

Abstract

This article examines current high levels of violent conflict in Plateau State in central Nigeria using an economic property-rights analysis that draws on the work of Harold Demsetz, Robert Cooter, Terry Anderson and Fred McChesney.

The thesis of the article is that this wide-spread violent conflict over resource use/access is tied, in important ways, to the passage of federal legislation in Nigeria that nationalized land. This legislation, I contend, blocked the continued evolution of customary land-law norms that had evolved to meet a variety of land-use needs and that had a relatively low-cost and transparent indigenous dispute resolution mechanism.

The new institutional environment is beset by problems associated with very high levels of official corruption that make enforcing the law difficult. More importantly though, the legislation itself blocks the evolution of land law so that outright sale (which was occurring under customary law) is now prohibited. This change means that individuals are forced to rely on corrupt government officials to allocate an increasingly scarce resource. Because the official channels for allocation are perceived as corrupt and because the government often does not enforce property rights, individuals might be resorting to costly private enforcement in a desperate effort to gain rights over valuable land.

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Blocking Legal Evolution and Paying the Price: Property and Conflict in the Nigerian Highlands

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Introduction

“The fundamental purpose of property rights, and their fundamental accomplishment, is that they eliminate destructive competition for control of economic resources. Well-defined and well-protected property rights replace competition by violence with competition by peaceful means.”¹

Three years: 53,000 people dead; thousands of homes destroyed; tens of thousands of men, women, and children displaced.² These terrible statistics are not the toll taken in a traditional war between nations. Nor are they the results of a civil war. Rather, these grim figures represent the outcome of a particular kind of conflict that surfaces all-too often in Africa and throughout the developing world: a bloody battle over the use and control of resources, a battle that ultimately is about property rights.

Between 2001 and 2004, the people of the central Nigerian state of Plateau suffered a series of deadly riots that led to the declaration of a state of emergency.³ What caused these riots? A peace conference conducted by the government blames the violence on

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¹ Armen A. Alchian, *Property Rights*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS available at <http://www.econlib.org/library/Enc/PropertyRights.html>.

² *Nigeria – Plateau State Violence Claimed 53,000 Lives – Report*, IRIN NEWS.ORG, Friday, October 8, 2004 available at <http://www.irinnews.org/report.asp?ReportID=43580>.

³ The state of emergency is now ended. For the text of the Declaration see, http://www.waado.org/NigerDelta/FedGovt/Federalism/emergency_rule/plateau_obasanjo.html. For reporting on the event. See *Nigeria: Obasanjo declares state of emergency in Plateau State*, available at <http://www.globalsecurity.org/military/library/news/2004/05/mil-040518-irin02.htm>.

disputes over property -- disputes that were, undoubtedly exacerbated by ethnic and religious conflicts.⁴ The scope of this killing is shocking and leads one to ask, “What has happened in Nigeria to drive people to settle land disputes by means of violence rather than by use of peaceful judicial, administrative, or customary mechanisms?”

This paper considers possible answers to these difficult questions, focusing on two issues: the evolution of legal norms in response to both endogenous and exogenous changes, and the role that African customary law and indigenous dispute resolution played in promoting coordination and cooperation among group members, and thereby reducing violent conflict. The paper considers whether the continued evolution of relatively elastic customary legal norms was impeded by legislative action of the federal government of Nigeria. Property norms under customary law were flexible enough to provide a wide variety of property rights and allow for the peaceful trading and reasonable protection of those rights, all at relatively low cost. In addition, accessible indigenous dispute resolution mechanisms provided access to leaders with substantial local knowledge of property rights arrangements. Further, the paper examines one element of the customary land law – rules for dealing with strangers – and considers how these provisions reduced transactions costs and aligned expectations about property norms.

Formal *de jure* rules governing property law were changed in 1978 by a federal statute that imposes a costlier, less flexible formalized and centralized approach to land-use issues. This paper suggests that legislation, coupled with significant enforcement problems, might be responsible for some of the violence in Plateau. Examining ways in

⁴ *Nigeria – Plateau State Violence, supra note 2.*

which the property-right environment has changed may provide insight into the sources of the violence plaguing the Nigerian highlands in Plateau State.⁵

The Outlines of the Crisis

Consider Yelwa. On May 2nd, 2004 in this small town in Plateau State, a group of Christian Taroks, carrying guns and machetes, attacked and murdered over 600 Fulani Muslims.⁶ The attack was meant to avenge a Fulani massacre of 50 Taroks that had taken place inside a church in February 2004, which, in turn, was a reprisal for earlier attacks by Christians of Fulanis. The attacks devastated the town and the region. One reporter noted that “Churches and mosques were razed. Neighbor turned against neighbor. Reprisal attacks spread until finally, in mid-May, the government imposed emergency rule.”⁷ While ethnic and religious conflicts partially explain the vicious confrontations, at heart, this massacre seems to have been about land. *New York Times* reporter Somini Sengupta wrote:

“Before there were mass graves here, there was the matter of cows and corn patches. Some years ago . . . farmers accused cattle herders of deliberately sending their long-horned beasts to trample across their plots. Cattle herders accused farmers of deliberately setting their grassy meadows on fire to keep their animals from grazing.”

⁵ The official motto of Plateau state is the “Home of Peace and Tourism.” See *Thatcher’s Website* available at: http://www.thachers.org/Oct%202001%20files/oct_2001.htm. This personal web site, run by an American doctor and missionary in Nigeria, also shows photos of the aftermath of the Jos riots.

⁶ *Nigeria: Prevent Further Bloodshed in Plateau State*, HUMAN RIGHTS WATCH, available at http://www.hrw.org/english/docs/2004/05/11/nigeri8568_txt.htm.

⁷ Somini Sengupta, *Letter from Africa; Where the Land Is a Tinderbox, the Killing Is a Frenzy*, NEW YORK TIMES, June 16, 2004.

Other observers agree. Human Rights Watch characterized the massacre as “a prolonged conflict over land use as well as political and economic control.”⁸ Discussing the conflict in Yelwa, Alex Vines of the Royal Institute of African Affairs argued that it was, at heart, a contest over land.⁹ Sengupta observed: “In recent years, as the desert has spread, trees have been felled and the populations of both herders and farmers have soared, the competition for land has only intensified.”¹⁰ Mark Doyle of the BBC echoed this insight:

While there is great wealth at the top of Nigerian society . . . there is also great poverty and some of the violence reflects a struggle for resources and survival. This is particularly the case in rural areas along a belt of territory across the centre of the country, including Plateau State, where farmers are in competition for land and resources with herders. In areas where farmers are predominantly settled Christians and where cattle herders, originally from further north, are mainly Muslim, an impression can be created of 'religious' or 'ethnic' tension. But in reality the root causes of the violence are political and economic - a competition for fertile land.¹¹

If the inhabitants of Yelwa, and of Plateau state more generally, are competing for a scarce resource – land -- in an increasingly heterogeneous environment,¹² economic

⁸ *Nigeria: Prevent Further Bloodshed*, *supra* note 6.

⁹ Sengupta, *supra* note 7.

¹⁰ *Id.* For a discussion of the relationship between property rights and migratory herding, see TOM BETHELL, *THE NOBLEST TRIUMPH*, 239-242 (1998).

¹¹ Mark Doyle, *Poverty behind Nigeria's violence*, BBC NEWS WORLD EDITION, May 19, 2004 at <http://news.bbc.co.uk/2/hi/africa/3730109.stm>. The same sentiment is found in a report by EDC News: “It is more a matter of the natives fearing their land was being taken over and deciding to fight for it,” says one local expert. The Sahara Desert is steadily advancing southwards, forcing many farming and grazing communities in the Nigeria’s [sic] far-north to move south in search of greener pastures. Their arrival in central Nigeria has increased pressure on the land. Many indigenous communities in the Middle Belt have been afraid that they will lose out to the newcomers.” See, *Conflict in northern Nigeria more about land and livelihoods than religion*, EDC NEWS, ENVIRONMENT & DEVELOPMENT CHALLENGES, Swedish International Development Cooperation Agency available at <http://www.edcnews.se/Cases/NigeriaYelwa2004.html>.

¹² “The population in northern Nigeria grew from approximately 16.8 million in 1952 (the date of a reliable census taken by the British) to approximately 47.3 million in 1991 (the date of the last reliable census by the independent government). This growth represents an annual increase of 2.61% per annum, though in

theory predicts that they would seek to create and enforce more individualized rights to land in order to internalize externalities caused by these changes. They would seek these rights in order to allocate the resource more efficiently and to restrict entry to better capture the increasing value of land.¹³ Unfortunately, the legislative solution to land-use and land-allocation issues in today's Nigeria -- the Land Use Act of 1978¹⁴ -- creates a rigid legal environment that limits internalization efforts by prohibiting the sale of land, restricting permissible lot sizes, and requiring government permission to lend or lease property.¹⁵ Such rigidity contrasts with the relatively elastic customary law in Plateau, which provided a rich array of mechanisms to manage changes in market value and technology -- including even the sale of land.¹⁶

some regions, such as Plateau State and Niger State increases have been more substantial -- 3.5% in Plateau per annum and 3.12% in Niger. Sustained droughts in the far northeast of Nigeria are partially responsible for the increase of population in the more humid areas of Plateau and Niger." See Werner Fricke, *Factors Governing the Regional Populations Development in NE-Nigeria*, in PERSISTENCE AND TRANSFORMATION BETWEEN CHAD BASIN AND BENUE 13, available at http://www.rzuser.uni-heidelberg.de/~bu1/sfb/d1/Session_fricke_www_symp99_2.html. The Annual Abstract of Statistics of Nigeria lists the 1991 population of Plateau state at 3,312,412. The projected population for 1998 was 4,627,043. See ANNUAL ABSTRACT OF STATISTICS, Federal Republic of Nigeria, Federal Office of Statistics, Table 12 at 26 and Table 13 at 27 (1999).

¹³In his seminal work, *Toward a Theory of Property Rights*, Harold Demsetz argues: "[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization. Increased internalization, in the main, results from changes in economic values. . . changes to which old property rights are poorly attuned." 57 AMERICAN ECONOMIC REVIEW, No. 2, 350 (May, 1967). He goes on to discuss the ways in which Montagnes Indians developed property rights in hunting grounds in response to increases in the value of fur-bearing animals. *Id.* at 351-354. See also, Eirik G. Furubotn and Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 JOURNAL OF ECONOMIC LITERATURE, Issue 4, 1141 (Dec. 1972), and Terry L. Anderson and Peter J. Hill, *The Evolution of Property Rights*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW, 126 (2003).

¹⁴Federal Republic of Nigeria, Decree #6, Land Use Act (Lagos, 1978). Shortly before the Land Use Act was implemented in 1978, 34,656.1hectare of land in the Benue/Plateau state was "purchased," which is defined as "bought for cash" by official Nigerian government documentation. In 1967 Benue and Plateau were merged, they have since been separated. See, RURAL ECONOMIC SURVEY, *Report on Land Tenure Enquiries*, 1976/1977 -- 1978/79, Federal Office of Statistics, Agricultural Survey Unit, Lagos, June, 1989 at Tables 2.1, 2.2 and 2.3. In 1977/78 this number had, for Plateau alone, fallen to 7,602 and in 1978/79 the number was 243 or 0.12 percent of the land in Plateau state. The Land Use Act prohibits such sales.

¹⁵ Land Use Act, *supra* note 14 at § ____.

¹⁶ Discussing the customary land law of Papua New Guinea, Robert Cooter writes: "[M]y general view (is) that customary law is living law, which changes and develops according to the wishes of the people who are subject to it." Robert Cooter, ISSUES IN CUSTOMARY LAND LAW, 4 (Institute of National Affairs 1989) available at: http://works.bepress.com/robert_cooter/. The customary land law of Nigeria changed as well, responding to differing needs and constraints. See discussion *infra*, at 36 to 45

Complicating this situation is the Nigerian government's inability, or unwillingness, to effectively mediate conflicts: "In the latest incident, police and army reinforcements were only sent to Yelwa after hundreds of people had already been killed."¹⁷ President Obasanjo, in his Declaration of May 18th, 2004 stated:

As at [sic] today, there is nothing on ground and no evidence whatsoever to show that the State Governor has the interest, desire, commitment, credibility and capacity to promote reconciliation, rehabilitation, forgiveness, peace, harmony and stability. If anything, some of his utterances, his lackadaisical attitude and seeming uneven-handedness over the salient and contending issues present him as not just part of the problem, but also as an instigator and a threat to peace. Plateau State cannot and must not experience another spate of violence, killings and destruction of property. If allowed, the crisis will engulf the entire nation.¹⁸

In situations where resources are highly valued and where the number of competitors for the resource is both large and heterogeneous, it is normally assumed that formal governance structures are needed both to define and enforce rights.¹⁹ In the case of property disputes in Nigeria's highlands, however, formal governance structures designed to manage such disputes are corrupt, costly and/or non-existent.²⁰

¹⁷*Nigeria: Prevent Further Bloodshed*, *supra* note 6; see also *Nigeria: Jos – A City Torn Apart*, available at http://www.hrw.org/reports/2001/nigeria/nigeria1201-02.htm#P107_10073. There is evidence that government officials knew in March that reprisals on the citizens of Yelwa were planned in response to the February killings. Despite assurances that the government would "deal decisively" with the any plotters, little was actually done to prevent the bloodshed. See, *Nigeria: 2,500 displaced in Plateau State violence*, says Red Cross, available at <http://www.reliefweb.int/w/rwb.nsf/0/60dd46cd396516f285256e4d0076eb95?>

¹⁸*Declaration of Emergency Rule in Plateau State of Nigeria*, available at http://www.waado.org/NigerDelta/FedGovt/Federalism/emergency_rule/plateau_obasanjo.html

¹⁹ Gary D. Libecap, *Contracting for Property Rights*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW, 145 (Princeton University Press 2003) who notes that in such a situation, "the power of the state usually is necessary to supplement informal constraints on access and use." In Nigeria, the state fails to provide such supplemental support.

²⁰ In 2004, Nigeria placed next to last in a score of perception of corruption within the state. See *Nigeria GLOBAL CORRUPTION REPORT 2003 225 (2004)* available at http://www.globalcorruptionreport.org/download/gcr2004/11_Country_reports_L_Z.pdf

This corruption and costliness traps the people of Plateau state between the proverbial rock and hard place. If land values in Plateau are rising due to increased demand, this should lead to a gradual movement away from the traditional communal property regime, towards greater individualization of tenure.²¹ However, the Land Use Act blocks this evolutionary move by prohibiting land sales and by encumbering other permitted transfers with significant bureaucratic obstacles.²² This legislatively imposed method for allocating land is widely believed to be corrupt.²³ The new system replaces evolved indigenous dispute resolutions mechanisms with a costlier bureaucratized dispute-resolution system. And finally, as President Obasanjo claims, the process for enforcing these new property rights often simply fails to function. Thus, the people of Plateau may be left to take “justice” into their own hands, as the federal government imposes an ill-fitting legislative solution on land-tenure issues that the state government fails to enforce, resulting in an anarchical environment.²⁴

²¹ Demsetz, *supra* note 13 at 350. In situations where property values increase, competition for control of the resource often increases. For discussions of increased conflict over land as a result of increases in value see, Lee J. Alston, Gary D. Libecap and Bernardo Mueller, *TITLES, CONFLICT AND LAND USE*, (1999), who discuss episodes of violence in the Brazilian rain forest in response increasing demand for land; see also, Gershon Feder and David Feeny, *Land Tenure and Property Rights: Theory and Implications for Development Policy*, 5 *THE WORLD BANK ECONOMIC REVIEW*, No. 1, 138-39 (January, 1991), discussing the conflict levels in Thailand in the late 19th century in response to rising land value.

²² Changes in the value of land in Plateau state, and the desire of individuals to capture this increased value, may be leading people to band together to better block entry by non-group members. If there is strength in numbers, dissatisfaction with the current land system in Plateau state may be causing people to group together to fight off threats to their property claims. This destructive collective action may represent a response to an unproductive *de jure* system and an attempt to adjust the *de facto* property rights in the absence of effective government action. See Gary D. Libecap, *CONTRACTING FOR PROPERTY RIGHTS* 16 (1989) who says: “For example, an increase in relative prices or a fall in production costs will raise the stream of rents attainable from ownership and encourage new competition for control. Old enforcement mechanisms may no longer be adequate, leading to rent dissipation as inputs are diverted from production to protect against trespass and theft. . . . Capturing a portion of any rents that can be saved by more precisely defining property rights motivates individuals to organize for collective action to adjust property institutions from their current state to the new conditions.”

²³ See discussion *infra* at 47-52.

²⁴ For an economic analysis of the decision-making process involved in determining when to negotiate property rights claims and when to fight over conflicting claims see generally Terry L. Anderson and Fred

Unfortunately, Yelwais not an isolated incident. Major riots occurred in the northern Plateau city of Jos in 2001.²⁵ In 2002, Fulanis attacked Tarok people in Wase in southern Plateau, in March, 2003 another Tarok settlement was attacked resulting in over 80 deaths, and in June 2003, over 500 people were killed.²⁶ Reprisals followed the Yelwa massacre.²⁷ The Jos riots, while attributed to discontent over a political appointment, were likely exacerbated by insecure property rights, which made it difficult to effectively absorb large numbers of internally displaced Nigerians. Human Rights Watch notes:

many people fleeing conflicts in their own areas had sought protection and safety in Jos; some had even settled there. Some observers believe that this regular influx of populations from neighboring states may have ended up destabilizing the tranquility of Jos. People fleeing in 2000 and 2001 from clashes in Kaduna, Bauchi, Taraba, and Nasarawa states may have inadvertently contributed to creating an atmosphere of fear among inhabitants of Plateau State by testifying to the atrocities they had left behind, some of which were still continuing. The increase in the population in Jos, in particular, also created an increase in economic pressures, leading in turn to the scarcity of some goods and increase in prices. Resources became stretched, and tensions began to rise.²⁸

Since 1999, a number of other northern and middle belt states in Nigeria have experienced repeated episodes of violence.²⁹ Violence escalated following the election of

S. McChesney *Raid or Trade? An Economic Model of Indian-White Relations* 37 JOURNAL OF LAW AND ECONOMICS 39-74 (1994).

²⁵ See *Nigeria: Jos - A City Torn Apart*, *supra* note 17. See also, *20 dead in fresh Plateau violence despite state of emergency*, available at <http://www.globalsecurity.org/military/library/news/2004/05/mil-040520-irin02.htm>

²⁶ *Plateau State: Communal Conflicts in Wase (Southern Plateau) and Berom area (Northern Plateau)* IDASA, SPECIAL TOPIC, WEEKLY UPDATE available at: http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D193%26TID%3D11%26OTID%3D2.

²⁷ See *20 dead in fresh Plateau violence*, *supra* note 24.

²⁸ See, *Nigeria: Jos – A City Torn Apart*, *supra* note 17.

²⁹ See, *Nigeria, 2,500 displaced in Plateau State violence*, *supra* note 17. The 1980s and 1990s have been described as particularly repressive in Nigeria. See, Abdul-Ganiyu Garba and P. Kassey Garba *Open Conflicts when State, Institution and Market fail: The case of Nigeria* 37 unpublished manuscript available

the civilian government of Olusegun Obasanjo in 1999, and particularly after the reintroduction of *sharia* law in criminal cases in 12 northern Nigeria states, beginning in 2000.³⁰ During the intervening years, thousands have been killed and, as noted, in 2004 President Obasanjo declared a state of emergency in the Plateau state.³¹

These conflicts are typically characterized as struggles between ethnic and religious factions.³² Nigeria is extraordinarily diverse, composed of over 250 ethnic groups.³³ Plateau State alone has 54 different ethnic groups.³⁴ Some of these groups have conflicts related to political rivalries, some related to religious differences, and some related to access to resources. The Yelwa massacre is an example of the latter.³⁵

from Department of Economics, Ahmadu Bello University, Zaria, Nigeria and on file with author. The recent rise in the incidence of violence may be tied to the election of a civilian leader. Under a military dictatorship, discord and attendant violence might be more effectively suppressed, whereas under civilian rule it might prove more difficult to suppress discord and violent conflict. Nigeria elected President Obasanjo in 1999. The country was ruled by military dictators from 1983 to 1999.

³⁰ *Sharia*, or Islamic, criminal law was introduced in the northern state of Zamfara in January, 2000. *Sharia* had been outlawed after Nigeria's independence in 1960. Since its reintroduction in 2000, 12 states have adopted *sharia*. See, John Paden, *Islam and Democratic Federalism in Nigeria*, AFRICA NOTES, No. 8, March, 2002, p. 1, Center for Strategic and International Studies. In Nigeria, *sharia* is applied to Muslims only in both civil and criminal cases. However, actions of vigilante groups, who "watch" for *sharia* violations, have resulted in non-Muslims to feel increasingly intimidated and, in some cases, in attacks against non-Muslims. See *Nigeria's Sharia Split*, BBC NEWS, October 15, 2001 available at <http://news.bbc.co.uk/1/hi/world/africa/1600804.stm>.

³¹ David Cowan (ed.) *Nigeria Country Report*, THE ECONOMIST INTELLIGENCE UNIT 7 (August, 2004), available at www.eiu.com. Subscription service.

³² See Gilbert Da Costa, *Resurgence in violence kills hundreds in Nigeria*, ASSOCIATED PRESS, PORTSMOUTH HERALD, August 23, 1999 available at http://www.seacoastonline.com/1999news/8_23_w2.htm.

³³ See *Nigeria*, CIA—THE WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/ni.html>.

³⁴ See, Funmi Peter Omale, *Implementation Committee for Peace Confab Inaugurated*, THIS DAY (Lagos), Friday, October 8, 2004 available at <http://allafrica.com/stories/200410080379.html>.

³⁵ *Nigeria: Muslim death toll in raid on Yelwa tops 600 – Red Cross*, IRINNEWS.ORG available at www.irinnews.org/report.asp?ReportID=40952&SelectRegion=West_Africa&SelectC May 7, 2004. See also Tom Ashby, *More than 100 Dead, 1,000 Wounded in Nigeria Feud*, REUTERS NEWS, Friday, April 30, 2004 available at <http://www.reuters.com/newsArticle>.

The country is not only divided along ethnic lines, it is also divided along religious lines: approximately 50% of the population is Muslim, 40% Christian, and 10% adhere to indigenous animist beliefs.³⁶ Of the 36 states in the Nigerian federation, the 19 northern states are predominately Muslim, while the 17 southern states are predominately Christian.³⁷

The heterogeneity of Nigerian society makes for a potentially explosive mix. Since its independence from British colonial rule in 1960, political power in Nigeria has shifted back and forth between representatives of different ethnic, regional, and religious groups, in an effort both to stem regional rivalries and to spread the benefits that flow from political leadership.³⁸

Despite efforts to dampen regional and ethnic tensions, the mix of ethnicities and religions has exploded into violence from time to time, the most seriously during the Biafran civil war in the late 1960s. To this day, conflict remains a significant problem,

³⁶ CIA Factbook, *supra* note 32.

³⁷ *See*, Paden, *supra* note 29 at fn. 1.

³⁸ At the time of independence in 1960, Nigeria was divided into three regions: the North, dominated by Hausa & Fulani ethnic groups, the West, dominated by Yorubas, and the East, dominated by Igbos. *See*, TOYIN FALOLA, *THE HISTORY OF NIGERIA*, 10-11 (1999). Over the past 44 years, Nigeria has been led by a northerner, Abubakar Tafawa Balewa, who was killed in a coup led by southeastern Igbos, who in turn were overthrown in a counter-coup led by Yakubu Gowon, a northerner from Middle Belt, which precipitated the three-year long Biafran civil war. The Gowon government broke the three regions of Nigeria into 12 to dampen regional tensions. This government lasted until 1975 when it was overthrown by Murtala Muhammed another northerner who, along with Olesgun Obasanjo a Yoruba Christian, ruled until Muhammed was assassinated and Obsanjo took over. Obsanjo, a military officer, voluntarily turned power over to a northerner, Alhaji Shehu Shagari in 1979. In 1983, a military coup displaced Shagari with Muhammad Buhari, which was overthrown in 1985 by General Ibrahim Babaginda and Suni Abacha. Babaginda ruled until 1993, when elections were held. Chief M.K.O. Abiola a Yoruba from the south won these elections, which were annulled by Babaginda, who then transferred power to an short-lived interim government, which was replaced by rule by Abacha. Abacha died in 1998. Obasanjo, a Yoruba Christian, was elected in 1999. On the problems associated with power sharing and the marginalization of ethnic groups in Nigeria, *see* Tunde Babawale, *The Rise of Ethnic Militias, Delegitimation of the State, and the Threat to Nigerian Federalism*, 3 WEST AFRICA REVIEW, available at <http://westafricareview.com/war/vol3.1/babawale.html>.

as certain groups within Nigeria fear domination by others and often perceive those in charge as corrupt.³⁹ Discontent has led to repeated demands for a change in leadership – or, often, to a violent coup to replace a leader perceived as illegitimate or biased with someone more considered more trustworthy. However, while increasing ethnic and religious polarization among Nigerians drives much of the nation’s violence, the underlying issue that often grounds this violence is property and land-tenure disputes.

This paper attempts to identify a possible connection between the current Nigerian property-rights regime and riots that have left thousands dead. The focus is on Plateau state for a number of reasons. First, Plateau is unique among the northern Nigerian states in that the hold of the Islamic Sokoto Caliphate was fairly tenuous in the region.⁴⁰ Indigenous customary norms may have lasted longer in Plateau than in many other regions of northern Nigeria. This means that those norms continued to develop and modify throughout the 19th century, rather than being replaced by “foreign” Maliki rules and customs.⁴¹ Even under British rule, significant deference was shown to customary norms and traditions in Plateau state. The British “hands off” policy of indirect rule meant that indigenous norms regarding land tenure and dispute resolution were largely protected and enforced by the colonial-era Native Court system.⁴² Finally, I focus on Plateau because there is clear recognition, in international media outlets, that some of the

³⁹ KARL MAIER, *THIS HOUSE HAS FALLEN: MIDNIGHT IN NIGERIA*, 11-19 (2000).

⁴⁰ British colonial official Lord Hailey writes: “The Fulani system of rule did not, however, extend throughout Northern Nigeria; on the Bauchi plateau and south of the Benue River there were large areas where ‘pagan’ tribes had never fully acquiesced in it. Though it would have been convenient to treat those areas as falling within the Fulani system, this was not thought to be justified.” LORD HAILEY, *AN AFRICAN SURVEY REVISED 1956*, 454 (1957).

⁴¹ ROBERT MCC. NETTING, *HILL FARMERS OF NIGERIA*, 46-47 (1968).

⁴² *Id.* at 48-51.

violence in Plateau is tied to disputes over access to, and control of land.⁴³ For these reasons, Plateau presents a unique opportunity to investigate the effects of centralized government action (nationalization legislation) -- coupled with problems of corruption and increasing heterogeneity -- on the spontaneous evolution of customary land tenure and property-rights norms.

The Property Environment: Property in Land and Land Tenure in Nigeria

Before 1978, there were three primary sources of property law in Nigeria: customary law, English common and statutory law, and post-colonial legislation. As of 1978, land law in Nigeria is based exclusively on a federal statute that has been incorporated into the Nigerian Constitution: The Land Use Act of 1978.⁴⁴

Customary Land Law

Traditionally, the belief was that property in land in Nigeria belonged to God, but was held communally, in a community-based tenure system.⁴⁵ Under this system, the first

⁴³ See discussion *supra*, pages 2-4.

⁴⁴ Land Use Act, *supra* note 14.

⁴⁵ See N.O. Adedipe, J.E. Olawoye, E.S. Olarinde & A.Y. Okediran, *Rural communal tenure regimes and private landownership in western Nigeria*, LAND REFORM BULLETIN: 1997/2, Food and Agriculture Organization of the United Nations (FAO) available at <http://www.fao.org/sd/LTdirect/LR972/w6738t13.htm>, and *Nigeria: Land Use, Soils, and Land Tenure*, Sec. I LIBRARY OF CONGRESS COUNTRY STUDIES, available at http://lcweb2.loc.gov/cgi-bin/query/D?cstdy:1:./temp/~frd_5Hy0:. Note, however, that in an older treatise on African customary law, ICJ Justice T.O. Elias argues that it is incorrect to conceive of the African land tenure system as communal. Rather, it is more appropriate, he argues, to consider it as corporate. See, T.O. Elias, *THE NATURE OF AFRICAN CUSTOMARY LAW*, 164. (1956).

person to clear and use unclaimed land would establish possession and use rights.⁴⁶ This first possessor would allocate land to heads of families, based on need.⁴⁷ Over time, the first possessor's role would be taken on by a headman or traditional chief, who would allocate property to family heads. These family heads would allocate land for use by their family members.⁴⁸

Among the duties of the chief were: to manage community land reserves, to maintain group customs concerning land use, to ensure that the rights of the group were not diminished, and to see that the rights of group members and, as appropriate, the rights of strangers, were respected. The chief held residuary, reversionary rights to the property as a trustee, on behalf of the group, never as an absolute owner.⁴⁹ These duties provided the chief with income (often in the form of in-kind payments of agricultural products and/or with cash payments for serving as an arbiter of disputes) along with significant social status, as well as political control over the group.⁵⁰

⁴⁶ See Adedipe, *et al*, *supra* note 44.

⁴⁷ These rights may be perpetual or for a period of time. See Emea Arua and Eugene Okorji, *Multidimensional analysis of land tenure systems in eastern Nigeria*, LAND REFORM BULLETIN: 1997/2 Food and Agriculture Organization of the United Nations (FAO) available at <http://www.fao.org/sd/LTdirect/LR972/w6728t14.htm>. Also, rights for the temporary use of land could be granted to other groups. An example would be granting the right to herders to allow their animals to graze the stubble in a field that has been harvested. See Ouedraogo & Toulmin, *Tenure Rights and Sustainable Development in Western Africa: A Regional Overview*, Feb. 1999, at 2, available at: http://www.oxfam.org.uk/what_we_do/issues/livehoods/landrights/africa_west.htm.

⁴⁸ Ouedraogo & Toulmin, *supra* note 46 at 4.

⁴⁹ Elias, *supra* note 44 at 164.

⁵⁰ On the issue of payments of chiefs for land-related duties see GAZETTEERS OF THE NORTHERN PROVINCES OF NIGERIA, Vol. IV 174 (1972).

The chief, usually along with appropriate elders, had primary responsibility for managing the indigenous dispute resolution process concerning land-use rights.⁵¹ In some groups, permanent tribunals existed, with identifiable judicial officers, whose job it was to bring offenders before the tribunal and thereby help preserve social order.⁵² Land disputes were an important part of the case work of such tribunals. Cases involving land might address boundary disputes, disputes over the length of time one party was permitted to borrow or lease land, or rights of a party to occupy land in perpetuity if it seemed the land had been gifted away.⁵³

When a dispute among members of the same family lineage arose, the aggrieved party would call for a meeting of the family or village headman and his advisors to resolve the issue.⁵⁴ The headman and/or elders would request that the aggrieved party state his or her case. The accused party would also be asked to state what he or she knew about the dispute. This oral evidence relied, obviously, on the memories of disputants, family members, and witnesses to transactions. The headman, along with elders, would cross-examine witnesses and then consult among themselves in order to reach at a decision.⁵⁵

These norms created a kind of informal property registry, or recording office. Reliance on memories requires disputants and adjudicators to draw heavily from the bank of

⁵¹ For an interesting discussion of dispute resolution among the Tiv, an ethnic group located near, but not in, Plateau state see PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV*, 30-31 (1989). While chiefs and elders often met in a kind of judicial session, disputes might also be taken directly to a chief for resolution. See also Elias, *supra* note 44 at 238-243 for a description of the way in which a civil case was conducted.

⁵² Elias, *supra* note 44 at 218-19.

⁵³ See Bohannan, *supra* note 50 at 60 and GAZETTEERS, *supra* note 49 at 114.

⁵⁴ See Elias, *supra* note 44 at 217-222. Elias notes that disputes over land were considered “great” subject matter and so would often be resolved in the chief’s court, under more formal rules of procedure.

⁵⁵ Bohannan, *supra* note 50 at 28-69.

dispersed local knowledge.⁵⁶ This process, which requires people to proclaim openly, or “publish,” what they know and to swear to the truthfulness of their statements, is one possible way to reduce information asymmetries – thereby reducing the costs of transacting.⁵⁷ Relatively transparent communications of this sort may also decrease levels of uncertainty within a community. On the other hand, there are clear drawbacks to reliance on memory. However, in an isolated area with a small and compact population, such an approach may have been cost effective, compared with more formal, and costly, specification of rights.⁵⁸

In cases of disputes *between* families or villages, the headman or sub-chief would approach a headman or sub-chief of a third group. This third party would attempt to resolve the dispute if both parties to the dispute agreed.⁵⁹ If they refused to submit to the third-party adjudication, this would be reported to the tribe’s main chief.⁶⁰ If the case warranted it, this head chief would be called on to hear and resolve the dispute. In cases of disputes between tribes, emissaries would be sent by the aggrieved tribe to the tribe allegedly causing the harm, asking for redress. In some cases, appeal was made directly to a third tribe to act as mediator.⁶¹

⁵⁶ See generally F.A. Hayek, *The Use of Knowledge in Society* 35 AMERICAN ECONOMIC REVIEW No. 4, 519-530 (1945).

⁵⁷ Note that such publication becomes costly in high-risk environments where officials, or others, can seize resources with relative impunity. See Benito Arruñada, *Property Enforcement as Organized Consent*, 19 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION, at 410 and 412-13 (2003). See also, Feder and Feeny, *supra* note 21 at 140.

⁵⁸ YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS*, 2-4 (1989).

⁵⁹ Elias, *supra* note 44 at 217.

⁶⁰ *Id.* at 217.

⁶¹ *Id.* at 218.

Even in less hierarchical societies, those in which political power was dispersed, civil disputes were handled in a similar manner: namely, by resort to an elder who would hear a dispute, then appeal to a more influential elder, or, if a case was especially important, it would be taken to an *ad hoc* council of elders of the family lines in the local community.⁶² A variety of other methods for initiating the resolution phase existed.⁶³

Paul Bohannon notes that land disputes were quite common, though he doesn't comment on the frequency with which they led to violence.⁶⁴

Family members had possession rights and rights to use land located in the family's territory. In other words, land was jointly owned on a kinship basis.⁶⁵ Under the customary tenure system, women normally could neither own nor inherit property, though their husbands typically "gave" them some land to work each year.⁶⁶

Traditionally, women had usufructory rights over certain land as long as they lived with their husband's family.⁶⁷

⁶² *Id.* at 220.

⁶³ These included announcing a dispute by beating drum throughout a village, which works to call elders together, the party seeking redress might go to a group of spiritual elders, whose jurisdiction might be broader than that of village elders, a spear might be placed before an accused party's home, signifying the need for speedy resolution of the claim. In cases where the offender was unknown, a "diviner" would be used to help identify the culprit – though this variety of detective work was rarely used in private, civil suits. *Id.* at 220-21.

⁶⁴ Bohannon, *supra* note 50 at 31. However, there is some evidence that land disputes in Plateau during the colonial era were somewhat uncommon. The GAZETTEER, discussing the Jos region, states: "Disputes about the ownership of land are rare and, when they do occur, they invariably arise out of a lease or loan." GAZETTEER, *supra* note 49 at 114. Additionally, news reports claim that Muslims and Christians in these areas "had coexisted peacefully in these rural communities for decades, but that all changed in 2001 when a complex mixture of religious issues, disputes over land tenure and politics led to a spat of tit-for-tat killings and communal attacks." See *Nigeria, 2,500 displaced in Plateau State violence*, *supra* note 17.

⁶⁵ Adedipe, *et. al.*, *supra* note 44

⁶⁶ Netting, *supra* note 40 at 167.

⁶⁷ Arua & Okorji, *supra* note 4 at 4 .

An individual was required to use land to benefit the family or community group.⁶⁸ So long as an individual was making beneficial use of land he could keep the property, pass it on to his heirs, and even pledge its use in satisfaction of a debt.⁶⁹ Individuals, as well as families, had rights to exclude both strangers and, in certain situations, family members. However, non-family members (strangers) could, if given permission by the headman or chief, use land in the territory of the community of which he became a member – a point to which I will return to.⁷⁰ Further, groups and individuals could lend land. Indeed, so long as land was available, the group or individual holding the unused land could not refuse to lend to one who asked, though increasing scarcity has placed strains on the lending system.⁷¹

Generally, individuals were not able to sell or mortgage property.⁷² However, a near equivalent of sale could be created by pledging land and never redeeming it.⁷³

Furthermore, there is evidence that in areas where significant labor was expended developing land for farming, a system approaching individualized tenure existed.⁷⁴

⁶⁸ Cooter discusses one of the key roles played by a communal property system: “Customary land law creates an incentive structure for cooperation and coordination among kin in the production and distribution of goods. The incentive structure includes a network of mutual obligations, which restricts everyone’s freedom. In such a network there can be no unitary, absolute ownership.” Cooter, *supra* note 16 at p. 15.

⁶⁹ See Library of Congress Studies, *supra* note 44. Individuals could leave land unused for periods of time and still exert claims over land. The period of non-use could not be “unreasonable” however, or the individual would forfeit his rights. See also, Elias, *supra* note 44 at 163.

⁷⁰ RICHARD OLANIYAN (ed.) NIGERIAN HISTORY AND CULTURE, 98 (1984). See also A.S. Bamire and Y.L. Fabiyi, *Economic implications of property rights on smallholder use of fertilizer in southwest Nigeria*, LAND REFORM available at <http://www.fao.org/DOCREP/005/Y2519T/y2519t08.htm>.

⁷¹ Ouedraogo & Toulmin, *supra* note 46 at 4.

⁷² Olaniyan, *supra* note 69 at 98.

⁷³ Netting, *supra* note 40 at 166.

⁷⁴ Netting states: “The multiplicity of arrangements for sharing, renting, and loaning land insures that an existing land base can be periodically redistributed according to need while preserving the principle fundamental to Kofyar intensive agriculture, that land is an individual possession.” *Id.* at 167-68.

Individuals were unable to acquire property by adverse possession.⁷⁵ However, individuals had full rights of ownership in physical structures they added to real property, as well as to plants/trees they added.⁷⁶ The customary idea of rights to land did not, apparently, include the rights to items found on the land that someone else placed there. This fact means that one family could have use rights to the soil, and another family, who had planted nut trees on the land, could have rights protect, maintain, and use the nuts. Under customary norms, the legal idea of land was limited to the soil. Finally, it was only the family or the community, acting under the direction of family and/or community leaders, who could dispose of property.

Towns and villages could also hold land. These lands typically included grazing and hunting lands, market sites, and such areas as sacred groves.⁷⁷ Today, corporate bodies, known as corporate aggregates, still hold land under communal tenure.⁷⁸ Some lands were “attached” to particular offices, or positions: *obas* in the south and *emirs* in the north. Legal interests in these lands were absolute rights. Over time, the role of the *obas* and *emirs* with regards to land has diminished and these traditional leaders have lost some of their prestige and power.⁷⁹

⁷⁵ Elias, *supra* note 44 at 163.

⁷⁶ *Id.* at 166.

⁷⁷ Adedipe, et. al. *supra* note 44

⁷⁸ Arua & Okorji, *supra* note 46 Corporate aggregates include rural towns, villages, patrilineal and matrilineal groups, as well as extended and nuclear families.

⁷⁹ *Id.*

Much land in Nigeria is still held based on customary rights. However, both population and the demand for land have increased.⁸⁰ As a result, land available for use and development is becoming scarcer. Studies from the mid-20th century report limited availability of land in some areas and the sale of land in certain districts.⁸¹ After Nigerian independence in 1960 land sales continued, furthering a move away from communal ownership and towards increased private ownership.⁸² In order to sell land under the customary law, the family member wishing to sell must receive the consent of all principal members of the family. For the transaction to be valid consideration must be paid, and the seller must provide evidence of the “handing over” of possession in the presence of witnesses.⁸³ Once families, or communities, begin to partition family or communal land this is a signal that customary tenure rights are ending. However, in some areas, purchase of land remains difficult.⁸⁴

The ability of families and communities to hold land based on customary rights was modified by the 1978 Land Use Decree, which vests ownership of all land in the government “to be held in trust and administered for the use and common benefit of all Nigerians.”⁸⁵ The Act apparently attempts to create a British-style land-tenure system in

⁸⁰The 1991 national census put the population of Plateau State at 2,959,599. *See People, Population and Settlement*, ONLINE NIGERIA available at <http://www.onlinenigeria.com/links/plateauadv.asp?blurb=462>. This compares with an estimated population in 1998 of 4,627,043. *See* footnote 12 *infra*.

⁸¹Netting, *supra* note 40 at p. 100. GAZETTEERS reports sales of land among the Angas tribe of Plateau. *See* GAZETTEERS *supra* note 49 at p. 166.

⁸²Chimah Ezeomah, *Land Tenure Constraints Associated with Some Recent Experiments to Bring Formal Education to Nomadic Fulani in Nigeria*, OVERSEAS DEVELOPMENT INSTITUTE (ODI), Pastoral Development Network, Agricultural Administration Unit available at www.odi.org/uk/pdn/papers/20d.pdf. *See also* Bamire and Fabiyi, *supra* note 69 at 3 who note that increased reliance on cash crops such as cocoa, oil palm, cola nut and coffee, in conjunction with technologies that increase agricultural production, making agricultural land more valuable are also leading to increased individual ownership.

⁸³Adedipe, *et. al.*, *supra* note 44

⁸⁴Arua & Okorji, *supra* note 46

⁸⁵Land Use Decree, *supra* note 14, § 1.

which the crown/sovereign holds ultimate title to land, but allows for long-term leasing of property.⁸⁶ Land-administration functions were taken from chiefs, family heads, local communities and transferred to administrative agencies. Issues involving the sale, lease or inheritance of land were, according to the law, to be managed by these agencies, which operate under the office of the state governors.⁸⁷

Previous forms of title were replaced by “certificates of occupancy,” which are issued by either state officials (in the case of urban land) or local government officials (in the case of most rural land).⁸⁸ These officials have the power to revoke customary rights if land is needed for a public purpose.

In addition to this change in the legal environment, exogenous factors are causing changes in the customary tenure system. As noted above, increases in population are a problem, as are migrations resulting from the increased desertification of northern Nigeria, and increasing urbanization, all of which increases pressure on land use in northern and middle belt Nigeria.⁸⁹ These pressures may lead to a desire among inhabitants for increased individualization of tenure and away from the restrictive Land Use Act regime and the traditional communal property tenure system.⁹⁰

⁸⁶ Cite to British land law --

⁸⁷ Donald C. Williams, *Measuring the Impact of Land Reform Policy in Nigeria*, 30 JOURNAL OF MODERN AFRICAN STUDIES, 589 (Dec., 1992).

⁸⁸ Ouedraogo & Toulmin, *supra* note 46 at 16.

⁸⁹ Sengupta, *supra* note 7.

⁹⁰ Ouedraogo & Toulmin, *supra* note 46 at 5. Lord Hailey recognized similar pressures in Nigeria in the mid 20th century when he noted that “The principal effect of economic development (in Nigeria) has been seen in the increasing tendency to delimit individual holdings, both in Muslim and pagan areas.” Hailey, *supra* note 39 at 789.

Property Norms in Northern Nigeria

Until the early 19th century, northern Nigeria was largely controlled by the Hausas – the main ethnic group in northern Nigeria. The Hausas maintained a customary land-tenure system until the first decade of the 19th century. During the very early 19th century, Muslim Fulanis, led by Usman dan Fodio, extended their control over a significant portion of northern Nigeria, creating the Sokoto Caliphate.⁹¹ As they did, they instituted changes in land-tenure rules. The new Fulani rulers took control of Hausa lands and vested ownership rights over these lands in the Sultan of Sokoto.⁹² Land held by the Sultan was divided into reserve lands, which was “state” property to be used by the Sultanate; cultivated lands, for which *imams* determined the use allocations; unused lands, also under the control of *imams*, and finally, *waqf* lands, to be used for the benefit of the entire community.⁹³ This system provided extensive control over land to *imams*, who would grant use rights and who would also, at times, assign unused land without reference to needs of the local community.⁹⁴

However, while Plateau state is part of northern Nigeria, it was subject to only limited Fulani control – primarily on the periphery of the region.⁹⁵ Most of the inhabitants of the interior of Plateau were free from the Fulani conquest,⁹⁶ and so, Fulani institutions did not take root there. The Fulani were unable to exercise extensive control over Plateau

⁹¹ Falola, *supra* note 37 at 35

⁹² Ezeomah, *supra* note 81 at 2.

⁹³ John Paden, *Islamic Political Culture and Constitutional Change in Nigeria*, 11 ISSUE: A JOURNAL OF OPINION, 25 (Spring-Summer, 1981).

⁹⁴ Library of Congress Study, *supra* note 44.

⁹⁵ GAZETTEERS, *supra* note 49 at 30-36.

⁹⁶ Netting, *supra* note 40 at 46.

because its rugged terrain, coupled with the fiercely independent nature of its inhabitants, made both military conquest and subsequent administration too costly.⁹⁷ The Plateau region provided a refuge for people escaping a variety of potential overlords.⁹⁸

Even in the 19th century, Plateau was highly heterogeneous, and was composed of many small ethnic groups who lived independently from one another, but who engaged in some trade.⁹⁹ The various tribes that inhabited Plateau moved there in order to escape threats posed by slave-raiding expeditions from the coastal regions and from the Islamic north. Another motive was their search for available land.¹⁰⁰ In the 19th century, the people of Plateau were primarily animists and had a less developed, less hierarchical political and social structure than did the Hausa/Fulanis.¹⁰¹

After the British took control of Nigeria in 1900, they created different governing structures in the North and South: the Protectorate of North Nigeria and the Protectorate of South Nigeria.¹⁰² As is true to this day, southern Nigeria was richer than the north and had a stronger tradition of autonomy. However, as the North had a well developed administrative structure and was governed by what the British viewed as a “respectful”

⁹⁷ GAZETTEERS, *supra* note 49 at 31.

⁹⁸ Olaniyan, *supra* note 69 at 84-5. This means that there was no one supreme *oba* or *emir* in Plateau. Rather, there were many leaders of small, discrete groups.

⁹⁹ *Id.* at 83-4.

¹⁰⁰ Netting, *supra* note 40 points out: “The need to avoid slaving depredations seems to be reflected in a zone of dense population in the hills and immediately adjoining lowlands, with large areas of fertile plain to the south left empty.” (p. 46) This observation is of significant import, as it may help us understand why control over fertile land in Plateau state – particularly in the Yelwa region – is contested. There may be only limited history of “control” by particular groups, thus allowing others to make competing claims.

¹⁰¹ *Id.* at 44; see also, Olaniyan, *supra* note 69 at 84-87.

¹⁰² Falola, *supra* note 37 at 68-69.

and conservative leadership, they adopted a “hands-off” approach to the north.¹⁰³ The British institution of indirect rule largely left the Muslim leadership in place.¹⁰⁴ It also respected the *sharia* law of the north as well as the customary laws of the area.¹⁰⁵

The British arrived in Plateau region in 1904, in response to requests by the Niger Company, which faced hostile inhabitants and repeatedly closed trading routes.¹⁰⁶ For reasons similar to those faced by the Fulani, the British were unable to subdue the inhabitants of the area in the early years of their rule.¹⁰⁷ It took repeated use of armed force to quell uprisings and inter-ethnic violence. When the inhabitants were, finally, brought under control, the British created a somewhat different governance structure for Plateau; not based on rule by emirs, but based on a high degree of self-rule at the local level.¹⁰⁸ Discussing the British approach to rule in Nigeria, Lord Hailey says:

The distinctive concepts which have determined the use of that system [Native Authority] are shortly as follows. It has in the first place avoided as far as possible the employment of any local authority which has not held a recognized position of influence derived from indigenous custom or tradition. Second, it has contemplated that the entities so employed (whether they have been Chiefs, Chiefs in Council, Councils of Headmen, or groups of Elders) should rely mainly on the authority they derive from indigenous custom when giving their aid in the

¹⁰³ *Id.* at 70.

¹⁰⁴ *Id.* Falola says, “[I]ndirect rule as deployed to consolidate power and to overcome the various obstacles posed by communications and by limitations of personnel and finance. The ideological assumption was that the British and Nigerians were culturally different and the best way to govern them was through the institutions which they themselves had invented.” He goes on to note that indirect rule allowed the British to govern at low cost by co-opting local rulers who continued to administer indigenous institutions.

¹⁰⁵ Ezeomah, *supra* note 81 at 2. The version of *sharia* applied in Nigeria is the Maliki form which follows precedent, opinions and reasoning developed under the Sunni Muslim tradition. *Imams* and *emirs* are the key legal decision makers, interpreting the law to the case at hand. Under the Sokoto Caliphate the *emir* was the chief *imam* and served as the court of last appeal (the grand kadi). In contemporary Nigeria, *sharia* courts have been created for each state with a grand kadi appointed for each. See, Paden, *supra* note 92 at 25.

¹⁰⁶ Plateau Province was formally created by the British in 1926. See, GAZETTEERS, *supra* note 49 at 117-18.

¹⁰⁷ *Id.* at 39-41.

¹⁰⁸ *Id.* at 46 48.

furtherance of schemes of social or economic welfare promoted by the Administration.¹⁰⁹

The Native Authority system gave chiefs and elders primarily responsibility for the functioning of local government; they were particularly important in the creation and functioning of Native Courts.¹¹⁰ As decision makers in this new dispute resolution process, local leaders would have continued to bring their deep local knowledge to bear on conflict resolution. Indeed if, as one critic argues, the British purposefully kept formally trained lawyers out of the Native Courts, then it seems likely that the indigenous dispute resolution norms developed under customary law prevailed in Native Courts.¹¹¹

In Plateau, the British attempted to create a tribunal for each tribe and even for sub-tribal units. Some large tribes had more than one court. The members of the courts acted as an advisory council for the Executive Chief, who served as President of the court. The British also created seven “Alkalai” Courts, for use by non-indigenous, Muslim inhabitants of Plateau.¹¹² When Plateau was divided into Districts in 1927, each district was assigned District Heads – both “Pagan” (animist) and Fulani (muslim). Starting in 1930, the “Pagan” Heads began supervising tax collection, including collection of the cattle tax imposed on the Fulani herdsmen.¹¹³ The notion was to move toward more

¹⁰⁹ Hailey, *supra* note 39 at 452.

¹¹⁰ Falola, *supra* note 37 at 71, and GAZETTEERS, *supra* note 49 at 49-50.

¹¹¹ There has been criticism of the British approach to staffing Native Courts. Critics argue that the British chose to appoint tribal leaders rather than trained legal academics or practitioners to these positions. The result was a system in which individuals with little or no formal legal training, and beholden to colonial authorities for their lucrative positions, were in power. Such criticism, while valid, appears to discount the informal training and deep familiarity with social norms and customs that such leaders would have possessed. For a discussion of the drawbacks of the British model of staffing Native Courts *see* Falola, *supra* note 37 at 71.

¹¹² GAZETTEERS, *supra* note 49 at 49.

¹¹³ *Id.* at 119.

extensive indirect rule and allow the local inhabitants greater control of the structures of governance. A further example of this approach is Lord Hailey's observation that: "The scope of rule-making power of Native Authorities was extended in 1945 to embrace the definition and modification of Native law and custom. In the same year they were also given special power to deal with matters relating to the tenure of land. . . ." ¹¹⁴

Because of the diversity of tribes in Plateau, and differences related to population density, soil fertility, and abundance or scarcity of land, there were differences among land-tenure norms ¹¹⁵ For example, the Gazetteer reports that in the Pankshin Division (eastern Plateau) among the Angas tribe, a man who cultivated land held tenure similar to freehold. ¹¹⁶ The report notes that farm land was sold, but for a low price (indicating relative abundance of land at the time). However, land in this area was not leased or pawned. The practices in Pankshin may be contrasted with those of the Jos Division (northern Plateau) where land was held in a manner more like a lease in perpetuity. ¹¹⁷ Land could be leased to or borrowed by others. Leases tended to be long-term with no set termination date, but with an annual payment in kind. Sale of land was rare in this area – except around the town of Ganawuri, where there was valuable fertile land. ¹¹⁸ In the Shendam Division, it seems that inhabitants held many sticks in the bundle of property rights, but not enough to warrant their tenure being labeled "freehold." This

¹¹⁴ Hailey, *supra* note 39 at 455.

¹¹⁵ Though the GAZETTEERS states: "This mention of farming disputes brings us to the question of land tenure about which tribal customs do not differ very much. Generally speaking all the land originally belonged to the chief of the tribe or village, by right of priority of settlement and ability to defend his boundaries and no land was taken up for building or farming except with the consent of the chief." GAZETTEERS, *supra* note 49 at 113.

¹¹⁶ *Id.* at 166.

¹¹⁷ *Id.* at 113.

¹¹⁸ *Id.* at 114-5. The availability of "valuable" fertile land is indicative of a certain scarcity and may help explain the evidence of sale in the region.

land could not be sold and chiefs could dispossess inhabitants for disloyalty or as punishment for a serious crime such a murder.¹¹⁹ The Gazetteer notes: “Disputes about the ownership of land are very rare, and when they do occur, they invariably arise out of a lease or loan.”¹²⁰

In 1916, the British enacted the Lands and Native Rights Ordinance,¹²¹ which created a peculiar bifurcated approach to land law in Nigeria. In southern Nigeria, most lands belonged to private citizens – not the government. Some property was held by a “stool” (a seat of political authority within a communal land-holding ethnic group), other property by communal or family groups and some by individual ownership.¹²² Land ownership and the sale of land were tracked in the south via a registry system.¹²³

A very different system applied to northern Nigeria.¹²⁴ In the north, the British declared all land in the former Fulani fiefs to be public property. The fief system was abolished and ownership over land in northern Nigeria was transferred to the British crown. As owners of the land, the British government required those on the land to apply for occupancy permits, though the government routinely recognized customary rights of occupancy.¹²⁵ This system placed limits on outsiders’ abilities to move into northern

¹¹⁹ *Id.* at 214.

¹²⁰ *Id.* at 114. Note that the level of dispute could be low for several reasons. For example, if land is abundant it may be less costly to move rather than engage in dispute over ownership. If customary norms and claims are recognized as legitimate, there might be relatively few disputes over ownership. Finally, disputes are suppressed, for some reasons, they would be less visible.

¹²¹ Cap. 105, Laws of Nigeria, 1948.

¹²² Segun Famoriyo, *Land Tenure and Food Production in Nigeria*, 41 LAND TENURE NEWSLETTER, 14 Land Tenure Center (July-September, 1973).

¹²³ Library of Congress Studies, *supra* note 44.

¹²⁴ See LAND AND NATIVE RIGHTS ORDINANCE, *supra* note 120.

¹²⁵ Naturally, the British could accept or reject an application. See Ezeomah, *supra* note 81 at 2.

areas.¹²⁶ It also had the effect of creating segregated areas of “strangers,” or, *Sabon Garis*. Settlers were those people whose relatives had been in the area longer than “non-indigenes” or “strangers.” Non-indigenes were granted were lesser legal rights than settlers. This differential access to land, to local government services, and to political representation created tensions throughout the northern Nigeria – tensions that remain to this day.

As a part of northern Nigeria, these same rules applied in Plateau state. Yet, because the British administrators showed significant deference to local customs there, and because authorities had greater difficulty “reaching” into the hinterlands of Plateau and exerting control, the actual, *de facto* impact of the Land and Native Ordinance Act in much of Plateau might have been muted.¹²⁷ Instead, it seems that customary norms surrounding tenure rights, leasing, borrowing, pledging, and even sales of land, continued to develop alongside more extensive British control in cities such as Jos or in other northern states.¹²⁸ The British expanded the legal authority of the Native Authorities to control the use and disposition of land in 1945.¹²⁹ This ordinance “[C]onfers on Native Authorities more extensive powers than they have in any other British dependency. They may make rules for the control of alienation and mortgaging, for prescribing that purchase at sale shall be subject to their approval, for regulating the allocation of ‘communal or family land’ and for controlling its use.”¹³⁰ Thus, just as during the pre-

¹²⁶ The Lands and Native Rights Ordinance limited the right to acquire rights in land to “natives” only. Thus, non-natives, people moving from one part of Nigeria to another, or immigrants, could not acquire rights to land under this statute. *See* Adedipe, *et al.*, *supra* note 44 at 4.

¹²⁷ Hailey, *supra* note 39 at 452-54.

¹²⁸ *Id.* at 789.

¹²⁹ *Id.* at 790.

¹³⁰ *Id.*

colonial era, under British rule local Nigerian authorities exercised extensive legal control of land resources.

Finally, following independence in 1960 the regional government of Northern Nigeria enacted the Land Tenure Law. The Land Tenure Law declares:

“(a) . . . the whole of the lands of Northern Nigeria, whether occupied or unoccupied, are hereby declared to be natives lands. (b) All native lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Minister and shall be held and administered for the use and common benefit of the natives, and no title to occupation and use of any such lands by a non-native shall be valid without the consent of the Minister.”¹³¹

It extended the system created by the Land and Native Rights Ordinance of 1916.

Further, it created formal restrictions for landholding rights by non-northerners.¹³² Under the 1962 Land Tenure Law, rights of occupancy could be for an indefinite term, however such right were often specified, on the “Form of Application” for 99 years on residential plots, 40 years for non-northern Nigerians on residential plots, and a sliding scale of up to 99 years for industrial plots.¹³³ In northern Nigeria, land was held by occupancy permits through the 1960s and 70s. In the 1970s, farmers located on the outskirts of cities often had their permits revoked, and land was taken and redistributed for urban development. It appears that only minimal compensation was paid for these takings, leading to additional conflict over land.¹³⁴ These conflicts, and concerns over the alleged speculation in land, set the stage for the next major development in the property rights regime in Plateau state: the Land Use Act of 1978.

¹³¹ Cap. 59, Laws of Northern Nigeria, 1963 at §§ 4- 6.

¹³² Library of Congress Studies, *supra* note 44. *See also*, C.M. McDowell, *The Interpretation of the Land Tenure Law of Northern Nigeria*, 14 JOURNAL OF AFRICAN LAW, No. 3 156 (1970).

¹³³ *See* C.M. McDowell, *supra* note 131 at 163.

¹³⁴ Library of Congress Studies, *supra* note 44.

The Land Use Act of 1978

The Land Use Act (LUA) was issued by the military government of Olusegun Obasanjo on March 29, 1978.¹³⁵ The law nationalized all land in Nigeria. At the time it went into effect, this law extinguished all existing rights to use and occupy land – including rights held by custom.¹³⁶ Citizens were required to apply to the government for certificates of occupancy, which are either statutory or customary, in order to make claims on land or, more significantly, to transfer rights in land. The law transferred primary responsibility for the management of communal land from the hands of chiefs or *emirs* to government officials.¹³⁷

President Obasanjo stated that one reason for the statute was the “limiting, inhibiting and divisive nature of land tenure in the country.”¹³⁸ The statute was designed to curb land speculation and real estate price increases, to open access to land for both private and public use, and to promote tenure security.¹³⁹ The Land Use Act was offered as an attempt to rationalize a complex set of customary, common law, and statutory provisions dealing with land in Nigeria, thereby creating a uniform legal environment.

¹³⁵ Cap. 212, Revised Laws of the Federation of Nigeria 1990.

¹³⁶ See Bola Fajemirokun, *Land and Resource Rights: Issues of Public Participation and Access to Land in Nigeria*, available at www.acts.or.ke/pap/rr/docs/SRCPAPLRR-bolspr.pdf.

¹³⁷ Adedipe, *et. al.*, *supra* note 44 at 4.

¹³⁸ Fajemirokun, *supra* note 135 at 1.

¹³⁹ *Id.* at 1.

As noted earlier, the LUA vests control over land in State Governors, who have a fiduciary responsibility to hold the land in trust for the use and benefit of the citizens of Nigeria. In a case from 1989, Makanjuola v. Balogun, the Supreme Court of Nigeria held that the effect of the LUA is to vest absolute ownership of land in each state in the hands of the State Governor.¹⁴⁰ Under the statute, State Governors may issue certificates of occupancy for land in both urban and non-urban areas.¹⁴¹ Local government officials may only issue certificates for customary rights of occupancy in rural areas. State Governors decide which areas are urban, and which are non-urban, and thus maintain significant power over land-allocation decisions.

State Governors are aided by Land Use and Allocation Committees that advise them on land-management issues in urban areas; on issues related to resettlement or to the revocation of rights based on public need. Land Use and Allocation Committees are the “courts of first instance” in resolving disputes related to the awarding of certificates and to the payment of compensation when land is improved or taken for public use.¹⁴²

Appeals from committees are taken to officials at the Ministry of Justice and then to the

¹⁴⁰ 5 S.Ct. 82, cited in *Id.* at 7.

¹⁴¹ The purchaser of the right to occupy land presents a receipt for the sale of this right to the local government chairman. If approved by this official, the purchaser next applies to the land allocation committee. If approved at this stage, the state governor will issue a statutory certificate of occupancy which constitutes a 99-year lease. See Anna Knox, *Nigeria Country Profile*, in 130 COUNTRY PROFILES OF LAND TENURE: AFRICA, 1996, 113 (December 1998).

¹⁴² Fajemirokun, *supra* note 135 at 4. See also Donald C. Williams, *Measure the Impact of Land Reform Policy in Nigeria*, 30 JOURNAL OF MODERN AFRICAN STUDIES, No. 4 591, 603-605 (1992). Williams notes that at least some of these committees were seriously comprised during the civilian the late 70s, early 1980s (“their non-partisan was thoroughly violated”) and so were viewed as deeply biased towards the government. As a result, some committees were disbanded and replaced by *ad hoc* committees appointed by military leaders. This situation may have improved since the end of military rule, but this is not known.

formal court system.¹⁴³ Land Allocation and Advisory Committees work with the Local Governments on similar issues.¹⁴⁴

A statutory certificate of occupancy is typically issued for 99 years.¹⁴⁵ The certificate acts as a kind of lease agreement between the government (the lessee) and the certificate holder (the lessor). Before the right is granted the state determines the amount of “rent” to be paid by the certificate holder.¹⁴⁶ Local governments may grant customary rights of occupancy only if there are no competing statutory rights. Statutory rights trump customary rights.¹⁴⁷

When a statutory certificate of occupancy is issued the certificate holder receives a set of rights, including rights to occupy, to use, and to improve property. This bundle is clearly thinner than that of a fee simple owner under Anglo-American law. For example, the certificate holder cannot sell, gift, or sublet land without the consent of the State Governor.¹⁴⁸ However, bequests of rights held under statutory and customary certificates of occupancy are managed by customary-law principles, not by statutory principles.¹⁴⁹

Under the customary land-tenure system the chief, *oba*, headman, or *emir* all held significant power.¹⁵⁰ In some cases chiefs and emirs abused their powers, allocating land to favorites, keeping strangers at bay, and requiring payoffs to permit land transactions to

¹⁴³ *Id.* at 604.

¹⁴⁴ *Id.* at 591.

¹⁴⁵ Knox, *supra* note 140 at 113. .

¹⁴⁶ Adedipe, *et. al*, *supra* note 44 at 4.

¹⁴⁷ *Id.*.

¹⁴⁸ Fajemirokun, *supra* note 135 at 3.

¹⁴⁹ Adedipe, *et. al*, *supra* note 44 at 4.

¹⁵⁰ *Id.* at 3.

occur.¹⁵¹ During the colonial period, the power that some chiefs and *emirs* held over land allocation ebbed as population growth increased the use of private sales of land.¹⁵² The Land Use Decree furthered this process, removing from traditional leaders their power to distribute a valuable resource – land – and of the income they garnered from land transactions.¹⁵³ Donald C. Williams argues: “The Land Use Decree . . . was designed to pose a direct challenge to alternative sources of societal authority by relegating all private transactions in land to government agencies.”¹⁵⁴

The Land Use Act shifts the power to allocate land away from traditional leaders and to government officials. At the same time, those individuals who held substantial local knowledge of the land, its traditional allocations and uses, are no longer called on to make allocation decisions. Individuals who may have little personal knowledge of the specifics of land holding and land use are instead called upon to decide who has rights to what. Cutting the link between the local knowledge and allocation/use decisions is especially problematic in areas where customary law is widespread because customary law depends upon the memory of local leaders. Written records were limited. Local leaders would reach decisions based on their intimate knowledge of individuals and their

¹⁵¹ *Id.*

¹⁵² *Id.* at 5 where Adedipe, *et. al.* note: “Even prior to the Land Use Act, the old notions of royal estates or stool land had been extensively eroded. Consequently, the political and cultural power inherent in the exercise of land allocation by traditional rulers was being undermined.”

¹⁵³ Williams, *supra* note 142 at 587 notes: “Land reforms often signify one element of a larger trend involving expansion of the state at the expense of other forms of societal authority. As such, they represent the frontier of a widening struggle over legitimacy and control between ‘state’ and ‘society . . .’” See also, Adedipe, *et. al.* *supra* note 44 at 5 who writes: “Furthermore, it appears that by nationalizing land in the country, the very fabric upon which traditional customs and practices were woven has been threatened.”

¹⁵⁴ Williams, *supra* note 142 at 587.

needs.¹⁵⁵ Government officials are unlikely to have either this intimate knowledge or a reasonable substitute, given the paucity of written records.

By placing power to allocate land rights in the hands of politicians – state governors – and, in turn, Land Use Allocation Committees and Land Allocation and Advisory Committees, the LUA has created a system in which government officials enjoy huge bargaining power advantages in issuing certificates or allowing a transfer or sale to take place.¹⁵⁶ Quoting an article entitled “Establishing a Business in Nigeria” Williams observes:

With the arbitrary powers given to the Governor of the state as regards the issuance of a C of O (certificate of occupancy), and coupled with the ensuring bureaucratic red-tapism, it is almost easier to pass a camel through a needle’s eye than to get this certificate. In the case of transfer of land, where the Governor’s consent is required before such transfer (be it temporary or permanent) can be effected, the consent is usually withheld until some exorbitant and ridiculous transfer fee (consent fee) is paid.¹⁵⁷

These same government officials can reward favorites with certificates of occupancy.¹⁵⁸ Cronies, family members, and politically well-connected individuals have much less difficulty obtaining certificates than do poorer, unconnected, and less well-educated citizens of Nigeria.¹⁵⁹ In a study of the effects of the Land Use Decree, Peter Koehn

¹⁵⁵ This is not to imply that decision making by local leaders was perfect, but rather, it is to emphasize the important role that local knowledge of social norms and customs related to property rights played with this particular group.

¹⁵⁶ “Rather than curtail land speculation, as was intended, the Land Use Decree opened the door for land to be acquired by government officials and used for political patronage. This is reinforced by the fact that members of the land use and allocation committee are appointed by the governor and the fact that the governor has discretion over rent charges.” See Knox, *supra* note 140 at 111.

¹⁵⁷ Williams, *supra* note 142 at 592.

¹⁵⁸ Fajemirokun, *supra* note 135 at 5 states: “[T]he vesting of land in State Governors has created powerful systems of authority and political patronage . . . those with access to the corridors of power are able to easily acquire land and sometimes through the dispossession of other poorer groups.”

¹⁵⁹ Williams, *supra* note 142 at 598 observes: “A growing body of evidence seems to suggest that the benefits of Nigeria’s land development and plot allocation schemes are chronically imbalanced. Past

maintains: “State government officials have effectively barred the rural and urban laboring classes from all types of statutory rights of occupancy.”¹⁶⁰

The Land Use Act suffers from other shortcomings. Due to the high level of corruption in the public sector, individuals have low levels of trust in the Nigerian bureaucracy.¹⁶¹ Because of their suspicion of public officials, many people may avoid seeking certificates, because they are required to show proof of payment of property taxes for three preceding years before a certificate will be issued.¹⁶² This requirement apparently leads officials to demand bribes before they declare tax records “clear.”¹⁶³ Such corruption obviously increases the costliness of the process.

Further the Land Use Act limits the size of land one may own depending on whether it is urban or rural and whether one is a farmer or herder.¹⁶⁴ Such a one-size-fits-all (or, almost all) approach to land use ignores the differing abilities of individuals to successfully manage land. The approach is reminiscent of the American government’s

studies of improprieties suggest that those with wealth and close connections to State Governments are overwhelmingly beneficiaries of these programmes.” *See also*, Libecap, *supra* note 22 at 17 who notes: “All things equal, those interest groups with greater wealth, size, and homogeneity will have more resources to influence politicians regarding the assignment of property rights. . .” Plateau state is composed of many small groups, but is increasingly populated by members of larger, politically powerful ethnic groups: Hausa and Fulani in particular.

¹⁶⁰ Peter Koehn, *Political Access and Capital Accumulation: an analysis of state land allocation processes and beneficiaries in Nigeria*, 12 AFRIQUE ET DÉVELOPPEMENT, No. 1 179 (1987).

¹⁶¹ *See Nigeria*, *supra* note 20 at 226.

¹⁶² Williams, *supra* note 142 at 592 states: “[A]ll claims on land must be supported by property tax receipts from three preceding years, or evidence of tax clearance under the terms of the pay-as-you-earn system. Since many landlords have consistently evaded the payment of taxes on rented properties, there is a real possibility that processing a certificate of occupancy could lead to criminal prosecution. Those who cannot avoid the necessity of obtaining such a document have to go to great lengths to pay out the necessary bribes for securing a tax clearance certificate from the State’s revenue office.”

¹⁶³ Williams, *supra* note 142 at 592.

¹⁶⁴ “Statutory rights of occupancy in urban areas were strictly limited to 0.5 hectare of ‘undeveloped’ land, while the number of ‘developed’ plots was subject to the determination of the State Governor’s Office. Customary rights of occupancy were to be confined exclusively to rural areas, where plots were permitted to be as large as 500 hectares of farmland or 5,000 hectares for grazing.” Williams, *supra* note 142 at 596.

approach to western land held by the federal government: parcel out plots of 160 acres – whether that was an efficient size or not, and force settlers to live within in the constraints of this arbitrary limit.¹⁶⁵ In Nigeria, the effects of the Land Use Act have been characterized in this way: “The Land Use Act has arguably exacerbated the stress on land caused by population increase, and increased the risk of long-term soil and environmental degradation.”¹⁶⁶

The Land Use Act extinguishes rights in undeveloped urban land over .5 hectare and limits the ability of individuals to possess multiple plots of developed land.¹⁶⁷ It has been noted that valuable property is more likely to be registered than less valuable land – presumably because the perceived benefits of registration exceed the costs of operating with the system.¹⁶⁸

The system for registering land is seen as being inefficient, both because it is subject to rent seeking and because it is not capable of handling registrations efficiently, due to personnel shortages, poor training, and lack of equipment.¹⁶⁹ Registry offices often lack maps and other evidence of property boundaries. For these reasons, they may have difficulty validating evidence that is provided by claimants. Over time, the costs associated with registering property have risen significantly.¹⁷⁰

¹⁶⁵ See Douglas W. Allen, *Homesteading and Property Rights: Or, How the West was Really Won*, in *THE POLITICAL ECONOMY OF THE AMERICAN WEST*, (1994).

¹⁶⁶ Adedipe, *et. al*, *supra* note 44 at 10.

¹⁶⁷ Land Use Act, *supra* note 14 at § 10.

¹⁶⁸ Williams, *supra* note 142 at 593.

¹⁶⁹ *Id.* at 590.

¹⁷⁰ *Id.* at 592 notes: “In Oyo State, a revision of filing fees in 1984 by the Governor increased the cost of this procedure (filing for a certificate of occupancy) by 500 per cent from Nigerian 50 to 250.”

The many problems associated with the Land Use Act suggest that *de facto* property rights are quite insecure -- unless, perhaps, one has useful political connections. As a result of these limitations, individuals often skirt the *de jure* land law:

“The tedious legal and bureaucratic formalities required for allocation of land in accordance with the Act have resulted in threatening the very survival and efficacy of the Act. It is thus open knowledge that means of circumventing the spirit and letter of the Act are being actively sought.”¹⁷¹

As things currently stand in Plateau, a combination of barriers are working jointly to block the development of a smoothly functioning, legal real-property market. These myriad problems lead citizens to circumvent the strictures of the Act. Further, the perceived injustices of the system, coupled with ineffective enforcement by the state, may lead to a more serious problem – that of citizens taking “justice” into their own hands, pursuing strategies of violence over strategies of cooperative trading, which was the past property-rights norm.¹⁷²

Blocking the Evolution of Property Norms: An Analysis of the Problem

With this background in mind, we can consider some possible answers to the question of why violent conflict over property is plaguing Plateau state. As we have seen, a number

Fajemirokun, *supra* note 135 at 5 observes: “It is also noteworthy that the transaction costs for obtaining certificates of occupancy have become important sources of government revenues.”

¹⁷¹ Adedipe, *et. al.*, *supra* note 44 at 10. An example of “skirting” is the following: “Those who do choose to register any sale often take advantage of prevailing inadequacies in the administrative process. After payment is made for a plot of land, it is quite common to locate a lawyer for what can only be described as the appropriate “doctoring” of documents, mainly in order to convey the impression that the purchase was made prior to 29 March 1978, when such unregulated sales were still legal . . . Even when fraud is detected, the documents are not always rejected. Often such discrepancies simply provide one more avenue for bribery.” Williams, *supra* note 142 at 594.

¹⁷² See Anderson & McChesney, *supra* note 23 at 46-48.

of conflicts in Plateau involve Christian farmers and Muslim herders competing for fertile land. Rising population, increasing heterogeneity, and ineffective government enforcement combine to raise costs associated with negotiating property rights claims.¹⁷³ It appears that existing methods for managing conflict have failed: neither customary norms nor legislative mechanisms are sufficient to stop violent conflict. A close examination of the customary legal environment and the Land Use Act reveals that a gap likely exists between the two.¹⁷⁴ This gap may help explain why people in Plateau have turned to violence to solve property-rights disputes.

Evidence indicates that Plateau was settled by many small ethnic groups, who lived in relative isolation due to the geography of the region and group preference.¹⁷⁵ These groups developed a rich customary law with a wide-ranging set of property rights and contracting norms that allowed them to trade rights internally and also provided mechanisms for trading rights with strangers. Evidence indicates that relatively peaceful trading of property rights predominated and that resort to violence to settle property-rights claims was limited until fairly recently.¹⁷⁶

¹⁷³ *Id.* at 49-52.

¹⁷⁴ Discussing evolving property rights for agricultural land in Thailand, Gershon Feder and David Feeny write: “If private property rights are not viewed as legitimate or are not enforced adequately, de jure private property becomes de facto open access.” See Feder & Feeny, *supra* note 21 at 137. Open access resources, owned by no one, are oftentimes subject to destructive competition that results in the now famous “tragedy of the commons.” This may well be an important part of the problem in Plateau.

¹⁷⁵ See discussion *supra* at 21-22..

¹⁷⁶ See discussion *infra* at 43.

The variety of rights in land, and of contracting vehicles, is striking though by no means uncommon in communal property regimes.¹⁷⁷ This variety indicates a rich institutional response to the problem of internalizing externalities.¹⁷⁸ As we have seen, the traditional communal-property regime has lasted, despite the imposition of legislation by both the British and post-colonial governments that was designed to change the property-rights environment. The persistence of this system may be taken as evidence of the importance of protecting family-based relationships, of providing incentives to cooperate and coordinate production activities in a useful manner, and of effectively allocating resources.¹⁷⁹ Indigenous dispute resolution -- which was accessible, relatively inexpensive, and largely transparent -- may also have helped to spread information, promote cooperation, and lessen conflict within and between ethnic groups.¹⁸⁰

There is evidence from Plateau that rights to land existed on a continuum, from traditional communal property rights to tenure rights that looked very similar to freehold. Not surprisingly, more extensive rights existed in those areas where investment in land was high – as was the case, for example, with the Kofyars, who invested heavily in building terraces and in fertilizing their relatively scarce land.¹⁸¹

The thickness of the property-rights bundle that individuals held under customary law meant that individuals had increased opportunities to trade these rights and, in turn, to

¹⁷⁷ For a discussion of varied solutions to the problem of managing common property, *see generally* ELINOR OSTROM, *GOVERNING THE COMMONS* (1990).

¹⁷⁸ There is evidence that throughout Nigeria, the customary legal environment provided a great variety of contracting vehicles, private bargaining mechanisms, related to land tenure. *See generally*, T.O. ELIAS, *NIGERIAN LAND LAW AND CUSTOM* (1962).

¹⁷⁹ Cooter, *supra* note 16 at 4.

¹⁸⁰ Bohannon, *supra* note 50 at _____.

¹⁸¹ Netting, *supra* note 40 at 158-168.

benefit from expanded trading opportunities – so long as the rights were enforced. To the extent that individuals hold thicker, as opposed to thinner, bundles of property rights they will have increased opportunities to take advantage of dispersed local knowledge, pursue entrepreneurial opportunities, and gain from trade. A thicker bundle may indicate additional room to experiment, to try different approaches to solving allocation and use problems. In their isolated environment, the inhabitants of Plateau seem to have gained from broad trading of rights to lend, pledge, use, and borrow land.

The richness of the customary legal environment also indicates that the law was relatively elastic, responding to changing needs over time through an evolutionary process.¹⁸²

While communal property remained the norm in Plateau state, there was some movement, over time, towards more individualized tenure over land.¹⁸³ In a situation where the demand for land increases, either through changes in population or technology, one would expect to see a community respond by expending more resources in defining property rights and in moving from communal ownership toward more individualized tenure, in the form of sale or, its near-equivalent, unredeemed pledges.¹⁸⁴ Such a move is one way for previously homogeneous communities to deal with the costs of information asymmetries that arise as the network of contacts and potential trading partners increase.¹⁸⁵ In Plateau, individuals recognized the gains to be had from greater

¹⁸² See David E. Ault and Gilbert Rutman, *The Development of Individual Rights to Property in Tribal Africa*, 22 JOURNAL OF LAW AND ECONOMICS, No. 1 171 (Apr. 1979).

¹⁸³ See discussion *supra* at 18-19. See also, Demsetz, *supra* note 13 at 350 who notes: “I do not mean to assert or to deny that the adjustments in property rights which take place need be the result of a conscious endeavor to cope with new externality problems. These adjustments have arisen in Western societies largely as a result of gradual changes in social mores and in common law precedents.” We see evidence of a gradual shift in social mores, in favor of some individualization of tenure, in Nigeria also.

¹⁸⁴ See Demsetz, *supra* note 13 at [redacted] and Libecap, *supra* note 22 at 16-17.

¹⁸⁵ Feder & Feeny, *supra* note 21 at 140.

specification of property rights.¹⁸⁶ These unknown entrepreneurs “created” a new right – the right to sell property.¹⁸⁷ By accommodating this entrepreneurial activity, the indigenous legal system expanded options for allocating property rights.

Even limited evidence of the existence of land sales indicates that the indigenous legal system was evolving in response to a changing environment.¹⁸⁸ The use of the unredeemed pledge, for example, provides evidence of a shift toward increased individualization of tenure, and hence, an evolution of traditional communal-property norms. A movement towards greater individualization of land-tenure rights will occur when the marginal benefits of creating and enforcing the rights exceed the marginal costs associated with the new rights.¹⁸⁹

In Plateau, there is evidence that such a process was taking place in mid-20th century. In the case of the Kofyar people, Netting notes that:

“The Kofyar insist that every square inch of arable soil, both village and bush, has an owner, a single person to whom the land belongs and who alone may decide on its use. This is probably a direct outgrowth of intensive farming. Wherever land

¹⁸⁶ Martin Chanock, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, 32 JOURNAL OF AFRICAN HISTORY, No. 1 72 3 (1991) notes: “But one of the aspects of pressure on land, taking the area as a whole, was the growth of cash cropping. Those who were doing well wanted more land and were prepared to innovate with forms of tenure. Their response to scarcity was far from traditionalist.”

¹⁸⁷ The notion of the property-rights entrepreneur is found in *The Evolution of Property Rights*, Terry L. Anderson and Peter J. Hill in PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW, 119-122 (2002), and in THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER, (2004) by the same authors.

¹⁸⁸ Ault and Rutman, *supra* note 180 at 171 comment: “Tribal institutions governing land use and occupation respond to changes in economic conditions. As population pressure or the importance of commercial agriculture increases, changes in the land tenure system should result in a system that defines the individual rights to the land more clearly. As land becomes scarce in a communal system, private and social benefits will diverge unless the individual bears the full costs of his actions.”

¹⁸⁹ Anderson and Hill, *The Evolution of Property Rights*, *supra* note 13 at 119.

can be made to produce heavily and continuously over a long period of time, it increases in value to both the occupant and his heirs.”¹⁹⁰

With the Kofyar, both factors may have been at work, resulting in a distinctive institutional response to the issue of land allocation.

Another interesting example of the flexibility of the customary legal environment in Plateau state – one that promoted homogeneity and its attendant benefits by aligning property-rights expectations -- was the provision for incorporating, or adopting, “strangers” into kinship groups.¹⁹¹ The mechanism of allocating property to strangers in perpetuity was, in essence, a method for *inducing homogeneity* and thereby managing problems associated with heterogeneity.¹⁹²

The process typically began whenever a stranger allied him or herself to a member of the community and lived with that family, establishing a good reputation.¹⁹³ T.O. Elias notes: “The practice has almost always been that strangers would attach themselves to an influential person with whose family they would normally have been lodging for some period prior to a formal request being made on their behalf by their host.”¹⁹⁴ During this

¹⁹⁰ Netting, *supra* note 40 at 159.

¹⁹¹ Elias, *supra* note 176 at 107-109. There were a number of other methods, under African customary law, to facilitate the incorporation of strangers into a group. Discussing the ways in which group members acted to bring strangers within the fold of the group, T.O., Elias notes: “rules of hospitality, the protection of friends, inter-marriage, and inter-tribal associations, all of which generally make it possible for members of the group to plead the strangers’ cause in a vicarious capacity.” See Elias, *supra* note 44 at 106.

¹⁹² For example, the GAZETTEER notes: “Land for farming may be obtained by a stranger in East Mama on approaching the village-head and elders and no rent or payment is asked. In Kwarra and the Northern Mama villages a stranger, as a rule, is taken into some one’s house and then he shares the farm land of that householder.” GAZETTEERS, *supra* note 49 at 279.

¹⁹³ Elias, *supra* note 176 at 111.

¹⁹⁴ *Id.*

period the stranger absorbed the norms and expectations of the adoptive group.¹⁹⁵ The adoptive family monitored this process and also did their best to ensure that the stranger was trustworthy and otherwise a good “fit” for the group.¹⁹⁶ When the adoptive family was assured this was the case, the head of the family would intercede on the stranger’s behalf and ask for land (underutilized land had to be available). Presumably, the adoptive family had its own reputation on the line in such a process and so would monitor strangers with special care. Once an application for land was made, the chief would typically consent so long as:

“(1) the stranger should be of good report, (2) he should be ready and willing to obey the accepted social norms of the adoptive group and (3) he should have respect for and loyalty to the head chief as well as the elders of the community. Land granted so granted is held by strangers in perpetuity *in exactly the same way and subject to the like conditions* of customary tenure as bind the members of the owner-occupiers themselves.”¹⁹⁷

This process turned a stranger into a quasi-family member and encouraged the adopted person to align his or her expectations regarding the use and transfer of property with those of the group.¹⁹⁸ One effect was lower transactions costs of group coordination, cooperation, resource allocation, and use. Another effect was reduced future costs associated with monitoring and enforcing obligations.

¹⁹⁵ This process would develop a sense of reciprocal duties and rights within the group. As Bruce Benson, notes: “Reciprocities are the basic source both of the recognition of duty to obey law and of law enforcement in a customary law system. That is, individuals must “exchange” recognition of certain behavioral rules for their mutual benefit.” BRUCE BENSON, *THE ENTERPRISE OF LAW* 12 (19 90).

¹⁹⁶ Nobel Laureate George Stigler said, information [transaction] costs represent “the costs of transportation from ignorance to omniscience; and seldom can a trader afford to take the entire trip.” The stranger mechanism did not take adoptive families to omniscience, but moved them a good way from ignorance towards more complete knowledge of the stranger. George Stigler, *Imperfections in the capital market*, 73 *JOURNAL OF POLITICAL ECONOMY*, No. 3 291 (1967).

¹⁹⁷ Elias, *supra* note 176 at 111. Emphasis added.

¹⁹⁸ *Id.* at 109.

This mechanism reduced transactions costs associated with dealing with heterogeneous agents.¹⁹⁹ When the ability to engage in impersonal exchange is limited, this mechanism personalize property-rights trades.²⁰⁰ While the process is costly and slow, it is a step in the evolutionary process from personal to impersonal exchange. The customary-law principle for dealing with strangers can thus be seen as a way for outsiders to develop a reputation for trustworthiness with an unfamiliar group. This feature of the customary African law, while cumbersome, might have worked to solve the problem of increased heterogeneity while also managing to ensure better uses of resources that were being underutilized.²⁰¹

Preserving relative homogeneity, or inducing homogeneity, might have been an important strategy for these groups for several reasons. First, groups with higher levels of homogeneity can coordinate production and other activity in a less costly manner than can more heterogeneous groups.²⁰² For farmers working with rather primitive, labor-intensive technology, low-cost coordination would be valuable.²⁰³ More homogeneous groups are able to cooperate at less cost than are heterogeneous groups.²⁰⁴ Individuals

¹⁹⁹ See Jürg Niehans, *Transaction Costs*, *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* Vol. 4, 676 (1987) who says: “Transaction costs arise from the transfer of ownership or, more generally, of property rights. They are a concomitant of decentralized ownership rights, private property and exchange.” See generally Ronald H. Coase, *The Problem of Social Cost*, 3 *JOURNAL OF LAW AND ECONOMICS* 1-44 (1960).

²⁰⁰ See Douglass C. North, NOBEL PRIZE LECTURE (1993) available at <http://nobelprize.org/economics/laureates/1993/north-lecture.html>, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990), and Kevin A. McCabe, *Reciprocity and Social Order: What do experiments tell us about the failure of economic growth?* FORUM SERIES ON THE ROLE OF INSTITUTIONS IN PROMOTING ECONOMIC GROWTH, available at: <http://www.mercatus.org/pdf/materials/274.pdf>

²⁰¹ For a discussion of the effects of heterogeneity on property-rights contracting, see Libecap, *supra* note 22 at 22-23.

²⁰² Cooter, *supra* note 16 at ____.

²⁰³ Netting, *supra* note 40 at ____ . on how community helped each other.

²⁰⁴ Libecap, *supra* note ____ at ____.

within the group are likely to have repeated interactions with other group members. They may generate higher levels of goodwill and trust each other more.²⁰⁵

Transactions costs incurred by the homogeneous group are low, compared to costs incurred by heterogeneous groups, because the homogeneous group can more effectively rely on social norms to promote compliance.²⁰⁶ Higher cooperation levels means that fewer resources are spent defining, monitoring, and enforcing property rights. In Plateau, evidence from the 1930s and the 1960s suggests that violent conflict over property was relatively rare.²⁰⁷ Of particular interest is Robert Netting's observations of the relationship between the Kofyar and Fulani herdsmen in the 1960s:

The pastoral Fulani did not have access to Plateau pastures until after British pacification and the eradication of the tsetse fly. Several households now move up and down the Kofyar escarpment according to the season, and some others have settled in the lowlands. Their milk products find little market among the beer-drinking Kofya, but individuals compete in offering money and services to induce Fulani to camp on and thus manure their fields. With the exception of venturing freely to new farms on the plain and markets within a twenty-mile radius, Kofyar show little change in their tolerant relations with neighboring groups. Few of the strangers in their territory enter into direct competition with the Kofyar, and those who do, such as the Tiv filtering north from the Benue, are merely regarded with mild suspicion.²⁰⁸

²⁰⁵ Kevin A. McCabe and Vernon L. Smith, *Goodwill Accounting in Economic Exchange*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX*, G. Gigerenzer and R. Selten, eds. 319-340 (2001).

²⁰⁶ Libecap, *supra* note 19 at p. 144-45. See also, Niehaus, *supra* note 197 who says: "With increasing complexity, transaction costs tend to increase very rapidly. . . This is the basic reason for the emergence of market economies consisting of a network of bilateral exchanges. Politics may be interpreted as the arena in which multilateral transactions are typically made."

²⁰⁷ See discussion *supra* pages 24 to 25 and fn.19. Netting notes that "With land scarcity and individual tenure, and lacking any sort of survey or written records, it is obvious that the Kofyar should have land disputes." He goes on to say, "Relatively few disputes concerning land come before the courts, whether clam or village moots or the Native Authority courts officially administering customary law. In comparison with arguments over women, divorce, and the repayment of bride price, land cases make up less than 5 percent of the disputes heard before NA courts. My impression is that a good many of the disputes over land ownership may be settled by informal hearings in a local clan segment or a village." Netting, *supra* note 40 at 172.

²⁰⁸ Netting, *supra* note 40 at 53.

As Libecap notes, however, when groups become heterogeneous and have a limited history of interaction, they may need to turn to more formalized government institutions to define and enforce these rights.²⁰⁹

The lengthy and costly process for inducing homogeneity through adoption may be contrasted to the short-term loan, which serves as a means for allowing heterogeneous individuals limited access to valuable resources.²¹⁰ Compared with long-term loans or sales of real property, the short-term loan might also have lower transactions costs, particularly when resources are relatively abundant. The reason is that less is at stake. Parties to a short-term contract, therefore, likely spend fewer resources outlining rights and obligations. Monitoring costs also are lower (because of the shorter length of the contract and the fact that the stakes aren't very high). These lower monitoring costs mean lower transaction costs. Thus, in cases where problems of heterogeneity cannot easily be overcome -- such as most trades between animists and Muslims, Christians and Muslims, or Fulanis and Taroks -- the short-term loan under customary land law is a cost-effective contracting mechanism for trading property rights and allocating a resource.²¹¹

²⁰⁹ Libecap, *supra* note 19 at 145. See also, Ruth S. Meinzen-Dick and Rajendra Pradhan, *Legal Pluralism and Dynamic Property Rights*, 22 CAPRI WORKING PAPER, International Food Policy Research Institute, January, 2002 at 5, available at: <http://www.capri.cgiar.org/wp/capriwp21.asp>.

²¹⁰ This was a common way for herders to acquire temporary use of land as they moved from one location to another, grazing their animals. See Ezeomah, *supra* note 81 at 3.

²¹¹ Note however, that loans do generate disputes. The GAZETTEERS comments that while there were few disputes over property in the 1930s, those that did come to the attention of this colonial authority typically involved loans or leases. See GAZETTEERS, *supra* note 49 at 114.

This brings us to the problem of recent conflict in Plateau state. In Plateau, population size is increasing at the same time that population heterogeneity is increasing.²¹² A rise in population size places additional demands on the resource of land, raising its value. At the same time, increased heterogeneity leads to higher transactions costs when bargaining for land rights. In the absence of a viable enforcement mechanism, these costs escalate rapidly. The combination of poorly enforced rights, increasing competition, and the increasing heterogeneity of actors might lead to fewer property-rights trades and more violence.²¹³

As we have seen, the customary land law provided two methods for dealing with heterogeneous actors: a) adoption or b) the short-term loan. Until recently, herders used the short-term loan of land to acquire rights to graze and water livestock.²¹⁴ Such loans presented “no permanent loss of land to the customary owners.”²¹⁵ These loans provided benefits to both parties to the transaction: farmers had fields of stubble grazed and manured; herders had access to grazing grounds not otherwise open to them. The benefits of the system were such that one commentator says: “In the past 60 to 70 years relationships between herding and farming groups in the use of land for grazing and cultivation were generally friendly.”²¹⁶

As the desert spreads southward, limiting grazing and watering opportunities, herders from the north are moving into Plateau presumably seeking more permanent rights to

²¹² See, “Conflict in northern Nigeria more about land and livelihood than religion,” *supra* note 11.

²¹³ See Anderson & McChesney, *supra* note 23 at 49-52.

²¹⁴ See Ezeomah, *supra* note 81 at 3.

²¹⁵ *Id.*

²¹⁶ Ezeomah, *supra* note 81 at 5.

such resources.²¹⁷ At the same time, as the population of settled farmers increases, there is an increase in the demand for farmland.²¹⁸ The two demands clash. Under the customary law, these heterogeneous parties could turn to the short-term loan to allocate grazing and watering rights. However, this kind of temporary solution might no longer be workable if the rising value of property gives short-term lessees incentives to breach the contract and remain on the land.

In such situations, the customary-law mechanism of “adopting” strangers should come into play. However, this customary mechanism, which worked effectively to incorporate small numbers of strangers, might simply be too cumbersome and too slow to incorporate larger groups of strangers. As a result, we expect to see movement towards increased individualization of tenure, as the older mechanism proves incapable of managing the double shock of increasing population and increasing heterogeneity. In other words, we expect to see the customary law adopt and allow for increased use of the sale of property.

However, this movement is blocked by the Land Use Act. Furthermore, the Act itself likely promotes tenure insecurity.²¹⁹ As the value of land increases, people holding insecure property rights will seek ways to make their rights more secure. Indeed, under

²¹⁷ “Plateau State has an estimated cattle population of 1.07 million in the hands of Fulani nomads . . . The rapid growth of cattle population on the Jos Plateau has resulted in over-grazing and very stiff competition for land between sedentary farmers and nomadic Fulanis which is often expressed in violent clashes between the two groups.” See *Natural Resources and Development*, ONLINE NIGERIA available at <http://www.onlinenigeria.com/links/LinksReadPrintasp?blurb=464>.

²¹⁸ In 1978 the number of hectares in crop cultivation in Plateau was 883,221. By 1987 the number had increased to 1,099,842, which represents a 24.5% increase. See PLATEAU STATE STATISTICAL YEAR BOOK, Department of Planning, Statistics Section, Jos, Nigeria, Table 15 at 19 (1981-1987).

²¹⁹ Fajemirokun, *supra* note 135 at 6. See also, Knox, *supra* note 140 at 110, who notes: “The legislation (the Land Use Decree) has been fraught with problems, not the least of which has been heightened tenure insecurity emanating from the government’s liberal use of its compulsory acquisition right and general public confusion over the law’s provisions.”

the Land Use Act, herders have a special incentive to assert claims to property because, under the statute, they may seek rights to as many as 5,000 hectares of land, while farmers may only seek a maximum of 500 acres.²²⁰ Thus herders have an opportunity to capture a large share of the rents associated with rising property value in the Plateau area.

The Land Use Act might also limit opportunities for cooperative indigenous dispute resolution. Previous institutional arrangements gave local leaders significant voice in dispute resolution over property rights. The process created by the LUA allows a much more limited role for such leaders – that of providing evidentiary material. This role is surely useful, however, it means that current decision makers are not accountable to the community in the way that a local leader would be. Also, it is presumably, more difficult and costly to negotiate or renegotiate land-use rights in the form of certificates of occupancy with government officials, who have significant bargaining power vis-à-vis applicants and can thus hold out for bribes. If this the hold out problem is real, as Williams argues, then renegotiations in response to changes in the environment are also more costly and take place less frequently than they would under a customary regime.²²¹

Government will normally provide increased clarification of property rights and enforcement when property values rise and heterogeneity increases.²²² However, if government attempts to define and enforce rights fail, then people have few options other than to skirt formal *de jure* processes. In Plateau, both settled farmers and incoming herders have insecure property rights under the current amalgamation of customary law

²²⁰ Land Use Act, *supra* note 14 at Article 6 (2).

²²¹ Meinzer-Dick and Pradhan, *supra* note 207 at 15 and Williams, *supra* note 162.

²²² Libecap, *supra* note 19 at 144-45.

and land-use legislation.²²³ The value of the land around these groups is rising, so members of each seek to capture the rents associated with this rise in value, by excluding members of the other. Corrupt government institutions provide no real alternative for conflict resolution, and the older customary system might be unable to process this level of change.²²⁴ In such a situation, the cost of resorting to violence might be perceived as lower than the cost of negotiating a peaceful transfer of property rights.²²⁵

By formalizing and centralizing decision-making about land use and land occupancy, the Nigerian government blocked the continued evolutionary development of customary land law. The Act replaces indigenous dispute-resolution institutions with bureaucratized, corrupt government institutions. Rather than rely on decentralized legal decision making, the Land Use Act creates a formalized and centralized system that is expensive for individuals to use. This system therefore, reduces experimentation in legal problem solving, and it leads to decreased jurisdictional competition. The system seems to be riddled with problems: time-consuming process, costliness, corruption, favoritism, and inaccessibility for citizens living in rural areas.

Legislation, such as the Land Use Act, might be less elastic and less responsive to community needs than the customary law because it is removed from individuals who

²²³ See, *Conflict in northern Nigeria*, *supra* note 11, and *Nigeria Country Profile*, *supra* note 30 at 110.

²²⁴ Meinzen-Dick and Pradhan note: "In some contexts of social and political change, legal pluralism [i.e., situations in which various legal systems, such as statutory law, customary law, religious law, and local norms, overlap] can increase uncertainty for local resource users. This is especially seen when statutory law does not recognize customary rights, and those with greater political connections, knowledge of state law, or access to the courts uses (sic) state law to override customary rights, in order to capture resources." Meinzen-Dick and Pradhan, *supra* note 207 at 13.

²²⁵ See generally, Anderson and McChesney, *supra* note 23 and see generally, John Umbeck, *Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights*, 19 ECONOMIC INQUIRY, No. 1 38-59 (1981).

hold dispersed local knowledge of each dispute -- i.e., the disputants -- and the potential impacts of a variety of judgments. By taking land-use decision-making out of the hands of local leaders – representatives of homogeneous groups – the Land Use Act removes the incentives members of these groups develop to communicate knowledge, coordinate activities, and cooperate. The Land Use Act, in effect, promotes the heterogenization of relations.

The Act blocks the development of a market in land sales, forcing individuals to rely on government officials to allocate this resource. This blockage limits development of impersonal exchange, and keeps property/land relations in a state of personal exchange but importantly, without the enforcement mechanisms that existed under customary law. Thus, the Land Use Act fails to solve problems associated with heterogeneous agents while at the same time outlawing sale of land -- the contractual mechanism that is best suited for managing property-rights relations among such individuals.²²⁶

The result is that compared to the customary system, the Land Use Act increases transaction costs. No longer can individuals and groups rely on social norms to ensure compliance with property rights. Rather, individuals must rely on the state to define, monitor, and enforce these rights. Significantly, however, the Nigerian state often fails in this essential function:

“In light of the pattern of violence in Plateau State over recent months, with each community seeking to avenge attacks by their opponents, the latest outbreak should have come as no surprise to federal and state authorities,” said [Peter] Takirambudde* . . . `Yet the Nigerian government took no action to preempt the massacre. The government’s neglect of the situation in Plateau over the last three

²²⁶ Cooter, *supra* note 16 at 4.

years has resulted in an endless cycle of revenge,' Takirambudde said. 'Not only have the police been unwilling or unable to stop the fighting, but the government has not taken responsibility for finding a lasting solution to the crisis.'"²²⁷

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In Nigeria, the state is considered to be highly corrupt, and state officials often fail to enforce and protect property rights.²²⁸ The judiciary is not considered to be impartial.²²⁹

Because the public sector is so corrupt, individuals must rely more heavily on personal exchange and personal influence to accomplish their goals. Such reliance might be more difficult in Nigeria because the old customary norms designed to smooth relations among individuals in dealings over land are superseded by the Land Use Act. No longer are village headmen, chiefs, or *obas* able to facilitate the incorporation of outsiders into the group or make land-use decisions based on their local knowledge. Yet, people do not have reliable access to government decision makers. Thus, disputes over land allocation and land use issues may be left to individuals to resolve – and individuals might turn to violence as their only meaningful method for asserting property claims.

With regard to land, the Land Use Act places primary responsibility for managing the land-allocation decisions with state governors and, as Transparency International's 2003 report on Nigeria states: "[A]lthough Nigeria is a federation of states, there has been

²²⁷ *Nigeria: Prevent Further Bloodshed*, *supra* note 6.

²²⁸ *See Nigeria*, *supra* note 20.

²²⁹ For an assessment of the state of the judiciary and the court system in Nigeria *see Assessment of Justice System Integrity and Capacity in three Nigerian States*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, (May 2004), which discusses, among other issues, low levels of public trust in Nigeria's courts, a declining willingness on the part of citizens to use the courts, a concern over a lack of judicial independence, concerns over lengthy, slow and costly process, and concerns over corruption, especially among clerks of courts available at http://www.unodc.org/pdf/crime/corruption/Justice_Sector_Assessment_2004.pdf. *See also, Nigeria*, *supra* note 226 at 227.

virtually no independent, anti-corruption effort by any of the states or by local government.”²³⁰ This situation bodes especially ill for land issues.

Further, government courts might be less accessible – because they are viewed as corrupt, costly, and far away -- than customary courts. These government courts might also be less transparent. These problems are particularly difficult for the poor and less well educated to manage. In a 2004 report on judicial integrity in Nigeria, the United National Office on Drugs and Crimes says:

Significant differences were found regarding the experiences and perceptions of respondents with different socio-economic and demographic characteristics. In particular the less privileged, both in terms of monetary means and educational background as well as the ethnic minorities tended to have worse experiences and perceptions of the justice system . . . Further, the poor and uneducated were more likely to experience delays in justice delivery . . . women, the poor as well as ethnic minorities experienced and perceived lower quality of justice delivery . . . ethnic minorities as well as the poor tended to have less trust in judiciary.²³¹

As individuals face increasing conflict over land, they suffer from a costly system for resolving disputes over land. Indeed, the system might well be perceived as so costly that individuals resort to violence in order to lay effective *de facto* claims to an increasingly valuable resource – land.²³²

Conclusion

At first glance the increased violence in Plateau State over property-rights allocations is puzzling. Why, in the home of “Peace and Tourism,” are thousands of people dying

²³⁰ *Nigeria*, supra note 226 at 226.

²³¹ *Assessment of Justice System Integrity*, supra note 227 at 29.

²³² See Anderson & McChesney supra note 23 at ____.

because of property disputes? The recognition that changing conditions, both exogenous and endogenous, create incentives that perhaps lead people to resort to violence rather than peaceful trade, helps piece this puzzle together. An increasing, and increasingly heterogeneous, population is demanding access to a scarce resource -- land. This rising demand raises land values. It is more costly for the citizens of Plateau to come together peacefully to trade these rights because of the increased transaction costs associated with greater heterogeneity and because the institutional process for trading rights, created by the Land Use Act, is also costly. These problems, coupled with tenure insecurity and poor enforcement of rights might lead to lower levels of peaceful trade and, in turn, increased violence.

The Land Use Act significantly restricts individual's abilities to trade property rights in land. Even if peaceful trade does take place, as it no doubt does, there remains a risk that such rights might be taken by predatory private or public action. The result is increased insecurity of tenure. Not only is there increased tenure insecurity in Plateau, there is a failure of the state government to enforce rights and to manage violence associated with violations of rights.

The result is that the Land Use Act has blocked legal evolution that would normally allow for greater individualization of tenure rights in Plateau state. People cannot buy and sell land in a decentralized market place, they can only legally acquire and transfer rights through a political process that is deeply corrupted. The result is that as certain land in Plateau becomes more valuable, because of internal migrations and increasing

population, citizens face extremely costly process for establishing rights in land. This paper suggests that these costs might now be so high that people are foregoing the mechanisms of the Land Use Act, opting instead to take the law into their own hands in an attempt to establish rights by private force. Unless and until the incentive structure regarding the transfer of land rights in Plateau (and throughout Nigeria) is changed to promote peaceful transfer over violence, the problems of Yelwa and Jos are likely to continue. Nigeria's leaders should take Robert Cooter's advice into consideration as they ponder how to return Plateau to its previously peaceful state:

Central authorities should aim for the modest goals of removing obstacles to economic opportunity, rather than trying to dictate the pace and direction of development Uncertainty over property rights can only be removed through the evolution of customary law and the registration of customary boundaries.²³³

²³³ Cooter, *supra* note 16 at 7.