal a tension and incompatibility between the ways in which the Nigerian government and Fulani communities understand the issue.

This thesis will explore that tension, arguing that it is the product of a fundamental conflict between conceptions of constitutionalism and using Aaron Mills’s theory of legality (or legal orders) as the framework for analysis.⁴⁶ Mills’s framework posits that law is situated in, understood as, and constrained by broader understandings of community and governance (i.e. constitutionalism) that are based in and arise from a worldview – the cosmological, epistemological, and ontological understandings which determine how a people understands and participates in the world around them.⁴⁷ He argues that worldviews are disclosed through creation stories, which vary across societies.⁴⁸ As such, conceptions of law may also vary across societies, creating significant implications for reconciling differences and conflicts.

First, I will describe two different conceptions of constitutionalism posited by Mills – liberal constitutionalism and rooted constitutionalism – summarizing the relationships he defines between worldview and law within each.⁴⁹ With respect to the classical understanding of liberal constitutionalism, I will summarize Mills’s analysis through an exposition of Locke’s theory of political power to demonstrate its foundations in human-centric rationality.⁵⁰ Mills’s conception of rooted constitutionalism is then juxtaposed to this liberal vision. Relying on colonial history and

⁴¹ *Stopping Nigeria’s Spiralling Farmer-Herder Violence*, by International Crisis Group, 262 Africa (2018) at 10.

⁴² *Ibid* at 8.

⁴³ *Ibid* at 23.

⁴⁴ *Ibid* at 10.

⁴⁵ *Ibid*.

⁴⁶ Aaron James Mills, *Minigowiziwin: All That Has Been Given for Living Well Together. One Vision of Anishinaabe Constitutionalism* (PhD, University of Victoria, 2019) [unpublished]; Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61 McGill LJ 847–84.

⁴⁷ Mills, *supra* note 46 at 24.

⁴⁸ *Ibid*.

⁴⁹ Mills, *supra* note 46.

⁵⁰ *Ibid* at 56–66; John Locke, *Second Treatise of Government*, Richard H Cox, ed. (Wheeling, IL: Harlan Davidson, Inc., 1982).

the current Nigerian constitution, I will then examine the legal order of the Nigerian state and argue that it constitutes a version of liberal constitutionalism. Next, I will examine pastoral Fulani constitutionalism through the lens of Mill's rooted constitutionalism using transcribed oral stories, ethnography, socio-economic studies, and ecological studies from Senegal, Mali, Burkina Faso, Niger, and Nigeria. Finally, following James Tully's "Reconciliation Here on Earth", I will then examine and critique the historic and current legal and policy responses to pastoralism, arguing that they constitute substantial violence and are fundamentally irreconcilable with Fulani constitutionalism.⁵¹

In examining the Fulani legal order as rooted, we must be cognizant of the risk of adopting assumptions of pan-indigeneity, which fail to account for the specificity of particular peoples and communities with complex and diverse histories, experiences, and environments. Mills's theory of rooted constitutionalism is based in Anishanaabe constitutionalism.⁵² In reading about historic and contemporary pastoral Fulbe relationships, beliefs, traditions, and practices, I identified elements of the rooted worldview and legal order he describes. Therefore, despite this risk, I am interpreting Fulani constitutionalism through the lens of Mills's rooted constitutionalism in order to enhance our understanding of Fulani legality.

Additionally, it is important to note that English literature on creation stories belonging to Fulani communities in Nigeria is extremely limited. Many scholars who have written about the Fulani in Nigeria refer to "origin" stories, by which is meant the origins of the Fulani as a distinct people rather than the genesis of the world. Creation stories and origins stories are not necessarily mutually constitutive.⁵³ Much of the Fulbe cosmology that has been transcribed is concentrated in Francophone West Africa, particularly Mali and Senegal.⁵⁴ The absence of creation stories among Fulani communities in Nigeria could reflect the influence of Islam in Nigeria, thereby potentially undermining the relevance of the stories examined herein.⁵⁵ However, given that the Nigerian Fulani are purported to have originated from the Senegambia region, it is possible that the ancestors

⁵¹ James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 83.

⁵² Mills, *supra* note 46.

⁵³ See Jan Vansina, "Comment: Traditions of Genesis" (1974) 15:2 *J African History* 317–322 at 317.

⁵⁴ See for example Ulli Beier, *The Origin of Life and Death: African Creation Myths* (London: Heinemann Educational Books Ltd, 1969); Amadou Hampate Ba, *Kaidara*, translated by Daniel Whitman (Washington, D.C.: Three Continents Press, 1988); Amadou Hampate Ba & G Dieterlen, *Koumen: Texte Initiatique des Pasteurs Peul* (Paris: Mouton, 1961).

⁵⁵ See Stephen Belcher, *Epic Traditions of Africa* (Bloomington: Indiana University Press, 1999).

of today's Fulani communities in Nigeria would have held some version of the stories transcribed.⁵⁶ However, I also recognize that stories are not universally held, understood, or interpreted by peoples who identify as belonging to the same community.⁵⁷

With this project, I am engaging in the exercise of possibility, inquiring into another way of thinking about the relationships between the Nigerian state and Fulani herders. The policies, projects, and perspectives of the past do not appear to be working. Violence has been occurring for decades and is reaching new, terrifying heights. The status quo is unsustainable, and it is necessary to consider the issue from an alternative perspective. This requires that I set aside my own liberal worldview. I do not propose that the analysis I offer here is or ever was a Fulani legal order. Rather, my use of Mills's rooted constitutionalism serves as a starting point for recognizing that there are deep, foundational differences between the state and the communities it regulates, affecting the success of the government's efforts to reduce the violence. Ultimately, my goal is to demonstrate that there are alternatives and that those possibilities should be explored – ideally by Fulani communities on their own terms – before and as a necessary condition to reform.

⁵⁶ See A M Katibi & A O Ahmad, "Northernism in Northern Nigerian Literature" in *Literature, Integration and Harmony in Northern Nigeria* (Malete: Kwara State University Press, 2017) 29.

⁵⁷ See Hester Lessard, Rebecca Johnson & Jeremy Webber, "Stories, Communities, and Their Contested Meanings" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 5.

CHAPTER ONE. CONFLICTING CONCEPTIONS OF CONSTITUTIONALISM

Law does not exist in isolation, disconnected and independent from society.⁵⁸ Rather, it sits within the larger normative frameworks of the societies in which it operates.⁵⁹ Therefore, diverse societies construct legal orders which differ in form and function. Moreover, different legal orders may co-exist within a larger political community or state (i.e. legal pluralism). In such cases, the interaction between legal orders often centers on the ways in which members of a minority community can express their identity – who they are and how they choose to live – within the larger political community.⁶⁰ Often, this interaction is shaped by the more powerful legal order, such that certain concepts belonging to the dominant legal order – like the purpose of political community and form of law – are taken as given.⁶¹ The minority community is then defined by shared race, ethnicity, religion, or culture, which amount to normative differences that can be accommodated within the dominant legal order.⁶² The problem with this way of conceiving of legal difference is that it inevitably leads to difficulty in identifying both the criteria that constitute identity and those who legitimately qualify as possessing it.⁶³ In Nigeria, normative difference is accommodated within the legal order as ethnicity and indigeneity. Legal force was given to an identity construct that was not clearly defined.⁶⁴ This has enabled groups holding political power

⁵⁸ For example, critical reflection is grounded in language and practices that are not universal. See James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008) at 22. Webber examines how cultural understandings influenced the debate surrounding *laïcité* and the *hijab* in Quebec in “Multiculturalism and the Limits of Toleration” in Andre Lapierre, Patricia Smart & Pierre Savard, eds, *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: Carleton University Press, 1996) 269.

⁵⁹ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, 3d ed (New York: Basic Books, 2000).

⁶⁰ See for the range of potential forms this interaction can take, Will Kymlicka, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995). From this perspective, culture provides people with the context within which they make meaningful choices about how to lead their lives, demonstrating a range of legitimate possibilities for how to lead a good life. See Avishai Margalit & Joseph Raz, “National Self-Determination” in Will Kymlicka, ed, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 79.

⁶¹ See Gordon Christie, “Culture, Self-determination and Colonialism: Issues around the Revitalization of Indigenous Legal Traditions” (2007) 6:1 *Indigenous LJ* 13–29 at 17; Mills, *supra* note 46 at 3.

⁶² Vernon Van Dyke, “The Individual, the State, and Ethnic Communities in Political Theory” in Will Kymlicka, ed, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 31 at 32.

⁶³ Christie, *supra* note 61 at 21. This is in part because, as Webber argues, cultures are dynamic, evolving, and open. Webber, *supra* note 58 at 98. Therefore, identity is also dynamic, evolving, and open. Mills argues that these delineated qualities which purportedly constitute indigenous identity miss the story of who a people are and who they came to be, which is what allows for the content and form of identity to change. Aaron Mills, “Rooted Constitutionalism: Growing Political Community” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 133 at 154.

⁶⁴ Nwachukwu, *supra* note 31 at 239–42.

to deny the status – and thereby the rights and entitlements – of some according to their own purposes, thereby facilitating conflict.⁶⁵

Given these issues, recognizing legal difference requires a reconfiguration of how one conceives of that difference.⁶⁶ Aaron Mills argues that legal difference arises from distinct worldviews, which Redfield defines as “an outlook upon the universe that is characteristic of a people” and “differs from culture, ethos, mode of thought, and national character.”⁶⁷ A worldview determines the way a person sees themselves in relation to the rest of the world, and this perception is situated in and constituted by the language, relationships, and activities of the person’s community.⁶⁸ The result is “a whole mode of consciousness” conditioning a person’s experience of the world and how it appears to them.⁶⁹ Therefore, if a worldview is “a unified ... field of thought, values, and action”, then law is only comprehensible within the broader worldview through which people literally make sense.⁷⁰

Mills argues that a worldview is made accessible through narrative, specifically through creation stories.⁷¹ Narratives in general are a mode by which human beings process and understand the world around them.⁷² According to Mills, creation stories in particular disclose the

⁶⁵ See Nwachukwu, *supra* note 31; Jeremiah O Arowosegbe, “Citizenship and Resource Competition in Nigeria” (2016) 26:1 *Anthropological Forum* 54–73; Adebani, *supra* note 34.

⁶⁶ *Ibid.* Mills, *supra* note 63 at 154.

⁶⁷ Robert Redfield, “The Primitive Worldview” (1952) 96 *Proceedings of the American Philosophical Society* 30–36 at 30. See Mills, *supra* note 46 at 24–25.

⁶⁸ A Irving Hallowell, “Ojibwa Ontology, Behaviour, and World View” in Jennifer S H Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934-1972* (Lincoln: University of Nebraska Press, 1976) 535 at 535.

⁶⁹ Michael Gilsenan, “Myth and the History of African Religion” in TO Ranger & IN Kimambo, eds, *The Historical Study of African Religion with Special Reference to East and Central Africa* (London: Heinemann Educational Books Ltd, 1972) at 53.

⁷⁰ Hallowell, *supra* note 68 at 536; Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 *Osgoode Hall LJ* 167–98; Geertz, *supra* note 59; Mills, *supra* note 46 at 24–25. As will be detailed below, Mills defines the relationships between worldview and law that condition what law is.

⁷¹ Mills, *supra* note 46 at 24–25; Mills, *supra* note 46 at 39.

⁷² Somers argued that “narrative is an ontological condition of social life.” Through narrativity we come to know, understand and make sense of the social world and constitute our social identities. “The Narrative Constitution of Identity: A Relational and Network Approach” (1994) 23:5 *Theory & Society* 605–649 at 606. Similarly, Meretoja wrote that narrative is “an ontological category that characterizes the human way of being in the world, that is, something constitutive of human experience.” “Narrative and Human Existence: Ontology, Epistemology, and Ethics” (2014) 45:1 *New Literary History* 89–109 at 89. Jeremy Bruner argued that narrative is one of two forms of cognitive functioning. We understand ourselves and relationships to others through experience. Stories help us to make sense of experiences (with others and with the world around us) by explaining a sequence of events in conjunction with our emotions, beliefs, and thoughts. Narratives also help to constitute ourselves in relation to others by rationalizing behavior in the context of community norms. They connect the individual and experience to the community. Elinor Ochs & Lisa Capps, “Narrating the Self” (1996) 25 *Annual Rev Anthropology* 19 at 26. Storytelling in general has community-building functions, such as building consensus, a common culture of shared understandings, and ethics. Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative”

cosmological, epistemological, and ontological contexts through which people understand themselves and their relationships to others.⁷³ Essentially, they explain the order of the world in which a people live.⁷⁴ According to Lessard et al, “[i]n choosing events, and describing who acted in those events, [stories] implicitly define the members of ... society; they tell us who counted, who belongs.”⁷⁵ In other words, creation stories describe what it means within a community’s worldview to be a person worthy of respect and recognition by others.⁷⁶ This, Mills argues, informs a community’s understanding of freedom, which he defines as “the state of being that obtains when one’s personhood is respected....”⁷⁷ Freedom defines the relationship between persons and community and thereby the purpose of individual persons coming together to belong in community.⁷⁸ Because different societies have different creation stories, and thereby different worldviews, they may also have different understandings of what personhood, freedom, and community mean.⁷⁹

Mills delineates a set of relationships between worldview and law that specify how a community’s understandings of personhood, freedom, and community both give rise to and limit their understandings of law.⁸⁰ He argues that a community’s worldview conditions the constitutional order of the community, which then determines the legal processes and institutions through which the community makes law, thus further conditioning the law itself.⁸¹ More specifically, if a worldview shapes understandings of personhood, freedom, and community, then

(1989) 87:8 Michigan L Rev 2411–441 at 2414. Narratives about origins establish and confirm a shared vision of community by positioning people in relation to each other, and, when we tell stories, we use a community’s language – a repertoire of codes, genres, lexicons, and grammars. Elinor Ochs & Lisa Capps, “Narrating the Self” (1996) 25 Annual Rev Anthropology 19–43 at 28. Further, stories help us understand community norms by establishing what is conventional and making sense of deviations. See, Gilson, *supra* note 69 at 50. Finally, Mircea Eliade writes that, “one understands what one is ... and how that came about because the myths” tell one how. Mircea Eliade, “Cosmogonic Myth and ‘Sacred History’” in Alan Dundes, ed, *Sacred Narrative: Readings in the Theory of Myth* (Berkeley: University of California Press, 1984) 137 at 140–41.

⁷³ In other words, creation stories describe the origins of the world, who or what exists within it, what knowledge is and how its acquired. Mills, *supra* note 46 at 68.

⁷⁴ Mills, *supra* note 62 at 68.

⁷⁵ Lessard, Johnson & Webber, *supra* note 57 at 11.

⁷⁶ Mills, *supra* note 46 at 68.

⁷⁷ *Ibid* at 84.

⁷⁸ *Ibid* at 43–44.

⁷⁹ *Ibid* at 48.

⁸⁰ *Ibid* at 40–48.

⁸¹ It is important to note that these relationships do not create single, fixed conceptions of constitutional orders, legal processes and institutions, and law. Rather, they provide a range of possibility. Because a worldview establishes a conception of personhood, community, and freedom, the possibilities for how we conceive of and manifest constitutions, legal institutions and procedures, and law are all constrained by the set of possibilities that reflect the conceptions of personhood, community, and freedom. *Ibid* at 43–47.

it explains how and why persons organize into community.⁸² In other words, it sets out the logic and structure through which persons come together to practice governance in order to effectuate their understanding of freedom.⁸³ This, according to Mills, is constitutionalism.

Because a community practices governance for a specific purpose (i.e. to bring about its conception of freedom), the legal processes and institutions by which it creates, adopts, interprets, modifies, and invalidates law must be consistent with that purpose.⁸⁴ Similarly, the possibilities for legal institutions and processes constrain the possible conceptions of law.⁸⁵ Mills writes that the purpose of law is to “coordinate social interaction” given and with respect to a community’s conception of freedom.⁸⁶ Specifically, law determines the range of possible actions “by empowering particular forms of normative interaction ... with force.”⁸⁷ *Which* particular forms of [normative interaction] and *what kind* of force transforms a general normative claim into a specifically legal one varies across legalities.”⁸⁸ Mills’s account of legal difference is far more foundational than differences in the content of law. Rather, it is a difference in the concept of law arising from distinct conceptions of constitutionalism and worldviews.⁸⁹

I. Traditional Conception of Liberal Constitutionalism

The words “constitution”, “constitutionalism”, and “constitutional order” evoke a particular notion, image, or even object. That notion, usually expressed as a written document, establishes a representative government whose power is distributed into distinct legislative, executive, and judicial branches and under whose law citizens possess equal rights and duties.⁹⁰ More generally, we may think of a constitution as facilitating the exercise of political power in accordance with a general system of principles, rules, and procedures.⁹¹ This notion of constitutionalism is often associated with the state, most notably the (single) nation-state, as well

⁸² *Ibid* at 42–43.

⁸³ *Ibid* at 44.

⁸⁴ *Ibid* at 45–46.

⁸⁵ *Ibid* at 38.

⁸⁶ *Ibid* at 46–47.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995) at 58–98.

⁹¹ James Tully, “The Unfreedom of the Moderns in Relation to their Ideals of Constitutionalism and Democracy” (2003) 65:2 *Modern L Rev* 204–228 at 205.

as with democracy.⁹² Further, the language associated with this conception of constitutionalism implies that it is neutral, objective, and universal.⁹³

Although there are notably distinct branches of thought within this type of constitutionalism, this thesis will refer to it broadly as liberal constitutionalism. In so doing, it assumes that these other articulations are based in the same underlying worldview.⁹⁴ Mills describes the liberal worldview very generally, preferring not to focus on any one of its many versions.⁹⁵ His purpose in doing so is “to tell a story so general and minimalist, that all liberals might agree that while it isn’t their story, it *necessarily underlies* the story they would prefer to tell.”⁹⁶ His account holds that individual autonomy, negative liberty, and contractarianism are the necessary, but not sufficient, conditions for creating a liberal community.⁹⁷

Given Mills’s articulation of the liberal creation story in a general form, this thesis will examine his description of liberal constitutionalism through an analysis of Locke’s state of nature narrative. The purpose is to demonstrate the ways in which a particular story about the order of the world, and the conceptions of personhood, freedom, and community that it implied, facilitated a traditional liberal theory of constitutionalism.⁹⁸ This particular story was chosen because Locke’s work was based in and wove together the arguments of earlier theorists (such as Hobbes’s state of nature and the natural freedom tradition) while establishing the groundwork for later constitutional theory (particularly Montesquieu’s *Spirit of the Laws* and Hamilton, Madison, and Jay in the *Federalist Papers*).⁹⁹

⁹² Though this is changing in complex ways to reflect the existence of multiple nations, shifting underlying conceptions of liberal constitutionalism in the process.

⁹³ Tully, *supra* note 58 at 20. However, the existence of other understandings of political community demonstrates that it is not the only form of constitutionalism.

⁹⁴ Mills, *supra* note 46 at 49–50.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at 50.

⁹⁷ *Ibid.* Mills recognizes that different non-classical liberals (specifically Charles Taylor, Jeremy Webber, and relational autonomy theorists) have influenced the discussion on negative liberty. However, he argues that while each of these positions attempts to rehabilitate individual autonomy and negative liberty, they still take them as necessary. Further, he notes that while many liberals critique contractarianism by taking political community as given, Mills argues that contractarian liberalism is the only form of liberal constitutionalism which offers any attempt to deal with the existence of indigenous peoples as unique constitutional communities. *Ibid.* at 50–55.

⁹⁸ As defined in *Two Treatises of Government* and other works on human nature and epistemology, such as the *Essays on the Law of Nature* and *Essays Concerning Human Understanding* which “fill in some of the detailed thinking on the concept of law and nature” omitted in *Two Treatises on Government*. See, John Yolton, *John Locke and the Way of Ideas* (Oxford: Oxford University Press, 1956). Other versions of this story have been told by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant.

⁹⁹ See Tully, *supra* note 90 at 81. There was an existing natural freedom tradition which held that people are naturally free in the sense of not being subject to the will of another (such that political subjection must be based on

A. *Locke's State of Nature*

1. The Rise of the Autonomous Person

In Locke's *Second Treatise of Government*, he tells a story about a stage of human existence defined by the absence of political authority which he calls the state of nature. Seemingly, the state of nature is a device used to identify the purpose and extent of political authority through its absence. Locke imbues his description of the state of nature with his theories of epistemology and natural law, articulates a theory of political power, and sets out a vision of the origins of the world as "given ... to the children of men."¹⁰⁰ Drawing on the Abrahamic creation story, he writes that God created humanity and gave to it the earth "for the support and comfort their being" such that all other beings were made for mankind's uses.¹⁰¹ This superior position of humans arises from the unique capacity to reason.¹⁰²

Locke was not the first to emphasize the importance of reason to human being. For example, in the thirteenth century, Thomas Aquinas delineated a theory of human ontology in which he argued that the ability to reason is a defining characteristic of human nature.¹⁰³ This notion had implications for how law was conceived of and understood. First, it held that God had established a body of eternal law which governed the nature of the universe.¹⁰⁴ Second, natural law consisted of the tenets of eternal law that governed beings in possession of reason (i.e. humans).¹⁰⁵ Natural law could be identified and known through Biblical revelation as interpreted by the Catholic Church, or it could be discovered within oneself through the application of the reason.¹⁰⁶ However, there was greater emphasis on divine revelation over rational discovery as the

consent, contract, or agreement). However, in this tradition, that freedom was non-political. Locke argued that political power was held by the individual, that sovereignty was vested in the people, and this was a major innovation. See James Tully, "Locke" in M Gollie & J Burns, eds, *The Cambridge History of Political Thought 1450-1700* (Cambridge: Cambridge University Press, 1991) 616 at 622.

¹⁰⁰ Locke, *supra* note 50 at § 25.

¹⁰¹ As such, plants and animals were deemed "the inferior ranks of creatures." See *Ibid* at §§ 26-27.

¹⁰² John Locke, *An Essay Concerning Human Understanding* (Kitchener: Batoche Books, 2001) at § 1.

¹⁰³ Specifically, Aquinas argued that human persons possess three sets of dispositions. Two of these types of dispositions are shared with other beings. The third set, consisting of the innate curiosity to understand and know, was deemed to be unique to human beings. Anthony J Lisska, "Natural Law and Roman Catholic Tradition: The Importance of Philosophical Realism" (2012) 71:4 *American J Economics & Sociology* 745-86 at 758-59.

¹⁰⁴ *Ibid* at 765-66.

¹⁰⁵ John Goyette, Mark Latkovic & Richard Myers, *St. Thomas Aquinas and the Natural Law Tradition* (Washington, DC: Catholic University Press, 2012) at xv.

¹⁰⁶ Brian Tamanaha, *On Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 39.

means of knowing natural law.¹⁰⁷ Thus, the Church was the leading authority on and determined the content of natural law.¹⁰⁸

The Reformation challenged this authority, facilitating the belief that everything, including natural law, was within the grasp of human understanding.¹⁰⁹ This belief was made possible by two ideas. First, Enlightenment thinkers challenged the very concept of knowledge. It had previously been believed that knowledge was innate within.¹¹⁰ Locke countered this theory, arguing that knowledge arises from sense perception and is developed through reason and argument.¹¹¹ Though the particulars of his epistemology are challenged, the notion that knowledge was not inherent in every human being facilitated the idea that “a man can attain knowledge of the law of nature ‘by himself and without the help of another, if he makes proper use of faculties he is endowed with by nature’.”¹¹² Rather than rely on conceptions of natural law imposed by those who claimed to have an innate or divinely revealed knowledge of God’s eternal law, the average individual could pursue a variety of paths within their own reasoned interpretation of God’s law.¹¹³

Second, Enlightenment philosophers believed that human nature was universal, such that natural law could be known through the application of reason to the study of that universal human nature.¹¹⁴ Consistent with this belief, Locke argued that the existence of human beings’ unique capacities clearly demonstrated a divinely intended purpose for humanity which must be consistent with human nature.¹¹⁵ As such, the law that governs human behavior is tied to our unique nature as human beings. By examining human nature – using our natural capacity to reason – it would be possible to identify the content of natural law.¹¹⁶

Locke then set about identifying the features of human nature that gave rise to those norms.¹¹⁷ Specifically, he determined that the innate ability to reason enables human beings to

¹⁰⁷ This purportedly was the necessary result of man’s original sin, which had obscured their capacity to discover natural law through reason. Goyette, Latkovic & Myers, *supra* note 105 at xv.

¹⁰⁸ Tamanaha, *supra* note 106 at 39.

¹⁰⁹ *Ibid.*

¹¹⁰ See generally, Yolton, *supra* note 98. See also, Shannon C Stimson, *The American Revolution in the Law* (Princeton: Princeton University Press, 2014) at 42–43.

¹¹¹ Erick Mack, *John Locke* (New York: Continuum, 2009) at 32.

¹¹² *Ibid.*

¹¹³ Stimson, *supra* note 110 at 42.

¹¹⁴ Tamanaha, *supra* note 106 at 39.

¹¹⁵ Erick Mack, *supra* note 111 at 28.

¹¹⁶ Tamanaha, *supra* note 106 at 39–40.

¹¹⁷ Erick Mack, *supra* note 111 at 35.

reflect on their individual desires and choose their own ends for themselves.¹¹⁸ In essence, human beings by their nature are autonomous, possessing the ability to govern their own thoughts and form their own goals.¹¹⁹ This construction of human nature facilitates the proposition that each individual is naturally free.¹²⁰ Liberty – the ability to realize and make actionable a persons’ thoughts and goals – is necessary to the integrity of human nature.¹²¹ Thus, Mills argues that the liberal worldview espouses “a foundational belief in the inviolability of autonomous persons.”¹²²

Further, if all men possess autonomy, such that it is in the nature of all humans and thereby universal, then there is a second feature of human nature. All men are morally equal.¹²³ If each individual has the ability to pursue his own ends, then each person’s autonomy is equally valued such that “there cannot be supposed any such subordination” among them.¹²⁴ Thus, there is a natural law limitation on one’s own sphere of action. According to Locke, “[t]he freedom then of men, and liberty of acting to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will.”¹²⁵ In other words, freedom consists in a tension between liberty and equality, and it is rationality which enables humans beings to navigate that tension and know the natural limits of his liberty.¹²⁶

Therefore, the state of nature is “a state of perfect freedom to order [one’s] actions, and dispose of [one’s] possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man.”¹²⁷ Given that all men possess this liberty, then “being all equal and independent, no one ought to harm another in his life, health, liberty, or possession.”¹²⁸ The problem, Locke wrote, is how to ensure the balance between liberty

¹¹⁸ First, Locke argued that it is human nature to seek pleasure and avoid pain and that this provides the rationale for why human beings seek certain ends and avoid others. Further, human beings have the capacity to evaluate and decide what will give them the most pleasure and when. *Ibid* at 37.

¹¹⁹ Mills, *supra* note 46 at 56–57.

¹²⁰ Locke, *supra* note 50 at § 4.

¹²¹ This definition of liberty comes from Mills, *supra* note 46 at 57. Additionally, Jean-Jacques Rousseau wrote that “[t]o renounce one’s liberty is to renounce one’s essence as a human being.” *The Social Contract and the First and Second Discourses* (New Haven: Yale University Press, 2002) at 159.

¹²² Mills, *supra* note 46 at 57.

¹²³ Locke, *supra* note 50 at § 4. It is important to note that Locke’s own notion of equality was limited. The means by which Locke, and liberalism in general, excluded individuals from their purportedly universal theory of human nature will be explored in the following chapter.

¹²⁴ Locke, *supra* note 102 at § 6; Mills, *supra* note 46 at 57.

¹²⁵ Locke, *supra* note 50 at § 63.

¹²⁶ Mills, *supra* note 46 at 56–57.

¹²⁷ Locke, *supra* note 50 at § 4.

¹²⁸ *Ibid* at § 6.

and equality in the state of nature.¹²⁹ Absent political authority, every person must be allowed to protect their own liberty and punish others for violations of it.¹³⁰ However, Locke held that the punishment necessary to protect and vindicate one's liberty would be ineffective due to bias and partiality.¹³¹ In Mills's words, some individuals may attempt to increase their own autonomy "at the expense of others."¹³² Therefore, "nothing but confusion and disorder will follow."¹³³ In other words, the state of nature creates uncertainty about the extent to which natural rights to liberty will be respected, and this uncertainty leads to chaos.¹³⁴

Therefore, the uncertainty found in the state of nature encourages human beings to leave the state of nature by joining into society with others.¹³⁵ Thus, the very purpose of belonging to a community is to sustain the autonomy of all members given their equal capacity for it.¹³⁶ They do so by "agreeing together mutually to enter into one community, and make one body politic."¹³⁷ Given that all men are free, equal, and autonomous, they must consent to the reduction of their freedom and delegation of the power to enforce their liberty to a third party.¹³⁸ In consenting to form a community, each individual becomes bound by the will of the majority in the exercise of political authority.¹³⁹ This is the social contract by which political community is constituted.¹⁴⁰

2. Dis-embedded from the Earth

Finally, there is one more important point to make clear about the liberal conception of personhood. Because personhood inheres in rationality and autonomy – traits which are unique to humans – persons are limited to humanity.¹⁴¹ This has crucial implications for the relationship

¹²⁹ *Ibid* at § 21.

¹³⁰ According to Locke, the reason is that "in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, everyone must needs have a right to do." *Ibid* at §§ 7-8.

¹³¹ *Ibid* at § 13.

¹³² Mills, *supra* note 46 at 57.

¹³³ Locke, *supra* note 50 at § 13.

¹³⁴ Mills, *supra* note 46 at 197.

¹³⁵ Locke, *supra* note 50 at § 123.

¹³⁶ Mills, *supra* note 46 at 56-57.

¹³⁷ Locke, *supra* note 50 at § 14.

¹³⁸ Locke wrote that "[t]he way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living amongst one another, in a secure enjoyment of their properties, and a greater security against any, that are not of it." *Ibid* at § 95. See also, Mills, *supra* note 46 at 59.

¹³⁹ Locke, *supra* note 50 at §§ 97-98.

¹⁴⁰ Mills, *supra* note 46 at 59.

¹⁴¹ *Ibid* at 57.

between human beings and the earth.¹⁴² Locke's creation story relates that God gave the earth to human beings for their benefit.¹⁴³ Thus, "there must ... be a means to appropriate [the earth] in some way or other, before they can be of any use, or at all beneficial to any particular man."¹⁴⁴ Though the earth was given to humanity in common, "every man has a property in his own person" such that "the labour of his body, and the work of his hands, ... are properly his."¹⁴⁵ Removal of land, plants, or animals from the state of nature conferred exclusive property rights over them.¹⁴⁶ In other words, the earth and all other non-human living beings appear to be extractable objects of human ownership not deserving of equal respect, rights, and duties.¹⁴⁷ According to both Aaron Mills and James Tully, this story facilitates a relationship between human beings and the earth in which human beings are independent from and dominate over the earth, an issue which will be explored more fully in the final chapter.¹⁴⁸

B. Constitutionalism within Locke's Worldview

It is from within this story, and others like it, that the traditional conception of a constitution has arisen.¹⁴⁹ In essence, the narrative demonstrates that liberal political community has a specific purpose: the equal protection of individual autonomy (i.e. justice).¹⁵⁰ Mills argues that this purpose shapes the form that a community (i.e. its "structure") takes and the reasoning behind that particular form (i.e. its "logic").¹⁵¹ If "the liberty principle requires that each person have a say, and equality requires that what each says demonstrates the same value for the autonomy of all", then logically belonging must arise by consent through the negotiation of "diverse community members [sharing] their respective views [and settling] on the terms" to which all can agree.¹⁵² In

¹⁴² *Ibid* at 198–200; Tully, *supra* note 51 at 90–96.

¹⁴³ Locke, *supra* note 50 at § 34.

¹⁴⁴ *Ibid* at § 26.

¹⁴⁵ *Ibid* at § 27.

¹⁴⁶ Specifically, he argued that "God gave the world to men in common; but since he gave it them for their benefit, and the great conveniences of life they were able to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it;)." *Ibid* at § 34.

¹⁴⁷ See generally, Tully, *supra* note 51.

¹⁴⁸ *Ibid* at 89–90; Mills, *supra* note 46 at 197.

¹⁴⁹ See for example, Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals* (Indianapolis: Hackett Publishing Co., 1983) at 74.

¹⁵⁰ See Locke, *supra* note 50 at § 124; Mills, *supra* note 46 at 57. See also, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

¹⁵¹ Mills, *supra* note 46 at 57–58.

¹⁵² *Ibid* at 57.

other words, a liberal worldview constitutes community through a social contract taking the “form of offer, acceptance, and internal correspondence.”¹⁵³

The social contract arises from a corresponding set of moments in which each member offers to the others to form a political community given a set of conditions.¹⁵⁴ Each of the others then accepts the terms of the offer, thereby generating the consent of all to form the community.¹⁵⁵ Crucially, this exchange consists in direct reciprocity between offer and acceptance, such that each member within the political community is bound to the other under the terms agreed upon.¹⁵⁶ If one individual infringes on the liberty of the other, the offending party owes relief directly to the victim.¹⁵⁷ By virtue of agreement, members of the political community then become citizens, possessing obligations and benefits under the terms of the contract which define the relationships between members or structure the political community.¹⁵⁸ Thus, according to Mills, “liberal political community is a standing agreement between community members” which “provisionally [settles] the question of how community members belong to one another.”¹⁵⁹

To effectuate a conception of freedom in which all persons possess equal capacity to pursue their own ends, the liberal constitutional order defines the authority which the people commit to, and thereby limit, the scope of their own liberty and the authority of the government.¹⁶⁰ Locke wrote that “freedom of men under government is, to have standing rule to live by, common to everyone of that society ...; liberty to follow [one’s] own will in all things, where the rules prescribe not, and not to be subject to the inconstant, unwritten, unknown, and arbitrary will of another man.”¹⁶¹ Two important notions follow. First, the government, through the exercise of its vested legislative authority, delineates a private sphere of action within which individuals may pursue their own goals, thoughts, and actions without interference, as well as a public sphere of

¹⁵³ Mills, *supra* note 46 at 59.

¹⁵⁴ Mills, *supra* note 46 at 59.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at 65.

¹⁵⁸ In other words, citizenship provides the structure of liberal political community. *Ibid* at 59–62.

¹⁵⁹ *Ibid* at 59.

¹⁶⁰ Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1940) at 22.

¹⁶¹ Locke, *supra* note 50 at § 22. Similarly, Montesquieu argued that liberty is the “right of doing whatever the law permits, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.” Charles de Secondat Montesquieu, *The Spirit of the Laws*, J V Prichard & Thomas Neugent, eds. (New York: Appleton and Company, 1990) at 180.

interaction within which individuals are obligated to act or not act in certain ways.¹⁶² Second, certainty over the boundaries of the private space and legitimate content of the public space is determined by rules promulgated by government within the scope of the authority consented to.¹⁶³ These rules are designed to prevent arbitrary encroachments on individual liberty by others and by the state.¹⁶⁴ They delineate obligations within the public space of the community, while preserving a private space within which members can pursue their own ends.¹⁶⁵

Further, belonging is assigned on the basis of citizenship, an “abstract and merely stipulated quality of belonging the state ascribes to its members.”¹⁶⁶ If all members in a political community possess morally equal liberty, then every individual citizen is entitled to equal treatment within the political community.¹⁶⁷ As such, deprivation of individual liberty based on race, sex, religion, or ability is an arbitrary violation.¹⁶⁸ Given this foundational equality, the public sphere (theoretically) remains neutral, such that cultural identity (theoretically) may be freely expressed in the private sphere.¹⁶⁹

C. Institutions and Procedures of Government

If the purpose of political community is to facilitate justice, it follows then that the institutional features of government must be consistent with and bring about that purpose.¹⁷⁰

¹⁶² Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 2012) at 8. Mills argues that this public-private sphere distinction is the definitive feature of liberal constitutionalism. Mills, *supra* note 46 at 60.

¹⁶³ Tamanaha, *supra* note 106 at 49.

¹⁶⁴ *Ibid.*

¹⁶⁵ Mills, *supra* note 46 at 60.

¹⁶⁶ *Ibid* at 59.

¹⁶⁷ *Ibid* at 57.

¹⁶⁸ Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) at 140. However, historically this has often been theoretical rather than actual. See generally Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought* (Chicago: Chicago University Press, 1995).

¹⁶⁹ Tamanaha, *supra* note 106 at 41–42. However, it has been argued that the public sphere is often pervaded by the cultural values of the majority. Given that the majority is able to bind minorities in the political community to its will, distinct minority cultural communities may become assimilated into the majority culture. The result may be a single culture for the whole political community. See, Van Dyke, *supra* note 62.. Some have argued that there is no necessary tension between commitment to individual autonomy and the recognition of cultural community, such that culture and community are already accounted for within the liberal model. Will Kymlicka in particular has argued that the fundamental purpose of individual autonomy is to pursue the good life and community and culture influence this pursuit by providing the context within which individuals exercise their autonomy to obtain it. See generally, Kymlicka, *supra* note 168. Additionally, consociational theory attempts to formally accommodate cultural diversity in public institutions by designing political arrangements around ethnic groups to build cooperation. This often entails a power-sharing arrangement and promotion of group autonomy through federalism. See, Kymlicka, *supra* note 60 at 16..

¹⁷⁰ Mills, *supra* note 46 at 62–63.

Therefore, the organizing goal of liberal constitutionalism leads to the specific institutions and procedures of government – such as representative government, democracy, and individuals rights protections – delineated in and synonymous with modern constitutions.¹⁷¹ Although alternatives are possible, the range of possible conceptions and constructions of government institutions and processes that facilitate a restrained government organized to protect individual freedoms is necessarily limited.¹⁷²

One common feature of the liberal legal tradition is a representative system of government.¹⁷³ Immanuel Kant argued that, in a direct democracy, each citizen is both the legislator and executor of his own will with the enforcement power of the state behind it.¹⁷⁴ Thus, to limit the power of government, it is considered necessary for citizens be represented by others.¹⁷⁵ A representative democracy then reflects two features of the liberal constitutional order – consent and limited government authority.

Another key institutional feature of liberal constitutionalism is the separation of government authorities into different branches.¹⁷⁶ In his initial conception of government, Locke called for the separation of two spheres of power: legislative and executive.¹⁷⁷ He reasoned that “it may be too great a temptation to human frailty, apt to grasp at power for the same persons, who have the power of making laws, to also have the power to execute them” such that those in power could exempt themselves from execution of the laws to their own advantage.¹⁷⁸ Montesquieu similarly called for the separation of power: “When the legislative and executive powers are united in the same person ... or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”¹⁷⁹ However, Montesquieu went a step farther by subdividing executive authority into: (1) the authority to make war, negotiate with other nations, and establish public security (now generally known as executive powers); and (2) the authority to punish criminals and decide disputes between individuals (now

¹⁷¹ *Ibid.*

¹⁷² Mills, *supra* note 46 at 850. These features are now generally settled. However, the evolution of political theory demonstrates that there are other possible institutional features which promote the goal of a liberal constitution.

¹⁷³ Tully, *supra* note 90 at 68.

¹⁷⁴ Kant, *supra* note 149 at 76.

¹⁷⁵ *Ibid.*

¹⁷⁶ Tully, *supra* note 90 at 68.

¹⁷⁷ Locke, *supra* note 50 at § 144.

¹⁷⁸ *Ibid* at § 143.

¹⁷⁹ Montesquieu, *supra* note 161 at 182.

generally belonging to a separate judiciary).¹⁸⁰ The establishment of a separate, judicial institution is, in form, a means to prevent arbitrary infringements on individual liberty, and, in function, a means to redress such infringements.

These examples demonstrate that the institutions and procedures through which liberal governance is practiced are consistent with and constrained by the understanding, purpose, and form of governance.¹⁸¹ So too, the concept of law is consistent with and constrained by those same understandings.¹⁸² In other words, there is a logical consistency throughout a legality that shapes its form and function.¹⁸³ Crucially, that logical consistency determines the state's understanding of its relationship to citizens and its role in relationships between citizens. It thereby frames the response to tension, disputes, and violent conflict between community members. In subsequent chapters, this thesis will argue that the Nigerian state is an example of liberal constitutionalism. As such, the Nigerian state understands its role in society as the protector and enforcer of its citizens' equal autonomy, influencing its attempts to accommodate Nigeria's multiple legalities, as well as its response to farmer-herder violence.¹⁸⁴

D. Law

Liberal constitutionalism is organized by and through rules. According to Mills, law in a liberal legal order is conceived of “as *rules*.”¹⁸⁵ Although Mills recognizes that every type of legal process and institution produces a unique form of law, he argues that “in each case, law is paradigmatically expressed as *rules*.”¹⁸⁶ Law, he says, “*must* have the abstract and generalized form of rules” to be consistent with the logic and purpose of liberal political community. The reason is that, if law were expressed in a concrete or particularized form, it would risk imposing on the negative liberty of some by articulating a condition not agreed to by all.¹⁸⁷

¹⁸⁰ Montesquieu argued that, “[w]ere it joined to the legislative, the life and liberty of the subject would be exposed to arbitrary control; ... Were it joined to the executive power, the judge might behave with violence and oppression.” *Ibid.* *The Federalist Papers*, influential upon the U.S. Constitution, took this notion even further, breaking the legislative power into two houses. See Tamanaha, *supra* note 106 at 54–55.

¹⁸¹ Mills, *supra* note 46 at 62–63.

¹⁸² *Ibid.* at 47.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.* at 159–60.

¹⁸⁵ *Ibid.* at 63. His emphasis. See also HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012).

¹⁸⁶ For example, law may take the form of legislative bills, court decisions, executive regulations, etc. Mills, *supra* note 46 at 63.

¹⁸⁷ *Ibid.* at 64.

Further, rules are intimately connected to the idea of rights. According to Mills, “where the freedom of persons is at stake ... rules take the unique form of *rights*” which “represent interests to which persons are *entitled*.”¹⁸⁸ Regardless of the source of these entitlements, “in all cases, a right gives effect to the notion” that a person has given up some of her autonomy to belong in the political community.¹⁸⁹ Because “all autonomous persons ... are rights-bearers, all share equally in the culture of reciprocal demand.”¹⁹⁰ In other words, all are equally duty-holders, such that if any one person infringes upon the liberty of another, the law provides a cause of action against the infringing party and a remedy that inures to the injured.¹⁹¹

Crucially, law expressed as rules, rights, and duties implies objectivity, neutrality, and universality. If all human beings are persons by virtue of their natural ability to reason, then it appears as if human nature is universal.¹⁹² Therefore, the rights and duties that follow from human nature also appear to be universal. However, Mills’s analysis of liberal constitutionalism demonstrates that the universality of human nature is itself a story.¹⁹³ Recognition of this is crucial because “[a]ll stories are narrated – told from someone’s perspective” and are “told to and for someone.”¹⁹⁴ They are subjective and subjunctive.¹⁹⁵ Therefore, the liberal constitutional order on which that story is built is also subjective and subjunctive.

II. An Alternative: Rooted Constitutionalism

Mills’s construction of liberal constitutionalism demonstrates that law is storied and contingent. It arises from within a legal tradition, constitutional order, and worldview.¹⁹⁶ It is only by conceiving of persons as uniquely capable of forming political community due to their innate possession of autonomy that liberal constitutionalism organizes society through the clear delineation of rights and obligations to which those persons have consented.¹⁹⁷ Thus, if persons are understood in a radically different way, then constitutionalism, legal processes and institutions, and law may also appear to be radically different. While laying out his framework for

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid* at 65.

¹⁹¹ *Ibid.*

¹⁹² Tamanaha, *supra* note 106 at 39.

¹⁹³ Mills, *supra* note 63 at 156.

¹⁹⁴ Lessard, Johnson & Webber, *supra* note 57 at 9.

¹⁹⁵ *Ibid* at 7–9.

¹⁹⁶ Mills, *supra* note 63 at 156.

¹⁹⁷ Mills, *supra* note 46 at 44–66.

understanding legality, Aaron Mills describes the legality of his own Anishanaabe community and contrasts it to the liberal legality of the Canadian state.¹⁹⁸ In so doing, he positions Anishanaabe legality within a broader framework capable of including other, often indigenous, legal orders.¹⁹⁹ He calls this legal order rooted (as in literally rooted in the earth).²⁰⁰ Further, he holds that there are elements of legality that all rooted societies share.²⁰¹ Many of these elements – such as interdependence and mutual aid – appear among Fulani communities, which will be discussed in Chapter Three.

A. Rooted Worldview

As discussed above, Mills posits that creation stories explain the order of the world in which a people live.²⁰² For rooted peoples, this order is given by a creator.²⁰³ Consistent with this order, each being in creation is uniquely gifted to fill some role within it.²⁰⁴ Although Mills's account is specific to Anishanaabe creationism, he writes that, within every indigenous explanation of creation he knows there is a firm appreciation of giftedness as the basis of cosmic order.²⁰⁵ Further, Mills suspects that every indigenous society has a creation story or stories that explain this cosmic order of giftedness.²⁰⁶

According to Mills, rooted creation stories describe a world in which all beings possess unique gifts.²⁰⁷ These gifts are given by a Creator, and each has a purpose within the cosmic order.²⁰⁸ This purpose is often understood as sacred law.²⁰⁹ If each being's gift confers a purpose, then it is necessary to know and use one's gifts in order to fulfill that purpose.²¹⁰ Since no being is completely gifted, then to use one's gifts necessarily means sharing gifts with other beings in creation.²¹¹ The manifestation of sacred law on earth – when non-human beings know and share

¹⁹⁸ Mills, *supra* note 46.

¹⁹⁹ *Ibid* at 14.

²⁰⁰ Mills, *supra* note 46 at 863.

²⁰¹ *Ibid* at 111.

²⁰² Mills, *supra* note 46 at 68.

²⁰³ *Ibid* at 68–71.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid* at 68.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid* at 69.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid* at 71.

²¹¹ *Ibid*.

their gifts – is natural law.²¹² For human beings, knowing and using their gifts entails learning how to care for the natural environment by respectfully and responsibly engaging with land, plant, and animal life.²¹³ From the cosmic order of gifts, Mills argues that rooted peoples “draw out a general ethos of giftedness in [their daily] lives” by sharing their gifts, including labor, material items, and food.²¹⁴ In other words, they follow the natural law.

There is an important parallel to liberal constitutionalism here. Based on Locke’s telling of the liberal creation story, both worldviews are based in an eternal or sacred law of a creator.²¹⁵ The manifestation of that eternal or sacred law on Earth is natural law.²¹⁶ However, there is a crucial difference. Liberal natural law is human-centric. Nature is chaotic and disordered, and natural law can only be known by humans through the exercise of their rationality and inquiry into their own nature.²¹⁷ By contrast, rooted natural law is earth-centric, and nature is ordered.²¹⁸ All beings, including those associated with nature, know and follow this order.²¹⁹ Further, humans can only know it by observing, listening to, interacting with, and inquiring into the nature of others.²²⁰ Thus, a cosmological sense of giftedness facilitates an ontology of interdependence and an epistemology based in and drawn from the earth.²²¹ These cosmological, epistemological, and ontological understandings inform how rooted peoples conceive of persons and their relationships to other beings.²²²

1. Interdependent Persons

To understand how multiple persons come together as community, it is first necessary to comprehend what it means to be a person. For rooted societies, a conception of persons begins with the cosmological belief in giftedness, which facilitates the recognition that all beings in creation are interdependent.²²³ Mills writes that, because all beings have unique gifts, each being

²¹² *Ibid* at 70–71.

²¹³ *Ibid* at 81.

²¹⁴ *Ibid* at 72.

²¹⁵ For liberal eternal law, see Lisska, *supra* note 103; Stimson, *supra* note 110. Cf Mills, *supra* note 46 at 70.

²¹⁶ Goyette, Latkovic & Myers, *supra* note 105 at xv. Cf Mills, *supra* note 46 at 71.

²¹⁷ Stimson, *supra* note 110.

²¹⁸ Mills, *supra* note 46 at 69.

²¹⁹ *Ibid* at 71.

²²⁰ *Ibid* at 81.

²²¹ *Ibid* at 78.

²²² *Ibid* at 68–97.

²²³ *Ibid* at 82.

needs or will need gifts it does not have.²²⁴ Therefore, individual persons are incomplete without their relationships to others.²²⁵ These relationships may include plant, animal, elemental, and spiritual beings, each of which possess and are able to share gifts.²²⁶ Thus, personhood inheres in the possession of gifts and capacity to share them.²²⁷

This has implications for how one understands freedom. Mills defines freedom as “the state of being that obtains when one’s personhood is respected.”²²⁸ If, in a rooted society, personhood exists in the capacity to give and receive gifts, then, to respect another’s personhood, freedom must facilitate that capacity to give.²²⁹ As such, a rooted conception of freedom necessarily entails the existence of an other with whom one gives and receives gifts.²³⁰ Mills argues that this freedom is created and maintained through the exercise of grace and equality.²³¹

Grace, in contrast to liberty, entails the sacrifice of giving gifts to and humility of receiving gifts from others, recognizing that “the demands of others serve to set [one] free.”²³² Within rooted freedom is the awareness that, where one shares with others, one will never be in need.²³³ Freedom then exists when one is free from need.²³⁴ It is only through receiving gifts from others that one can achieve the absence of need, and it is only by giving gifts to others that a person can receive gifts.²³⁵ Therefore, freedom is only experienced with and in relation to other beings.²³⁶ Embedded within sacrifice and humility is respect for one another.²³⁷ Accord to Mills, that respect facilitates the recognition that all contributions are equally valuable regardless of their extent or size.²³⁸ Equality then does not mean that all individuals give and take gifts of the same amount or value.²³⁹ Rather, it requires a person to give and accept in proportion to their own gifts and needs.²⁴⁰

²²⁴ *Ibid.*

²²⁵ *Ibid* at 80.

²²⁶ *Ibid.*

²²⁷ *Ibid* at 78–84.

²²⁸ *Ibid* at 84.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid* at 86.

²³² *Ibid.*

²³³ *Ibid* at 86–88.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid* at 85.

²³⁷ *Ibid* at 86–88.

²³⁸ *Ibid* at 88–90..

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

Crucially, Mills argues that conceiving of freedom as arising from the exercise of grace, rather than liberty, does not negate or constrain the capacity for individual free choice.²⁴¹ Rather, free choice exists within and is vitally important to rooted freedom.²⁴² Giving must be practiced and developed, which inherently entails an element of choice as to how to share one's gifts.²⁴³ Rather than conceiving of gifting through the concept of non-interference implicit in liberal liberty, free choice regarding others entails responsibility.²⁴⁴ Experiencing a sense of responsibility to support another is not interference; rather it offers the option of assistance, which can be freely accepted or rejected (i.e. chosen).²⁴⁵

2. Embedded in the Earth

Finally, it is important to understand the implications of a rooted constitutional order for human relationships to the earth. In particular, human beings are embedded within and dependent on their relationships to the earth and other non-human beings.²⁴⁶ They are co-equal with one another, deserving of respect and gratitude. As such, the earth is a member of the political community. Without the earth, rooted constitutionalism is unable to function.²⁴⁷

B. Rooted Constitutionalism

Understanding oneself as being gifted and free only with and through the sharing of one's gifts with others, facilitates an understanding of belonging through gift sharing.²⁴⁸ In other words, the reason that people come together to form community is to share their gifts. Thus, belonging is "active and contingent"; one belongs to a community only to the extent that one participates in the sharing of gifts with others.²⁴⁹ The logic by which community is organized then in a rooted worldview is mutual aid.²⁵⁰ For Mills's rooted community, this logic is reflected in a dual form. A person can reach out to another with a gift, which is received with gratitude and responded to with reciprocity; or one can reach out to another by presenting a need, which is received with a sense

²⁴¹ *Ibid* at 90–95.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid* at 92.

²⁴⁶ *Ibid* at 72–88.

²⁴⁷ *Ibid* at 204.

²⁴⁸ *Ibid* at 96.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

of responsibility and responded to with reciprocity.²⁵¹ Crucially, reciprocity need not be direct or immediate.²⁵² Rather, it is circular.²⁵³

If mutual aid is the logic of a rooted constitutional order, then Mills argues that kinship is the constitutional structure through which that logic is organized and practiced.²⁵⁴ Kinship delineates relationships between members of the community and through which community members present and receive gifts and needs.²⁵⁵ Specific roles frame how gratitude and responsibility manifest in reciprocity.²⁵⁶ In other words, a kinship role shapes what a reciprocal gift might look like – what type of response might be acceptable – which will vary depending on the role.²⁵⁷

C. Legal Institutions and Processes

While the purpose of liberal constitutionalism is to facilitate justice, rooted constitutionalism seeks to facilitate harmony, the communication and interaction of gifts and needs.²⁵⁸ According to Mills, harmony is a necessary condition to rooted freedom.²⁵⁹ A person is only able to engage in relationships with others – to give and receive gifts with others and thereby be free of one’s needs – if they are connected to those others.²⁶⁰ Thus, “the goal of community is to sustain (and where necessary, to restore) relationships that support” connections between members.²⁶¹

Further, if constitutionalism is the collective practice of governance in pursuit of freedom, then legal traditions are the processes and institutions with which a society practices governance. If governance takes the form of mutual aid within specific relationships requiring the appropriate response to the presentation of a gift or a need, then rooted legal traditions must facilitate members’

²⁵¹ This duality arises from the inherent nature of a sense of giftedness. If people are uniquely gifted, such that they are not in possession of all gifts needed to live, then they are also, simultaneously in need. As gift and need are mutually constitutive of a person, such that one needs others, it follows that the logic of community recognizes both those elements and facilitates the matching of them. *Ibid* at 100–107.

²⁵² *Ibid* at 108.

²⁵³ *Ibid*.

²⁵⁴ *Ibid* at 114.

²⁵⁵ *Ibid* at 115.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*.

²⁵⁸ *Ibid* at 125–26.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* at 126.

²⁶¹ *Ibid* at 127.

capacity to make these determinations.²⁶² Thus, rooted legal processes and institutions have two, often overlapping, functions. They both develop and train members' capacity to exercise legal judgement and help members use that judgement in particular circumstances.²⁶³ Because legal judgement is embedded in specific relationships, legal reasoning is holistic, requiring consideration of aspects of one's being beyond the mind.²⁶⁴ If legal reasoning is holistic, then "its legal judgement output is holistic too."²⁶⁵ In other words, processes of legal judgement may be embedded within what would appear to be markers of culture (e.g. stories, music, ceremonies, initiation rites).²⁶⁶ Therefore, "the practice of ... law is the practice of everyday living."²⁶⁷

D. Law & Force

Given its embeddedness within everyday living, law within a rooted worldview looks very different from the settled, clearly identifiable, and determinate rules within the liberal legal order. In fact, Mills argues that "rooted law doesn't find its ultimate expression as rules (much less as rights), *at all*."²⁶⁸ Rather, law refers to "a particular form of judgment about how to exercise responsibilities in relational (and specifically, kinship) categories."²⁶⁹ Thus, it places a significant emphasis on individual agency.²⁷⁰ That agency is guided by the worldview and logic of mutual aid, which is taught and guided by legal traditions.²⁷¹ Importantly, reasonable people might disagree about what form responsibility should take in a specific situation or how to perform it.²⁷² Therefore, Mills argues that constitutional logic of mutual aid requires substantial self-governance, (i.e. that interdependent persons govern themselves effectively).²⁷³ Further, because persons are highly interdependent, self-governance is also simultaneously community governance.²⁷⁴

²⁶² *Ibid* at 129.

²⁶³ *Ibid*.

²⁶⁴ *Ibid* at 130–31.

²⁶⁵ *Ibid* at 131.

²⁶⁶ *Ibid* at 131–34.

²⁶⁷ *Ibid* at 133–34.

²⁶⁸ *Ibid* at 135. His emphasis.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid*.

²⁷¹ *Ibid* at 136–37.

²⁷² *Ibid* at 165.

²⁷³ *Ibid* at 157–60.

²⁷⁴ *Ibid* at 159.

This legal order also leads to an expression of force – the enforcement of rooted law – that is quite different from that of a traditional state-based legal order.²⁷⁵ While persons in a liberal community confer on the state the authority to enforce law by coercive force, rooted legal enforcement – consisting of both authority to exercise and ensure compliance to – is persuasive.²⁷⁶ In other words, those who follow a particular authority figure are able to leave the community or retract their support, and those who are in a position of authority seek to persuade community members to accept and choose to follow.²⁷⁷ Thus, expressions of governance and enforcement look quite different.

III. Conclusion

Ultimately, the traditional liberal articulation of legality misses a fundamental point. In being grounded on a narrative about human nature, it fails to recognize that it is, in fact, based in a worldview.²⁷⁸ More specifically, it is based in one of many possible worldviews, and as such, it produces one understanding and form of constitutionalism. It merely appears to be universal through the lens of its worldview. However, it is not constitutive of the concept of constitutionalism itself. Rather, what Mills means by constitutionalism is the way in which societies organize themselves as political communities. “Stripped to its bare essentials constitutionalism means nothing more than persons practicing governance together (which entails a notion of community) to secure their freedom.”²⁷⁹ In other words, constitutionalism is the framework through which a political community expresses and practices its worldview.²⁸⁰ It “reflects an understanding of what a person is and what a community is, and pursues a vision of freedom determined by these understandings for its members.”²⁸¹

A constitution then isn’t merely the set of institutions, procedures, and processes that establish government. Rather, these institutional features serve a purpose and attempt to effectuate a certain outcome, a way of living together in society as determined by the constitutional order.²⁸²

²⁷⁵ Broadly, Mills defines law by its purpose: to coordinate social interaction consistent with the legal order’s conception of freedom. It empowers particular forms of normative interaction with force, transforming a normative interaction into a legal one. *Ibid* at 45–46.

²⁷⁶ *Ibid* at 161.

²⁷⁷ *Ibid* at 163.

²⁷⁸ Mills, *supra* note 46 at 852–54.

²⁷⁹ Mills, *supra* note 46 at 43.

²⁸⁰ Mills, *supra* note 46 at 855.

²⁸¹ Mills, *supra* note 46 at 855.

²⁸² *Ibid* at 57.

Viewed in this way, constitutionalism is the logic and structure through which a society constitutes its political community as conceived of through a worldview.²⁸³ Such a conception facilitates other understandings of constitutionalism. Crucially, from the awareness of these other conceptions of constitutionalism arises implications for compatibility between them. In particular, Mills argues that translation of law between legalities which do not share a similar worldview or constitutional order – whether through assimilation, legal pluralism, or hybridity – creates the danger that one will be translated *into* the other.²⁸⁴ Such a translation, taken out of the worldview and logic which gives law its meaning, may lead to a fundamental distortion of the translated legality.²⁸⁵ This, ultimately, is the danger of Nigeria’s approach to farmer-herder violence.

²⁸³ *Ibid* at 28.

²⁸⁴ *Ibid*. For more on these mechanisms for accommodating legality diversity within one state and the distinctions between them, see *Ibid* at 209–219.

²⁸⁵ Mills, *supra* note 46 at 28.

CHAPTER TWO. COLONIALISM AND THE LIBERAL CONSTITUTIONAL ORDER IN NIGERIA

Promulgated in 1999, the Nigerian constitution is in every sense a modern, liberal constitution. It is an example of the ubiquitous constitutional form characteristic of statehood and governance throughout the globe. It creates a representative government in which the political power of the people has been vested; delineates restrictions on the scope of that government's authority over the people; establishes separate branches of government, each with generally distinct but occasionally overlapping sets of authority; and provides for the protection of delineated individual rights.²⁸⁶ Additionally, consistent with legally plural models for the recognition of cultural diversity within the state, it recognizes ethnic and religious identity through its federalist structure and customary court system.²⁸⁷

It is also, in no small part, a product of European influence. The creation story embedded in the Nigerian constitution has its origins in the Enlightenment and was disseminated through colonialism. As a modern constitution, it reflects the propositions and characteristics of a legal tradition which grew out of the intellectual, religious, and cultural upheaval of the Enlightenment.²⁸⁸ This upheaval told a story about the origins of the world and of human nature as rationally autonomous and universal. From this story arose a theory of constitutionalism and law as universal.²⁸⁹ Confronted with communities possessing different constitutional orders, European states then sought to reconcile that difference to the purportedly universal legal order they imposed on indigenous peoples.²⁹⁰ As will be examined below, this entailed complex processes of exclusion based in and rationalized by the liberal creation story.

I. The Liberal Worldview in Nigeria

Liberalism and its underlying state of nature narrative, as developed over centuries by Locke and others, is complexly connected to European colonial expansion.²⁹¹ The narrative – and

²⁸⁶ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at §§ 1-6, 33-46.

²⁸⁷ *Ibid* at §§ 3, 255-68, 318(1).

²⁸⁸ Tully, *supra* note 90 at 58–98.

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid*.

²⁹¹ See for example, Anthony Pagden, “Human Rights, Natural Rights, and Europe’s Imperial Legacy” (2003) 31:2 *Political Theory* 171–99; Bhiku Parek, “Liberalism and colonialism: A Critique of Locke and Mill” in Nederveen Pieterse & Bhiku Parek, eds, *The Decolonization of Imagination: Culture, Knowledge and Power* (London: Zedd Books, 1995) 81; Tully, *supra* note 90; Barbara Arneil, *John Locke and America* (Oxford: Clarendon Press, 1996); Richard Waso, “The Formation of Natural Law to Justify Colonialism, 1539-1689” (1996) 27:4 *New Literary History* 743–59.

the understandings of personhood and community it provided – became the basis from which European powers framed their claims over the New World.²⁹² For example, James Tully has argued that Locke’s *Two Treatises of Government* presented a perspective of human history characterized by stages of development which helped to facilitate claims to indigenous land.²⁹³ Along this timeline, indigenous peoples fell within the first stage, constituting the earliest members of humanity.²⁹⁴ Hence, the now famous phrase, “In the beginning, all the world was America.”²⁹⁵

This first stage of development paralleled the state of nature.²⁹⁶ According to Tully, indigenous peoples were characterized within Locke’s framework as governing themselves through the individual and ad hoc application of natural law, such that there had been no delegation of power to a representative government.²⁹⁷ Further, land was unowned, such that indigenous peoples were “commonly without any fixed property in the ground.”²⁹⁸ Therefore, Locke argued that indigenous peoples were not subject to the protections afforded European nations under international law.²⁹⁹ To take their land for productive use was not only sanctioned by natural law, it was mandated.³⁰⁰

Such a narrative found expression in the principle of *terra nullius*, with which European states, and the English in particular, laid claim to indigenous land as against other European nations.³⁰¹ Since, within Locke’s conception of natural rights and private property, “the right to unclaimed land was precisely a natural right, any attempt to prevent it from being exercised, by vicious aborigines, constituted a violation of natural law.”³⁰² From this perspective then, lands

²⁹² Pagden, *supra* note 291 at 181; Robert Wokler, “Anthropology and Conjectural History in the Enlightenment” in Christopher Fox, Roy Porter & Robert Wokler, eds, *Inventing Human Science: Eighteenth-Century Domains* (Davis: University of California Press, 1995) at 31.

²⁹³ Tully, *supra* note 90 at 71. For example, Immanuel Kant also believed in a universal history of man, espousing a theory that the history of the world proceeded by stages culminating in civilized order most closely approximated by Europeans. Kant, *supra* note 149.

²⁹⁴ Tully, *supra* note 90 at 71.

²⁹⁵ Locke, *supra* note 50 at § 49; Tully, *supra* note 90 at 71.

²⁹⁶ Tully, *supra* note 90 at 71–73.

²⁹⁷ *Ibid* at 72.

²⁹⁸ Locke, *supra* note 50 at § 38; Tully, *supra* note 90 at 72.

²⁹⁹ Tully, *supra* note 90 at 72–73.

³⁰⁰ *Ibid*.

³⁰¹ Robert J Miller, “The Doctrine of Discovery” in Robert J Miller et al, eds, *Discovering Indigenous Lands* (Oxford: Oxford University Press, 2010) at 7–8.

³⁰² Pagden, *supra* note 291 at 183. According to Locke, because the earth was given to mankind for their “support and comfort”, in order for it to be of use, “there must of necessity be a means to appropriate” land and the earth’s resources. Locke, *supra* note 50 at § 26. Thus, natural law requires that land be put into productive use, such that any attempts to interfere with productive effort, or even the absence of production itself, constituted a violation of natural law. Tully, *supra* note 90 at 72–73.

could be claimed if they were unoccupied by any person or were occupied in a manner inconsistent with European notions of property.³⁰³

Additionally, Uday Singh Mehta detailed the ways in which liberalism developed strategies by which Europeans excluded groups of people from membership in political community despite its purported universality. The basis for these exclusions were mental capacities and cultural habits.³⁰⁴ Mehta noted that within Locke's theory, "political inclusion is contingent on a ... capacity to reason."³⁰⁵ The exercise of political authority requires consent; consent requires knowledge of natural law; and knowledge of natural law requires reason.³⁰⁶ Crucially, the exercise of reason was not actually universal, but qualified.³⁰⁷ Certain groups of people, Locke argued, did not possess the capacity to exercise reason and so could not express consent.³⁰⁸ Children in particular were temporarily without this capacity, which had to be developed and honed by education.³⁰⁹ Therefore, by characterizing indigenous peoples as within a lower stage of human development, they could be viewed as children to whom rationality needed to be taught.

Further, Locke characterized cultural custom as nothing more than the settled "habits of thinking in understanding", an automatic response to stimulus arising from sustained engagement with one's society.³¹⁰ These ideas found expression in English colonial characterizations of indigenous legal systems, which were deemed customary law. If custom is nothing more than habits of thinking, then by characterizing indigenous law as *custom*-ary law Europeans implied that indigenous legal systems consisted of mere *habit* rather than rational or *reasoned* law.³¹¹ Further, Locke argued that it was possible to change cultural customs by education and training in the exercise of reason.³¹² Therefore, early colonial efforts attempted to educate and civilize

³⁰³ Miller, *supra* note 301 at 21.

³⁰⁴ Mehta, *supra* note 168 at 59–64.

³⁰⁵ *Ibid* at 60.

³⁰⁶ *Ibid* at 59.

³⁰⁷ *Ibid* at 60.

³⁰⁸ Within Locke's text, these groups were children (whose inability to exercise reason was temporary) and "lunatics" and "idiots" (whose incapacity to exercise reason was permanent). However, it has also been argued that women, indigenous peoples, and slaves were included by liberalism, if not by Locke, in this category and thereby excluded from membership in liberal political community. Locke, *supra* note 50 at §§ 52-61.

³⁰⁹ Mehta, *supra* note 168 at 59–64.

³¹⁰ John Locke, *The Educational Writings of John Locke*, James Axtell, ed. (Cambridge: Cambridge University Press, 1968) at 325.

³¹¹ Tully, *supra* note 90 at 78.

³¹² *Ibid* at 89.

indigenous peoples, particularly through the imposition of civil law.³¹³ Following violent rebellion in India, British strategy shifted to indirect rule, which set about managing difference under the appearance of cultural protection.³¹⁴

In these ways, the state of nature narrative was carried forth into the British protectorate over Nigeria, as evidenced by Frederick Lugard's description of the Nigeria colonial administration in *The Dual Mandate in British Tropical Africa*. The former governor's discussion of indirect rule in Africa projects a state-of-nature narrative onto the continent, which he described as a "great blank space" on the map filled with "warlike tribes" and "savagery."³¹⁵ In describing indigenous peoples, he divided them into two races reflecting different stages of development.³¹⁶ One of these racial categories was considered to be biologically, culturally, and racially closer to Europeans, while the other was considered to be closer to the state of nature.³¹⁷ The latter Lugard characterized as "happy, thriftless, excitable ... lacking in self-control, discipline, and foresight."³¹⁸ Essentially, he characterized indigenous peoples as unreasonable, irrational, or immature such that it was the "task of civilization to ... inculcate in the natives a sense of responsibility, of liberty, and of justice."³¹⁹

The means by which European nations claimed land evidences a tension in characterizations of indigenous peoples and conceptions of political community. While denying indigenous capacity to give consent, Europeans simultaneously sought that consent in order to legitimize their land claims as against one another. During early European colonization of Africa, colonial practice consisted of commercial trading agreements between indigenous peoples and trading companies.³²⁰ However, the Berlin Conference, which was "aimed at the extension of benefits of civilisation to the natives", introduced the contractarian notion that indigenous peoples must give consent to be occupied by European powers.³²¹ In practice such consent often was

³¹³ Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge: Harvard University Press, 2012) at 19–31.

³¹⁴ *Ibid* at 43–44.

³¹⁵ Frederick D Lugard, *The Dual Mandate in British Tropical Africa* (London: Wiliam Blackwood and Sons, 1922) at 2,3,423,489.

³¹⁶ *Ibid* at 67.

³¹⁷ *Ibid*. This story, the Hamitic myth, was common at the time. See generally, Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 2018).

³¹⁸ Lugard, *supra* note 315 at 69.

³¹⁹ *Ibid* at 5.

³²⁰ *Ibid* at 18–21.

³²¹ *Ibid* at 48.

merely implied by a lack of demonstrated aggression or resistance to European claims, perhaps rationalized by capacity justifications.³²² Thus, while the practice was theoretically based in a contractarian conception of political community, it continued to treat indigenous peoples as existing in a lower stage of development and requiring the beneficial guidance of European administration.

The colonial imposition of the liberal worldview continued into the era of independence, as European authorities conditioned that independence on the acceptance of liberal constitutions.³²³ Since the end of the protectorate, there have been four constitutionally organized republican governments, punctuated by periods of military dictatorship.³²⁴ The constitution today is a modified reiteration of the 1979 constitution and modeled substantially on the U.S. constitution.³²⁵

The extent to which Enlightenment scholarship influenced the U.S. constitution (and by extension the Nigerian constitution) is the subject of much debate.³²⁶ What scholars who contest this influence really dispute is its impact on the structure and content of the constitution – the specific institutions it constructed, powers it delineated, and rights it protected. However, Locke's primary contribution was to establish the foundations for a new idea of political community by

³²² This practice assumed both notice of the claim and an understanding of true European intent, both of which were highly fallible. *Ibid* at 48–63.

³²³ Alemante G Selassie, "Ethnic Identity and Constitutional Design for Africa" (1992) 29 *Stan J Intl L* 1–56 at 15.

³²⁴ Ignatius Akaayar Ayua & Dakas CJ Dakas, "Federal Republic of Nigeria" in John Kincaid & G Alan Tarr, eds, *Constitutional Origins, Structure and Change in Federal Countries* (Montreal: McGill-Queen's University Press, 2005) 240.

³²⁵ Section 14(1) explicitly states that the Constitution is "anchored in the tenets of liberal democracy", and it delineates a bicameral legislature, presidential executive, and independent judiciary, as well as individual and communal rights guaranteed against infringement by federal, state, and local government and private actors. *Constitution of the Federal Republic of Nigeria*, *supra* note 32. See also, George Steven Swan, "The Constitution of the Second Republic of Nigeria" (1985) 20:1/2 *J Asian & African Studies* 42–55 at 42.

³²⁶ See generally, David Schultz, "Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding" (1993) 37:4 *American J Legal History* 464–95. Rhetorical approaches attempted to identify the extent of this influence by examining pamphlets, speeches, sermons, and other statements made by influential American thinkers during constitutional construction to identify the sources of their ideas about political power and government. Some scholars have conducted deep textual comparisons, while others have counted citations and quotations. See for example, Carl Becker, *The Declaration of Independence: A Study in the Ideas* (New York: Knopf, 1956); P G A Pocock, *The Machiavellian Moment: Florentine Thought and the Atlantic Republican Tradition*, 2nd ed (Princeton: Princeton University Press, 2003); Thomas Pangle, *Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988). Cf Donald S Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought" (1984) 78:1 *American Political Science Rev* 189–197. Still others have examined book sales and library catalogues as evidence of influence. See for example, H T Calbourn, *The Lamp of Experience* (Chapel Hill: University of North Carolina Press, 1965). The conceptual history approach similarly examined political speeches, pamphlets, and treatises seeking to understand the authors' intended meaning of concepts, and therefore politics, to demonstrate what political actors believed about a subject. See Schultz, *supra* note at 469..

offering an innovative way of conceiving of political power, sovereignty, and government.³²⁷ Thus “Locke’s thought may be understood as an epistemological framework within which Americans established the logic of their legal and jurisprudential innovations” resulting in a new conception of the law and of freedom.³²⁸ In other words, Locke and other Enlightenment philosophers constructed the worldview which provided the foundations for the U.S. constitution. Ultimately, through both the practices of colonization and the importation of a model of government, the political community created by the Nigerian constitution is also based in this worldview.

II. The Constitutional Order in Nigeria

Given Nigeria’s colonial history, it is arguable that its constitutional order is not and cannot be a social contract. The fundamental tenet of social contract is consent.³²⁹ Each individual must agree to give up their liberty if their autonomy, and thereby their very personhood, are to be respected.³³⁰ If independence was conditioned upon acceptance of a liberal constitutional order, then it would appear that the Nigerian constitutional order arose from coercion rather than consent post-independence.³³¹ Similarly, the 1999 constitution arose from a transition from military rule.³³² Its provisions were deliberated over by a committee, seeming to provide for the negotiation required to agree to form a single political community; however, that committee was appointed by an authoritarian dictator.³³³ Thus, “We the People... having firmly and solemnly resolved: to live in unity and harmony as one indivisible, indissoluble, Sovereign Nation” seems to lack legitimacy.³³⁴

Despite this critical failure, the Nigerian state is organized and operates *as if* there were consent. In essence, consent is assumed to have occurred.³³⁵ Its preamble projects an image of its promulgation as the execution of a social contract, with individuals coming together as a community (“We the People”) to establish a government.³³⁶ Additionally, it acknowledges that the Nigerian people are vested with sovereignty and delegate authority implied by that sovereignty to

³²⁷ See Stimson, *supra* note 110 at 47.

³²⁸ *Ibid.*

³²⁹ Mills, *supra* note 46 at 59; Mehta, *supra* note 168 at 59.

³³⁰ Locke, *supra* note 50 at § 87.

³³¹ Selassie, *supra* note 323 at 379.

³³² Ayua & Dakas, *supra* note 324 at 248.

³³³ *Ibid.*

³³⁴ *Constitution of the Federal Republic of Nigeria*, *supra* note 32.

³³⁵ Mills argues that modern liberal theory tends to take political community as given. Rather, they “seek justification only for its ongoing exercise of its authority.” *supra* note 46 at 58.

³³⁶ *Constitution of the Federal Republic of Nigeria*, *supra* note 32.

the government.³³⁷ In other words, each citizen is assumed to have agreed to forgo their natural liberty over their own persons and property to the state in exchange for its protection.³³⁸ To that end, it delineates a set of institutional features to secure individual dignity and restrain state power from encroaching on the private sphere.³³⁹

However, a key obstacle to the liberal constitutional order in Nigeria has been the diversity of its people, specifically their ethnic and religious diversity.³⁴⁰ The traditional liberal constitutional order separates the public sphere from the private sphere.³⁴¹ The former operates as a “neutral ground for individuals to stand as equals in the distribution of rights, privileges, and power without regard to social particularity.”³⁴² The problem with such a neutral public space is that it assumes (1) groups are discrete, internally united, and fixed and (2) equal bargaining power in the distribution of rights and duties.³⁴³ These assumptions did not hold true in Nigeria. In early constitutional arrangements, majority ethnic groups captured the public space to the detriment of minority groups, leading to the repeated collapse of Nigeria’s constitutional order.³⁴⁴

As such, Nigeria has attempted to accommodate diversity through alternative arrangements.³⁴⁵ The primary means by which it has recognized group identity historically has been through federalism.³⁴⁶ In 1967, twelve states were created from four regions dominated by

³³⁷ *Ibid* at § 14.

³³⁸ Locke, *supra* note 50 at § 87.

³³⁹ Selassie, *supra* note 323 at 2–3. The government cannot unilaterally alter by legislation or an executive act the powers delegated to it by the people. The constitution ensures the participation by the people in government, functioning as an expression of consent to be bound by the law. Finally, all citizens have equality of rights and obligations before the law, such that the law may not be applied arbitrarily. *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at §§ 1,14,17.

³⁴⁰ Selassie, *supra* note 323 at 5.

³⁴¹ See Mills, *supra* note 46 at 60; Selassie, *supra* note 323 at 5; John Boye Ejibowah, “Political Recognition of Ethnic Pluralism: Lessons from Nigeria” (2000) 6:3 *Nationalism & Ethnic Politics* 1–18 at 3.

³⁴² Ejibowah, *supra* note 341 at 3.

³⁴³ See generally, Ejibowah, *supra* note 341.

³⁴⁴ In 1958, as a constitution was being designed in anticipation of independence, the government was structured into three regions. Each consisted of a plurality of ethnic groups but contained a single majority group. Despite minority groups’ fears that the majority groups would exclude them from government and the political process, the Willink Commission determined that individual rights protections would be sufficient to guarantee ethnic equality and representation. Six years after independence, a military government came to power and abolished federalism. During the Second Republic of Nigeria, states and local governments were divided along ethnic lines and the proportional representation principle was introduced. The result was an explosion in the number of groups seeking recognition. Ultimately, Nigeria transitioned between republic and military forms of government for the next three decades, before the current republic was constituted in 1999. See generally Ayua & Dakas, *supra* note 324; Ejibowah, *supra* note 341. See also, Eghosa E Osaghae, “Federalism, Local Politics and Ethnicity in Nigeria: Do Ethnic Minorities Still Exist in Nigeria?” (1986) 24:2 *J Commonwealth & Comparative Politics* 151; Eghosa E Osaghae, “Ethnic Minorities and Federalism in Nigeria” (1991) 90:359 *African Affairs* 237.

³⁴⁵ Ejibowah, *supra* note 341.

³⁴⁶ Martin Dent, “Nigeria: Federalism and Ethnic Rivalry” (2000) 53:1 *Parliamentary Affairs* 157–168 at 164.

ethnic majority groups. Over twenty years, that number was increased by military decrees to thirty-six states.³⁴⁷ The purpose of that greater subdivision was “to meet the demands of subnational groups for greater autonomy” thereby promoting more equal recognition of minority groups within the state.³⁴⁸ These arrangements survive today. Additionally, Nigeria employs revenue and power sharing arrangements and a federal policy requiring a balance of ethnic representation within the executive branch of the federal government to accommodate ethnic difference.³⁴⁹ Such formal accommodations seek to facilitate minority access to representation and power within the public sphere with which to obtain more equal distributions of rights and privileges.

These arrangements demonstrate that the Nigerian constitution structures membership within the political community through citizenship. Citizenship delineates the rights to which an individual is entitled on the basis of membership in the political community.³⁵⁰ In Nigeria, that membership is tied in complex ways to indigeneity and homeland.³⁵¹ According to Nwachukwu, “one’s local state ([which is] ethnically defined), ... the particular community from which one’s ancestors are believed to descend or *originate*[,] is the determining factor in the distribution of entitlements, resources and rights.”³⁵² Thus, how one defines and determines membership in a political community determines access to rights.

At the national level, the constitution provides that “every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria” is a citizen of Nigeria by birth.³⁵³ It also provides for citizenship by registration or nationalization.³⁵⁴ Thus, all persons born, naturalized, or registered as citizens in Nigeria possess national citizenship promising equal rights at the national

³⁴⁷ Ayua & Dakas, *supra* note 324 at 253.

³⁴⁸ J Isawa Elaigwu, “Federalism in Nigeria’s New Democratic Polity” (2002) 32:2 *Publius: The Journal of Federalism* 73–95 at 76; Nwachukwu, *supra* note 31 at 245.

³⁴⁹ In other words, the constitution prohibits the predominance of persons from a limited set of states or ethnic groups in un-elected government office. Ayua & Dakas, *supra* note 324 at 251–52; Emmanuel O Ojo, “Human Rights and Sustainable Democracy in Nigeria (1999 - 2003)” (1999) 15 at 27. Further, the constitution requires that the president appoint to the Ministers of Federal Government “at least one Minister from each State, who shall be an indigene of such State.” *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 147(2).

³⁵⁰ James Tully, *On Global Citizenship* (London: Bloomsbury, 2014) at 11.

³⁵¹ Arowosegbe, *supra* note 65 at 65–66.

³⁵² Nwachukwu, *supra* note 31 at 236. Nwachukwu’s emphasis.

³⁵³ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 25(1).

³⁵⁴ *Ibid* at § 25(2)-(3).

level.³⁵⁵ However, the concept of state-of-origin has had complex and significant implications for participation in and access to rights.³⁵⁶

National citizenship by birth is based in ancestral belonging to a community indigenous to Nigeria, which then raises the issue of who belongs and the meaning of belonging.³⁵⁷ The constitution does not define indigeneity.³⁵⁸ As a result, state and local authorities have significant discretion in determinations of indigenous status.³⁵⁹ Generally, it is understood in terms of one's state-of-origin.³⁶⁰ In other words, every person born in Nigeria is indigenous to one, and only one, state.³⁶¹ Therefore, "Nigerian citizens lack indigenous status (read effective citizenship) outside of their 'state of origin,' the state ascribed to the person on the sole basis of ethno-genetic antecedents."³⁶² As a result, individuals who cannot trace their descent to a community indigenous to Nigeria; who reside in communities outside of their state of origin; or who belong to an ethnic group not accepted as indigenous to a state may be considered settlers.³⁶³ They effectively may not qualify as citizens possessing equal rights or access to benefits in the state in which they reside. One of these rights is access to land.³⁶⁴

The conception of political community as indigenous citizenship, though indigenous in name, is not necessarily indigenous in substance. Mamdani has detailed the ways in which the British colonial administration constructed ethnic and indigenous identity and gave legal effect to it by assigning rights on the basis of that identity.³⁶⁵ Under the protectorate, defined ethnic communities were identified with a specific homeland.³⁶⁶ Those who were "indigenous" to a homeland were entitled to customary rights to govern themselves.³⁶⁷ These rights included the

³⁵⁵ Nwachukwu, *supra* note 31 at 240.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ Tola Odubajo, "The Quest for Peace in Nigeria's Plateau" (2016) 46:2 Africa Insight 76–92 at 80.

³⁵⁹ *Ibid.* at 82; Sayne, *supra* note 33 at 3.

³⁶⁰ According to Nwachukwu, this understanding arises from the definition of belonging provided in the interpretive section of the constitution. Nwachukwu, *supra* note 31 at 241. "[Belong to] ... when used with reference to a person in a State refers to a person either of whose parents or any of whose grandparents was a member of a community indigenous to the State." *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 318(1).

³⁶¹ Nwachukwu, *supra* note 31 at 241.

³⁶² Per Nwachukwu, this situation is also associated with the federal character principle. The constitution requires the president to appoint at least one minister from each state who is indigenous to that state. Thus, indigeneity became an important concept in access to influence and benefits flowing from the federal government. *Ibid.* at 242.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.* at 255; Sayne, *supra* note 33.

³⁶⁵ See generally, Mamdani, *supra* note 317; Mamdani, *supra* note 313.

³⁶⁶ Mamdani, *supra* note 313 at 46–53.

³⁶⁷ *Ibid.* at 51–53.

administration of land use.³⁶⁸ Thus, customary land tenure then came to be organized as exclusive communal title to land assigned on the basis of indigeneity.

This arrangement created a serious tension applicable to the conflict between Fulani herders and agricultural communities.³⁶⁹ In areas where violence is prevalent, such as Jos Plateau, many sedentary communities are considered to be indigenous to the area.³⁷⁰ By contrast, Fulani herders are deemed settlers.³⁷¹ As a result, they do not possess the same rights to access land as those who qualify as indigenous.³⁷² Ultimately, then the liberal constitutional order constituting the Nigerian state is part and parcel of the conflict between Fulani herders and farming communities. If political community is organized to facilitate the equal liberty of all citizens, then citizens' rights and duties in the public sphere must be delineated on some equal basis. However, attempts to accommodate ethnic difference have facilitated the unequal distribution of rights and benefits.³⁷³ The things with which ethnic identity is defined – blood quantum, lineage, or homeland – are fluid, such that there may be reasonable disagreement over the characteristics that comprise that identity.³⁷⁴ They therefore have been inadequate to identify, understand, and adequately recognize difference.³⁷⁵

III. Legal Traditions

From this constitutional order, there arise legal institutions and processes that facilitate the purpose of liberal political community: justice.³⁷⁶ For example, in addition to delegating the powers of government vertically into federal and state governments, the Nigerian constitution separates the authority of both the federal and state governments horizontally into three branches of government.³⁷⁷ This separation of the powers of government into distinct branches with limited scope of authority is a means to prevent arbitrary infringements of individual liberty.³⁷⁸

³⁶⁸ *Ibid.*

³⁶⁹ Ojukwu & Onifade, *supra* note 34 at 178; Arowosegbe, *supra* note 65 at 66–67.

³⁷⁰ Ojukwu & Onifade, *supra* note 34 at 177–78.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ Nwachukwu, *supra* note 31; Ojukwu & Onifade, *supra* note 34; Sayne, *supra* note 33.

³⁷⁴ Christie, *supra* note 60 at 17.

³⁷⁵ Mills, *supra* note 63 at 133.

³⁷⁶ Mills, *supra* note 46 at 126–27.

³⁷⁷ The federal government and each state has a legislature, executive, and judiciary, each with a set of specified powers and limitations. The federal legislature is further delineated into a Senate and a House of Representatives. *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at §§ 4-6.

³⁷⁸ Locke, *supra* note 50 at § 144; Montesquieu, *supra* note 161 at 182.

Additionally, Nigeria is a representative democracy, an institutional arrangement actualizing consent and limited government authority.³⁷⁹ Citizens are represented in the federal government through the legislative branch.³⁸⁰

Further, the constitution provides for a judicial branch whose purpose is to vindicate infringements on individual rights.³⁸¹ This court system includes customary and Sharia courts, which have been inserted into an otherwise liberal legal tradition in an attempt to account for normative difference within Nigeria. Although distinct from state courts, they are intended to serve the same fundamental purpose. In other words, these customary and Islamic courts need to be logically consistent with liberal governance. Therefore, the constitution limits the application of customary and Islamic law to formal civil proceedings involving issues of personal law.³⁸² In so doing, these customary and Islamic legalities are deemed to be badges of culture. Within the context of their personal lives, individuals entering the public sphere may choose (i.e. exercise their autonomy) to be bound by additional, culturally contingent restrictions on that autonomy. These badges of culture constitute “conceptions of the good”, culturally determined ideas and objectives for how to live a good life.³⁸³

Not all citizens within the state have agreed to be bound by specific bodies of customary and Islamic law under the terms of the social contract, such that the public sphere must remain neutral.³⁸⁴ Thus, the government takes care in its authorization and use of these cultural markers within the public sphere.³⁸⁵ For example, the Nigerian constitution contains a supremacy clause, amounting to a repugnancy clause in the application of customary and Islamic law, thereby

³⁷⁹ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 14.

³⁸⁰ *Ibid* at § 4.

³⁸¹ *Ibid* at § 6(6).

³⁸² The Sharia Court of Appeal has appellate jurisdiction in civil proceedings involving questions of personal law, specifically, questions related to marriage concluded within Islamic law or where all parties are Muslim, questions regarding *wakf*, gift, wills or succession where the endower, donor, testator, or deceased person is Muslim; custody over Muslim children; and any other proceeding dealing with personal law where the parties, being Muslim have requested it. *Ibid* at § 262. Under Sections 267 and 282, the jurisdiction of the federal and state customary law courts are limited to customary law. Customary law is defined in *Oyewunmi v Ogunesan* as “the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.” *Oyewunmi v Ogunesan*, [1990] NWLR 192. Cited in E E S Nwauche, “The Constitutional Challenge of the Integration of Customary and the Received English Common Law in Nigeria and Ghana” (2010) 25 Tul Eur & Civ LF 37–63 at 43.

³⁸³ Kymlicka, *supra* note 168 at 12.

³⁸⁴ See Mills, *supra* note 46 at 60.

³⁸⁵ *Ibid*.

invalidating any rules, decisions, customs, or norms inconsistent with the constitution.³⁸⁶ Crucially, Nigerian courts evaluate this issue in light of constitutionally guaranteed individual civil and political rights.³⁸⁷ For example, section 42(1) of the constitution protects against discrimination on the basis of belonging to a particular community or ethnic group, and courts have invalidated communities' customary law on this basis.³⁸⁸ Thus, while the Nigerian constitution appears to account for the possibility of legal difference, it does so only within the constitutional logic of liberalism.

IV. Law

That law is conceived of as rules in the Nigerian constitutional order is clear. Federal and state legislatures pass bills which become laws to which the citizens are subject.³⁸⁹ The executive branch has the authority to issue regulations.³⁹⁰ Courts make decisions to which the parties are bound and, as a common law tradition, from which rules are developed and applied in future cases.³⁹¹ Crucially, citizens are entitled to the protection of rights preserving their liberty, of which both citizens and state are duty-holders.³⁹²

The Nigerian constitution establishes fourteen “Fundamental Rights”, including the rights to life, dignity of human person, and personal liberty.³⁹³ These rights are framed as claims which their holders possess against the state, which itself possesses a corresponding duty not to interfere arbitrarily with those rights in ways delineated by the constitution. Each constitutional provision establishes the conditions under which such rights may be modified or extinguished. Thus, the constitution establishes the boundaries within which citizens can justifiably act, and citizens are on notice of these limitations. As such, they have the “liberty to follow [their] own will in all things, where the rules prescribe not, and not to be subject to the inconstant, unwritten, unknown, and arbitrary will of” the Nigerian state.³⁹⁴ Further, the constitution provides the mechanism by which citizens whose rights are violated may seek redress and remedy for the breach.³⁹⁵ Thus, the

³⁸⁶ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 1(2)-(3).

³⁸⁷ Nwauche, *supra* note 382 at 54–55.

³⁸⁸ E S Nwauche, “Legal Pluralism and Access to Land in Nigeria” (2011) 59 *Acta Juridica* 25 at 54–55.

³⁸⁹ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 4(2).

³⁹⁰ *Ibid* at § 5.

³⁹¹ *Ibid* at § 6.

³⁹² *Ibid* at §§ 33–46.

³⁹³ *Ibid*.

³⁹⁴ Locke, *supra* note 50 at § 22.

³⁹⁵ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 46.

constitution's chapter on fundamental rights limits government power and serves to protect citizens' liberty from arbitrary interference, consistent with the liberal constitutional order.

V. Conclusion

The Nigerian state is a political community constituted by a liberal constitutional order. Through complex processes of colonialism, the creation story underlying that constitutional order was introduced.³⁹⁶ That story posited that Nigerian peoples consisted of autonomous individuals in need of European assistance to develop the rationality by which to consent to leave the state of nature and form political community.³⁹⁷ Although colonialism arguably precludes the primary mechanism by which liberal political community is constituted – consent – it is evident in both the text of the 1999 constitution, as well as the persistence of the government it establishes, that such consent is presumed to have occurred. The purpose of that community is to facilitate the equal exercise of citizens' liberty.³⁹⁸ However, given substantial diversity within Nigeria, attempts to delineate rights and duties to citizens on an equal basis have resulted in constructions of citizenship which deny rights to certain groups.³⁹⁹ As a result, the Nigeria constitutional order contributes to the violence between farmers and Fulani herders.

³⁹⁶ Locke, *supra* note 102 at 58–98; Mehta, *supra* note 168 at 59–64; Lugard, *supra* note 315.

³⁹⁷ Mills, *supra* note 63 at 58–98; Mehta, *supra* note 168 at 59–64.

³⁹⁸ *Constitution of the Federal Republic of Nigeria*, *supra* note 32 at § 14(1).

³⁹⁹ Nwauche, *supra* note 382.

CHAPTER THREE: ROOTED CONSTITUTIONALISM AND FULANI HERDERS

According to western literature, Fulani legality appears to be intimately related to *pulaaku*.⁴⁰⁰ Marguerite Dupire, writing about the Wodaabe in Niger, described *pulaaku* as a distinctive behavior, a way of being Fulani.⁴⁰¹ Similarly, Stenning described it as “the Fulani way”, consisting of general rules for right conduct among Wodaabe communities in northeastern Nigeria.⁴⁰² Riesman went further, referring to *pulaaku* as a moral or social code for a Jelgobe community in Burkina Faso.⁴⁰³ De St. Croix, writing about Gwandu communities in northern Nigeria, also referred to *pulaaku* as a code, one which deals with “morals and manners” regulating conduct in dealings between people.⁴⁰⁴ He wrote that, while it is common to all Fulbe, distinct communities interpret it differently.⁴⁰⁵ Ver Eecke, writing from the Adamawa region of Nigeria, stated that *pulaaku* embodied the Fulani worldview, constituting Fulani culture.⁴⁰⁶ Still others have argued that the concept and its use vary across Fulbe communities, but it is often associated with knowledge, cattle, language, and freedom.⁴⁰⁷

The literature describes *pulaaku* as imposing or requiring self-control. Specifically, a person is expected to master their needs in public due to the harsh demands of pastoralism and the physical environment.⁴⁰⁸ Often, the survival and growth of a herd requires that herders’ needs be

⁴⁰⁰ Descriptions and definitions by a few foundational scholars in particular appear to have influenced much of the scholarship produced since the mid-twentieth century. See Anneke Breedveld & Mirjam De Bruijn, “L’image des Fulbe. Analyse critique de la construction du concept de pulaaku” (1996) 36:144 cca 791–821 at 792.

⁴⁰¹ For a summary of Dupire, see *Ibid* at 795–96. It should be noted that the Wodaabe now consider themselves to be a distinct group from the Fulani, who they view as having lost their Fulani-ness (presumably because of the influence of Islam). See Kristin Loftsdottir, *The Bush Is Sweet: Identity, Power and Development among WoDaaBe Fulani in Niger* (Uppsala: Nordiska Afrikainstitutet, 2008) at 93.

⁴⁰² Stenning, *supra* note 13 at 55.

⁴⁰³ Paul Riesman, *Freedom in Fulani Social Life* (Chicago: University of Chicago Press, 1977) at 132.

⁴⁰⁴ de St Croix, *supra* note 15 at 16.

⁴⁰⁵ *Ibid*.

⁴⁰⁶ Catherine Ver Eecke, “Sub-national Fulbe Identity in Nigeria? Responses to Political Change in Post-independence Times” in Paul Kazuhisa Eguchi & Victor Azarya, eds, *Unity and Diversity of a People: The Search for Fulbe Identity* Senri Ethnological Studies 35 (Osaka: National Museum of Ethnology, 1993) at 141.

⁴⁰⁷ Rene Dognin, “Sur Trois Ressorts du Comportement Peul” in Théodore Monod, ed, *Pastoralism in Tropical Africa: Studies Presented and Discussed at the XIIIth International African Seminar, Niamey, December 1972* African Ethnographic Studies of the 20th Century (Oxon: Oxford University Press for the International African Institute, 1975) 298 at 299.

⁴⁰⁸ See, for example, Riesman, *supra* note 403 at 129, 158; Loftsdottir, *supra* note 401 at 94; Catherine Ver Eecke, “Pulaaku: An Empowering Symbol among the Pastoral Fulbe People of Nigeria” in Gidado M Tahir, ed, *Education and Pastoralism in Nigeria* (Zaria: Ahmadu Bello University Press, 1991) 7.

subjugated to those of the herd itself.⁴⁰⁹ According to the literature, there are many constituent elements of *pulaaku* which facilitate the exercise of self-control to bring about correct behavior.

One of these elements is *semteende*, defined in various ways by authors studying different communities. Among the Wodaabe in northeastern Nigeria, Stenning defined *semteende* as modesty or reserve, which prescribes correct conduct in personal relations in any given situation within a community to which a man belongs.⁴¹⁰ Riesman, writing about the Jelgobe in Burkina Faso, emphasized the importance of shame.⁴¹¹ According to his definition, a person feeling *semteende* has done or is at risk of doing a shameful thing and falling short of acceptable behavior.⁴¹²

Ver Eecke posited that there are two meanings associated with *semteende* in Adamawa, referring both to the possession of personal characteristics (shyness, reserve, or possession of a sense of shame, humility, and self-composure), as well as guidelines or rules for behavior in social interactions.⁴¹³ She argues that possession of the quality *semteende* enables one to obey the rules of *semteende*.⁴¹⁴ Further, she identified two sets of rules for two distinct forms of social interaction: private and public.⁴¹⁵ Among close relatives and when at home, a person may be less reserved and is more freely able to express their needs.⁴¹⁶ However, in public one is expected to express restraint and hide one's feelings.⁴¹⁷ According to this interpretation of *semteende*, rules prohibit the loss of control over one's emotions or basic human needs in public.⁴¹⁸ *Semteende* fosters socially acceptable behavior through the risk of experiencing shame for rule violations.⁴¹⁹

Another element of *pulaaku* is *munyal*. This has been described as patience, fortitude, and endurance.⁴²⁰ According to Ver Eecke, it is this quality that enables one to "withstand the harsh

⁴⁰⁹ For example, being with cattle in a lightning storm to prevent them from running away in fear or enduring the loneliness of solitary migration to graze the animals. Riesman, *supra* note 403 at 159.

⁴¹⁰ This conduct included deference to seniors, avoidance of certain categories of kin in certain circumstances, and cooperation with men of one's own age. Stenning, *supra* note 13 at 58.

⁴¹¹ Riesman, *supra* note 403 at 129–39.

⁴¹² *Ibid.*

⁴¹³ Ver Eecke, *supra* note 10 at 50–56.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.* at 53.

⁴¹⁶ Riesman, *supra* note 403 at 129–39.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.* at 129.

⁴¹⁹ Ver Eecke, *supra* note 10 at 50–56.

⁴²⁰ Stenning, *supra* note 13 at 59; Loftsdottir, *supra* note 401 at 96; Victor Azarya, Paul Kazuhisa Eguchi & Catherine Ver Eecke, "Introduction" in Paul Kazuhisa Eguchi & Victor Azarya, eds, *Unity and Diversity of a People: The Search for Fulbe Identity* Senri Ethnological Studies No. 35 (Osaka: National Museum of Ethnology, 1993) 4 at 3.

demands of *semteende*.⁴²¹ When a person is faced with a potentially shameful situation, he or she must exercise *munyal* and “suffer in silence.”⁴²² This attitude, she argues, is grounded in the challenges of a pastoral way of life in the bush.⁴²³ Alternatively, Loftsdottir, writing about the Wodaabe in Niger, described *munyal* as being patient with others, not expressing dissatisfaction to avoid confrontation, and not exposing one’s feelings.⁴²⁴ A third component of *pulaaku* addressed in the literature is *hakkiilo*, defined as care, forethought, and common sense.⁴²⁵ According to Stenning, *hakkiilo* would entail behaviors like inspecting cattle before putting them out to pasture or lighting the corral fire to keep disease-ridden mosquitos away from cattle.⁴²⁶

Ver Eecke suggests that there are a number of other elements or qualities associated with *pulaaku*. These include *endam* (kindness or charity), *chahu* (generosity), *goongaaku* (truthfulness, being responsible and trustworthy, keeping promises), *ngainaaka* (herdsmanship, adhering to pastoral way of life and cosmology), *ngoru* (bravery), and *ndimaaku* (freedom).⁴²⁷ She defines *endam* as reciprocating or responding to *semteende*.⁴²⁸ It involves having compassion for and offering charity to those in need, and its purpose is to promote harmony and unity.⁴²⁹ Although it is associated with kinship, *endam* also extends beyond familial boundaries and may be expressed to those outside kinship categories.⁴³⁰ *Chahu* is related to *endam*, which encourages kindness towards people through generosity and giving.⁴³¹ Within this concept, Ver Eecke states, there is a condemnation of materialism, such that a Pullo is expected to share excess wealth.⁴³²

These descriptions of *pulaaku* suggest that Fulani legality is expressed as a detailed legal code consisting of rules for conduct that are enforced through shame. However, it is possible that these concepts were interpreted and filtered through a western, liberal lens such that it influenced the authors’ understandings and expositions of *pulaaku*. In so doing, they may have misunderstood Fulbe legality. In attempting to identify the Fulbe legal order, the authors may have focused on

⁴²¹ Ver Eecke, *supra* note 10 at 57–58.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ Loftsdottir, *supra* note 401 at 96.

⁴²⁵ Stenning, *supra* note 13 at 56; Loftsdottir, *supra* note 401 at 96.

⁴²⁶ Stenning, *supra* note 13 at 56.

⁴²⁷ Ver Eecke, *supra* note 10 at 58–64.

⁴²⁸ *Ibid* at 60–61.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid* at 61–62.

⁴³² *Ibid.*

elements that looked familiar to them and narrowed that legal order into one aspect of legality: law. In so doing, the literature may artificially limit Fulani legality.

For example, in defining *pulaaku* as rules or a code of conduct, the literature suggests that for every situation there is a determinate outcome, regardless of the context surrounding that situation. It implies the certainty and efficiency of a western legal code. Further, it delineates social space between private and public, much like a liberal legal order. The exposition of specific rules for engaging in the public sphere implies that the expression of one's feelings or needs constitutes an imposition on or interference with others in the public space. This characterization implies the importance of maintaining public neutrality and that there is more freedom to exercise one's autonomy in the private sphere.

Ver Ecke seems to recognize that there are additional aspects of *pulaaku* that do not fit into this model of western legality. However, she does not fully explain their relationship to other elements of *pulaaku* or provide a theory as to how these pieces form a coherent whole. When viewed through an alternative lens, it is possible that that these elements may be far more important to Fulbe legality than suggested by the literature. In this chapter, I will suggest an alternative approach to understanding *pulaaku*, one which places greater emphasis on concepts of *endam* and *chahu* using Aaron Mills's rooted constitutionalism as the framework for understanding.

I. Viewing Fulani Legality through a Rooted Lens

A. Worldview

The notion that creation is premised on giftedness is not unique to indigenous peoples in North America. It also is evident in the relationships to land of many indigenous peoples in Africa. Ndlodvu-Gatsheni and Tafira noted that “[in] the African juridical and cosmological purview, land has no marketable, monetary and exchange value. Rather it is priceless.”⁴³³ The reason is that “land is a natural endowment.”⁴³⁴ In other words, land – the earth – is a gift from a creator.⁴³⁵ Thus, land is understood

⁴³³ Chimusoro Kenneth Tafira & Sabelo J Ndlovu-Gatsheni, “Beyond Coloniality of Markets” (2017) 46:4 Africa Insight 9–24 at 15.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid* at 11.

“as a corporeality, a material and immaterial, a tangible and intangible resource that is congruent with the earth and all that walks on it; the atmosphere, the rivers, the oceans and the seas and all that live in it; the cosmogony that dominates all these spheres; the religio-spiritual valences that emanate from the totality of nature. Thus humans are indefinitely connected to the environs; they are inseparable from them.”⁴³⁶

This statement is evocative of a cosmic order based in the notion of giftedness which establishes the relationships between beings in the world as interdependent.⁴³⁷ It appears to contain a multiplicity of ideas which correspond closely to Mills’s conception of rooted creationism and may be identified in Fulbe creation stories and lifeways.

Among Fulani communities throughout Nigeria, *pulaaku* has been described as a path for living life with others.⁴³⁸ Hopen writes that this path is “given to them by their ancestors and should be regarded as sacred.”⁴³⁹ It indicates that, implicit in Fulani legality, is an order within which the Fulani live and which is both given and sacred.⁴⁴⁰ Further, Fulbe creation stories can be interpreted as describing this order in terms of giftedness.⁴⁴¹ For example, Beier transcribed a Fulbe creation story from Mali, which described how a Creator, Doondari, created stone from a drop of milk.⁴⁴² The stone then created iron, which created fire, which created water, which created air.⁴⁴³ Doondari then combined these elements into a human being.⁴⁴⁴ From this story, the earth and life itself could be interpreted as a gift from a creator.⁴⁴⁵ Human life is given by the elements of the earth, such that there is a sense of inseparability between human and all other beings.

Importantly, this creation story also relates that man was flawed and filled with pride, leading Doondari to create in human beings other shortcomings so as to overcome that pride.⁴⁴⁶ Arguably, pride interferes with the relationship between man and the earth in that it generates a sense of superiority, thereby undermining the mutuality between humans and earth. Thus, the

⁴³⁶ *Ibid.*

⁴³⁷ Mills, *supra* note 46 at 66–83.

⁴³⁸ Ver Eecke, *supra* note 408 at 10; Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 4; Hopen, *supra* note 17 at 28. Similarly, Mills described sacred gifting in Anishanaabe legality (*miinigowiziwin*) as a path. Mills, *supra* note 46 at 71.

⁴³⁹ Hopen, *supra* note 17 at 27.

⁴⁴⁰ Mills, *supra* note 46 at 69–71.

⁴⁴¹ *Ibid.*

⁴⁴² Beier, *supra* note 54 at 1.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Mills, *supra* note 46 at 68–71.

⁴⁴⁶ Specifically sleep, blindness, worry, and death. Beier, *supra* note 54 at 1.

creation of human needs – such as sleep, blindness, worry, and death – undercuts pride and generates the humility needed to restore and rebalance the mutual relationship between humans and the earth. Interpreted in this way, the story demonstrates that there is a duality to creation: life and death, gift and need. They are two sides of the same coin.⁴⁴⁷

One could also interpret *Kaidara*, a Fulbe story originating in Senegal, as disclosing a cosmological belief in giftedness.⁴⁴⁸ In this story, three men journey to a land of shadows in search of Kaidara, a representative of the Creator.⁴⁴⁹ Two of the men hoped to obtain material wealth and power, while the third, Hammadi, sought to understand the cosmic order of the world.⁴⁵⁰ Along their journey, they encountered signs manifested in plant, animal, and elemental life.⁴⁵¹ Upon reaching Kaidara, he gave each man three oxen laden with gold.⁴⁵² Hammadi, recognizing that the signs he encountered on his journey represented the cosmic order, asked Kaidara to explain them.⁴⁵³ Instead, Kaidara told him to use the gold to discover their meaning.⁴⁵⁴ On their journey home, the men encountered an old man covered in rags and lice.⁴⁵⁵ While his companions scorned the man, Hammadi sat with him, cleaned him, and asked for three pieces of advice, giving up one ox for each.⁴⁵⁶ He later encountered challenges corresponding to the advice he received and followed it.⁴⁵⁷ His companions did not and perished, leaving Hammadi with their gold.⁴⁵⁸ Later in life, Hammadi achieved great prestige but still sought to understand the signs from his journey.⁴⁵⁹

⁴⁴⁷ Mills, *supra* note 46 at 106.

⁴⁴⁸ Mills, *supra* note 46 at 69–71.

⁴⁴⁹ See, Hampate Ba, *supra* note 54. Kaidara is the god of gold and cosmic knowledge. The land of shadows is a place in between the world inhabited by all visible beings and a spirit world. Amadou Hampate Ba, “Out of the land of shadows: a West African people learns to respect the cosmic order” (1990) 43:5 UNESCO Courier 22–24 at 22.

⁴⁵⁰ Lilyan Kesteloot, “Kaidara: An Introduction” in *Kaidara* (Washington, D.C.: Three Continents Press, 1988) 37 at 41–43.

⁴⁵¹ Specifically, a chameleon; bat; scorpion; snakes guarding a pool of water; a continuously refilled gazelle print filled with water; a bustard; a goat circling a tree; two trees alternately sharing each other’s leaves; a rooster which turns into a ram, a bull, and then fire; two springs of water sharing water between them and a dry river bed; and a man carrying a bundle of sticks too big and too heavy. Hampate Ba, *supra* note 54 at 49–64.

⁴⁵² *Ibid* at 65.

⁴⁵³ *Ibid*.

⁴⁵⁴ *Ibid*.

⁴⁵⁵ *Ibid* at 68–72.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid* at 72–79.

⁴⁵⁸ *Ibid* at 79.

⁴⁵⁹ *Ibid* at 83.

When Kaidara came to his home disguised as a beggar, Hammadi took him in.⁴⁶⁰ Only then did Kaidara reveal the meaning of the signs Hammadi encountered on his journey.⁴⁶¹

In this story, each being that the men encountered on their journey can be interpreted as possessing unique gifts. For example, the chameleon was adaptable and patient; the bat possessed piercing vision; the scorpion was generous.⁴⁶² However, each being also had some shortcoming, an incompleteness. The chameleon may be hypocritical or untrustworthy; the bat may overlook something obvious; and the scorpion was quick to anger.⁴⁶³ These shortcomings could be interpreted as representations of need.⁴⁶⁴ None is perfect in and of itself.

Further, giving is a crucial element of this story. In Hammadi's interaction with the old man in the land of shadows, each gave in proportion to their gifts.⁴⁶⁵ The old man's gifts of advice were materially negligible (in proportion to his lack of material wealth) but immeasurably beneficial to Hammadi, while Hammadi's gifts were proportionately and materially substantial. Despite their material differences, the gifts were equally valuable.⁴⁶⁶ Further, Hammadi respected the value of the advice given by following it, such that he ultimately received even greater wealth.⁴⁶⁷ When he later respected an old beggar by giving him shelter and food, he was given knowledge about the order of creation. Ultimately, this gift was the result of his willingness to share his wealth and respect others.⁴⁶⁸ This interpretation echoes the notion within rootedness that creation grows through the sharing of gifts.⁴⁶⁹

⁴⁶⁰ *Ibid* at 83–84.

⁴⁶¹ The chameleon is adaptable, patient, prudent, but also may be hypocritical and unreliable. The bat possesses the ability to see at night; he can see through difficulties to solve problems but is at risk of losing sight of what is right in front of him. The female scorpion, whose young eats it from the inside out, represents sacrifice and generosity, putting its offspring's needs before its own; but it is also capable of anger and malice. The snakes represent family and community protective of its people, but also a selfish man who does not share with his neighbors. The hoof print which refills with water represents generosity; if one shares with others what little one has, he will never be without. The bustard, a bird which is deceptively difficult to capture, warns against chasing fruitless endeavors, particularly power. The trees who share one another's leaves represent the duality of the world, life and death, happiness and misfortune. The rooster represents the dangers of secrecy, which have the power to devastate a whole community. The three springs, two of which exchange their water between them and one of which is dry, represent the need to communicate and share, not just with those who have something to offer, but with those in need as well. Finally, the man heaping sticks into a pile and unable to carry them, represents the ignorance and foolhardiness of men without knowledge. *Ibid* at 86–97.

⁴⁶² *Ibid* at 87–89.

⁴⁶³ *Ibid*.

⁴⁶⁴ Mills, *supra* note 46 at 82.

⁴⁶⁵ *Ibid* at 88–90.

⁴⁶⁶ *Ibid* at 89.

⁴⁶⁷ *Ibid* at 88; Hampate Ba, *supra* note 54 at 100.

⁴⁶⁸ Hampate Ba, *supra* note 54 at 99–100.

⁴⁶⁹ Mills, *supra* note 46 at 68.

From another story transcribed by Amadou Hampate Ba, in which a Fulani herder was taught how to be a pastoralist, one could derive a human awareness of and commitment to living within the natural order of the world.⁴⁷⁰ In *Koumen*, the herder Silé learned about the basic elements from which all creation is composed, plant life, cycles of time and weather, and the spirits he could call on to ask for aid.⁴⁷¹ In so doing he sought to understand how to care for cattle while respectfully and responsibly relying on the land to do so.⁴⁷² This story demonstrates a commitment to knowing one's place within the cosmic order, including how to interact with the other beings with whom one is in interdependent relationships.⁴⁷³

Further, historical and ethnographic accounts of pastoral Fulbe communities demonstrate a “general ethos of giftedness” in their daily lives.⁴⁷⁴ The literature reports among Fulbe communities across West Africa gifts of food, cattle, labor, and material items to family and clan members in both daily life and moments of need.⁴⁷⁵ Additionally, Ver Eecke has argued that there is a complement to *semteende* (often described as shame).⁴⁷⁶ That complement is *endama*, which is described as kindness, understanding, compassion, or support, particularly towards those in need. It “impels [one] to act on behalf of others and improve their condition” and is intimately related to *chahu* (being kind to people through generosity).⁴⁷⁷ *Chahu* also implies that one should not accumulate excess material wealth and should share with others instead.⁴⁷⁸ Implicit in these concepts are notions of giving that are lived in everyday life. From these stories and practices, one could argue that Fulbe cosmology is based in giftedness. This interpretation facilitates ontological understandings of interdependence and an epistemology based in and drawn from the natural environment, which has implications for belonging.⁴⁷⁹

1. Personhood

To understand how and why persons come together as community, one first needs to understand what it means to be a person. Among a Jelgobe community in Burkina Faso, Riesman

⁴⁷⁰ *Ibid* at 74.

⁴⁷¹ Hampate Ba & Dieterlen, *supra* note 54.

⁴⁷² *Ibid*.

⁴⁷³ Mills, *supra* note 46 at 75.

⁴⁷⁴ *Ibid* at 72.

⁴⁷⁵ See for example, Stenning, *supra* note 13 at 49; Hopen, *supra* note 17 at 51; Majekodunmi, *supra* note 37 at 536–37.

⁴⁷⁶ Ver Eecke, *supra* note 10 at 60–61. See also, Riesman, *supra* note 403 at 200–01.

⁴⁷⁷ Ver Eecke, *supra* note 10 at 61.

⁴⁷⁸ *Ibid* at 61–62.

⁴⁷⁹ Mills, *supra* note 46 at 68–97.

wrote that one's "personality... also includes the people with whom he has relations. Without the others a man lacks part of himself...."⁴⁸⁰ Within this Fulbe community, personhood is inherently tied to other beings with whom one is in relationships.⁴⁸¹ To paraphrase Mills, a person is their relationships.⁴⁸²

One's relationships – and thereby one's personhood – appear to be maintained through giving.⁴⁸³ Among pastoral communities generally, Niamir-Fuller and Turner have found that social ties are cultivated through reciprocal exchanges, such that "reciprocity is the medium through which interdependence among individuals and groups is established and maintained."⁴⁸⁴ According to Riesman, in seeking assistance from a relative or friend, a Pullo is "doing something more than trying to get the object he wants; he is reviving the link between himself and the person he comes to. The person who gives also wants to revive the link between himself and the recipient."⁴⁸⁵ Thus, implicit in the practice of giving appears to be recognition of one's interdependence on others.

Further, understanding belonging also requires an awareness of who counts as persons. In other words, one needs to know the set of beings with whom it is possible to belong as a community. Like rooted communities, the relationships that constitute personhood in Fulbe communities may include plant, animal, elemental, and spiritual beings.⁴⁸⁶ For example, in *Kaidara*, Hammadi picked a flea off the old man and attempted to crush it, but the man stopped him, saying:

"I ate a chicken before this flea went after me. ... Another day, the earth will eat [the flea]. Life is like that. The termite gnaws at the roots... The hen, in turn, swallows the termite. Man takes nourishment from the hen and the wild beast eats man. Patient the earth waits..."⁴⁸⁷

Implicit in this passage is recognition that all beings rely on others for their own survival. In other words, all creatures – whether plant or animal – contribute in their own capacities to the

⁴⁸⁰ Riesman, *supra* note 403 at 167.

⁴⁸¹ *Ibid.*

⁴⁸² Mills, *supra* note 46 at 159.

⁴⁸³ *Ibid* at 97–98.

⁴⁸⁴ Maryam Niamir-Fuller & Matthew Turner, "A Review of Recent Literature on Pastoralism and Transhumance in Africa" in Maryam Niamir-Fuller, ed, *Managing Mobility in African Rangelands: The Legitimization of Transhumance* (London: Intermediate Technology Publications, 1999) 18 at 35.

⁴⁸⁵ Riesman, *supra* note 403 at 183.

⁴⁸⁶ Mills, *supra* note 46 at 80.

⁴⁸⁷ Hampate Ba, *supra* note 54 at 96.

maintenance and growth of the earth.⁴⁸⁸ The sacrifice of their lives then constitutes a gift deserving respect.⁴⁸⁹ Thus, as Mills describes, personhood seems to inhere in the capacity to give and receive gifts and thereby be in relationships with others.⁴⁹⁰

Among Fulbe peoples, cattle seem to possess this capacity. Though cattle are not explicitly named in the creation story transcribed by Beier, the story demonstrates that cattle are implicitly tethered to humanity by virtue of their role in mankind's creation.⁴⁹¹ The large drop of milk alludes to cattle. From this drop, all other beings, including human beings, were created.⁴⁹² Thus, milk is a gift from which all life grows. Further, *endam* – a component of *pulaaku* that entails practicing kindness and charity in one's relationships – derives from milk.⁴⁹³ Therefore, milk is implicitly and intimately connected to giving. Milk is not only a gift, but it also is part of the means by which Fulbe peoples “draw out a general ethos of giftedness in [their] daily lives” from the sacred gifts of creation.⁴⁹⁴

Western literature documenting Fulbe lifeways also demonstrates this point. Milk has historically been the primary staple of pastoral Fulbe diets.⁴⁹⁵ Therefore, Fulbe households rarely sold or killed a cow, supplementing their diets by exchanging milk for grains with agricultural communities.⁴⁹⁶ Despite substantial reliance on milk for subsistence, one could not milk a cow using the logic of (human) consumption maximization.⁴⁹⁷ Maintaining a herd and household required a delicate balance of factors, but it primarily considered the needs of the cow and its calves.⁴⁹⁸ Household needs were considered last.⁴⁹⁹ Thus, milk appears to be a gift to be respected, rather than a resource to be exploited.⁵⁰⁰ It is that gift which facilitates a relationship of substantial interdependence between Fulbe peoples and cattle, such that relationships to cattle are viewed in

⁴⁸⁸ Mills, *supra* note 45 at 88.

⁴⁸⁹ Mills, *supra* note 46 at 88.

⁴⁹⁰ *Ibid* at 84.

⁴⁹¹ Beier, *supra* note 54 at 1.

⁴⁹² *Ibid*.

⁴⁹³ Ver Eecke, *supra* note 408 at 11; Ver Eecke, *supra* note 10 at 61.

⁴⁹⁴ Mills, *supra* note 46 at 72.

⁴⁹⁵ See Stenning, *supra* note 13 at 4.

⁴⁹⁶ *Ibid* at 102.

⁴⁹⁷ *Ibid*.

⁴⁹⁸ Riesman describes the daily milking process and explains how one would evaluate the amount of milk to take and leave. In particular, one would consider factors such as the age and health of the calf, the season, and availability of water and pasture, with human needs considered last. *supra* note 403 at 168.

⁴⁹⁹ See for example Stenning, *supra* note 13 at 102; Riesman, *supra* note 403 at 168.

⁵⁰⁰ Mills, *supra* note 46 at 40.

terms of equality.⁵⁰¹ Stenning reported that Woodaabe subsistence and wealth derived solely from cattle, sustaining Woodaabe life and community.⁵⁰² In sharing this gift, cattle were viewed as kin.⁵⁰³

Plants also appear to be gifted in Fulbe cosmology. For example, Hampate Ba relates that plants possess unique capacities and intervene in the lives of pastoralists, thereby offering their gifts to Fulbe people and the herd.⁵⁰⁴ He reports that pastoralists made offerings of milk to plants in return for their gifts, indicating that Fulbe peoples experienced gratitude for those gifts and respected the beings who offered them.⁵⁰⁵ Again, the possession and sharing of gifts seems to facilitate the relationship between plant life and human life.⁵⁰⁶

Further, according to Hampate Ba, there are guardian spirits who each represent some element of or being in creation.⁵⁰⁷ De St. Croix similarly documented a belief in a “vast world of spirits” among Gwandu communities in northern Nigeria.⁵⁰⁸ These spirits existed in plant and animal life, such as a baobab tree or termite hill, as well as in natural phenomenon like clouds, rainbows, and tornados.⁵⁰⁹ They are described as having agency. For example, if a herder killed a wild animal, the spirit to whom the animal belonged might retaliate by killing members of the herd.⁵¹⁰ Additionally, according to both Hampate Ba and de St. Croix, a Pullo could ask certain spirits for assistance.⁵¹¹ Spirits, then, also appear to possess the ability to enter into gift sharing relationships with human beings.

Ultimately, persons in a Fulbe worldview, when defined as beings in possession of gifts to be shared and capable of entering into relationships with others, need not be limited to human beings.⁵¹² Rather, human beings seem to fit within a much larger conception of persons with whom it is possible to belong through gift-sharing.⁵¹³ What makes human beings unique is their gift: the

⁵⁰¹ *Ibid* at 84; Loftsdottir, *supra* note 401 at 71.

⁵⁰² Stenning, *supra* note 13 at 4.

⁵⁰³ Hampate Ba & Dieterlen, *supra* note 54.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ For example, *d'aalan* is the patron of pastures and *pellel* has the gift of lightning, a significant danger living in the bush. Hampate Ba reports that Fulbe pastoralists in Senegal would make offerings to these spirits, asking them for aid or assistance. *Ibid*.

⁵⁰⁶ Mills, *supra* note 46 at 84.

⁵⁰⁷ Hampate Ba & Dieterlen, *supra* note 54.

⁵⁰⁸ de St Croix, *supra* note 15 at 54.

⁵⁰⁹ *Ibid*.

⁵¹⁰ *Ibid*.

⁵¹¹ Hampate Ba & Dieterlen, *supra* note 54; de St Croix, *supra* note 15 at 54–55.

⁵¹² Mills, *supra* note 46 at 84.

⁵¹³ *Ibid* at 79–83.

ability to be a steward of the earth.⁵¹⁴ For example, the protagonist of *Koumen* literally becomes a person when he develops this gift by learning about the beings with whom both he and cattle are in relationships.⁵¹⁵ Human personhood then inheres in mastering knowledge of how to be with the others with whom one is in relationships and specifically how to care for, respect, and ask for assistance from them.⁵¹⁶

2. Freedom

If, as Mills argues, freedom arises from respect for one's personhood, and one's personhood exists only within relationships to others, then rooted freedom can only be experienced with and in relation to other beings.⁵¹⁷ It is possible that this idea is implied within the Fulbe concept *semteende*. Western literature on Fulani legality often describes *semteende* as feeling shame, reserve, or restraint, and it characterizes this feeling as falling short of an ideal.⁵¹⁸ However, Riesman made the following observation about *semteende* in connection to mutual assistance:

“When someone confides [a need] to another, he is revealing his weakness and his shame, but once these are revealed, they are henceforth shared... The person being asked feels in himself the need of the other ... [A] gift ... in fulfilling a need, permits both persons to regain equal footing in their capacity to overcome their needs, and, as a result, to respect each other.”⁵¹⁹

Seeking aid from others requires acknowledgement and communication of one's needs, weaknesses, and limitations.⁵²⁰ That itself requires humility.⁵²¹ Here, both people in the relationship experience humility, one by communicating his need and the other by sacrificing something to assist the other. However, embedded in the interaction is respect for the other and the awareness that both parties will be made more free: one of his present need, the other of a future need by eventual reciprocity.⁵²²

Similarly, in *Kaidara*, Hammadi came upon an antelope track that, despite the meager quantity of water it contained, satisfied his thirst by continually refilling.⁵²³ This demonstrates that

⁵¹⁴ *Ibid* at 81–82.

⁵¹⁵ Hampate Ba & Dieterlen, *supra* note 54 at 39.

⁵¹⁶ Mills, *supra* note 46 at 79–84.

⁵¹⁷ *Ibid* at 84.

⁵¹⁸ For example, Riesman reported hearing among the Jelgobe the phrase “*mido semta*” (“I am at risk of revealing a weakness”). *supra* note 403 at 136.

⁵¹⁹ *Ibid* at 183.

⁵²⁰ Mills, *supra* note 46 at 86–88.

⁵²¹ *Ibid* at 87.

⁵²² *Ibid* at 86.

⁵²³ Hampate Ba, *supra* note 54 at 90.

when a person gives whatever they have, no matter how small, they are never without what they need.⁵²⁴ Implicit in this idea is equality. However, it is not “formal equality”, whereby a person is expected to give or receive as much as the next.⁵²⁵ Rather, a person should give as much as she is able or take only as much as she needs.⁵²⁶ For example, *chahu* encourages people in possession of excess material wealth to share it with others.⁵²⁷ Similarly, in Fulbe milking practices, a woman takes milk from her cows in proportion to the cows’ gifts *and* the needs of the cows and household.⁵²⁸ Thus, Fulbe freedom can be viewed as rooted freedom. By sharing one’s gifts, a person will always be free from need.⁵²⁹

Crucially, free choice is still very much part of Fulbe life.⁵³⁰ Riesman argued this point when he related an experience with the Jelgobe in which a cow belonging to a man in the community died some distance away from the camp.⁵³¹ He needed help retrieving it, and a group of young men worked together to assist him in doing so.⁵³² Afterward, Riesman observed the cow’s owner giving money to some of the young men to buy kola nuts that all could enjoy together.⁵³³ The man referred to it as a gesture of gratitude.⁵³⁴ Riesman noted that what was important about this interaction was their freedom to choose to help.⁵³⁵ They did not consider themselves to be obligated to provide that assistance, but they did so out of a sense of responsibility.⁵³⁶

Responsibility appears to be essential to a Fulbe conception of freedom, as evidenced by Riesman’s descriptions of greetings between people in the Jelgobe community.⁵³⁷ These, often lengthy, greetings appeared to be mandatory; it was considered to be unforgivably rude not to participate in greeting someone.⁵³⁸ However, Riesman observed that the obligation to greet “is not experienced as an incursion on their personal freedom, *but as one of its expressions*, for instead of

⁵²⁴ *Ibid.*

⁵²⁵ Mills, *supra* note 46 at 89.

⁵²⁶ Mills, *supra* note 46 at 90.

⁵²⁷ Ver Eecke, *supra* note 10 at 61–62.

⁵²⁸ Riesman, *supra* note 403 at 168.

⁵²⁹ Mills, *supra* note 46 at 86; Hampate Ba, *supra* note 54 at 90.

⁵³⁰ As it is of rooted freedom generally, according to Mills, *supra* note 46 at 90–95.

⁵³¹ Riesman, *supra* note 403 at 224–25.

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ Mills, *supra* note 46 at 94.

⁵³⁸ Riesman, *supra* note 403 at 173.

being imposed on them it is assumed by each person as a responsibility.”⁵³⁹ Responsibility in a Fulbe community appears to facilitate gift-sharing by giving impetus to one’s capacity to share gifts.⁵⁴⁰ If personhood exists in relationships, and gift-sharing is the means by which relationships are maintained, then freedom can only exist in relation to others.⁵⁴¹ Thus, the experience of responsibility, which encourages one to share, is a mechanism of freedom.⁵⁴²

3. Community

Riesman’s description of Jelgobe greetings emphasizes another important point: belonging is “active and contingent.”⁵⁴³ The concept of society among Jelgobe Fulbe “as an entity existing in its own right does not seem to exist.”⁵⁴⁴ It is “not an independent thing that keeps itself going and demands only obedience to rules.”⁵⁴⁵ Rather, society means “the fact of being together”, and being together is not easy.⁵⁴⁶ Its existence lies within actively maintained relationships between people, and these relations “cease to exist if people stop communicating.”⁵⁴⁷ In other words, community is lived and practiced.⁵⁴⁸

According to Mills, the form that belonging in such a community takes will vary with the local environment.⁵⁴⁹ The ecological belt within which many Fulbe communities live requires the fluid dispersal of people through space and over time.⁵⁵⁰ Availability of water and pasture and the presence of cattle-related disease determine both where and the intensity with which community is practiced.⁵⁵¹ During dry seasons, the concentrated presence of large communities in a single area is precluded by the earth’s ability to meet the needs of cattle and human beings.⁵⁵² As a result, during certain times of the year, community may consist of smaller groupings living at greater

⁵³⁹ *Ibid* at 175.

⁵⁴⁰ Mills, *supra* note 46 at 92–94.

⁵⁴¹ *Ibid* at 84–85.

⁵⁴² *Ibid* at 92–94.

⁵⁴³ *Ibid* at 96.

⁵⁴⁴ Riesman, *supra* note 403 at 162..

⁵⁴⁵ *Ibid* at 175.

⁵⁴⁶ *Ibid*.

⁵⁴⁷ *Ibid*.

⁵⁴⁸ Mills, *supra* note 46 at 98.

⁵⁴⁹ Mills, *supra* note 46 at 96–97.

⁵⁵⁰ See Stenning, *supra* note 13 at 4; Blench, *supra* note 18 at 44; Wilson, *supra* note 35 at 36; Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 5; Ver Eecke, *supra* note 408 at 9.

⁵⁵¹ See Stenning, *supra* note 13 at 101; de St Croix, *supra* note 15 at 30–32; Ayodele O Majekodunmi et al, “Pastoral livelihoods of the Fulani on the Jos Plateau of Nigeria” (2014) 4:1 Pastoralism: Research, Policy & Practice 20 at 7–9.

⁵⁵² See for example, Roger Blench, *Natural Resource Conflicts in North-Central Nigeria: A Handbook and Case Studies* (2004) at 44.

distances.⁵⁵³ At other times, when pasture and water are more plentiful, community may consist of larger groups living closely together.⁵⁵⁴

Additionally, pastoralism constitutes a difficult way of life, and belonging in Fulani society explicitly acknowledges this. *Munyal* – often translated as endurance, patience, or fortitude in the face of adversity and misfortune – is described in western literature as a quality needed to withstand the demands of Fulani society and pastoralism.⁵⁵⁵ It is associated with restraint, particularly with not revealing one’s experience of hardship.⁵⁵⁶ Yet, Loftsdottir recounts an experience with a member of a Wodaabe community that suggests an alternative interpretation of *munyal*. As was explained to Loftsdottir:

“*Munyal* is worth more than anything else. When you are sad you want to do *munyal*. You want to pretend that you do not care, you want to laugh and not to show you are sad. Because whether you are sad or not, in the end, it is all the same.”⁵⁵⁷

Rather than interpret *munyal* as an obligation to suppress a person’s feelings and needs, from this account one could understand it as a chosen exercise of both responsibility and gratitude.⁵⁵⁸ Loftsdottir indicated that feelings of sadness, frustration, or fear may interfere with a person’s ability to fulfill responsibilities to other community members.⁵⁵⁹ Further, such emotions may undermine and hinder one’s experience of gratitude. This account suggests that *munyal* is an exercise in focusing on positive experience. From such a perspective, it means embodying gratitude for the gifts in a person’s life and responsibility to one’s community members.⁵⁶⁰

By reinterpreting the literature, it is possible to conceive of belonging in pastoral Fulbe communities as rooted. The stories held by and historical practices of Fulbe communities across West Africa demonstrate a way of being in the world that lives within the natural order of the environment.⁵⁶¹ These stories and ways of being facilitate the possibility that they derive from a

⁵⁵³ Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 5.

⁵⁵⁴ Stenning, *supra* note 13 at 54; de St Croix, *supra* note 15 at 30–32.

⁵⁵⁵ See for example Ver Eecke, *supra* note 10 at 58.

⁵⁵⁶ See Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 3; AHM Kirk-Green, “Maudu Laawol Pulaaku: Survival and Symbiosis” in Mahdi Adamu & AHM Kirk-Green, eds, *Pastoralists of the West African Savanna: Selected Studies Presented and Discussed at the Fifteenth International African Seminar held at Ahmadu Bello University, Nigeria, July 1979* (Manchester: Manchester University Press, 1986) 15 at 42; Stenning, *supra* note 13 at 59; Ver Eecke, *supra* note 10 at 56.

⁵⁵⁷ Loftsdottir, *supra* note 401 at 91.

⁵⁵⁸ Mills, *supra* note 46 at 89–92.

⁵⁵⁹ Loftsdottir, *supra* note 401 at 91.

⁵⁶⁰ Mills, *supra* note 46 at 89.

⁵⁶¹ *Ibid* at 74; Hampate Ba & Dieterlen, *supra* note 54.

cosmological belief that the world is gifted, which then facilitates the possibility that notions of personhood and freedom are conceived of as interdependent on and achieved through others.⁵⁶² As such, it is possible to interpret the logic of Fulani community as mutual aid.

B. Constitutionalism as Mutual Aid

According to Mills, the cosmological, epistemological, and ontological context embedded in creation stories informs and produces the logic of belonging.⁵⁶³ It explains why and how people come together in community.⁵⁶⁴ Put in another way by Nigerian novelist Chinua Achebe, “[our] ancestors created their different politics with myths embodying their varying perceptions of reality.”⁵⁶⁵ By reading Fulbe creation stories and practices through the lens of a rooted worldview, it seems that the reason people come together in community is to share their gifts so that all may be made more free.⁵⁶⁶ Further, ethnography and socio-economic literature describe examples of mutual assistance in Fulbe communities throughout the region and across time.⁵⁶⁷ Although mutual assistance is well documented among many Fulbe communities, at issue is whether it can be considered a logic by which Fulani community is constituted.

First, it is necessary to determine how extensions of belonging are made.⁵⁶⁸ Implicit within this interpretation of Fulbe cosmology is a sense of duality.⁵⁶⁹ For example, many of the beings in *Kaidara* possess unique positive qualities, but they also possess weaknesses.⁵⁷⁰ This idea demonstrates that personhood consists not only of the possession of gifts, but it also entails

⁵⁶² Mills, *supra* note 46 at 79–84; Hampate Ba, *supra* note 54 at 96; Riesman, *supra* note 403 at 176; Loftsdottir, *supra* note 401 at 71.

⁵⁶³ Mills, *supra* note 46 at 24.

⁵⁶⁴ *Ibid* at 43.

⁵⁶⁵ Chinua Achebe, “What Has Literature Got to Do With It?” in Frank Aig-Imoukhuede, ed, *Tapping Nigeria’s Limitless Cultural Treasures* (Nigeria: National Council for Arts and Sciences, 1987) 25 at 29.

⁵⁶⁶ Mills, *supra* note 46 at 96.

⁵⁶⁷ For example, Stenning wrote in 1959 that, among Wodaabe communities in Nigeria, a family in need of cattle could borrow from others and that, where a herd and family could no longer support one another, families could find assistance from among kin, *supra* note 13 at 41. Similarly, de St. Croix in 1972 reported among Fulani in the Gwande region of Nigeria that relatives would help a family member if he lost his cattle to disease by offering cattle to rebuild the herd, *supra* note 15 at 14. Additionally, a family with a small herd lacking a bull could often borrow a bull from another family so as to ensure the growth of its herd. *Ibid* at 24. Riesman also noted that among the Jelgobe in Burkina Faso, “people ceaselessly sought whatever they needed from those with whom they lived.” *supra* note 403 at 181.

⁵⁶⁸ Mills, *supra* note 46 at 44.

⁵⁶⁹ Kesteloot, *supra* note 450 at 42.

⁵⁷⁰ Hampate Ba, *supra* note 54 at 86–97.

difficulty, struggle, or the experience of need.⁵⁷¹ They are mutually occurring.⁵⁷² Thus, the offering of a gift or presentation of a need functions as an extension of belonging to a community.⁵⁷³

Second, it is essential to understand how these extensions of belonging are received.⁵⁷⁴ Riesman's story about the deceased cow demonstrates that the presentation of a need may be received with the experience of responsibility. Awareness of another's need facilitates *yurmeede*, which, according to Riesman, means compassion.⁵⁷⁵ *Yurmeede* then is a complement to *semteende* (weakness, shortcoming, or *need*).⁵⁷⁶ When a person in need experiences *semteende*, another person with the ability to help should feel the compassion (or responsibility) to do so.⁵⁷⁷ Further, in experiencing responsibility, there is joy; it is not perceived to be a burden. Riesman explains that "it seemed that everyone had come together for a party rather than for work" to help move the deceased cow.⁵⁷⁸ Similarly, when he approached a woman in the community to ask for some thread, it gave her "obvious pleasure" to be asked to give.⁵⁷⁹ Finally, although less evident in the literature, gratitude may also be a way in which the extension of belonging through the offer of a gift is received.⁵⁸⁰

Crucially, the response to an extension of belonging in community is reciprocity, which need not be immediate or direct.⁵⁸¹ In *Kaidara*, when Hammadi inquired as to how he could express his gratitude, Kaidara replied that he had already done so by giving his wealth to someone in need.⁵⁸² Loftsdottir also identified the practice of indirect reciprocity among Wodaabe communities in Niger. She described *habbanaaji* (cattle loans) as a practice whereby herd members were given to a friend or relative, "an act usually not forgotten."⁵⁸³ Someone who had

⁵⁷¹ Mills, *supra* note 46 at 82.

⁵⁷² If a person is only able to give and never receive gifts, then they cannot be in equitable gift-sharing relationships. *Ibid.*

⁵⁷³ *Ibid* at 100.

⁵⁷⁴ *Ibid* at 44.

⁵⁷⁵ Riesman, *supra* note 403 at 200.

⁵⁷⁶ Often translated as pity. *Ibid.* Similarly, Ver Eecke refers to *endam* (having compassion towards those in need) as a reciprocation of *semteende*. Ver Eecke, *supra* note 10 at 60.

⁵⁷⁷ Riesman, *supra* note 403 at 200–201; Ver Eecke, *supra* note 10 at 60–61.

⁵⁷⁸ Riesman, *supra* note 403 at 224.

⁵⁷⁹ *Ibid* at 182.

⁵⁸⁰ For example, in *Kaidara*, Hammadi's reaction to Kaidara's gift was gratitude, which had been expressed indirectly and over time through gifts to others. Hampate Ba, *supra* note 54 at 100.

⁵⁸¹ Mills, *supra* note 46 at 107–13.

⁵⁸² Specifically, Kaidara replied, "Under the tree you showed me, by offering all your wealth when you needed it more than I. You also set your fortune aside for me when you reached the river bank, even more graciously than beneath the tree. And now, this evening, you propose giving me all your wealth and power, and even your very head, in addition." Hampate Ba, *supra* note 54 at 100.

⁵⁸³ Loftsdottir, *supra* note 401 at 74.

given many animals to others and latter suffered losses was more able to depend on those around him to reconstitute his herd than someone who had been reluctant to help others in need.⁵⁸⁴ Riesman also appears to recognize this: “I realized that even if the woman had given me all the thread she had ... she could ask *someone else* if she needed some later.”⁵⁸⁵ This statement indicates that gratitude or responsibility can be manifested by returning or asking for a gift from *another* person.⁵⁸⁶ Ultimately, by participating in mutual aid, one will experience reciprocity from others in the community when and in the form most needed.⁵⁸⁷

Further, the literature demonstrates that mutual aid is strongly related to kinship such that kinship appears to provide the structure through which mutual aid is practiced.⁵⁸⁸ Stenning wrote that “[a] man is wealthy because of his kin, not in spite of them.”⁵⁸⁹ Similarly, in the Adamawa region, Ver Eecke described how *endam* (generosity) features heavily among kin.⁵⁹⁰ However, the extent and nature of reciprocity appears to vary across different types of relationships. In other words, kinship roles define and determine what reciprocity looks like.⁵⁹¹

Within immediate family relationships, the form and extent of reciprocity appears to be substantial. For example, Riesman wrote that children did not experience any needs insofar as the people around them could fulfill them.⁵⁹² A mother in particular assumed this responsibility, so much so that Riesman interpreted the relationship as a mother experiencing a child’s needs *as if they were her own*.⁵⁹³ The herd also falls within close kin relationships.⁵⁹⁴ Substantial

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Riesman, *supra* note 403 at 182. My emphasis.

⁵⁸⁶ Mills, *supra* note 46 at 108.

⁵⁸⁷ *Ibid* at 107–113.

⁵⁸⁸ *Ibid* at 114.

⁵⁸⁹ Stenning, *supra* note 13 at 195.

⁵⁹⁰ Ver Eecke, *supra* note 10 at 60.

⁵⁹¹ Mills, *supra* note 46 at 115.

⁵⁹² Riesman, *supra* note 403 at 227.

⁵⁹³ *Ibid* at 228. My emphasis.

⁵⁹⁴ Stenning described the close and interdependent relationship between household and herd *supra* note 13 at 101–103. For example, a new household came into being when it received its first cattle. *Ibid* at 38. Additionally, de St Croix described how herders knew their cows individually and possessed ways of communicating to specific, individual cows *supra* note 15 at 19. Hopen also described the “symbiotic” nature of family relations to cattle, such that a loss of one’s cattle constitutes a loss of one’s identity *supra* note 17 at 26–27. Ver Eecke also explained that the *daangol* (rope tying a calf to its mother) symbolized the unity of the corral (for cattle) and domestic living space in one household. Catherine Ver Eecke, “Na’I Ngoni Fulaaku: Cattle Values and their Implications for Cultural Change among the Fulbe of Gongola State, Nigeria” in *Studies in Fulfulde Language, Literature, and Culture: Proceedings of the 1st-4th International Conferences on Fulfulde Language, Literature, and Culture* (Nigeria: Center for Study of Nigerian Languages, Bayero University, 1991) 184 at 190. Again, this echoes the notion that a person is their relationships. Mills, *supra* note 46 at 159.

responsibility is owed to them in return for the extraordinary gifts that they provide to the family, and reciprocity often requires that a person's own needs come after those of cattle.⁵⁹⁵

Outside of the immediate household, the literature reports that many Fulbe communities are organized by agnatic lineage groups or in clans.⁵⁹⁶ Stenning described households as being highly economically independent yet linked by cooperation.⁵⁹⁷ For example, a new family was formed with gifts from another family's herd.⁵⁹⁸ Among Fulani communities in Nigeria, households reportedly grouped in cattle camps, sharing labor and livestock.⁵⁹⁹ When a member of one's lineage group needed an animal, whoever possessed that animal in the lineage group was expected to provide it.⁶⁰⁰ If a household's herd was depleted by disease or theft, members of his clan would give him cattle to help rebuild it.⁶⁰¹ Stenning explicitly tied these gifts to kinship: "[in] lineage group and clan we see forms of social organization that are extensions of the family."⁶⁰² Today, reciprocity in the form of gift-sharing is still practiced among Fulani clan members in Nigeria, constituting them in "a social network of exchange and reciprocity in addition to kinship ties."⁶⁰³

Gift-sharing then appears to constitute the boundaries of community; however, those boundaries function as "a steady gradient" depending on the closeness of relationships.⁶⁰⁴ The existence of community is dependent on the active and continual renewal of relationships between members through mutual aid.⁶⁰⁵ The intensity with which mutual aid was practiced – and thus the relationships themselves – varied across time and space based on the environment and needs of the herd.⁶⁰⁶ However, the form that social organization took was an extension of the family.⁶⁰⁷

⁵⁹⁵ See Hopen, *supra* note 17 at 23; Riesman, *supra* note 403 at 159.

⁵⁹⁶ See Stenning, *supra* note 13 at 202; de St Croix, *supra* note 15 at 12; Hopen, *supra* note 17 at 44.

⁵⁹⁷ Stenning, *supra* note 13 at 37.

⁵⁹⁸ *Ibid* at 38.

⁵⁹⁹ *Ibid* at 49; Hopen, *supra* note 17 at 60.

⁶⁰⁰ Stenning, *supra* note 13 at 41.

⁶⁰¹ *Ibid*; Blench, *supra* note 552 at 50; Loftsdottir, *supra* note 401 at 74.

⁶⁰² Stenning, *supra* note 13 at 59–60.

⁶⁰³ Majekodunmi, *supra* note 37 at 537.

⁶⁰⁴ Mills, *supra* note 46 at 122.

⁶⁰⁵ Riesman, *supra* note 403 at 180.

⁶⁰⁶ For example, Stenning reports that, during the wet season, clans would form seasonal cattle camps. Within camps, members possessed the same responsibilities of kin, but extended to include all members. During the dry season, when pasture was less available and intensive use of land would deplete pasture, lineage groups would disperse, performing mutual aid within themselves until they revived the extended relationships in the following wet season.

⁶⁰⁷ Stenning, *supra* note 13 at 59–60.

Relationships to strangers demonstrate the boundary at its thinnest or farthest.⁶⁰⁸ Although there are reports of offering milk to strangers, much of the literature characterizes relationships of Fulani communities with strangers as initially reserved and cautious, such that a great deal of restraint was exercised.⁶⁰⁹ In other words, one did not express one's needs to individuals where there was no expectation of response or reciprocity.⁶¹⁰

If community is defined by the intensity with which gift-sharing is practiced, then belonging in Fulbe community need not be limited to Fulbe peoples.⁶¹¹ For example, relationships with external communities historically also were characterized by mutual assistance.⁶¹² Access to water and pasture, as well as cattle-related disease, dictated community migration, which required herders to graze their cattle on or near lands used by indigenous agricultural communities.⁶¹³ According to Awogbade, before pastoralists moved into a new grazing area, Fulani herders would present themselves to the local community to obtain their permission to graze.⁶¹⁴ In return, "rulers demanded tributes and courtesy calls to be paid annually as acknowledgement of rights to land."⁶¹⁵ The literature often describes these relationships as symbiotic or interdependent, entailing the exchange of grain for milk and grazing pasture on crop residue for manure.⁶¹⁶

Although framed as an exchange or contract between communities over rights to land, such exchanges could be interpreted as mutual aid in that each community shared gifts that fulfilled the other's needs.⁶¹⁷ Further, Riesman noted that maintaining a relationship requires revival of the link between people or, in this case, between communities.⁶¹⁸ The purpose of annual visits may have been to renew the link between them. Given the circularity and iterant nature of migration patterns,

⁶⁰⁸ Mills, *supra* note 46 at 124.

⁶⁰⁹ See Riesman, *supra* note 403 at 183–85; Hampate Ba & Dieterlen, *supra* note 54; Ver Eecke, *supra* note 408 at 12; Ver Eecke, *supra* note 594 at 190.

⁶¹⁰ Ver Eecke, *supra* note 408 at 13.

⁶¹¹ Mills, *supra* note 46 at 121–25.

⁶¹² See Blench, *supra* note 552 at 42; Wilson, *supra* note 35 at 37; PE Lovejoy & S Baier, "Desert-Side Economy of the Central Sudan" in Michael Grantz, ed, *The Politics of Natural Disasters: The Case of the Sahel Drought* (New York: Praeger, 1976) 145 at 158; Hopen, *supra* note 17 at 158; Majekodunmi, *supra* note 37 at 538.

⁶¹³ Stenning, *supra* note 13 at 6.

⁶¹⁴ M O Awogbade, *Fulani Pastoralism* (Zaria: Ahmadu Bello University Press, 1983) at 11.

⁶¹⁵ *Ibid.*

⁶¹⁶ Blench, *supra* note 552 at 42; Wilson, *supra* note 35 at 40; Mary Wren Bivins, *Telling Stories, Making Histories: Women, Words, and Islam in Nineteenth Century Hausaland and the Sokoto Caliphate* (Portsmouth: Heinemann Educational Books Ltd, 2007) at 55.

⁶¹⁷ Fulani gifts were milk and manure while indigenous agriculture communities possessed the gifts of grain and pasture. Both needed to supplement their diets with the gifts of the other. Additionally, Fulani needed pasture to graze herds while agricultural community needed fertilizer for the soil. Blench, *supra* note 18 at 42; Wilson, *supra* note 35 at 40; Wren Bivins, *supra* note 616 at 55.

⁶¹⁸ Riesman, *supra* note 403 at 183.

these relationships may have constituted a sustained practice of mutual aid rather than one-time direct exchanges.⁶¹⁹ Belonging, then, could be inclusive of the agricultural communities within whom they were in relationships. If so, then the temporally attenuated nature of the relationship would shape a sense of responsibility or gratitude and corresponding reciprocity that is relatively thin as compared to relationships with close kin or clan.⁶²⁰ Viewed through this lens, it appears that a person belongs to Fulani community by virtue of one's relationships, not by virtue of one's status (indigenous or otherwise).

C. Legal Traditions

Gift sharing appears to be critical to the constitution of Fulbe community, which necessitates institutions that enable community members to share gifts.⁶²¹ Because mutual aid occurs in specific relationships, within which the extent of responsibility or gratitude and form of reciprocity may vary, there is no definite or prescribed response to a situation.⁶²² Rather, individuals must make decisions within specific relationships.⁶²³ To use Mills's terminology, they must exercise legal judgment.⁶²⁴ This necessitates legal processes and institutions which train and facilitate the application of that legal judgment.⁶²⁵

Crucially, legal procedures and institutions in a rooted constitutional order need not be explicitly and exclusively identified as legal.⁶²⁶ According to Mills, this is because legal reasoning – by which legal judgment is made – is holistic, occurring not only in the mind, but also in the body, heart, and spirit.⁶²⁷ It is possible that reasoning within a Fulbe legal tradition is also holistic. Stenning wrote that, for Wodaabe communities, different qualities of *pulaaku* were associated with different organs of the body. In particular, the belly was associated with *semteende* (restraint, reserve, needs); the heart with *munyal* (patience and fortitude); and the head with *hakkiilo* (care, forethought, and cattle).⁶²⁸

⁶¹⁹ Stenning, *supra* note 13 at 4.

⁶²⁰ Mills, *supra* note 46 at 121–25.

⁶²¹ *Ibid* at 129.

⁶²² *Ibid*.

⁶²³ *Ibid* at 130.

⁶²⁴ *Ibid*.

⁶²⁵ *Ibid* at 129.

⁶²⁶ *Ibid* at 131–33.

⁶²⁷ *Ibid* at 130–31.

⁶²⁸ Stenning, *supra* note 13 at 55–59.

Semteende is often described in relation to the restraint of one's basic physical needs.⁶²⁹ Deciding when, how, and to whom one should express these physical needs is an essential component of *semteende*.⁶³⁰ As such, the physical body becomes involved in the exercise of judgment within one's relationships. It could therefore constitute a method of reasoning.⁶³¹ Similarly, *munyal* is often described as the restraint of one's emotions and seems to be related to one's responsibilities to others in the community.⁶³² By involving the exercise of judgment in determining how to express one's emotions within relationships, *munyal* may constitute a method of reasoning with one's heart.⁶³³ Additionally, to practice pastoralism requires substantial knowledge of cattle, plant, and animal life, as well as weather and lunar patterns.⁶³⁴ It is an intellectually challenging practice, which necessitates careful attention the needs of the herd and the environment in which one lives.⁶³⁵ Hence, the head (or mind) may also constitute a method of reasoning.⁶³⁶

Assuming that reasoning requires all aspects of being, legal judgement then may be embedded in processes and institutions that do not appear to be strictly legal.⁶³⁷ Rather, they may exist in any aspect of daily life, which might appear to be markers of culture (e.g. stories, music, ceremonies, initiation rites).⁶³⁸ In Mills's words, "the practice of ... law is the practice of everyday living."⁶³⁹ Within and across many Fulbe communities, the literature identifies traditions, practices, and processes that appear to fulfill the key functions of legal traditions: training and assisting in the exercise of legal judgment.⁶⁴⁰ One such practice may be storytelling.⁶⁴¹

⁶²⁹ See for example Riesman, *supra* note 403 at 37–38; Ver Eecke, *supra* note 10 at 52–53; Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 3.

⁶³⁰ Riesman writes that a person has done a shameful thing (and experiences *semteende*) by demonstrating in public that he is not stronger than his needs, discomforts, or impulses, *supra* note 403 at 132. Ver Eecke writes that *semteende* entails guidelines for social interaction in private and self-presentation in public, *supra* note 10 at 53. A person cannot behave however they choose irrespective of others.

⁶³¹ Mills, *supra* note 46 at 131.

⁶³² Loftsdottir, *supra* note 401 at 91.

⁶³³ Mills, *supra* note 46 at 131.

⁶³⁴ Saverio Krätli & Nikolaus Schareika, "Living Off Uncertainty: The Intelligent Animal Production of Dryland Pastoralists" (2010) 22:5 *European J Development Research* 605–622 at 612.

⁶³⁵ *Ibid.*

⁶³⁶ Mills, *supra* note 46 at 131.

⁶³⁷ *Ibid* at 131–34.

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid* at 133–34.

⁶⁴⁰ *Ibid* at 130.

⁶⁴¹ See generally, DW Arnott, "Literature in Fula" in BW Andrzejewski, S Pilszewicz & W Tyloch, eds, *Literatures in African Languages: Theoretical Issues and Sample Surveys* (Cambridge: Cambridge University Press, 1985) at 72. For the tradition of oral epics among Fulbe in Senegal and Mali, see Belcher, *supra* note 55; Christiane

Achebe writes that “[p]eople create stories create people; or rather stories create people create stories.”⁶⁴² Implicit within a people’s stories are their understandings of the world around them, which influence how they came to be constituted as a people.⁶⁴³ These understandings are communicated to people by stories which then reinforces the understandings and practices through which a people continually constitutes itself.⁶⁴⁴ One example of this may arise from the Adamawa region of Nigeria, where Cobern et al. transcribed Fulani stories from three dry-season communities.⁶⁴⁵

In one such story, all the animals in a community came together to search for and share food during a famine.⁶⁴⁶ Despite agreeing to do so, the hyena refused to participate.⁶⁴⁷ When the community discovered that the hyena shirked his responsibility, he was expelled from the community.⁶⁴⁸ From this story, one could draw out the elements of mutual aid: that community literally inheres in the sharing of gifts; that gratitude and responsibility require and shape the form of reciprocity given or received; and that giving is reciprocal.⁶⁴⁹ To have the ability to share and refuse to do so is a breach of governance. The telling of this tale demonstrates that stories can help to develop legal judgment by teaching the broader logic by which community is constituted.⁶⁵⁰

Additionally, Cobern et al. noted there was no one lesson stated in each tale.⁶⁵¹ Rather, the lessons one could draw from a story were left open. This demonstrates the nature of a constitutional order based in relationships.⁶⁵² Within specific relationships, the extent of gratitude and responsibility will vary, and as a result reciprocity will look different in different relationships.⁶⁵³ There is individual agency in judgements about how to reciprocate.⁶⁵⁴ The subjective interpretation

Seydou & Brunhilde Biebuyck, “A Few Reflections on Narrative Structures of Epic Texts: A Case Example of Bambara and Fulani Epics” (1983) 14:3 *Research in African Literatures* 312.. For storytelling among Fulani in Nigeria, see William W Cobern, Abdurrahman Umar & Mohammad I Junaidu, “Traditional Education and Folktales: A Stimulus to Literacy Amongst the Nomadic Fulani” (1984) 10:52 *Durham & Newcastle Research Review* (130-133) 5; Malum Amadu, *Amadu’s Bundle: Fulani Tales of Love and Djinns*, Gulla Kell, ed., African Writers Series 118 (London: Heinemann Educational Books Ltd, 1972).

⁶⁴² Achebe, *supra* note 565 at 27.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Cobern, Umar & Junaidu, *supra* note 641.

⁶⁴⁶ Cobern, Umar & Junaidu, *supra* note 641 at 132.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Mills, *supra* note 46 at 98–129.

⁶⁵⁰ *Ibid* at 136.

⁶⁵¹ Cobern, Umar & Junaidu, *supra* note 641 at 131.

⁶⁵² Mills, *supra* note 46 at 136–37.

⁶⁵³ *Ibid* at 115.

⁶⁵⁴ *Ibid* at 145–47.

of stories enables individuals to exercise that agency within the logic of community.⁶⁵⁵ Ultimately then, storytelling may fill both functions of legal traditions.

E. Law

The literature defines *pulaaku* in terms that imply an equivalence to the concept of law. It is often described as a code of conduct or a set of rules. This definition, derived and reiterated from a set of descriptive accounts, has been critiqued as implying a uniformity that does not exist in fact.⁶⁵⁶ According to de St. Croix, *pulaaku* was common to all Fulbe, but interpreted differently by distinct communities.⁶⁵⁷ Dognin similarly argued that the purported code varies by location and across different forms of social organization, particularly between settled and mobile Fulani.⁶⁵⁸

Such a critique begins to express an important point about *pulaaku*. It guides Fulbe people in their relationships and these relationships are contingent on the local environments in which they live.⁶⁵⁹ According to Loftsdottir, when asked to describe the concept of *pulaaku* among Wodaabe communities in Niger, most mentioned specific formal acts, but they also stressed the general importance of hospitality and generosity towards one's kin.⁶⁶⁰ She writes that *pulaaku* "seems to be associated with rather formal rules of conduct ... *often associated with general respect towards others.*"⁶⁶¹ Ultimately, *pulaaku* "prescribes how a Pullo should act vis-à-vis specific types of people" (i.e. within specific types of relationships) "as well as the public in general."⁶⁶²

Although much of the literature describes *pulaaku* as prescriptive or rule-like, it is also possible to interpret *pulaaku* as entailing the exercise of judgement. Rather than mandating strict adherence to a code of conduct or set of behaviors requiring specific outcomes, *pulaaku* may provide the framework through which persons exercise responsibilities in their relationships.⁶⁶³ Thinking about law as legal judgement, rather than legal rules, shifts the focus to individual

⁶⁵⁵ Mills, *supra* note 46 at 137–39.

⁶⁵⁶ See Breedveld & De Bruijn, *supra* note 400.

⁶⁵⁷ de St Croix, *supra* note 15 at 16.

⁶⁵⁸ Dognin, *supra* note 407 at 299.

⁶⁵⁹ See Loftsdottir, *supra* note 401 at 93; Roy H Behnke & Ian Scoones, *Rethinking Range Ecology: Implications for Rangeland Management in Africa*, Paper No. 33 (London: International Institute for Environment and Development, Dryland Networks Program, 1992); Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 5.

⁶⁶⁰ It is important to note that, among Nigerien Woodabe, *pulaaku* is referred to as *mbodagansi*. Loftsdottir, *supra* note 401 at 94.

⁶⁶¹ *Ibid.* My emphasis.

⁶⁶² Azarya, *supra* note 17 at 3.

⁶⁶³ Mills, *supra* note 46 at 136.

agency.⁶⁶⁴ This agency is vital to the Fulani.⁶⁶⁵ For example, Riesman wrote that “the freedom of men is a necessary condition for their participation in social life and hence for the very existence of social life.”⁶⁶⁶ How one person experiences a need varies from how others experience that same need, and individual agency is necessary to identify the appropriate response.⁶⁶⁷ Conceiving of *pulaaku* as judgement accounts for this difference and enables a person’s response to vary accordingly.⁶⁶⁸

F. *The Practice of Law: Compliance and Enforcement*

According to Mills, the exercise of this individual agency as legal judgment requires substantial self-governance, and the literature on Fulbe legality strongly emphasizes self-control.⁶⁶⁹ *Pulaaku* reportedly requires demonstrations that a person is stronger than their needs, discomforts, and impulses.⁶⁷⁰ Ver Eecke notes the importance of this restraint arises from the challenges posed by life in the bush.⁶⁷¹ Notions of control and restraint are evident in descriptions of *semteende*, such that a person who possesses *semteende* has the air of restraint, humility, self-composure, and quietness.⁶⁷² Many authors describe *semteende* as having shame, and this shame arises when one loses self-control, particularly in public.⁶⁷³ Thus, the literature divides *pulaaku* into two sets of rules, those governing behavior in private and public, such that less restraint is required at home and among close kin.⁶⁷⁴ An alternative rooted interpretation to this construction

⁶⁶⁴ *Ibid* at 140.

⁶⁶⁵ Riesman, *supra* note 403 at 139.

⁶⁶⁶ *Ibid* at 141. Again, the incident concerning the deceased cow and collective assistance demonstrates this point. Although the young men felt a responsibility within their relationship to the owner to help him, they exercised their agency in determining the form of that assistance. They took their time, went to another village to seek more help and flirt with girls, and found some donkeys to help carry the load. Similarly, the owner exercised his agency in evaluating how his gratitude shaped reciprocity, leading him to buy the men kola nuts. All of this demonstrates an important point: that people differ in their responses to experience. *Ibid* at 224–25.

⁶⁶⁷ Mills, *supra* note 46 at 145–53.

⁶⁶⁸ *Ibid*.

⁶⁶⁹ Mills, *supra* note 46 at 157. Riesman, for example, writes that the “ideal of *pulaaku* is characterized by self-control.” *supra* note 403 at 132.

⁶⁷⁰ Riesman, *supra* note 403 at 132.

⁶⁷¹ Ver Eecke, *supra* note 408 at 10.

⁶⁷² Loftsdottir, *supra* note 401 at 94; Riesman, *supra* note 403 at 129; Stenning, *supra* note 13 at 59; Ver Eecke, *supra* note 10 at 52–57.

⁶⁷³ Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 5; Riesman, *supra* note 403 at 129–32; Ver Eecke, *supra* note 10 at 53.

⁶⁷⁴ Riesman, *supra* note 403 at 123; Ver Eecke, *supra* note 408 at 12.

of *pulaaku* and *semteende* is that restraint of one's needs functions as self-governance in Fulbe legality.⁶⁷⁵

Further, *semteende* also appears to function as a form of community governance, specifically as negative social force.⁶⁷⁶ As Riesman writes, the experience of *semteende* often is associated with shame and fear of repercussion from the community.⁶⁷⁷ "In this way, *semteende* is a social force acting within the psyche of each person in such a way that everyone orients his behavior to the same model and contributes to the social order."⁶⁷⁸ In other words, the experience of shame appears to be a form of persuasive compliance.⁶⁷⁹ It encourages people to engage in mutual aid through the persuasive power of experiencing shame in front of others (i.e. negative social force).⁶⁸⁰ Therefore, self-control, self-restraint, and the experience of *semteende* appear to constitute one function of legality: compliance.

Finally, Mills argues that authority in rooted governance – the means by which law may be legitimately enforced – is persuasive.⁶⁸¹ Persuasive authority entails leading "without compulsion" or coercion.⁶⁸² Those who follow a particular authority figure are able to withdraw their support, and those who are in a position of authority seek to persuade community members to follow.⁶⁸³ There is evidence of persuasive authority in pastoral communities, both in relationships with herds and between human beings. For example, Kratli and Schreika describe the use of persuasive force in herd management.⁶⁸⁴ Additionally, among Woodabe communities, authority reportedly manifested in an *ardo*.⁶⁸⁵ The *ardo* was often an older head of household with a large herd.⁶⁸⁶ According to Mills, leadership (or persuasive influence) in a rooted context grows

⁶⁷⁵ Riesman's discussion of child rearing practices may speak to this point. He writes that a child is not capable of self-control. As such, she does not even possess *semteende* for there is no reason to impose shame or restraint before she acquires the capacity for self-control. Riesman, *supra* note 403 at 168. The capacity for self-governance must be learned and practiced. Further, Mills notes that if persons within this worldview and logic are interdependent, then the practice of self-governance implies community governance. Mills, *supra* note 46 at 158.

⁶⁷⁶ Mills, *supra* note 46 at 176–79.

⁶⁷⁷ Riesman, *supra* note 403 at 138–39.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Mills, *supra* note 46 at 172.

⁶⁸⁰ *Ibid* at 176–79.

⁶⁸¹ *Ibid* at 161.

⁶⁸² Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) at 62; Mills, *supra* note 46 at 163.

⁶⁸³ Mills, *supra* note 46 at 163.

⁶⁸⁴ Krätli & Schareika, *supra* note 634 at 163.

⁶⁸⁵ Stenning, *supra* note 13 at 52.

⁶⁸⁶ *Ibid* at 52–53.

directly in proportion to one's demonstrated ability to provide for others.⁶⁸⁷ A man with more cattle would be more able to assist others in need and therefore was more likely to have persuasive influence. Further, an *ardo* did not have the ability to compel or coerce members of his community to action. Rather, his authority came from the consensus of the community.⁶⁸⁸ Thus, if an *ardo* lost this consensus, community members might leave or support another leader.⁶⁸⁹ In essence, authority within Fulbe communities was persuasive.

Ultimately, by changing the framework through which we view Fulani legality, it is possible to reconceive of concepts described by western literature through a completely different constitutional lens. What at first glance appears to be rules, a code of conduct, and a compellingly negative sense of shame and restraint, can instead be understood as a radically different way of being in the world. The legal order described here undoubtedly is not an actual Fulani legal order. However, it is crucial to realize that western accounts of Fulani legality likely also fail to adequately understand and explain it. Rather, it should be defined on its own terms. The critical point is that there is a worldview and a logic underlying Fulani legal orders. To engage in any meaningful way with Fulani peoples, the Nigerian state must first be aware of this difference.

II. Recognizing the Impact of Islam and Colonialism

Whatever a Fulani herder worldview and constitutional logic might have been in the past, it is evident that Islam and colonialism have had an impact. In the early nineteenth century, Fulani Muslim cleric Usman dan Fodio led a *jihad* against the Islamic Hausa state of Gobir.⁶⁹⁰ This jihad led to the creation of a Fulani Islamic state. The resulting Sokoto Caliphate and its emirates assumed a feudal system of governance from the Hausa state, which established a hierarchical administrative structure of lineage-based emirates ruled by a newly created Fulani aristocracy.⁶⁹¹ As a result, Fulani society became stratified.⁶⁹²

⁶⁸⁷ Mills, *supra* note 46 at 167.

⁶⁸⁸ Stenning, *supra* note 13 at 52–53; de St Croix, *supra* note 15 at 17–19; Ver Eecke, *supra* note 406 at 147.

⁶⁸⁹ de St Croix, *supra* note 15 at 17–19.

⁶⁹⁰ HFC Smith, "A Neglected Theme of West African History: The Islamic Revolution of the 19th Century" (1961) 2:2 *J Historical Society Nigeria* 169–85 at 175; Louis Brenner, "Histories of Religion in Africa" (2000) 30:2 *J Religion in Africa* 143–67.

⁶⁹¹ HAS Johnston, *The Fulani Empire of Sokoto*, West African History Series (London: Oxford University Press, 1967) at 166.

⁶⁹² Peter Tibenderana, "British Administration and the Decline of the Patronage-Client System in Northwestern Nigeria, 1900-1934" (1989) 32:1 *African Studies Rev* 71–95 at 72.

The Fulani in northern Nigeria are often associated with these Islamic conquerors. However, not all Fulani were part of the system of governance they created. The majority of Fulani pastoralists never took part in state governance.⁶⁹³ It is often repeated in the literature that mobile Fulani were more likely to adhere to traditional beliefs and practices than settled Fulani.⁶⁹⁴ For example, many Woodabe Fulani moved east into independent Bornu, seeking to escape the Islamic state and remained unaffected by Islamic influence.⁶⁹⁵ Additionally, Middle Belt communities reportedly were not significantly affected by the caliphate or Islamic reform.⁶⁹⁶

This is important because there is a reported correlation between adherence to Islam, sedentarization, and adherence to traditional Fulbe lifeways.⁶⁹⁷ Historically, pastoralists settled as a temporary response to poverty or sudden herd loss.⁶⁹⁸ However, the establishment of a Fulani Islamic state represented a significant shift, facilitating a generalized and permanent process of settlement that transformed intra- and inter-group relationships.⁶⁹⁹ According to Shimada, “[a]ll aspects of Fulbe lives... were affected.”⁷⁰⁰ Stratification based on access to wealth and power led to a more complicated economic system, including agriculture and labor employment, such that livelihoods no longer depended on cattle milk.⁷⁰¹ This greater division of labor enabled diversified wealth accumulation and altered relationships to cattle, facilitating vast settlement.⁷⁰² By conferring individual titles and authority to rule, it also resulted in greater use of coercive force.⁷⁰³ Political units became larger and more bureaucratic, and the effectiveness of the *ardo* declined

⁶⁹³ Marilyn Robinson Waldman, “A Note on the Ethnic Interpretation of the Fulani Jihad” (1966) 36:3 *Africa* 286–291 at 287.

⁶⁹⁴ See for example Blench, *supra* note 18 at 46; Ver Eecke, *supra* note 10 at 33.

⁶⁹⁵ Stenning, *supra* note 13 at 100–01. It is notable that today, many Wodaabe consider themselves to be distinct from the Fulani, who Wodaabe believe have absorbed Islamic Hausa values and customs. Loftsdottir, *supra* note 401 at 91.

⁶⁹⁶ Moses Ochondu, *Colonialism by Proxy: Hausa Imperial Agents and Middle Belt Consciousness in Nigeria* (Bloomington: Indiana University Press, 2014) at 229.

⁶⁹⁷ Blench, *supra* note 18; Shimada, *supra* note 18.

⁶⁹⁸ Azarya, *supra* note 17 at 39.

⁶⁹⁹ *Ibid* at 42.

⁷⁰⁰ Shimada, *supra* note 18 at 95. This perhaps was also the beginning of a sense of distinctive superiority based on ethnicity over others. Waldman suggests that a greater connection between settled and pastoral Fulani was their economic interdependence rather than a sense of ethnic superiority over non-Fulani. She argued that the “fact that many Fulani were aloof from town life and from the Hausa” showed that transhumance entailed minimal contact with others, not necessarily a sense of superiority. Although there is significant ethnic polarization today, Waldman suggests that arose through the proliferation of Islam. She suggests that the establishment of orthodox Muslims rulers who felt superior on grounds of faith to non-Muslims and non-orthodox Muslims, and who were predominately of the same ethnic group, may have facilitated the sense of superiority. Waldman, *supra* note 693.

⁷⁰¹ Shimada, *supra* note 18 at 95–96.

⁷⁰² Azarya, *supra* note 17 at 42.

⁷⁰³ Ver Eecke, *supra* note 406 at 149.

with increasing use of Islamic and statutory law.⁷⁰⁴ Further, religious conversion can result in the transformation of creation myths, such that narratives from the new religion become incorporated into local tradition.⁷⁰⁵ The result is that, “for many of today’s Fulbe, with the exception of some of the nomads, a significant part of their identity is indeed based in Islam. In at least some Fulbe communities, Islam has begun to surpass *pulaaku* in importance as a guiding path.”⁷⁰⁶ Ultimately, the establishment of the Islamic state caused fundamental transformation in Fulani ways of life.⁷⁰⁷

The colonial protectorate further abstracted Fulbe legality from its traditional forms by incorporating them into the administrative and taxation structure. Lugard declared the protectorate over northern Nigeria in 1900, and by 1904 he had brought the region under its colonial administration by conquest.⁷⁰⁸ The first twenty-five years of the protectorate significantly transformed Fulani political authority.⁷⁰⁹ In order to promote efficiency and reduce corruption, it reshaped and redistributed the structure of the caliphate’s government.⁷¹⁰ By reconfiguring units of government, it undermined the respect for and efficacy of village heads.⁷¹¹ Further, to incorporate mobile pastoralists into the geographically based local governance system, the administration placed all pastoralists under headmen, to whom was applied the title of *ardo*, to collect the cattle tax.⁷¹² Through its cattle tax and other policies, the colonial administration promoted pastoral settlement.⁷¹³

Today, there is evidence that relationships of reciprocity and reciprocal exchange networks are in decline.⁷¹⁴ These reciprocal relationships are negatively associated with increased livelihood diversification, economic differentiation, and market integration, as well as decreased political autonomy and social cohesion.⁷¹⁵ In Jos Plateau, Majekodunmi found that the nature of gifts in

⁷⁰⁴ Stenning, *supra* note 13 at 73–74; Azarya, *supra* note 17 at 45.

⁷⁰⁵ Belcher, *supra* note 55 at 3–5.

⁷⁰⁶ Azarya, Kazuhisa Eguchi & Ver Eecke, *supra* note 420 at 4.

⁷⁰⁷ Shimada, *supra* note 18 at 95.

⁷⁰⁸ Ochon, *supra* note 696 at 229.

⁷⁰⁹ Stenning, *supra* note 13 at 92.

⁷¹⁰ Tibenderana, *supra* note 692 at 76–77; A G Adebayo, “Jangali: Fulani Pastoralists and Colonial Taxation in Northern Nigeria” (1995) 28:1 Intl J African Historical Studies 113 at 116.

⁷¹¹ Tibenderana, *supra* note 692 at 77.

⁷¹² However, this type of *ardo* did not possess the same role, qualities, or authority of an *ardo* within the existing Fulani political organization. Adebayo, *supra* note 710 at 124.

⁷¹³ Adebayo, *supra* note 13 at 138; Stenning, *supra* note 13 at 87–95.

⁷¹⁴ For Fulbe relationships with farming communities throughout West Africa see, Davidheiser & Luna, *supra* note 7. Since independence, symbiotic relationships between pastoral and non-pastoral Fulani have declined substantially, according to Frantz, *supra* note 37. For recent specific evidence relating to Fulani in Nigeria, see Majekodunmi, *supra* note 37.

⁷¹⁵ Majekodunmi, *supra* note 37 at 535.

Fulani communities has changed substantially.⁷¹⁶ Rather than give cattle, households reportedly give cash, crops, products, or small ruminants to members of their communities.⁷¹⁷ Further, gifts to farmers or authorities hosting pastoralists have become rare, demonstrating a decline in interdependence between Fulani and indigenous communities.⁷¹⁸ Thus, Fulani households and communities appear to be less interdependent, which may evidence a breakdown in Fulani constitutionalism.⁷¹⁹

⁷¹⁶ Majekodunmi, *supra* note 37.

⁷¹⁷ *Ibid* at 538.

⁷¹⁸ *Ibid*.

⁷¹⁹ *Ibid* at 542–43.

CHAPTER FOUR. MISGUIDED RESPONSES AND LOST POSSIBILITIES: A DEEPENED CRITIQUE TO UNDERSTAND THE CONTINUATION OF VIOLENCE

Over the preceding chapters, I have offered a description of the legality of the Nigerian state, as well as an analysis of Fulani legality using the theoretical framework developed by Aaron Mills to demonstrate the depth and extent of difference between them. In this chapter, I will examine the potential implications of that difference as the Nigerian government seeks to resolve violent disputes between farmers and herders. In so doing, I will critique the government's response, demonstrating the ways in which its policy sits within the liberal paradigm and is fundamentally disconnected from pastoral Fulani lifeways.⁷²⁰

The violent conflict in Nigeria and across other states in the region is part of a larger system of diverse, interconnected issues. As described succinctly by Milligan, "population growth, agricultural expansion, a degraded environment, and a weakening of customary institutions, are generally assumed to be prime causes of pastoralist-farmer conflict, representing a classic case of demand- and supply-led resource scarcity."⁷²¹ In Nigeria's drylands, which are characterized by low but variable precipitation, herd migration has been an important and sustainable adaptive strategy in pastoral lifeways; yet, that strategy and lifeway are threatened.⁷²²

Land use in Nigeria has changed substantially over the course of its colonial history.⁷²³ Land tenure reform emphasizing private property rights and technological innovations in irrigation facilitated the increasing fragmentation of land into exclusive parcels for cultivation, thereby shrinking and closing cattle migration corridors.⁷²⁴ Further, Nigeria's rapidly growing population requires access to land.⁷²⁵ Such changes in land use, and particularly agriculture, displace natural

⁷²⁰ This critique is inspired by Tully, *supra* note 51.

⁷²¹ Simon Milligan & Tony Binns, "Crisis in Policy, Policy in Crisis: Understanding Environmental Discourse and Resource-use Conflict in Northern Nigeria" (2007) 173:2 *Geographical J* 143–156 at 144.

⁷²² See Maria E Fernandez-Gimenez & Sonya Le Febre, "Mobility in pastoral systems: Dynamic flux or downward trend?" (2006) 13:5 *Intl J Sustainable Development & World Ecology* 341–362. For rainfall variability across Nigeria, see Chidozie Charles Nnaji, Cordelia Nnennaya Mama & Okechukwu Ukpabi, "Hierarchical Analysis of Rainfall Variability across Nigeria" (2016) 123:1–2 *Theoretical & Applied Climatology* 171–184 at 181. For herd migration as an adaptive strategy in that environment, see Behnke & Scoones, *supra* note 659 at 14–15; A R E Sinclair & J M Fryxell, "The Sahel of Africa: Ecology of a Disaster" (1985) 63:5 *Canadian J Zoology* 987–994 at 992.

⁷²³ See Davidheiser & Luna, *supra* note 7.

⁷²⁴ *Ibid.*

⁷²⁵ It is set to become the third most populous country in the world by 2050. See Aisha Olushola Arowolo & Xiangzheng Deng, "Land use/land cover change and statistical modelling of cultivated land change drivers in Nigeria" (2018) 18:1 *Regional Environmental Change* 247–259 at 248.

vegetation, reducing fodder availability for herds.⁷²⁶ Land use and land cover changes have a significant impact on climate change.⁷²⁷ Collectively, these changes reduce access to resources, increase competition, and facilitate conflict while generating concerns about sustainable food production for the growing population.⁷²⁸ As such, Suleiman et al. found that the most significant challenge to pastoral cattle production in Nigeria's drylands was conversion of land previously used for cattle routes into crop fields.⁷²⁹

In response to this multidimensional problem, the Nigerian government has adopted a policy seeking a market-oriented transformation of the livestock sector.⁷³⁰ The stated goal is to ensure "the livestock sector becomes a catalyst for building national prosperity."⁷³¹ To that end, the policy employs a six pillar approach, including investment and economic development, conflict resolution, justice and peace, humanitarian relief to persons displaced by conflict, human capital development, and a catchall "cross-cutting issues."⁷³² As such, "a key intervention is the establishment of ranches, aimed at mitigating the escalating crisis between settled-farmers and pastoralists that could undermine the entire development of the livestock sector."⁷³³ In other words, the objective of the policy is to shift livestock production away from pastoralism and towards commercial ranching; to encourage mobile pastoralists to settle on defined, exclusive parcels of

⁷²⁶ See Michael Mortimore, Frances M A Harris & Beryl Turner, "Implications of Land Use Change for the Production of Plant Biomass in Densely Populated Sahelo-Sudanian Shrub-Grasslands in North-East Nigeria" (1999) 8:3-4 *Global Ecology & Biogeography* 243-256 at 244.

⁷²⁷ Land use refers to socio-economic attributes of land, such as food production, recreation, logging, mining, technology, and government policies, while land cover refers to the natural physical and biological cover over the soil. N B Eniolorunda, S A Mashi & G N Nsofor, "Toward Achieving a Sustainable Management: Characterization of Land Use/Land Cover in Sokoto Rima floodplain, Nigeria" (2017) 19:5 *Environment, Development & Sustainability* 1855-1878. For a review of literature on the impact of land use/land cover on climate change, see Rezaul Mahmood et al, "Impacts of Land Use/Land Cover Change on Climate and Future Research Priorities" (2010) 91:1 *Bull American Meteorological Society* 37-46.

⁷²⁸ For impact on conflict, see Davidheiser & Luna, *supra* note 7 at 89. For concerns about food security, see *Climate Change and Land: Summary for Policy Makers*, An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems, by Almut Arneth et al, An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems (Intergovernmental Panel on Climate Change, 2019) at 17.

⁷²⁹ Suleiman, Jackson & Rushton, *supra* note 5 at 1180.

⁷³⁰ The policy itself does not seem to have been publicly published, though it has been referenced in an FAO report. See *The Future of Livestock in Nigeria: Opportunities and Challenges in the Face of Uncertainty*, by FAO (Rome, 2019).

⁷³¹ *Ibid* at 14.

⁷³² —, "Nigeria to Spend N100 Billion on New Plan for Cattle, Other Animals", *All Africa* (9 September 2019), online: <<https://allafrica.com/stories/201909200036.html>>.

⁷³³ FAO, *supra* note 730 at 14.

land and intensify cattle production.⁷³⁴ Although the policy arose as a response to violent conflict, it portrays the violence as a primarily economic issue to which pastoral peoples are an obstacle.

This livestock transformation plan is part of a long history of policy and practice by both colonial and post-colonial governments. Underlying the framework is a body of legal, economic, and ecological theory that frames and justifies Nigeria's approach to regulating pastoral communities. This body of theory exists within and contains assumptions arising from a liberal worldview. Such assumptions strike at the core meanings of personhood and community, thereby determining how pastoralism is reconciled to the political community of the Nigerian state.

I. Misguided Responses: The Theory of Pastoral Policy in Nigeria

The theory and policy regulating pastoralism in Nigeria is based in a storied understanding of the relationship between people and the earth.⁷³⁵ This relationship, in Nigeria and the western world generally, is one of subject and object, owner and “thing” owned.⁷³⁶ In other words, land is property, a commodified bundle of rights over a territorially delineated and often exclusive area.⁷³⁷ As James Tully explained, this relationship creates a situation in which it appears as if we as human beings are “separate from or independent of” the earth.⁷³⁸ It therefore places human beings in a position of dominion (or domination) and control over the earth.⁷³⁹ Land then becomes an object to be exploited and from which its fruits are an extractable resource to be taken out of the earth and consumed.⁷⁴⁰ With its legal origins purportedly in the English enclosure movement (within which Locke's *Two Treatises* comfortably fits) this way of relating to the earth became part of the modern policy regimes directed at pastoral communities in Africa through a paradigm of pastoralism developed by economists and ecologists.⁷⁴¹

⁷³⁴ Additionally, the federal government also proposed (but later retracted) the establishment of rural grazing areas (RUGAs). These clusters of ranches to which pastoralists would have relocated purportedly would have contained the resources and facilities for numerous pastoralist households to herd their cattle within a single, defined migration area. International Crisis Group, *supra* note 41 at 23–26; Laila Johnson-Salami, “Nigeria's Grazing Crisis Threatens the Future of the Nation”, *Financial Times* (15 July 2019), online: <<https://www.ft.com/content/a56ccf22-a331-11e9-a282-2df48f366f7d>>; –, “Nigeria's Livestock Plan to End Farmers, Herders Violence Set for Launch”, *Premium Times* (14 September 2019), online: <<https://www.premiumtimesng.com/news/351499-nigerias-livestock-plan-to-end-farmers-herders-violence-set-for-launch.html>>.

⁷³⁵ Mills, *supra* note 46 at 197; Tully, *supra* note 51 at 103–04.

⁷³⁶ Mills, *supra* note 46 at 197; Tully, *supra* note 51 at 103–04.

⁷³⁷ See Locke, *supra* note 50 at § 32; Tully, *supra* note 51 at 103–04; *Land Use Act*, No. 6, No. 6 (29 March 1978).

⁷³⁸ Tully, *supra* note 51 at 104.

⁷³⁹ *Ibid.*

⁷⁴⁰ Locke, *supra* note 50 at § 32; Mills, *supra* note 46 at 204.

⁷⁴¹ See Mark Moritz et al, “Open Access, Open Systems: Pastoral Management of Common-Pool Resources in the Chad Basin” (2013) 41:3 *Human Ecology* 351–365 at 351–52; Camilla Toulmin, Ced Hesse & Lorenzo Cotula,

A. Economic Theory

Supporting this paradigm is a property rights theory that gained popularity in 1970s as serious droughts threatened life across the continent.⁷⁴² That theory is commonly referred to as the tragedy of the commons, proposed by Garret Hardin in 1968.⁷⁴³ The tragedy that Hardin describes seems to be a modern retelling of Locke's state of nature cast in economic terms.⁷⁴⁴ Locke's theory of political community is grounded in the necessity of mechanisms to preserve individual liberty and property.⁷⁴⁵ Although the earth is common, each man has property in his person and labor.⁷⁴⁶ Whenever he removes something out of the state of nature, it mixes with his labor and becomes his property, excludable from others.⁷⁴⁷ This is the starting point of Hardin's theory.⁷⁴⁸ The commons Hardin describes is a resource, usually depicted as a grazing pasture, over which each individual has a right of use but which, once captured, cannot be used by another.⁷⁴⁹ The goal of a rational person in the commons is to "maximize his gain" in the use of it.⁷⁵⁰

Locke continued, arguing that there is a natural limitation on what a man can take from the commons: only as much as he can consume.⁷⁵¹ Thus, individuals will, in the exercise of their autonomy, take as much from the commons as they can use.⁷⁵² Because there is no third party enforcement, each individual is responsible for his own compliance, inevitably resulting in uncertainty, disputes, and chaos.⁷⁵³ Retold in the language of economic rationalization, Hardin

"Pastoral Commons Sense: Lessons from Recent Developments in Policy, Law and Practice for the Management of Grazing Lands" (2004) 14:2/4 *Forests, Trees & Livelihoods* 243–262 at 247–49; Milligan & Binns, *supra* note 721 at 150–51; Akin M Omotayo, "Ecological Implications of Fulbe Pastoralism in Southwestern Nigeria" (2003) 14:5 *Land Degradation & Development* 445–457 at 445–46.

⁷⁴² Moritz et al, *supra* note 741 at 350–51; Toulmin, Hesse & Cotula, *supra* note 741 at 247–49.

⁷⁴³ Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 *Science* 1243–48.

⁷⁴⁴ Jeremy Webber made this point, writing "The story generally told by law and economics scholars about the emergence of private property is best considered a myth of the emergence of economic man – akin to the political myth of the establishment of organized societies through social contract – rather than a plausible ethnohistorical account." Jeremy Webber, "The Grammar of Customary Law" (2009) 54 *McGill LJ* 549–626 at 601. In this retelling, the economic language of utility maximization is a quantifiable heuristic for individual liberty. Maximizing utility – the balancing of marginal costs and marginal benefits – is fundamentally a mode of rationality by which one makes choices that are best for oneself.

⁷⁴⁵ Locke, *supra* note 50 at § 94.

⁷⁴⁶ *Ibid* at § 27.

⁷⁴⁷ *Ibid*.

⁷⁴⁸ Hardin, *supra* note 743 at 12.

⁷⁴⁹ *Ibid*.

⁷⁵⁰ *Ibid*.

⁷⁵¹ Specifically, "as much land as a man tills, plants, improves, cultivates, and can use the product of." Locke, *supra* note 50 at § 32.

⁷⁵² *Ibid*.

⁷⁵³ *Ibid* at § 13.

argued that a rational herdsman obtains positive utility by adding an animal to his herd but incurs little of the cost of his additional grazing.⁷⁵⁴ As a result, the herdsman “concludes that the only sensible course ... is to add another animal.”⁷⁵⁵ In other words, if the natural limit to consumption is what a man can use, then there is no limit. Since every herdsman does the same, “each man is locked into a system which compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”⁷⁵⁶ This is, in essence, Locke’s state of nature, such that the absence of a third party coercive authority to enforce limitations on individuals’ resource use leads to instability for all.⁷⁵⁷

Locke wrote that uncertainty and chaos lead individuals to leave the state of nature by agreeing to be bound by limitations on their liberty.⁷⁵⁸ Harold Demsetz developed a theory of property rights which takes up this idea, explaining the transition from the ruin and chaos of Hardin’s commons to the certainty and efficiency brought by a system of private property rights.⁷⁵⁹ Consistent with both Locke and Hardin, Demsetz argued that where there is increased competition over progressively scarce land, access to the resource becomes more uncertain.⁷⁶⁰ Simultaneously, however, competition over the resource increases its value.⁷⁶¹ The result is a rebalancing of the benefits and costs of resource use, which causes society to shift towards a system of private ownership rights.⁷⁶² Private rights, when recognized by the state through registration and titling, purportedly create greater certainty over those rights and facilitate the incentives to invest in improvements of the land.⁷⁶³ In Locke’s terms, individual users agree to forgo their unrestrained access to the commons in order to obtain greater certainty over and benefit from a smaller but exclusive area.

Like Locke’s state of nature, this property rights theory treats pastoralism and open access systems as if they were an early stage of economic development.⁷⁶⁴ From such a perspective,

⁷⁵⁴ Hardin, *supra* note 743.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid* at 1244.

⁷⁵⁷ Locke, *supra* note 50 at § 13.

⁷⁵⁸ *Ibid* at § 123.

⁷⁵⁹ Harold Demsetz, “Towards a Theory of Property Rights” (1967) 57:2 American Economic Review 347–59.

⁷⁶⁰ *Ibid* at 354–55.

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid* at 350–53.

⁷⁶³ *Ibid* at 355–56.

⁷⁶⁴ Demsetz’s work is literally titled “Toward a Theory of Property Rights”.

pastoralists have not yet advanced to the stage of private property rights. Further, it assumes and attributes to pastoralists a form of liberal rationality: free choice to maximize one's own liberty at the expense of others as manifested in a cost-benefit analysis.

B. Ecological Theory

Traditional ecological theory also contained assumptions about pastoralism which helped to shape policy perceptions of it. Until the late 1980s, pastoralism was studied under the assumption that it was practiced in a potentially stable system.⁷⁶⁵ According to the prevailing opinion of the time, that system became destabilized by improper herding practices like excessive herd size and overgrazing.⁷⁶⁶ Thus, within the logic of this paradigm, herd populations oscillated between extremes as they overgrazed, then died off until pasture recovered sufficiently to facilitate herd growth.⁷⁶⁷ The model assumed a point of equilibrium, a stable and permanent carry capacity or number of animals the environment could support at all times of the year.⁷⁶⁸ Thus, changes to the system were necessary to restore the equilibrium.⁷⁶⁹

C. Influence on Policy

Crucially, the traditional economic and ecological perspectives of pastoralism are now known to be false.⁷⁷⁰ In particular, they inaccurately describe the factual scenarios on which the theories are based.⁷⁷¹ However, both substantially influenced a sustained framework of law and policy in Nigeria. These theories are part of an established tradition, and the perspectives and assumptions underlying them have long been part of colonial and post-colonial regulation of pastoralism.⁷⁷² In 1926, former Governor of the Northern Nigeria Protectorate, Frederick Lugard,

⁷⁶⁵ James E Ellis & David M Swift, "Stability of African Pastoral Ecosystems: Alternate Paradigms and Implications for Development" (1988) 41:6 *J Range Management* 450–59 at 451.

⁷⁶⁶ *Ibid*; Anders Hjort, "A Critique of 'Ecological' Models of Pastoral Land Use" (1981) 46:3/4 *Ethnos* 171–189 at 175–76.

⁷⁶⁷ Hjort, *supra* note 766 at 173.

⁷⁶⁸ *Ibid* at 175–76.

⁷⁶⁹ Ellis & Swift, *supra* note 765 at 451.

⁷⁷⁰ Webber, *supra* note 744 at 599–602; Behnke & Scoones, *supra* note 659; Ellis & Swift, *supra* note 765.

⁷⁷¹ Webber, *supra* note 744 at 599–602; Behnke & Scoones, *supra* note 659; Ellis & Swift, *supra* note 765.

⁷⁷² Ellis and Swift identified two major contributors to the traditional pastoral paradigm. In 1926, Melville Herskovits propagated the cattle-complex hypothesis, an idea which led to the view that the pastoral tradition of accumulating large herds of livestock was irrational and poor environmental management. Melville J Herskovits, "The Cattle Complex in East Africa" (1926) 28:1 *American Anthropologist* 230–272; Ellis & Swift, *supra* note 765 at 451. In 1935, Stebbing wrote that pastoralists' large herds and overgrazing would lead to desertification. E P Stebbing, "The Encroaching Sahara: The Threat to the West African Colonies" (1935) 85:6 *The Geographical Journal* 506 at 510.

wrote that pastoralists were inefficient in their use of land and livestock production because their “methods have not changed since the time of Abraham.”⁷⁷³ As such, herders in Nigeria needed European assistance to learn how to manipulate land, water, and other resources to maximize livestock production.⁷⁷⁴ Two types of development policies followed: (1) technical interventions seeking to manipulate herd sizes and local environments and (2) the alteration of land tenure systems.⁷⁷⁵

Throughout colonial governance, the settlement of pastoralists was seen as a necessary means to ensure the success of the livestock industry.⁷⁷⁶ Commercial ranching and settlement initiatives were implemented throughout the era of protection.⁷⁷⁷ The establishment of group ranches and reserves attempted to settle groups of pastoralists on specific tracts of land with the hope that some form of privatization would facilitate better management practices and stable herd populations.⁷⁷⁸ A World Bank study conducted between 1947 and 1954 gave scientific support to these views when it concluded that nomadism was wasteful and unproductive.⁷⁷⁹ It suggested that Nigeria seek to replace pastoral migration with grazing reserves, which then became a central tenet of livestock development policy following independence.⁷⁸⁰

To that end, post-independence governments in Nigeria continued their attempts to modernize the pastoral livestock economy through technical interventions and property rights reform.⁷⁸¹ In 1965, the Grazing Reserve Law empowered the Native Authorities and the Ministry of Animal and Forestry Resources to acquire native land and reserve it specifically for grazing.⁷⁸² Following severe drought in the 1970s and 1980s, anxieties surrounding the commons intensified across the continent, fed by Hardin’s tragedy and leading to policies aimed at controlling

⁷⁷³ Lugard, *supra* note 315 at 533.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ See Ellis & Swift, *supra* note 765 at 452. See also, Lugard, *supra* note 315 at 533; Sinclair & Fryxell, *supra* note 722 at 992.

⁷⁷⁶ Omotayo, *supra* note 741 at 446.

⁷⁷⁷ In 1912, there were attempts to establish commercial ranches, which later failed. In the 1930s, the administration adopted crop-livestock integration policies and mixed farming in Kano and Zaria provinces. In 1942, the administration settled pastoralists on the Jos Plateau, an effort which also failed. See *Ibid.*

⁷⁷⁸ By changing resource use incentives to internalize costs of use. Demsetz, *supra* note 759.

⁷⁷⁹ Omotayo, *supra* note 741 at 446; Milligan & Binns, *supra* note 721 at 150.

⁷⁸⁰ Milligan & Binns, *supra* note 721 at 150.

⁷⁸¹ Toulmin, Hesse & Cotula, *supra* note 741 at 246.

⁷⁸² Milligan & Binns, *supra* note 721 at 150.

pastoralism.⁷⁸³ Throughout the 1970s, reserves were established in Plateau, Katsina, and Bauchi states.⁷⁸⁴

Additionally, in 1978, the federal government engaged in substantial land tenure reform. According to Allot, the Land Use Act imposed for the first time a uniform system of land titling.⁷⁸⁵ The Act vested all land within the territory of each state in the state governor to be “held in trust and administered for the use and common benefit of all Nigerians.”⁷⁸⁶ State governments were vested with authority to manage land in urban areas, and local governments possessed the authority to manage land in rural areas.⁷⁸⁷ Recognizing Nigeria’s legally plural communities, registration and acquisition of private land title was not limited to individuals. Local government possesses authority to grant customary rights of occupancy, defined as “the right of a person or community lawfully using or occupying land in accordance with customary law.”⁷⁸⁸ Thus, communities could claim customary rights of occupancy to their homelands, enforceable against non-members.⁷⁸⁹ However, given pastoral migration – and therefore the apparent absence of a defined, identifiable homeland – the act disadvantaged pastoral communities in multiple ways. According to Davidheiser and Luna, such policies were “especially hard on pastoralists as colonial regimes tended to lay claims to territories that were not permanently settled, and that were an important part of the transhumant Fulbe production system.”⁷⁹⁰ Further, it disadvantaged mobile herders relative to settled, indigenous farming communities by giving to the latter legally enforceable exclusion rights.⁷⁹¹ Thus, rights to access land may be delineated based on one’s indigeneity to an area.

⁷⁸³ Mark Moritz, “Pastoral Intensification in West Africa: Implications for Sustainability” (2012) 18:2 J Royal Anthropological Institute 418–438 at 351. See for example, H F Lamprey, “Pastoralism Yesterday and Today: The Overgrazing Problem” in F Bourliere, ed, *Tropical Savannas: Ecosystems of the World* (Amsterdam: Elsevier, 1983) 643; Sinclair & Fryxell, *supra* note 722.

⁷⁸⁴ Milligan & Binns, *supra* note 721 at 150–51; Omotayo, *supra* note 741 at 446.

⁷⁸⁵ A N Allott, “Nigeria: Land use Decree, 1978” (1978) 22:2 J African L 136–160 at 136. From this perspective, the act appears as an application of economic theory that, by facilitating the formal registration of land rights and titling, the national government can prevent overuse, incentivize investment, and reduce disputes over land use. Jean-Philippe Platteau, “The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment” (1996) 27:1 Development & Change 29–86 at 37.

⁷⁸⁶ *Land Use Act*, *supra* note 737 at § 1.

⁷⁸⁷ *Ibid* at § 2.

⁷⁸⁸ *Ibid* at §§ 6, 50.

⁷⁸⁹ Olong, *Land Law In Nigeria*, 2nd ed (Stoke on Trent: Malthouse Press Ltd, 2012) at 46.

⁷⁹⁰ Davidheiser & Luna, *supra* note 7 at 83.

⁷⁹¹ For example, on the Jos Plateau, indigenous communities control access to land. Majekodunmi, *supra* note 37 at 542.

Throughout the 1980s and 1990s there were few changes to the government's policies on pastoralism.⁷⁹² Today, the federal government seeks a radical transformation of extensive, migratory pastoralism into intensive, sedentary commercial livestock production. Thus, Hardin's tragedy of the commons narrative – and the larger theoretical paradigm within which it sits – has “profoundly shaped” pastoral policy and the discussion “about the impact of pastoralists on ecosystems.”⁷⁹³ In essence, the policies with which the state approaches and regulates herders who practice migration are steeped within the liberal worldview. The logic with which they perceive, make sense of, and respond to pastoralism is a liberal constitutional logic.

D. The Fundamental Problem with the Traditional Paradigm

Within the traditional ecological and property rights paradigms, pastoralism as a type of rooted constitutionalism appears irrational.⁷⁹⁴ According to Mills, if nature is “inherently unlawful and disordered, and only humans possess the autonomy to choose to live otherwise,” then only human beings are capable of constituting communities.⁷⁹⁵ Liberal constitutionalism then necessarily entails the separation of human communities from the earth.⁷⁹⁶ Further, human manipulation or management of the earth is required to overcome disorder.⁷⁹⁷ Hence, we attempt to establish order through the fragmentation and commodification of land as private property, which creates the incentives to improve and perfect it with human interventions.⁷⁹⁸ The earth then needs human dominion and management to be ordered, efficient, and sustainable.⁷⁹⁹ From this perspective, pastoral Fulani constitutionalism is irrational. The relationship of herders to cattle, plant life, and spirits brings non-human beings associated with nature into the calculus of constitutionalism. By organizing human communities through herd migration to available pasture and water, pastoralism exists within the chaos of nature and does not seek to control it.

Further, when translated into the language of autonomy and logic of social contract, pastoralists appear to behave irrationally by exercising their autonomy without regard for and in

⁷⁹² Milligan & Binns, *supra* note 721 at 151.

⁷⁹³ Toulmin, Hesse & Cotula, *supra* note 741 at 247.

⁷⁹⁴ In the words of Davidheiser and Luna, “[t]ransient populations are anathema to the legal, rational, and bureaucratic state” *supra* note 7 at 83.

⁷⁹⁵ Mills, *supra* note 46 at 197.

⁷⁹⁶ Tully, *supra* note 51 at 104.

⁷⁹⁷ Mills, *supra* note 46 at 197.

⁷⁹⁸ Tully, *supra* note 51 at 115; Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

⁷⁹⁹ Mills, *supra* note 46 at 197.

violation of the autonomy of others.⁸⁰⁰ In other words, they disrespect farmers' personhood by not adhering to the principle that all persons possess equal – and therefore limited – liberty such that farmers are made unfree. This lack of respect for farmers' liberty creates the chaos manifested in violent disputes. From this point of view, Fulani herders should desire changes to their way of being that would reduce the disorder and make their own liberty more certain. Yet, they are unwilling to do so.⁸⁰¹ Thus, even if pastoralism weren't irrational in and of itself, violent disputes between farmers and herders in Nigeria have generated chaos such that it is rational to progress to an improved way of being by forgoing their unlimited liberty in the commons for limited but secure rights in private property.

Therefore, the role of the Nigerian government within this logic is to create laws and policies that enforce the equality principle against Fulani herders so as to prevent and punish unjustified infringements on farmers' liberty.⁸⁰² Hence, the Nigerian government has repeatedly enacted policies which promote the settlement of pastoralists and privatization of access to land.⁸⁰³ Such policies create clear reciprocal duties and rights with respect to land which can be vindicated. By settling on reserves, herders would gain rights to access resources within and guarantees against agricultural encroachment from without.⁸⁰⁴ However, reserves also create a corresponding duty not to use privately held land outside the reserve.

The problem is that these rights and duties arrangements are inherently in conflict with pastoral relationships to land. For example, Moritz described how pastoralists in the Chad Basin maintained free and open access to pasture, regardless of herder's ethnic community or origin.⁸⁰⁵ For these pastoralists, cattle literally are life; without cattle, people cannot live *as pastoralists*.⁸⁰⁶ Thus, "to deny cattle access to grazing resources is to deny pastoralists life."⁸⁰⁷ While private

⁸⁰⁰ In the language of utility, they incur all the benefit of their actions without incurring the costs (i.e. damage to farmers' crops).

⁸⁰¹ It is my contention that the reason for this is that they understand the issue through a different logic.

⁸⁰² This is because liberal political community is organized to ensure the equal respect of everyone's liberty, resulting in the vesting of government with coercive authority to prevent and enforce sanctions against infringements. Mills, *supra* note 46 at 159–60.

⁸⁰³ Even customary access to land can be seen as the promotion of privatization. The Land Use Act treats customary land tenure as customary land rights; such rights can be held by individuals or an organization (by which it likely means a community as a corporate entity). However, whether individually or collectively held, these rights entail the exclusion of those who do not hold them. In this sense, they are private. *Land Use Act*, *supra* note 737 at § 6.

⁸⁰⁴ In other words, farmers possess duties not to infringe upon the reserve land.

⁸⁰⁵ Moritz et al, *supra* note 741 at 355.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.*

property rights respect the holders' autonomy over a parcel of land (and by extension their personhood) within a liberal worldview, private property rights disrespect pastoralists' personhood by literally disconnecting them and their cattle from the earth.⁸⁰⁸ As such, foreclosing cattle access to grazing through exclusive land rights make pastoralists unfree.

II. Lost Possibilities: A Shift in the Paradigm, but Not the Worldview

A significant body of scholarship has critiqued the traditional pastoral paradigm such that it is no longer the dominant model. By showing that the use of common pool resources like pasture does not necessarily result in overuse, Ostrom demonstrated that individual exclusive title is not a necessary condition of efficient and sustainable resource use.⁸⁰⁹ The caveat is that certain conditions within communal land management be met.⁸¹⁰ Generally, these conditions include rules governing access, use, and enforcement.⁸¹¹ Importantly then, the literature still holds that open access (defined as the absence of these conditions) can lead to overuse and, in so doing, relies on assumptions of traditional economic rationality.⁸¹²

Further, Ellis and Swift demonstrated in 1988 that the assumption of a stable equilibrium fails in a drylands environment.⁸¹³ As such, they argued that interventions which attempt to achieve stability in a highly variable climate are likely to be irrelevant, disruptive, or destructive.⁸¹⁴ Behnke and Scoones then demonstrated in 1992 that pastoral strategy is to move throughout the local environment, exploiting optimal periods in each area.⁸¹⁵ Such practices, referred to as opportunistic management, respond to fluctuations in water and pasture availability, adapting to and using environmental variability rather than attempting to manipulate the environment.⁸¹⁶ These arguments demonstrated for the first time in western literature that pastoral migration is ecologically rational.

⁸⁰⁸ Mills, *supra* note 46 at 204.

⁸⁰⁹ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990) 226.

⁸¹⁰ *Ibid.*

⁸¹¹ Maryam Niamir-Fuller, "Toward a Synthesis of Guidelines for Legitimizing Transhumance" in Maryam Niamir-Fuller, ed, *Managing Mobility in African Rangelands: The Legitimization of Transhumance* (London: Intermediate Technology Publications, 1999) 226.

⁸¹² Moritz et al, *supra* note 741 at 352.

⁸¹³ Ellis & Swift, *supra* note 765 at 453.

⁸¹⁴ *Ibid* at 451.

⁸¹⁵ Behnke & Scoones, *supra* note 659.

⁸¹⁶ *Ibid* at 14–15.

Such work has challenged the traditional arguments that extensive pastoralism is less efficient and more environmentally damaging than intensive livestock production in dryland environments. Rather, it argues that migration-based pastoralism can, in fact, be sustainable.⁸¹⁷ Further, the new paradigm suggests that overgrazing occurs in drylands when animals are concentrated due to restrictions on herd movement.⁸¹⁸ As such, settlement schemes like reserves and ranches, which assume that local ecosystems can support herds year-round within a defined territory, are associated with overuse of land, augmented effects of drought, and increased disputes.⁸¹⁹

This is evident in Nigeria. For example, in the Zamfara Reserve, increased use of reserve land following agricultural encroachment into traditional migration corridors led to overgrazing and degradation within the reserve.⁸²⁰ Similarly, Ducrotoy et al. argue that grazing reserves are failing to meet their goals of promoting pastoral settlement and self-sufficiency.⁸²¹ By pushing pastoralists onto the Kachia Grazing Area, cattle production has outstripped resource availability.⁸²² As a result, households have continued to take animals out of the reserve on transhumant migrations during the dry season.⁸²³

The shift in the science demonstrates a growing awareness that traditional policy solutions are ill-suited to the challenges posed by pastoralism in a liberal state. According to Turner, formal title to land increases rigidity and restricts movement.⁸²⁴ Yet, Burnsilver et al. demonstrate that the environment necessitates movement to some degree.⁸²⁵ Thus, Fernandez-Gimenez argues that pastoralists need more secure access to land, but also require flexible patterns of land use and

⁸¹⁷ For a review article on the sustainability of pastoralism, see Workneh Kassa Tessema, Paul T M Ingenbleek & Hans C M van Trijp, “Pastoralism, Sustainability, and Marketing: A Review” (2014) 34:1 *Agronomy for Sustainable Development* 75–92. See also, Fernandez-Gimenez & Le Febre, *supra* note 722; Mwangi, *supra* note 6 at 164; Toulmin, Hesse & Cotula, *supra* note 741.

⁸¹⁸ Fernandez-Gimenez & Le Febre, *supra* note 722 at 349.

⁸¹⁹ Rogier van den Brink, Daniel W Bromley & Jean-Paul Chavas, “The Economics of Cain and Abel: Agro-pastoral Property Rights in the Sahel” (1995) 31:3 *J Development Studies* 373–399 at 392.

⁸²⁰ Davidheiser & Luna, *supra* note 7 at 91.

⁸²¹ Marie Julie Ducrotoy et al, “Fulani cattle productivity and management in the Kachia Grazing Reserve, Nigeria” (2016) 6:1 *Pastoralism: Research, Policy and Practice* 1–25.

⁸²² Ducrotoy et al, *supra* note 39.

⁸²³ Ducrotoy et al, *supra* note 821.

⁸²⁴ Matthew Turner, “The Role of Social Networks, Indefinite Boundaries and Political Bargaining in Maintaining the Ecological and Economic Resilience of the Transhumance Systems of Sudan-Sahelian West Africa” in Maryam Niamir-Fuller, ed, *Managing Mobility in African Rangelands: The Legitimization of Transhumance* (London: Intermediate Technology Publications, 1999) 97.

⁸²⁵ Shauna BurnSilver, Jeffrey Worden & Randall Boone, “Processes of Fragmentation in the Amboseli Ecosystem, Eouthern Kajiado District, Kenya” in Kathleen Galvin, ed, *Fragmentation in Semi-arid and Arid Landscapes: Consequences for Human and Natural Landscapes* (Dordrecht: Springer, 2008) 225.

social relations.⁸²⁶ Although Nigeria has not adjusted its policy approach, this awareness has led to attempted solutions in many other African countries.⁸²⁷ For example, decentralization – allowing communities to govern and administer access to land with customary law in purportedly contextually appropriate ways – and laws codifying rights to movement and protecting migration corridors from agricultural encroachment.⁸²⁸

Unfortunately, however, these solutions fail to rectify the underlying tension between state and pastoral constitutional orders. Rather, they continue to misunderstand pastoralism because they evaluate it with a liberal worldview and logic.⁸²⁹ For example, Krätli and Schareika point out that the new ecological paradigm continues to view environmental variation as a problem to be solved or risk to be mitigated by human manipulation of the environment through strategic movement and fluctuations in social organization.⁸³⁰ Similarly, Toulmin et al. note that legal and policy responses like decentralization and private land tenure are founded on the notion of productive land use such that land is still understood to be an exploitable commodity.⁸³¹ These persistent assumptions reveal that a critical element is missing from the new paradigm.

According to Adriansen, while the arguments of the new pastoral paradigm are “based on the ‘needs of nature’... pastoralists’ actions and mobility practice are explained using a scientific understanding of drylands and not [pastoralists’] own explanations or conceptualisations of ‘nature’.”⁸³² What is missing then, is pastoralists’ own worldview through which they understand the earth and their relationship to it. In other words, if you were to look at pastoralism within the Fulani worldview and logic, it would be rational, and, using rooted logic as a model, it is.

⁸²⁶ Fernandez-Gimenez & Le Febre, *supra* note 722.

⁸²⁷ Toulmin, Hesse & Cotula, *supra* note 741 at 250; Mwangi, *supra* note 6 at 164–66.

⁸²⁸ Mwangi, *supra* note 6 at 164–66.

⁸²⁹ This, Mills says, is a problem with legal pluralism generally. Specifically, Mills argues that the problem with legal pluralism that it only works if the legalities being brought into a pluralist relationship are sufficiently similar. However, “where the situation is one of legality difference – where one legal system is liberal and the other rooted – then legal pluralism is incoherent.” The reason, he argues, is that it is not possible to communicate across distinct logics because a logic is the very way by which one understands that which is being translated. That is, in translating across different legalities, pluralism “reconstitutes the other in its own constitutional image.” Mills, *supra* note 46 at 215.

⁸³⁰ Krätli & Schareika, *supra* note 634 at 607.

⁸³¹ Toulmin, Hesse & Cotula, *supra* note 741 at 250.

⁸³² Hanne Kirstine Adriansen, “Pastoral Mobility: A Review” (2005) 9:1 Nomadic Peoples 207–214 at 209.

Rooted constitutionalism proceeds from the perspective that “creation is inherently lawful and ordered” such that “humans are responsible for creating communities that are reconcilable to the earthway.”⁸³³ As Tully wrote,

“Every second of the day the living earth gives countless gifts of goods and services needed to sustain all interdependent forms of life... Each interdependent form of life not only sustains itself, but also, in so doing, produces goods and services that help to sustain others; and vice versa. Accordingly, the way life sustains life by reproducing the conditions of life is portrayed as the mutual exchange of gifts among interdependent partners.”⁸³⁴

Rooted constitutionalism reproduces this cycle, such that rooted communities “remain always-already in interdependent relationships with other” human, animal, and plant communities.⁸³⁵

The local earthway in drylands Nigeria is characterized by cycles in which the earth gives the gifts (or goods and services) that help to sustain human and non-human beings in ways that vary across space and time. Mobile pastoralism – as a mode of organizing humans and non-humans into communities – harnesses these cycles, recognizing the order inherent within them.⁸³⁶ In other words, migration reproduces the earthway in drylands Africa within a pastoral constitutional logic.⁸³⁷ It is both the way pastoralists fit into the order inherent in the local environment, as well as a way of knowing that directly informs how community is organized within it.⁸³⁸ Migration entails the respectful and responsible use of pasture and water considering the needs of the herd.⁸³⁹ It requires herders to listen to the earth and cattle and respond to their respective gifts and needs when making decisions about how to organize community in any given time and place.⁸⁴⁰ When viewed through a rooted lens, it leads to outcomes which respect the earth and the non-human beings with whom herders are in relationships, such that all are made more free.

Ultimately, there appears to be a foundational disconnect between pastoralism and the state’s policy approaches to pastoralism. Within the liberal logic, open access makes farmers less free; within the rooted logic, private land rights make pastoralists and all other beings less free.

⁸³³ Mills, *supra* note 46 at 197.

⁸³⁴ Tully, *supra* note 51 at 88. Emphasis his.

⁸³⁵ Mills, *supra* note 46 at 197.

⁸³⁶ Behnke & Scoones, *supra* note 659; Krätli & Schareika, *supra* note 634; Fernandez-Gimenez & Le Febre, *supra* note 722.

⁸³⁷ As an example of rooted constitutionalism.

⁸³⁸ Krätli & Schareika, *supra* note 634 at 610.

⁸³⁹ *Ibid* at 610–615.

⁸⁴⁰ *Ibid* at 160–65.

Thus, the very logics which organize community are fundamentally at odds with one another, and this is caused by “a foundational eco-system incommensurability beneath the roots of each kind of legality.”⁸⁴¹ That incommensurability exists in the difference between how personhood is defined and what it means to respect it.⁸⁴²

Within a rooted pastoral worldview, the earth and other-than-human beings appear to be persons worthy of respect and with whom humans are interdependent.⁸⁴³ To respond to the earth’s needs, and thereby respect (and not overexploit) its gifts, herders must be able to move openly.⁸⁴⁴ Through movement, herders and the other non-human beings with whom they are in interdependent relationships are made more free. However, within the worldview underlying the state’s regulation of pastoralism, human beings are independent of cattle and the natural environment, which become objects whose use is evaluated in terms of the marginal costs and benefits to human beings. This necessitates the parceling of land into exclusive pieces. Thus, the Nigerian state and pastoral Fulani communities living within that state appear to possess very different and potentially irreconcilable understandings of political community.

III. The Violence of Nigeria’s National Livestock Transformation Policy

The tension between these divergent understandings of political community has implications for reconciliation between Fulani herders and the Nigerian state. As Mills writes, “the profundity of difference between [liberal and rooted] legalities suggest that dialogue [between them] isn’t possible.”⁸⁴⁵ Whether or not this is the case here is well beyond the scope of this paper. However, it appears from the National Livestock Transformation Policy that dialogue is not part of the state’s objective. In seeking to resolve the conflict, the Nigerian state has adopted a policy which seeks to overhaul the livestock sector through a transformation of herders’ very lifeways.

By expressing in its policy a strong commitment to economic development, the state appears to view pastoralism as a primarily economic activity to which the violence is an obstacle. When understood in this way, livestock production is severed from the larger social, cultural, and legal sphere in which herders practice it. Such a perspective fails to account for the ways in which pastoralism is holistic and embedded within other activities that appear to the state as mere cultural

⁸⁴¹ Mills, *supra* note 46 at 200.

⁸⁴² *Ibid* at 197–200.

⁸⁴³ *Ibid* at 68–82.

⁸⁴⁴ Fernandez-Gimenez & Le Febre, *supra* note 722.

⁸⁴⁵ Mills, *supra* note 46 at 195.

markers.⁸⁴⁶ Further, it assumes that the larger cultural context surrounding herding can continue to exist and operate within the private sphere created by the liberal constitutional logic. Ultimately, the policy purports that “the state’s liberal constitutional order can serve as the logic and structure within which the legal interests of rooted peoples may be articulated.”⁸⁴⁷ As such, Nigeria’s policies related to pastoralism represent a constitutional monologue, rather than a dialogue.⁸⁴⁸ In other words, the promotion of settlement and commercial ranching is a clear attempt to incentivize Fulani herders to give up their legal orders entirely and conform to the constitutional order of the state.

One of the many problems with this approach is the violence it causes to Fulani herders. Because liberal constitutional orders are based in the separation of human communities from nature, or in other words, the independence of human communities from the earth – they “necessarily consume the earth.”⁸⁴⁹ As Mills argues,

“Without a healthy earth, there’s no functioning earthway. Without a functioning earthway, there’s no rooted constitutionalism. Without functioning rooted constitutionalism, there aren’t lawful [rooted] communities. Without lawful communities, we experience social disintegration and assimilation into settler legal systems.”⁸⁵⁰

Because rooted constitutional orders are based in and reproduce relationships between humans and the earth, the destruction of those relationships leads to the destruction of rooted constitutional orders and thereby rooted peoples.⁸⁵¹

Further, there are broad and significant implications to the government’s approach. All peoples – whether liberal or rooted – can recognize that relationships in Nigeria are in crisis. Violent disputes between farmers and herders represent a substantial source of insecurity for many, rooted or otherwise. Further, environmental changes and population growth have put the earth, and thereby the food supply of all Nigerians, at risk. James Tully would argue that this situation has been brought about by the liberal constitutional order. Through the imposition of a private property system by the colonial and post-colonial governments “humans became dis-embedded

⁸⁴⁶ *Ibid* at 130–33; Stenning, *supra* note 13 at 55–59; Cobern, Umar & Junaidu, *supra* note 641.

⁸⁴⁷ Mills, *supra* note 46 at 212.

⁸⁴⁸ *Ibid*; James Tully, “Recognition and Dialogue: The Emergence of a New Field” (2007) 7:3 *Critical Rev Intl Social & Political Philosophy* 84–106.

⁸⁴⁹ Mills, *supra* note 46 at 204–05.

⁸⁵⁰ *Ibid*.

⁸⁵¹ Mills also argues that the inverse does not hold true. In other words, rooted constitutional orders do not, in his opinion, do violence to liberal peoples. *Ibid* at 204–09.

from participation in the symbiotic ecological and social relationships that sustain life and re-embedded in abstract competitive, economic, political, and legal relationships that depend on but destroy underlying interdependent ecological and social relationships.”⁸⁵² According to Tully, extracting the earth from its interdependent relationships with human and other-than-human beings and reconfiguring it as private property facilitates the commodification and exploitation of the earth.⁸⁵³ In other words, it is human management, manipulation, and improvement of land that has led to changes in land cover, soil degradation, and an at-risk environment.

Ultimately, the means constitute the ends.⁸⁵⁴ Increasingly privatized and individualized solutions – like the National Transformation Livestock Plan – will likely generate more of the same. By seeking the settlement of pastoralists, the policy dis-embeds them from their interdependent relationship with the earth and promotes one based in objectification and exploitation. Viewing land as property purports to prevent conflict by creating bundles of clear rights which can be enforced against others. However, by conceiving of land as exclusive and rival, the interests of some are pitted against those of others. Under the increasing strain of competition due to population growth and climate change, conflicts over interests in land are likely to increase, such that private property rights can only provide a remedy for violations after they have occurred. Thus, relationships will likely erode even further. In seeking to end the violence, the government’s policy may only perpetuate the problem.

⁸⁵² Tully, *supra* note 51 at 104.

⁸⁵³ *Ibid* at 104–07.

⁸⁵⁴ Mills, *supra* note 46 at 276.

CONCLUSION

Violent disputes between Fulani herders in agricultural communities have substantially undermined safety and security throughout Nigeria. Underlying the conflict are tensions relating to ethnicity and indigeneity, which have implications for access to land.⁸⁵⁵ These tensions are fundamentally an issue of how political community is defined in Nigeria. Membership in the political community of Nigeria takes the form of ethnic and indigenous citizenship.⁸⁵⁶ Though nominally indigenous, this conception of political community does not necessarily reflect indigenous conceptions of belonging. Rather, it reflects an understanding of political community imposed by colonialism.⁸⁵⁷

Through its colonial history, the Nigerian state was constructed on a foundation of autonomy, free choice, and social contract, organized to equally preserve and protect its citizens' liberty. It conceives of relationships to land as private property rights, which are delineated on the basis of indigeneity, creating tensions over access to land.⁸⁵⁸ As such, the state approaches the violent conflict between farmers and herders as an issue of protecting indigenous farmers' property rights from unjust and arbitrary infringements by Fulani herders and their cattle. It therefore has created a policy which seeks to transform the livestock sector, enclosing cattle within territorially constrained commercial ranches.⁸⁵⁹

However, the policy attempts much more than an overhaul of the livestock sector. Rather, it seeks to transform Fulani pastoralists' very lifeways by assimilating them into the state's political community.⁸⁶⁰ Forgoing migratory grazing for intensive, sedentary cattle production entails the assignment of rights and duties to Fulani herders in respect of their land use. This delineation of rights and duties appears to fundamentally conflict with pastoral Fulani lifeways.

Using Aaron Mills's proposed framework of rooted constitutionalism, this thesis endeavored to demonstrate that it is possible to understand Fulani communities, migration, and cattle raising practices through an alternative conception of constitutionalism. Within this framework, Fulani understandings of community necessitate fluid, mobile relationships to land. It

⁸⁵⁵ Nwachukwu, *supra* note 31 at 249; Arowosegbe, *supra* note 65 at 65–66; Odubajo, *supra* note 358 at 80.

⁸⁵⁶ Nwachukwu, *supra* note 31; Odubajo, *supra* note 358.

⁸⁵⁷ Mamdani, *supra* note 313.

⁸⁵⁸ Nwachukwu, *supra* note 31; Sayne, *supra* note 33.

⁸⁵⁹ FAO, *supra* note 730 at 14.

⁸⁶⁰ Mills, *supra* note 46 at 212.

is only through these relationships that Fulani people and communities are made free. Thus, within a rooted constitutional worldview and logic, the government's solution to the conflict infringes upon Fulani herders' freedom by seeking their settlement.

Ultimately, there appears to be a fundamental, and potentially irreconcilable, conflict between the state's constitutional order and the constitutional order of Fulani herders. There is a tension in the very means by which both parties make sense of the world around them.⁸⁶¹ Thus, within each, the laws of the other are irrational and lack all meaning.⁸⁶² Further, by failing to recognize this tension and perceiving the problem solely through its own worldview, the Nigerian state will inevitably contribute to the violence.⁸⁶³

⁸⁶¹ Mills, *supra* note 46.

⁸⁶² *Ibid.*

⁸⁶³ *Ibid* at 203–05.

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