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# UNINTENDED CONSEQUENCES OF LEGAL WESTERNIZATION IN NIGER: HARMING CONTEMPORARY SLAVES BY RECONCEPTUALIZING PROPERTY

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# **UNINTENDED CONSEQUENCES OF LEGAL WESTERNIZATION IN NIGER: HARMING CONTEMPORARY SLAVES BY RECONCEPTUALIZING PROPERTY**

**Thomas Kelley, UNC-Chapel Hill School of Law**

## **Introduction**

Slaves living today in the Republic of Niger are being harmed by that country's aggressive program of legal westernization. Nigerien law reformers and their Western<sup>1</sup> sponsors have inadvertently disadvantaged the slaves by passing laws that institute private property ownership, a legal concept that had been known to Niger's rural citizens but never fully embraced by them. This paper will describe how the transition to private property has exacerbated the plight of Niger's slaves, and will draw upon their experience to call for a different approach to legal westernization in Niger and across the developing world.

Niger is not the only poor country struggling through the process of legal westernization, and this is not the only historical epoch in which such Western-inspired law reform has taken place. Since the middle of the 20<sup>th</sup> century, developing nations have been guided by the West through successive waves of law reform.<sup>2</sup> The first wave in the 1960s saw Western legal experts – mostly Americans – fanning across Africa and

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<sup>1</sup> The "West" refers to European and North American donor countries and the international institutions they control, most notably the United Nations, the World Bank, and the International Monetary Fund. Non-Western countries such as China and Libya also wield power in Niger. However, those countries' agendas have not focused on law reform, leading me to disregard them for purposes of this project.

<sup>2</sup> See JAMES A. GARDNER, LEGAL IMPERIALISM, AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8 (1980) (referring to "legal missionaries" from the U.S. who disbursed across Africa in the 1960s); see also Leonardo A. Villalon & Abdourahamane Idrissa, *Repetitive Breakdowns and a Decade of Experimentation, Institutional Choices and Unstable Democracy in Niger*, in THE FATE OF AFRICA'S DEMOCRATIC EXPERIMENTS, ELITES AND INSTITUTIONS 27 (Leonardo A. Villalon & Peter VonDoepp, eds., 2005) (referring to a recent "world-wide wave" of pro-democracy agitation).

the developing world to help newly independent nations establish modern legal systems that in theory would lead to political stability and economic development.<sup>3</sup> The results of this so-called Law and Development movement were not encouraging, and a body of critical literature arose that assigned blame to, among other things, the naivety and ethnocentrism of the Western legal experts.<sup>4</sup> Most post-independence efforts at modernizing and westernizing African legal systems sputtered, militaries seized power, and law in those countries became whatever its strongman rulers decreed.<sup>5</sup>

A new wave of Western-inspired African law reform began in the early 1990s after the fall of the Berlin Wall and the end of the Cold War.<sup>6</sup> The African strongmen could no longer count on unquestioning and uncritical financial support by playing the Western and Eastern blocs off of one another and, according to the new rules of the

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<sup>3</sup> See Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFAIRS 95, 97 (1998) (arguing that rule of law reforms are intended to “consolidate both democracy and market economics”).

<sup>4</sup> GARDNER, *supra* note 2, at 8-9; see David M. Trubek, *Toward a Social Theory of Law: an Essay on the Study of Law and Development*, 82 YALE L. J. 1, 2, 4, 16 (1972) (arguing the law and development movement failed because of a “core conception of modern law” as an “ethnocentric and evolutionist generalization from Western history,” which “cannot deal effectively with the realities of legal life in the Third World”); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977) (blaming the law and development failure on, among other things, “unfamiliarity with the target culture and society”); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L.R. 1062, 1073, 1079-80 (arguing law and development reformers were too rooted in their own liberal American political philosophy); Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L.R. 597, 602 (noting that many constitutional reforms acted merely to “guarantee the ill-gotten gains of colonial settlers over the historic rights of the colonially dispossessed”); Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 107-108 (2004) (blaming the failure on lack of resources, a lack of norms hospitable to the “rule of law” and a political economy of entrenched interests that oppose democratic reform).

<sup>5</sup> See Peter VonDoepp & Leonardo A. Villalon, *Elites, Institutions, and the Varied Trajectories of Africa’s Third Wave Democracies*, in THE FATE OF AFRICA’S DEMOCRATIC EXPERIMENTS at ; Thomas Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 GEO. WASH. INT’L L. R. \_\_ (2007).

<sup>6</sup> VonDoepp & Villalon, *supra* note 5, at 1; see Klug, *supra* note 4, at 602 (stating the end of the Cold War “witnessed a wave of constitution making”); Carothers, *supra* note 3, at 95, 103 (noting law reform in developing countries has mushroomed and is “enjoying a new run as a rising imperative of globalization”).

game, only nations on the road to democracy and rule of law would be favored with aid.<sup>7</sup> The West dispatched new teams of legal experts to Africa, this time including many from European countries.<sup>8</sup> By and large, their work has been to draft new constitutions, write new laws, and reform legal institutions, all in the image of the United States and Europe.<sup>9</sup> Niger, which spent most of its post-independence history as a military dictatorship,<sup>10</sup> was among the countries swept up in this wave of the 1990s.

The new wave of legal westernization has included an intense focus on the establishment of Western-style private property rights in poor countries. Law reformers and international development experts have adopted as a guiding principle the theory that poor countries can rise with the economic tide of globalization and grow their way out of poverty if, and only if, they provide citizens with consistent, predictable, and enforceable rights in private property.<sup>11</sup>

According to this theory, poor countries such as Niger remain poor because their citizens lack secure rights in their own property, and therefore cannot convert their property into productive capital.<sup>12</sup> The Third World entrepreneur cannot pledge his

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<sup>7</sup>See Leonardo A. Villalon, *The Moral and Political in African Democratization: the 'Code de la Famille' in Niger's Troubled Transition*, 3 DEMOCRATIZATION 41, 44, 61-63 (1996) (noting that in Niger the transition to democracy and rule of law has been heavily influenced by the U.S. and other Western countries, in part by employing the leverage afforded by their financial resources).

<sup>8</sup>See generally *Mission D'Analyse et de Formulation du Cadre General du Processus de Reformes et du Programme d'appui aux Reformes Judiciare au Niger*, KR-1994 (2003) [hereinafter *Mission d'Analyse*] (a comprehensive plan for legal reform drafted in cooperation with French, German, and Danish legal experts); see also Klug, *supra* note 4, at 615 (referring to a new wave of Western lawyers engaged in "an orgy of junketeering to far-off places").

<sup>9</sup>See Carothers, *supra* note 3, at 95-96 (stating recent law reform has involved "rewriting constitutions, laws, and regulations," in addition to "far-reaching [legal] institutional reform").

<sup>10</sup>Villalon, *supra* note 7, at 45.

<sup>11</sup>See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL, WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); see also The World Bank, *Building Institutions for Markets*, 34-38 (2002) (discussing the importance of secure property rights and formal land titles); Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. LAW 183, 184 (spring 1995) (noting that the United States Agency for International Development and the World Bank have strongly promoted land titling and registration as a core development strategy).

<sup>12</sup>DE SOTO, *supra* note 11, at 52.

house as collateral for a business loan, nor can the farmer pledge his agricultural land to buy fertilizer or a tractor because neither can produce a secure and enforceable deed to his property.<sup>13</sup> Without such a deed, and in the broader context of an unpredictable and inconsistent legal framework, investment is unacceptably risky.<sup>14</sup> The solution to this problem, one that will lead inexorably to economic and social development, is the establishment of unified, consistent, nationwide systems of private property ownership and registration, allowing property owners to revive their “dead” capital and generate surplus value from their assets.<sup>15</sup> According to proponents of this property-focused theory of development, the cultural diversity of Third World nations does not detract from the thesis because all the world’s people – no matter their cultural particularities – are entrepreneurial and anxious to gain firm control of their capital so they that they can build wealth.<sup>16</sup>

Not everyone agrees that the key to Third World development is drafting laws that secure private property rights. Some argue that such a focus ignores other important variables retarding development, such as the political power structure of the particular country, or the unavailability of surplus agricultural labor.<sup>17</sup> Others point to empirical studies of early efforts at property privatization concluding that few of the predicted economic benefits actually materialized.<sup>18</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 55.

<sup>16</sup> *See id.* at 4.

<sup>17</sup> *See, e.g.,* Jonathan Manders, *Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto* (Student Note), 37 CORNELL IN’L L.J. 177, 184 (2004).

<sup>18</sup> *See generally* Hendrix, *supra* note 11, at 183. In recent decades legal and economic scholars have disagreed as to whether customary land tenure schemes are in fact insecure and whether they can rightly be blamed for retarding economic expansion and whether land privatization in fact creates economic and social advantages. In 1975, the World Bank issued a Land Reform Policy Paper insisting that formal land titling was a precondition for economic development. WORLD BANK, LAND REFORM (Policy Paper No. 11018, May 1975), *available at* <http://www->

This paper will not attempt to resolve that question. It will assume that Western-style property laws will be at the heart of law reform and development efforts – in Niger and elsewhere – for the foreseeable future.<sup>19</sup> The paper’s contribution will be to demonstrate that the current approach to legal westernization, particularly the focus on privatization of property, is flawed because it fails to take into account indigenous cultural and legal conceptions. It will depart from usual critiques of law reform in the developing world in that it will construct much of its argument upon direct observation<sup>20</sup> of how new Western laws and legal concepts are affecting poor, non-Western people.

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wds.worldbank.org/servlet/WDS\_IBank\_Servlet?pcont=details&eid=000178830\_98101911122064. The notion, which was based on Hardin’s tragedy of the commons thesis, Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968), was that countries could develop only if so-called “community property,” prevalent in Africa and much of the developing world, was formally divided into securely titled, individual freeholds. However, more recent empirical scholarship has called the entire hypothesis into question. Some have found that factors other than lack of formal ownership and land titles, factors such as shortage of labor and lack of education are impeding economic growth. In the mid-1990s, the World Bank began to back away from its insistence that a freehold land tenure was a prerequisite to economic development, but that view has continued to influence state policy across Africa. See Julian Quan, *Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa*, in EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA 31, 34-38 (Camilla Toulmin & Julian Quan eds., 2000); Jean-Philippe Platteau, *Does Africa Need Land Reform?*, in EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA, *supra*, at 51, 56; Shem E. Migot-Adholla & John Bruce, *Are Indigenous African Tenure Systems Insecure?*, in SEARCHING FOR LAND TENURE SECURITY IN AFRICA 1, 4-8 (Shem E. Migot-Adholla & John Bruce eds., 1994); John W. Bruce, Shem E. Migot-Adholla & Joan Atherton, *The Findings and Their Policy Implications: Institutional Adaptation or Replacement*, in SEARCHING FOR LAND TENURE SECURITY, *supra*, at 251-64.

<sup>19</sup> See Republic of Niger, Office of the Prime Minister, Permanent Secretariat for the Poverty Reduction Strategy, *Threshold Program – Millennium Challenge Corporation Action Plan (Translated English Version)*, May 2007, pp. 26-44 [hereinafter *Niger Millennium Challenge Report 2007*] (copy on file with author) (describing the regularization of land rights as one of three pillars of the Millennium Challenge Corporation program for Niger).

<sup>20</sup> My field research on law reform in Niger took place during year-long stay in 2003-2004, during which time I observed and performed interviews in five slave communities and gathered second-hand accounts of approximately fifteen others. I also have benefited from numerous accounts of contemporary slavery gathered by Timidria, Niger’s leading anti-slavery human rights organization. See, e.g., Alhamdou Intalla, “*Litige de Champ*” a Intoussan (Abala-Filingue), LETTRE DE TIMIDRIA, July 2004, at p. 6 (copy on file with author) (reporting nobles selling land traditionally cultivated by slaves); Timidria, LETTRE DE TIMIDRIA, March 2004, at pp. 5-6 (copy on file with author) (recounting nobles selling slave lands with the complicity of the local Land Commission); Timidria, LETTRE DE TIMIDRIA, March, 2007, at p. 2 (copy on file with author) (recounting a story of nobles reclaiming land traditionally farmed by slaves); see generally Abdourahaman Chairbou & Mahaman Nanzir, *Etat Des Dossiers de Timidria Suivis Par Maitre Abdourahaman Chaibou, Avocat a la Cour a la Date du 26 Decembre 2006* (copy on file with author) (a report from a Niamey law office listing its representation of Timidria in nine separate legal cases involving nobles seizing or selling land from under traditional slaves).

For a rare example of a scholar who has spent time in the African hinterlands performing fieldwork on the effects of Western law reform, see CHRISTIAN LUND, *LAW, POWER AND POLITICS IN NIGER: LAND STRUGGLES AND THE RURAL CODE* (1988).

Those people are slaves in Niger, and their experiences will provide dramatic examples of the harm that can result when Western legal reformers bungle into a country they do not understand and plunk down pre-fabricated Western laws.<sup>21</sup>

The paper will begin in Part I with the step that Western law reformers seem always to skip: it will explore aspects of the culture and law that existed on the ground in Niger before Western law reforms were introduced. It will focus on two aspects of traditional Nigerien culture and law – land tenure and slavery – paying particular attention to the indigenous property concepts embedded in each. Part II of the paper will introduce and analyze Niger’s new Western land tenures law and anti-slavery laws, and will show how they have imported unfamiliar conceptions of private property. Part III will describe the harm that slaves are suffering as the new laws impose a culturally novel conception of private property on them, and will illustrate that harm with case studies from three contemporary slave communities. Although the paper does not attempt to formulate a comprehensive solution for the problem it identifies, Part IV will offer general policy suggestions for Niger as well as commentary on future efforts at legal westernization in the developing world. In spite of the paper’s observation that legal westernization is harming innocent, powerless people in Niger, it will not conclude that all efforts to westernize and modernize Third World legal systems are wrong; rather, that legal westernization could be carried out more wisely and effectively.

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<sup>21</sup> See STEPHEN GOLUB, BEYOND RULE OF LAW ORTHODOXY, THE LEGAL EMPOWERMENT ALTERNATIVE, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE WORKING PAPER (No. 41, October, 2003), p. 25 (critiquing recent law reform efforts in the developing world and calling for law reformers to “tromp around in the boondocks” of poor countries before writing new laws for them); GARDNER, *supra* note 2, at 8-9 (arguing Western law reformers arrived in the developing world “unencumbered by any significant understanding of the local language, law, polity, economy, or culture” and as a result were “inept, culturally unaware, sociologically uninformed . . . [and] ethnocentric.”); Merryman, *supra* note 4, at 480 (stating Western lawyers often blundered in to the top rungs of foreign society without understanding what was going on below).

# **I. Niger Before Legal Westernization: Demographic Challenges, Customary Land Tenure Rules, and Lingering Slavery Traditions**

## **A. Demographic Challenges**

The Republic of Niger has four major ethnic groups – Hausa (56%), Zarma (22%), Fulani (8.5%), and Tuareg (8%)<sup>22</sup> – each with its own language, history, and set of cultural and legal traditions. This paper will draw insight and examples primarily from among the Zarma people for the simple reason that I speak their language and have undertaken most of my fieldwork in the southwestern part of the country where they live.<sup>23</sup>

Niger is a large,<sup>24</sup> hot,<sup>25</sup> landlocked, desperately poor country that ranks dead last in the United Nations' Human Development Index.<sup>26</sup> Its population stands at approximately 13 million,<sup>27</sup> while its fertility rate (7.9 children per woman) and its population growth rate (3.3%) are among the highest in the world.<sup>28</sup> This rapidly

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<sup>22</sup> BUREAU OF AFRICAN AFFAIRS, U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: NIGER (March 2005), available at <http://www.state.gov/r/pa/ei/bgn/5474.htm> [hereinafter NIGER BACKGROUND NOTE 2005].

<sup>23</sup> I developed a basic command of the Zarma language during Peace Corps service in a small, rural village from 1986-1988. I am aware of the perils of making sweeping, reductive generalizations about “Nigerien culture and tradition,” or, worse yet “African culture and tradition,” based on intimate knowledge of only one of its ethnic groups. My intent is to proceed inductively, offering a detailed analysis of the clash between Western and Zarma linguistic, cultural and legal conceptions that will concretely illustrate the complexity of exporting Western law. Based on those specific examples, I will extrapolate more general conclusions to the boundaries of Niger and beyond.

<sup>24</sup> NIGER BACKGROUND NOTE 2005, *supra* note 22 (estimating Niger is three times the size of California).

<sup>25</sup> *Id.* (noting that two thirds of Niger is in the Sahara Desert).

<sup>26</sup> U.N. DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2005 NIGER COUNTRY FACT SHEET (2005), available at [hdr.undp.org/statistics/data/country\\_fact\\_sheets/cty\\_fs\\_NER.html](http://hdr.undp.org/statistics/data/country_fact_sheets/cty_fs_NER.html) [hereinafter U.N. DEVELOPMENT REPORT 2005] (noting among other things that a majority of Niger's people lives on less than \$1 per day, 85% live on less than \$2).

<sup>27</sup> *Id.*; see also U.S. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK: NIGER (2006), available at <http://www.cia.gov/cia/publications/factbook/geos/ng.html> [hereinafter CIA WORLD FACTBOOK 2006] (estimating the population at 12.5 million).

<sup>28</sup> U.N. DEVELOPMENT REPORT 2005, *supra* note 26.



expanding population must compete for a scant pool of natural resources<sup>29</sup> including a critically short supply of arable land.<sup>30</sup> The vast majority of Niger's citizens are subsistence farmers, which means that if they lose access to agricultural land – something we later will learn is happening to Niger's slaves as a result of legal westernization – they will not be able to feed themselves.

This barebones statistical description of Niger is what a Western legal expert might garner from the internet. This paper, however, argues that sound law reform must be based on more than surface knowledge of the subject country. Therefore, we will explore in detail two aspects of Nigerien culture that are being profoundly altered by Western law reform: land tenure and slavery.

#### B. Traditional Land Tenure in Niger

Traditional land tenure is a shorthand term that refers to a complex and dynamic set of traditions and practices related to land use.<sup>31</sup> Because such practices are evolving, fluid and negotiable, and because they vary by region and ethnic group, any attempt at description must be taken as a mere snapshot of an evolving social and cultural institution. One thing that can be said with certainty, however, is that traditional land tenure customs in Niger are not constructed upon the Western legal concept of private ownership.

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29 WORLD BANK, NIGER COUNTRY BRIEF (September 2004), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGEREXTN/0,,menuPK%3A382460~pagePK%3A141132~piPK%3A141107~theSitePK> (stating Niger possesses no significant mineral deposits other than uranium); *but see* NIGER BACKGROUND NOTE 2005, *supra* note 22 (stating Niger has some exploitable gold deposits and potential for oil exploration).

<sup>30</sup> WORLD BANK, NIGER COUNTRY BRIEF, *supra* note 29; *see* CIA WORLD FACTBOOK 2006, *supra* note 27 (saying 90% of Niger's population works in agriculture and mentioning Niger's environmental challenges of overgrazing, soil erosion, deforestation and desertification).

<sup>31</sup> Christian Lund, *Struggles for Land and Political Power: On the Politicization of Land Tenure and Disputes in Niger*, 40 J. LEGAL PLURALISM & UNOFFICIAL L. 3, 4 (1998).

In the not distant past, access to agricultural land in Niger depended almost entirely on a man's<sup>32</sup> stage in life and status within his community. As a child (*zanka*) he would have no control over any land and would be expected to work in the family fields and contribute to the commonweal. As a young bachelor approaching marriageable age (*arwasu*) he would continue to work in the extended family's fields under elder males' direction, but those elder males would set aside a small plot of land (*kurga*) for him, which he would cultivate in the evenings and on rest days to earn money for a bride payment. After marrying and establishing his own family, the elder males of his lineage would expand his *kurga* into a full sized field, or *fari*. He would cultivate that full-sized field, still under the general guidance of his father and other elder males of the lineage, and in so doing, would achieve the status of *alfari*, which means farmer but also connotes a respected, responsible adult. Ultimately, as the man's beard grayed and his own sons matured, he would achieve the status of *dotigi*, or respected elder, and would, in consultation with other *dotigi* of his family lineage, make land available to the next generation of males.

The use rights granted to younger men were generally predictable and stable, but they always were subject to the needs of the larger group. If for example, a young man absented himself from the village for an extended time, the elder males could limit or extinguish his right to continue cultivating a particular plot.<sup>33</sup> If a plot of land needed to

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<sup>32</sup> In Zarma culture women do not inherit land. This is so even in Zarma communities that claim to follow Islamic *sharia* law, which grants female children a ½ share of land as compared to their male siblings. See David S. Powers, *The Islamic Family Endowment (Waaqf)*, 32 VAND. L. J TRANSNAT'L L. 1167, 1169 (1999).

<sup>33</sup> Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U J. INT'L L & POL. 635, 682 n. 176 (Spring 2002)

be ceded to a neighboring village to resolve a dispute, the elder males could do so, trumping a younger man's presumptive use right.<sup>34</sup>

Although elder males controlled and mediated access to agricultural land, their power sprang from and was subject to the authority of the *laabu koy*, or land chief,<sup>35</sup> whose role was to ensure that mortals' use of the land would not offend its original inhabitants, the *gangi bi*, or black spirits.<sup>36</sup> If the spirits were offended, they could visit all manner of misfortune on the community: sickness, drought, pestilence, and locusts, to name a few.<sup>37</sup> Thus, under traditional Nigerien land tenure customs, a man received use rights from the males of the previous generations, but that man could never be said to own the land because his use rights were subject to the needs of the community (including the spirits who were the original owners), as mediated through the offices of the community elders and the *laabu koy*.<sup>38</sup>

In the 1960s, with the growing influence of Islam and French Civil Law, both of which favor inheritance of land within nuclear families,<sup>39</sup> there began a gradual cultural shift toward farmers viewing themselves as something more than merely the users of

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<sup>34</sup> See *id.*

<sup>35</sup> PAUL STOLLER, FUSION OF THE WORLDS: AN ETHNOGRAPHY OF POSSESSION AMONG THE SONGHAY OF NIGER 27 (1989).

<sup>36</sup> *Id.*; see generally, Annemarie M. Terraciano, *Contesting Land, Contesting Laws: Tenure Reform and Ethnic Conflict in Niger*, 29 COLUM. HUM. RTS L. REV. 723, 737 (1998) (noting the *laabu koy*'s authority derived from his spiritual relationship with the land); see SARA BERRY, NO CONDITION IS PERMANENT: THE SOCIAL DYNAMICS OF AGRARIAN CHANGE IN SUB-SAHARAN AFRICA 106 (1993) (noting the spiritual underpinnings of traditional land tenure); see generally William F. S. Miles, *Shari'a as De-Africanization: Evidence from Hausaland*, 51 AFRICA TODAY 51, 58 (noting that indigenous spirit worship is still practiced as part of a syncretic version of Islam).

<sup>37</sup> See NORBERT ROULAND, LEGAL ANTHROPOLOGY 216 (Philippe G. Planel trans., Stanford Univ. Press 1994) (1988).

<sup>38</sup> See SARA BERRY, *supra* note 36, at 106 (quoting a Yoruba chief as saying that "land belongs to a vast family of which many are dead, few are living, and countless numbers are yet unborn").

<sup>39</sup> See Powers, *supra* note 32, at 1169 (stating Islamic inheritance law dictates that land be passed within a nuclear family from one generation to the next).

agricultural land.<sup>40</sup> Today, most Zarma men presume that the land that has been passed down to them will remain under their control and that they will be free to pass their land on to their sons. Yet, in practice, most farmers still exercise something less than complete ownership over the fields they cultivate. For example, they acknowledge the rights of secondary users of the land, such as women from the community, who may enter without permission to gather herbs or glean unused grain stalks.<sup>41</sup> Further, many state flatly that they do not have the right to alienate the land that they cultivate, implicitly acknowledging that the lineage has an inchoate claim. Consistent with that view, men express distaste at the prospect of formally dividing large tracts of communally held lineage land, saying obliquely that dividing land between brothers is something that nobles simply do not do.<sup>42</sup>

To Western eyes, Niger's traditional land tenure system can be mystifyingly diffuse. People imply in one breath that they are the owners of land, and in the next that they do not have the right to exclude all others from it or alienate it. They maintain that they inherit land from their fathers and intend to pass the same land on to their sons, but state flatly that it would be unthinkable to formally divide it. In sum, land tenure in contemporary rural Niger is something narrower than community ownership by lineage groups, yet broader and less determinate than individual ownership.

### C. Slavery in Niger

#### 1. A history of Nigerien slavery

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<sup>40</sup> Interview with Group of Villagers, in Fandou Berri, Republic of Niger (June 1, 1996); Interview with Yaye Issa and Issafou Lali, in Fandou Berri, Republic of Niger (May 22, 2000)

<sup>41</sup> Interview with Bachirou Djibo and others, in Fandou Berri, Republic of Niger (October 21, 2003).

<sup>42</sup> Interview with Yaye Issa, in Fandou Berri, Republic of Niger (May 27, 1996); *see* Interview with Bachirou Djibo, in Niamey, Republic of Niger (May 18, 2000) (discussing continuous joint ownership of land).

Briefly reviewing the history of slavery in Niger serves two purposes. First, it lays a necessary foundation for understanding contemporary slavery, and why newly passed Western anti-slavery laws have missed the mark. Second, it may satisfy the curiosity of incredulous Western readers as to how slavery has managed to persist into the 21<sup>st</sup> century.

Slavery has existed in what is now Niger since at least the Middle Ages.<sup>43</sup> Until the 19<sup>th</sup> century, the number of slaves was relatively small and slave holding was primarily a source of status and household help, not a fundamental means of production.<sup>44</sup> Most slaves were recruited into their status through raiding and capture.<sup>45</sup> Although they sometimes were bought and sold at regional markets, those markets never developed regular links with the external trade across the Atlantic and the Sahara.<sup>46</sup>

The 19<sup>th</sup> century was an epoch of warfare and political fragmentation in the region<sup>47</sup> and in the chaos slavery became a more significant social institution.<sup>48</sup> A class of powerful and charismatic warriors arose whose daily occupation was fighting,<sup>49</sup> and because they had little time for agricultural labor, they captured increasing numbers of slaves to farm their fields and provide food for their people.<sup>50</sup> During this time, slavery

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<sup>43</sup> MOUSTAPHA KADI OUMANI, UN TABOU BRISE: L'ESCLAVAGE EN AFRIQUE, CAS DU NIGER 22 (2005).

<sup>44</sup> IDRISSE KIMBA, GUERRES ET SOCIETES, LES POPULATIONS DU "NIGER" OCCIDENTAL AU XIX SIECLE ET LEURS REACTIONS FACE A LA COLONISATION (1896-1906) 76 (1981).

<sup>45</sup> See *infra* note 99 and accompanying text.

<sup>46</sup> KIMBA, *supra* note 44, at 27; OUMANI, *supra* note 43, at 116.

<sup>47</sup> JEAN-PIERRE OLIVIER DE SARDAN, LES SOCIETES SONGHAY-ZARMA (NIGER-MALI) 62 (1984); FINN FUGLESTAD, A HISTORY OF NIGER 1850-1960, at 39-41 (1983).

<sup>48</sup> PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY, A HISTORY OF SLAVERY IN AFRICA 68 (2<sup>nd</sup> ed., 2000).

<sup>49</sup> See KIMBA, *supra* note 44, at 42 (referring to the shift of power to warriors in 19<sup>th</sup> century Zarma-Songhay society).

<sup>50</sup> See Anti-Slavery International & Timidria, SLAVERY IN NIGER: HISTORICAL, LEGAL AND CONTEMPORARY PERSPECTIVES 29 (Galy Kadir Abdelkader, ed., 2004) [hereinafter SLAVERY IN NIGER] (noting that 19<sup>th</sup> century warfare made agricultural work an occupation of the servile classes); KIMBA, *supra* note 44, at 59 (same); FUGLESTAD, *supra* note 47, at 41-43 (discussing Zarmas')

became a more central aspect of Nigerien social organization, particularly in Zarma regions, and slave raiding became more of a business, though still primarily directed at the domestic market.<sup>51</sup>

This was the state of affairs when French colonizers arrived on the scene in the late 19<sup>th</sup> century. In spite of its official embrace of abolition,<sup>52</sup> France was ambivalent about slavery in its West African colonies<sup>53</sup> because it wanted to avoid undermining the power of the noble slaveholding elites through whom it ruled,<sup>54</sup> and because it relied on slaves' labor to provide a cheap and ready workforce for its colonial enterprise.<sup>55</sup>

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increasing dependence on slave labor and the deteriorating conditions of domestic slaves during the warrior epoch).

<sup>51</sup> LOVEJOY, *supra* note 48, at 73, 75.

<sup>52</sup> MARTIN A. KLEIN, *SLAVERY AND COLONIAL RULE IN FRENCH WEST AFRICA* 17 (1998) (noting that France had outlawed slavery in 1848 and its citizens held strong abolitionist sentiments, so colonial administrators felt compelled to make frequent anti-slavery pronouncements but did little to end slavery); OLIVIER DE SARDAN, *supra* note 47, at 190 (arguing the French passed many decrees directed at French public opinion but did little to end slavery in Niger).

<sup>53</sup> KLEIN, *supra* note 52, at 17; *see also* TREVOR R. GETZ, *SLAVERY AND REFORM IN WEST AFRICA: TOWARD EMANCIPATION IN NINETEENTH-CENTURY SENEGAL AND THE GOLD COAST* 30 (2004) (arguing the French were unenthusiastic about emancipation in West Africa).

<sup>54</sup> OUMANI, *supra* note 43, at 123, 126; *SLAVERY IN NIGER*, *supra* note 50, at 37; Jean-Pierre Olivier de Sardan, *Esclavage d'Echange et Captivité Familiale Chez les Songhay-Zerma*, *XLII JOURNAL DE LA SOCIÉTÉ DES AFRICANISTES* 151, 165 (1973).

<sup>55</sup> *See* LOVEJOY, *supra* note 48, at 268 (arguing the French used slaves to meet labor needs); *see also* GETZ, *supra* note 53, at 47 (same); KLEIN, *supra* note 52, at 93, 176 (arguing the French were in a resource squeeze and moved against slavery only when they needed to capture the labor of freed slaves).

France was innovative in the matter of saying one thing and doing another when it came to indigenous African slavery. It avoided the need to apply French Republican laws – and thus abolition – to Africans in the colonies by dividing French people into two classes: *citoyens* (citizens) who enjoyed all the rights granted by France's constitution and laws, and *indigènes* (indigenous people or subjects) who did not. Needless to say, almost all Nigeriens fell into the latter category. *SLAVERY IN NIGER*, *supra* note 50, at 36; FUGLESTAD, *supra* note 47, at 68. France also employed careful language to support claims that slavery did not exist in its colonies. It called the people of servile status in Niger captives rather than slaves, which permitted it to claim at the Brussels Conference in 1889-90 that slavery did not exist in its West African colonies. OLIVIER DE SARDAN, *supra* note 47, at 190.

Also, France created institutions that permitted it to appear committed to abolition while channeling slaves' labor toward the colonial enterprise. It devised a system called *engage à temps* (temporary engagement) under which government officials received escaped slaves and pressed them into service as indentured laborers for periods of 10 to 14 years. GETZ, *supra* note 53, at 46. The plan was presented to the French public as a way to ease freed slaves into independent living, but historians generally agree its real purpose was to help the colonial administration meet its labor needs. *See* LOVEJOY, *supra* note 48, at 268; GETZ, *supra* note 53, at 46-47.

Similarly, the French created *villages de liberté* (liberty villages) to welcome escaped slaves. They usually were established along the lines of French military advances, KIMBA, *supra* note 44, at 206

As the 20<sup>th</sup> century progressed, France pursued a compromise policy on slavery by which it actively curbed and eventually forbade slave raiding, caravans, markets, and ultimately any sale or exchange of slaves, but looked the other way when it came to individuals and families possessing them.<sup>56</sup> During this epoch, some slaves, particularly those who had been captured recently and had memories of their natal villages, fled to their homelands or to the larger cities for jobs in the colonial administration.<sup>57</sup> However, most of those who had been raised as slaves and lacked knowledge of their origins stayed put and continued to live under the control and patronage of their masters.<sup>58</sup>

For complex political reasons only summarized here, Niger's government did little to combat slavery after the colonizers departed in 1960.<sup>59</sup> At independence the French handed the colonial apparatus over to a class of Nigerien leaders, known as *les evolues* (the evolved ones),<sup>60</sup> who represented a thin slice of the population that had aligned itself as clients of France by attending French schools and adopting the French language and culture.<sup>61</sup> Some of these *evolues* were the sons of traditional chiefs, but others came from the ranks of former slaves, either because they had sought shelter from their masters during the colonial administration, or because their noble masters, when required by the French to send their children to state sponsored schools, had often sent

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(noting that one liberty village was established just north of Niger's present day capital, Niamey), and those Africans who landed in them were treated essentially as slaves of French soldiers. LOVEJOY, *supra* note 48, at 269; KLEIN, *supra* note 52, at 84-85.

<sup>55</sup> OLIVIER DE SARDAN, *supra* note 47, at 192.

<sup>56</sup> *Id.* at 165, 192 (arguing the French opposed the capturing, buying and selling of slaves in Niger but ignored other slavery practices); SLAVERY IN NIGER, *supra* note 50, at 37-40 (arguing the French administrators passively resisted early 20<sup>th</sup> c. decrees abolishing slavery).

<sup>57</sup> FUGLESTAD, *supra* note 47, at 120, 148

<sup>58</sup> OLIVIER DE SARDAN, *supra* note 47, at 195.

<sup>59</sup> OUMANI, *supra* note 43, at 125.

<sup>60</sup> FUGLESTAD, *supra* note 47, at 16, 109, 120-121; ROBERT CHARLICK, NIGER: PERSONAL RULE AND SURVIVAL IN THE SAHEL 40 (1991).

<sup>61</sup> See generally FUGLESTAD, *supra* note 47, at 121; CHARLICK, *supra* note 60, at 40.

the children of their slaves rather than their own.<sup>62</sup> Although many of the *evolues*, then as now, looked upon rural people and traditional chiefs with distain,<sup>63</sup> once they had their hands on the reins of power they discovered, just like the French before them, that they could not rule without the chiefs' backing and participation.<sup>64</sup> The upshot was that the post-independence state was under the control of two elite groups: the educated descendants of slaves who generally wished to downplay their servile origins, and traditional chiefs (and some of their educated sons) whose power and wealth depended at least partly on slavery. Neither group had any desire to raise the divisive subject,<sup>65</sup> and slavery in Niger went on as before.<sup>66</sup>

## 2. Slavery today

Timidria, Niger's leading anti-slavery human rights organization, published a detailed study in 2004 concluding that there were 870,000 souls in the country suffering

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<sup>62</sup> FUGLESTAD, *supra* note 47, at 16.

<sup>63</sup> See JEAN-PIERRE OLIVIER DE SARDAN, ANTHROPOLOGY AND DEVELOPMENT: UNDERSTANDING CONTEMPORARY SOCIAL CHANGE 205 (Tidjani Alou trans., 2005) (referring to Nigerien civil servants' contempt for peasants); FUGLESTAD, *supra* note 47, at \_.

<sup>64</sup> See OUMANI, *supra* note 43, at 126.

<sup>65</sup> See SLAVERY IN NIGER, *supra* note 50, at 54-56 (noting that in the post-independence government most of the important ministries were controlled by traditional chiefs); see also Olivier de Sardan, *supra* note 54, at 166 (explaining that the wealth of post-independence chiefs depended on slavery and that the *evolue* could not attack this relationship because they needed the chiefs to maintain power).

<sup>66</sup> Before the recent spate of law reforms, Niger's post-Independence government had officially addressed the topic of slavery only once. In 1969, a regional government administrator in the town of Tanout, in north-central Niger, sent a letter to Niger's Minister of Justice seeking guidance on how to deal with questions of inheritance among Tuareg slaves (*bella*) in his region. Although Nigerien state civil law permitted any citizen to leave personal property to his heirs, custom dictated that all of a slave's personal property belonged to the master and reverted to him upon the slave's death. In Niamey, government officials passed the request for guidance from ministry to ministry (all of the relevant ministries were controlled by traditional chiefs) until an official response was issued reminding the regional official that Niger's pluralist legal system permitted traditional chiefs to rule on matters of custom, and that inheritance was just such a matter. In other words, the government determined that slavery customs should determine the outcome, and the masters should retain the property in question. The minister who came up with this answer – himself a Tuareg from a noble family – went on to note that increasing numbers of Tuareg slaves were taking advantage of *de jure* emancipation to fraudulently claim ownership of their former masters' cattle, and that they should be aggressively prosecuted under the Penal Code in such instances. SLAVERY IN NIGER, *supra* note 50, at 55-56.



under the yoke of slavery.<sup>67</sup> The government of Niger reacted by imprisoning Timidria's president and declaring to the world that there was not a single slave in the country.<sup>68</sup> To emphasize the point, a government spokesperson defied anyone to uncover evidence of a slave market or people living in chains.<sup>69</sup> The discussion in Part II.C., below, will offer a theory to explain how Timidria and the government could have arrived at such divergent pictures of contemporary slavery. For now, it must suffice to say that, notwithstanding the government's insistence to the contrary, the dichotomy between slave and non-slave remains a fundamental, defining aspect of contemporary Nigerien social order,<sup>70</sup> but that extant slavery in Niger is different than Western slavery.<sup>71</sup> None of the rules regarding Nigerien slavery are written, and none are intentionally supported by formal state law, yet they are adhered to strictly by most Nigeriens.

In urban areas, even among educated elites, young people may not marry until each family has conducted a thorough investigation to ensure no trace of servile blood.<sup>72</sup> In rural Niger, which comprises the vast majority of the country's population, one's status as a slave determines not only whom one may marry<sup>73</sup> but where in the village

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<sup>67</sup> SLAVERY IN NIGER, *supra* note 50, at 88. This number would equal approximately 7% of Niger's population.

<sup>68</sup> Paul Raffaele, *Born Into Bondage: Despite denials by government officials, slavery remains a way of life in the African nation of Niger*, SMITHSONIAN MAGAZINE, September 2005, at \_\_ (noting that Niger's government denies the existence of slavery, and the US Embassy in Niger professes little knowledge it).

<sup>69</sup> *Niger Rejects Slavery Allegation*, SUNDAY TIMES, SOUTH AFRICA, May 27, 2005, at \_ (available at <http://sundaytimes.co.za> . . . ) (quoting Niger government spokesperson denying the existence of slavery and challenging the world "show us a single slave market"); ABC TV transcript, quoting the Governor of Tahoua, Zity Maiga, denying that slavery exists).

<sup>70</sup> OLIVIER DE SARDAN, *supra* note 47, at 27; Paul Stoller, *The Negotiation of Songhay Space: Phenomenology in the Heart of Darkness*, \_\_ AMERICAN ETHNOLOGIST 420, 422 (1980); OUMANI, *supra* note 43, at 22; KIMBA, *supra* note 44, at 206 (stating slavery remains in Nigerien peoples' mentality and continues to affect every aspect of contemporary social organization).

<sup>71</sup> See *infra* Part II.C.

<sup>72</sup> OUMANI, *supra* note 43, at 150; see SLAVERY IN NIGER: *supra* note 50, at 61 (citing an example of a wedding in Niamey's Boukoki neighborhood canceled when servile origins were discovered); see also Interview with Bachir Tidiani, in Niamey, Republic of Niger (February 26, 2004) (claiming that even among educated elites in Niamey nobles do not marry slaves).

<sup>73</sup> OLIVIER DE SARDAN, *supra* note 47, at 31.

one may live,<sup>74</sup> how one must address others in public,<sup>75</sup> whether one may participate in political or spiritual leadership,<sup>76</sup> and most important for our inquiry, the conditions under which one may cultivate agricultural land.<sup>77</sup>

To fully understand slavery in Niger, it is necessary to recognize and grapple with some linguistic and categorical distinctions between Niger and the West.<sup>78</sup> In general, we in the West conceive of one broad category of servile people that we refer to as slaves or, in French, *esclaves*. Nigeriens, on the other hand, think of slavery as a diverse set of servile social positions, each described by a different term.<sup>79</sup> For example, the most encompassing term in the Zarma language for slave is *banya*, which describes any person acquired through capture, trade, purchase or gift, as well as anyone whose ancestors were so obtained.<sup>80</sup> A subcategory of *banya* is *tam*,<sup>81</sup> a newly captured slave who must be watched carefully and, in some cases, chained or hobbled to prevent escape.<sup>82</sup> The *tam*

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<sup>74</sup> See OUMANI, *supra* note 43, at 141 (noting many slaves are confined to their own quarter of Zarma villages); see generally, Stoller, *supra* note 70, at 422-23 (discussing the symbolic importance of spatial organization of villages in maintaining the noble-slave hierarchy).

<sup>75</sup> Olivier de Sardan, *supra* note 54, at 158.

<sup>76</sup> *Id.*

<sup>77</sup> See *infra* notes 98-103 and accompanying text; see also SLAVERY IN NIGER, *supra* note 50, at 60; Olivier de Sardan, *supra* note 54, at 158-59.

<sup>78</sup> See OLIVIER DE SARDAN, *supra* note 63, at 170-71 (arguing the goals of development projects often are confounded because they fail to take account of local languages and the differing cultural conceptions they represent).

<sup>79</sup> OLIVIER DE SARDAN, *supra* note 47, at 27.

<sup>80</sup> *Id.*

<sup>81</sup> I was introduced to the enduring cultural relevance of the word *tam*, as well as the social category it represents, on my first day as a Peace Corps volunteer in an isolated Zarma village in 1986. As the village chief and a group of elders were showing me the grass hut that would be my home, they asked me my name. When I responded “Tom,” they looked shocked and embarrassed and urged me to choose something different. Later, I learned what the word *tam* meant and that the pronunciation of it and my name were almost indistinguishable. I agreed to participate in a naming ceremony to spare my neighbors the embarrassment of calling me Slave.

<sup>82</sup> I should note that Jean-Pierre Olivier de Sardan, an eminent French anthropologist who is fluent in the Zarma language and has performed years of fieldwork among the Zarma and Songhay of Niger, explains Zarma terms for slavery somewhat differently. He has written that *tam*, like *banya*, is generic. He adds that the term *ciray banya* or literally “under slave,” connotes a newly captured person who has no rights within the social group. See OLIVIER DE SARDAN, *supra* note 47, at 43-44. I am quite certain, however, that in the zone where I have performed field research, the term *tam* is used as I explain in the text and the term *ciray banya* is known but not often employed.

looks much like our Western conception of slavery: he is completely at the mercy of his master and may be sold, bartered, pledged, exchanged or killed, and may be required to perform onerous and dangerous labor such as well digging.<sup>83</sup> Among Zarma people, few if any have been enslaved in recent generations, so the numbers of *tam* are diminished even though the category continues to have cultural resonance.<sup>84</sup>

The category of slave that now is most common in Zarma society and that most confounds Western preconceptions of slavery is *horso*. A slave who has been assimilated into the master's lineage – usually after his line has been connected to a noble family for three generations – achieves the status of *horso*.<sup>85</sup> The *horso* experiences little of the violence and overt repression that a Westerner associates with slavery. He wears no chains, and according to cultural norms may not be beaten, exchanged or sold.<sup>86</sup> He often is raised beside his master's children, and when he grows older is addressed with respectful terms such as “father” or “brother.”<sup>87</sup> He is free to wander through the

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<sup>83</sup> OUMANI, *supra* note 43, at 117. Oral history accounts of the founding of Zarma villages often begin with the patriarch departing on a slave raiding expedition and then requiring the captured slaves to dig the well that becomes the symbolic and practical life spring of the new community. See, e.g., *infra* note 177-78 and accompanying text.

<sup>84</sup> There are other important social categories that, in translation, end up being folded into the English word slave. For example, a female can fall into any of the categories thus far described, but if she is taken as a concubine by a noble (most often her master), and if she bears him a child, she becomes *wahay*. As such, she is no longer a *banya*, though her origins are never forgotten and she never achieves the status of noble (*koyize*) or free person (*talaka*) within the social group. The son born of a *wahay* is a *wahayize*, or child of *wahay*. A *wahayize* is considered to have no maternal ancestors. He is invested with his father's nobility and has the right to inherit and to vie for political leadership; however, he carries the stigma of servile blood in a society where status and rights are determined largely by one's ancestry. Many great political leaders and warriors in Zarma history have been *wahayize* and it is said that they are driven to greatness by a desire to prove themselves and overcome their servile origins. See generally OLIVIER DE SARDAN, *supra* note 47, at 121.

<sup>85</sup> Jean-Pierre Olivier de Sardan, *Les Voleurs D'Hommes (Notes Sur L'Histoire Des Kurtey)*, Etudes Nigeriennes 29, p. 11 (1969); see Olivier de Sardan, *supra* note 54, at 154 (noting that the three generation rule of transition from *tam* or *ciray banya* to *horso* varies in practice) .

<sup>86</sup> OUMANI, *supra* note 43, at 117.

<sup>87</sup> Olivier de Sardan, *supra*, note 54, at 161.

community without restraint and may even live in a separate village and simply pay a tax or tithe (*laabu albarka*)<sup>88</sup> to the master at the end of each harvest.<sup>89</sup>

But in spite of this lack of physical restraint, the *horso* is on the other side of an impenetrable social barrier, and is never assimilated into Nigerien society.<sup>90</sup> According to the French anthropologist Jean-Pierre Olivier de Sardan, the status of *horso* is most accurately likened to that of a child.<sup>91</sup> Like the child, the *horso* must depend on the elder males of the lineage for food and shelter. Like the child, the *horso* usually works in the collective fields of the extended family, fields controlled by noble elder males. Like the child, the *horso* may be permitted to cultivate a plot of land (*kurga*) for his own account, but only so much and so long as the noble patriarch permits.<sup>92</sup>

However there are vital differences between *horso* and noble children. The noble child progresses through the various culturally determined stages of life<sup>93</sup> that permit him to form a marriage alliance with a noble lineage,<sup>94</sup> become a head of household, participate in political and spiritual leadership of his community,<sup>95</sup> and, most important for our purposes, assume control over lineage land. The *horso*, in contrast, never progresses beyond the status of child. He spends his entire life remitting a percentage of

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<sup>88</sup> *Id.* at 158; SLAVERY IN NIGER, *supra* note 50, at 9. The term *laabu albarka*, which translates roughly to “land praise,” describes annual post-harvest payments that borrowers of land remit to those who control it. In some cases it is nominal and largely symbolic, an acknowledgment that the person farming the land has only temporary rights in it. In other cases it looks more like a rent by which the cultivator turns over an agreed upon percentage of his harvest.

<sup>89</sup> OLIVIER DE SARDAN, *supra* note 47, at 52; *see infra* Part III.B. (describing a group of *horso* who live in their own village and pay *laabu albarka* to a noble chief).

<sup>90</sup> Olivier de Sardan, *supra* note 54, at 160 (arguing a *horso* can never fully enter Zarma society); OUMANI, *supra* note 43, at 117.

<sup>91</sup> Oliver de Sardan, *supra* note 85, at 29, 34-5.

<sup>92</sup> *See supra* Part I.B.

<sup>93</sup> *Id.*

<sup>94</sup> Stoller, *supra* note 70, at 421; OUMANI, *supra* note 43, at 143-4.

<sup>95</sup> Olivier de Sardan, *supra* note 54, at 158 ; also SLAVERY IN NIGER, *supra* note 50, at 60-61 (recounting a story of a slave descendant elected to leadership position in northern Niger in the mid 1990s and then deposed because of his servile origins).

his harvest to his master,<sup>96</sup> never becomes an *alfari* (farmer) or *dotigi* (elder), and therefore never claims control of agricultural land.<sup>97</sup>

Indeed, the ideology of Zarma slavery closely associates *horsos*' servile status with their landlessness. Ask any Zarma noble or *horso*,<sup>98</sup> how *horso* arrived at their station and he will tell you that they descend from men who were defeated in battle, were given the choice between a warrior's death and enslavement, and chose the latter.<sup>99</sup> Zarma culture holds that this primal act of submission is such a profound surrender of the slave's humanity that it renders him a non-person<sup>100</sup> and removes from him the privilege of claiming ties to his ancestry.<sup>101</sup> He enters into a status that the American scholar of comparative slavery, Orlando Patterson, has termed "social death."<sup>102</sup>

A vital aspect of this ideological transformation is that, as a genealogical isolate,<sup>103</sup> the *horso* lacks *tubu*, a word that translates to English roughly as "inheritance,"

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<sup>96</sup> See *supra* note 88 and accompanying text.

<sup>97</sup> SLAVERY IN NIGER, *supra* note 50, at 9; see OUMANI, *supra* note 43, at 117, 141.

<sup>98</sup> I imply by this statement that *horso* are Zarma people. From an outsider's perspective, that is true: they speak the same language and adhere to the same cultural values. However, *horso* do not consider themselves to be Zarma, and, in fact, throughout my interviews with them routinely referred to themselves as *banya* or *horso* and to noble Zarmas as "Zarma people" or simply "they."

<sup>99</sup> Olivier de Sardan, *supra* note 85, at 29; ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH, A COMPARATIVE STUDY 5 (1982). Nigeriens repeat this story, even though they are perfectly aware of the historical fact that many slave ancestors were snatched as children when they were collecting firewood in the bush or pulling water from a distant well or in other circumstances where there was no volitional act associated with their enslavement. Olivier de Sardan, *supra* note 85, at 32.

<sup>100</sup> SLAVERY IN NIGER, *supra* note 50, at 30, 35; see OLIVIER DE SARDAN, *supra* note 47, at 31 (claiming slaves and nobles considered two species). Not long ago in an interview with a group of village elders I inquired about nobles' practice of sometimes marrying slave women. They explained that wealthy Zarmas who could afford many wives but who did not wish to disobey the Koran's limit of four could marry slaves as the fifth and subsequent wives because the Koran restricts a man to marrying four "people," but as slaves are not people, the man can marry as many as he wishes. Interview with Bachirou Djibo, in Niamey, Republic of Niger (February 19, 2004); Interview with elders, in Fandou Berri, Republic of Niger (April 27, 2004) (verifying the "fifth wife" reasoning and complaining that the French made their lives difficult when they forbade the selling of slaves).

<sup>101</sup> See PATTERSON *supra* note 99, at 78.

<sup>102</sup> *Id.*, at 5; see Igor Kopytoff & Suzanne Miers, *African Slavery as an Institution of Marginality*, in SLAVERY IN AFRICA, HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVES 14-15 (Suzanne Miers & Igor Kopytoff, eds., 1977); see also OLIVIER DE SARDAN, *supra* note 47, at 29, 33 (using the term "social bastards" to describe Zarma slaves).

<sup>103</sup> PATTERSON, *supra* note 99, at 5.

but that connotes more than the mere right to receive personal and real property from deceased forbearers and encompasses the spiritual underpinnings of land tenure described above in Part I.B. If the right to exploit agricultural land originates with an ancestor's pact with the spirits, and if that right is sustained through the generations by maintaining the original pact with those spirits, then *horso*, whose predecessors willingly forfeited their *tubu*, can have no spiritual or temporal claim to the land that they inhabit.

The vitality of this slavery ideology is maintained over time by the constant repetition of culturally ingrained stereotypes.<sup>104</sup> The slave is often reminded that he has no ancestry whose honor he must defend.<sup>105</sup> Lacking honor, he wears garish clothing, speaks volubly and entertainingly no matter how embarrassing, and begs from nobles no matter how inappropriate.<sup>106</sup> The noble, according to the cultural stereotype, is characterized by all things opposite. He dresses modestly and carries himself with ease and finesse, never raising his voice in public and often communicating through intermediaries.<sup>107</sup> It is his privilege and his duty to act with honor and to avoid at all costs bringing shame to his person, his family and his ancestors.<sup>108</sup> Significant for purposes of this paper, it is vital to his family's honor that the noble patriarch provide

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<sup>104</sup> Olivier de Sardan, *supra* note 54, at 161 (stating Zarma slaves are constantly reminded that they are physically and mentally different to justify their ongoing repression); *see also* Kopytoff & Miers, *supra* note 102, at 38 (noting slaves constantly are reminded of their inferior status like bastards in medieval England); *id.* at 2 (arguing the need for physical force often obviated by masters' use of cultural symbols).

<sup>105</sup> *See* OLIVIER DE SARDAN, *supra* note 47, at 35.

<sup>106</sup> *See* Stoller, *supra* note 70, at 421. Perhaps arising out of the labor they are expected to perform as well as their different ethnic origins, slaves are also said to have fat necks, small and malformed ears, hard muscles, rough skin, gnarled fingers, and thick nails. Olivier de Sardan, *supra* note 54, at 160.

<sup>107</sup> Olivier de Sardan, *supra* note 54, at 160.

<sup>108</sup> *Id.* at 161; Olivier de Sardan, *supra* note 85, at 38.

generously for his guests, clients and dependents – including *horso* – especially in times of scarcity.<sup>109</sup>

Before proceeding, we should pause to address one further potentially confusing categorical distinction between Nigerien and Western conceptions of slavery, one that was implied but not explored in the foregoing discussion. It is that the social category *horso* does not translate precisely to the Western category of slave, and in fact does not correspond neatly to any Western social category.

Custom permits the *horso* freedom wander through the community without restraint from nobles, and permits him to cultivate a *kurga* for his own account. As we will see directly below, formal state law permits him to walk away whenever he pleases.<sup>110</sup> How then can he be considered a slave? Might the position of the *horso* better be described as a one of caste rather than slavery? I think not, partly because Zarmas themselves consider the status of *banya*, *tam*, and *horso* to be of a piece, all of which they, if they speak French, translate to the word *esclave*. They view these related statuses as arising from a noble's capture of another human being, an act that legitimates the noble's control. This claim of legitimate control is different from caste, which

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<sup>109</sup> Stoller, *supra* note 70, at 421. Rural Nigeriens' increasing embrace of Islam is having a complicated influence on traditional slavery, one we will only touch upon in this note. In certain respects, Islam acts to weaken traditional slavery. For example, as rural people embrace Islam, their deeply rooted traditional beliefs about ancestors' pacts with land spirits begin to lose their salience. This would tend to weaken an essential tenet of the ideology of Zarma slavery, described above. Also, Islam has a moderating effect on slavery. While the Koran acknowledges slavery, it forbids enslaving fellow Muslims and encourages manumission of those who convert to Islam. On the other hand, contemporary Islam can help perpetuate traditional slavery. Nobles employ Islam as a tool to reinforce the inferior status of *horso* by telling them that the Koran commands their obedience. The slaves, most of whom consider themselves Muslim and almost all of whom are uneducated, believe what they are told and further internalize their status. SLAVERY IN NIGER, *supra* note 50, at 6; OLIVIER DE SARDAN, *supra* note 47, at 34.

<sup>110</sup> See *infra* Part II.C.

typically applies to people who perform a specific skill such as weaving or metalwork, and who live in isolation from non-casted people.<sup>111</sup>

Ultimately the question of which English (or French) word to assign to these Zarma cultural categories is insoluble. It must suffice to say that neither the English word “slavery” nor “caste” accurately describes the social status of *horso* because such category simply does not exist in our culture. What is essential for this paper’s broader discussion of legal westernization in Niger is that the *horso* and other *banya* are part of an oppressed class of citizens who have little chance under existing culture and law to alter their status,<sup>112</sup> and whose situations are being worsened by Western law reform.

## **II. Legal Westernization in Niger: Introducing Private Ownership of Land and Slaves**

### **A. The legal context**

Until recently, formal state law in Niger has been distant, unpleasant, and largely unknown to most of its citizens.<sup>113</sup> The French, who colonized Niger from 1899 to 1960, brought with them their civil law traditions, but their presence in the country was comparatively thin,<sup>114</sup> and their law had relatively little effect outside of major urban

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<sup>111</sup> See DAVID E. HUNTER & PHILLIP WHITTEN, *ENCYCLOPEDIA OF ANTHROPOLOGY* 63 (1976) (defining caste as “[a] hereditary, endogamous group of people (or a collection of such groups) bearing a common name and having the same traditional occupation”); see also R.M. DILLEY, *ISLAMIC CASTE KNOWLEDGE PRACTICES AMONG HAALPULAAR’EN IN SENEGAL: BETWEEN MOSQUE AND TERMITE MOUND* 6, 27-28, 46, 57-88 (2004) (discussing caste in Muslim West Africa in terms of common occupations such as artisans or musicians, distinguishing caste from slavery, and describing a social category similar to that of *horso* as distinct from caste because the former are directly under the control of their masters); LEONARDO A. VILLALON, *ISLAMIC SOCIETY AND STATE POWER IN SENEGAL: DISCIPLES AND CITIZENS IN FATICK* 56 (1995) (describing Senegalese Wolof castes in terms of specific occupations and distinguishing between casted people and slaves).

<sup>112</sup> See *SLAVERY IN NIGER*, *supra* note 50, at 60 (noting that Niger’s *horso* have no proto-capitalist urban centers to migrate toward where they would have a realistic chance of finding wage-paying factory jobs).

<sup>113</sup> Villalon, *supra* note 7, at 56; Kelley, *supra* note 33, at 659-60; *Mission d’Analyse*, *supra* note 8, at 24-27 (stating that Niger’s citizens neither understand nor have access to the state legal system).

<sup>114</sup> See *infra* notes 54-55 and accompanying text.



centers.<sup>115</sup> Chiefs and other traditional authorities retained significant power and the country's multifarious legal traditions remained vibrant throughout the colonial period.<sup>116</sup>

Post-independence rule did little to change the traditional, pluralistic nature of Niger's laws. Nigerien political elites, like the French before them, could not hold on to power without the chiefs' support, so they retained their prerogatives, including a significant amount of control over laws and legal traditions.<sup>117</sup> This tendency toward a weak state legal system and local control over law was reinforced by the fact that Niger was ruled by military dictators for much of its post-Independence history. With strongmen ruling by decree, the formal state legal system was left to wither.<sup>118</sup> The resulting situation, which persists to this day, is that the state legal system holds some sway in Niger's largest cities while the vast majority of Niger's citizens orders its affairs according to the traditions that exist in their localities, most of which combine Islamic law with animist traditions.<sup>119</sup>

After the fall of the Berlin Wall, Niger's military dictators acceded to democratization pressures from domestic civil society actors,<sup>120</sup> and from the West, which conditioned future aid on democratic reform.<sup>121</sup> After numerous fits and starts, the

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<sup>115</sup> Because Niger was so bereft of exploitable resources, and because the French were determined to minimize the expense of their global colonial project, they departed in Niger from their "direct rule" philosophy and instead relied to a large extent on traditional leaders (many of whom they propped up and manipulated) to administer the territory. Kelley, *supra* note 33, at 651-2.

<sup>116</sup> *Mission d'Analyse*, *supra* note 8, at 26.

<sup>117</sup> See Kelley, *supra* note 33, at 658.

<sup>118</sup> Kelley, *supra* note 5, at 120; see *Mission d'Analyse*, *supra* note 8, at 6.

<sup>119</sup> See Kelley, *supra* note 5, at \_ (describing Nigerien's use of quasi-Islamic oracles to resolve legal disputes); see also Kelley, *supra* note 33, at 680-85 (describing the spiritual underpinnings of traditional Nigerien land law).

<sup>120</sup> Villalon, *supra* note 7, at 61-62.

<sup>121</sup> See MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* 51 (1977) (describing the "conditionalities" that accompany aid packages); see generally *Niger Millennium Challenge Report 2007*, *supra* note 19 (conditioning further aid in part on progress with law reform).

military handed power over to civilian political leaders in 1999.<sup>122</sup> Since then, the government, guided by the Western legal experts,<sup>123</sup> has passed a new Constitution, an Electoral Code, a Criminal Code, a Code of Criminal Procedure, a Rural Code,<sup>124</sup> and a surfeit of international treaties and lesser bits of legislation.<sup>125</sup> We focus here on the Rural Code, which introduced private property to land ownership, and the new Constitution and Penal Code, which together have introduced private property to the legal definition of slavery.

#### B. The Rural Code: Intentionally Re-Conceptualizing Land Tenure

Western legal experts and economists believe that Niger's traditional land tenure system<sup>126</sup> has retarded the country's economic and social development.<sup>127</sup> As discussed in this paper's introduction, the presumed problem is that traditions governing control of land are fluid, negotiable and unpredictable, which discourages people – both domestic and international – from intensifying investments in land and from using land as collateral for other investments.<sup>128</sup> The overall effect, the experts say, is to scotch any hope Niger might have of growing its economy toward prosperity.<sup>129</sup>

Operating under these assumptions, the government of Niger and its Western sponsors launched a full scale land reform effort under the generic name of the Rural

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<sup>122</sup> For an excellent summary of this transition period, see Villalon & Idrissa, *supra* note 2, at .

<sup>123</sup> See, e.g., *Mission d'Analyse*, *supra* note 8, (title page) (indicating that an important law reform plan was developed in cooperation with Danish, German and French experts).

<sup>124</sup> The drafting of the Rural Code began in the 1980s before the latest wave of legal Westernization.

<sup>125</sup> Villalon., *supra* note 7, at 50-55, 57, 59, 61-62; see *Mission d'Analyse*, *supra* note 8, at 64 (discussing the need for a new Civil Procedure Code). Based on my own review of recent legislative activity, the lesser legislation includes laws governing the National Assembly, the decentralization of Niger's government, non-governmental organizations and domestic associations, magistrates, and the legal profession.

<sup>126</sup> See *supra* Part I.B. note \_ and accompanying text.

<sup>127</sup> See *supra* notes 11-16 and accompanying text.

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*

Code (*Code Rural*).<sup>130</sup> It aims to convert Niger from customary land tenure to a Western system of freehold ownership and titling. It does so by devolving formal authority for land use regulation away from the federal government in Niamey (which, for reasons discussed above, holds little sway outside of large cities) down to local levels.<sup>131</sup> Each locality will have a Land Commission to coordinate and rule over land tenure issues,<sup>132</sup> and each such Commission will include officials from various government offices as well as representatives of farmers, herders, women's groups, young people, and traditional chiefs.<sup>133</sup>

The rulemaking authority of the local Commissions is sweeping, but for purposes of this inquiry their most important responsibility is to establish rural registers (*dossiers ruraux*) to document and track citizens' land rights.<sup>134</sup> A citizen, upon registering his rights with the Commission, receives a certificate (*attestation*) describing those rights. If no one comes forward to dispute the rights as recorded, the certificate matures into the equivalent of freehold title.<sup>135</sup> Although the Rural Code and its *dossier ruraux* in theory are open to recognizing group control and non-ownership interests in land, in fact the policy makers and bureaucrats involved in implementing the Code have a strong bias in

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<sup>130</sup> The Rural Code also attempts to clarify the rules governing herders' rights, agriculture cooperatives, firewood collection, mining, and access to other natural resources. See Camilla Toulmin & Julian Quan, *Registering Customary Rights*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA*, *supra* note 18, at 207, 213-15 (describing the objectives that the Rural Code aims to address). The discussion in this article will focus on the Code's treatment of agricultural land use regulation.

<sup>131</sup> After a recent administrative reorganization, Niger is divided into 8 Regions, 36 Departments, and 265 communes. See *Niger a l'Heure de la Decentralisation*, CONSTRUIRE L'AFRIQUE (June -August 2004), at p. 3. In theory, each of these divisions will have its own Land Commission.

<sup>132</sup> Toulmin & Quan, *supra* note 130, at 217. The process of creating the local land commissions has been under way for more than a decade but thus far only a fraction have been established. The donor community, however, has made the establishments of the commissions a top priority. See *Niger Millennium Challenge Report 2007*, *supra* note 19, at 29.

<sup>133</sup> Decret No. 9-367/PRN/MAG/E du 2 Octobre 1997, Article 22 (« [L'instruction des dossiers] entend obligatoirement l'autorite coutumiere du lieu d l'immeuble ou celui dans lequel la transaction fonciere a ete passee. »)

<sup>134</sup> Toulmin & Quan, *supra* note 130, at 216; see also Decret No. 97-367/PRN/MAG/E du 2 Octobre 1997 (laying down the detailed procedures by which land rights will be investigated and verified before being inscribed in a *dossier rural*).

<sup>135</sup> Toulmin & Quan, *supra* note 130, at 215-16.

favor of compelling Nigeriens to register their lands in the names of individual owners.<sup>136</sup>

Of vital importance to Niger's contemporary slaves, the law explicitly states that the determination of ownership will be made with reference to traditions and customs.<sup>137</sup> As discussed in Part I.C.2., above, tradition and custom hold that slaves lack *tubu*, and therefore have no rights in land.

Although law reformers in Niger advertise the Rural Code as a long overdue housekeeping project, an instrument for bringing order and consistency to a disordered jumble of customary land tenure rules, in fact it is affecting a profound cultural and legal transformation. Before the institution of Western law, a person's access to land depended on a complex web of social relations. So long as he fulfilled his obligations to his lineage and his community, he could expect reasonably secure and durable access to land. Under the new land tenure rules, the person's obligations to the social group fade in importance as his access to land comes to depend solely on obtaining a piece of paper designating his ownership. Once he has this paper, he can, if he wishes, ignore his cultural obligations to his community, including his obligations to his *horso*.

### C. The New Constitution and Penal Code: Unintentionally Redefining Slavery

In 1999, the government of Niger adopted a constitution patterned on those of leading liberal, Western, democratic societies, particularly France.<sup>138</sup> Its familiar features

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<sup>136</sup> See Interview with Abdoul Karim Mamalo, Permanent Secretary of the Rural Code, in Niamey, Republic of Niger (November 10, 2003); see also République du Niger, Ministère de l' et de l'Élevage, Comte National du code rural, CENT (100) QUESTIONS ET REPONSES POUR COMPRENDRE LE CODE RURAL 19-20, 22 (August 1999) (implying that the sole role for "custom" is as a reference point or piece of evidence in the Land Commission's quest to determine who owns which plot of land).

<sup>137</sup> LUND, *supra* note 31, at 4.

<sup>138</sup> See REPUBLIQUE DU NIGER, LA CONSTITUTION DU 18 JUILLET 1999 (1999) [hereinafter, Niger Constitution]; see Villalon & Idrissa, *supra* note 2, at 32-33 (noting the entire political and legal

include separation of governmental powers,<sup>139</sup> separation of church and state,<sup>140</sup> a society based on the rule of law,<sup>141</sup> and an independent judiciary.<sup>142</sup> It also includes a commitment to the concept of human rights as defined by the 1948 Universal Declaration of the Rights of Man,<sup>143</sup> and an explicit ban on slavery.<sup>144</sup>

To bolster the general constitutional anti-slavery declarations, Niger adopted in 2003 a revised Penal Code that included for the first time specific punishments for slavery practices.<sup>145</sup> For example, reducing a human being to slavery is punishable by 10 to 30 years and a fine of 1,000,000 francs to 5,000,000 francs.<sup>146</sup> People found guilty of treating others as slaves are subject to punishment of 5 to 10 years' imprisonment and fines of 500,000 to 1000,000 francs.<sup>147</sup>

As to exactly what constitutes slavery, the new Criminal Code hews closely to the definition provided by international human rights accords,<sup>148</sup> declaring that "slavery is the

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transition in Niger was rooted firmly in Western, especially French, tradition and that many of Africa's reformed constitutions look the same because they were drafted by the same European legal experts).

<sup>139</sup> Niger Constitution, Article 28.

<sup>140</sup> *Id.* Article 4.

<sup>141</sup> *Id.* Article 99.

<sup>142</sup> *Id.* Articles 100 and 101.

<sup>143</sup> *Id.* Preamble. Article 132 of the Constitution states that properly ratified treaties have the force of law and take precedence over contrary existing domestic laws. Niger has ratified all of the relevant international conventions concerning slavery and forced labor, most notably the Slavery, Servitude, Forced Labor and Similar Institutions and Practices Convention of 1926 (the Slavery Convention of 1926), The 1948 Universal Declaration of Human Rights, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery ("the Supplementary Convention") of 1956, and the African Charter on Human and Peoples' Rights of 1981. See RESEAU DES JOURNALISTES POUR LES DROITS DE L'HOMME, RECUEIL DES INSTRUMENTS JURIDIQUES INTERNATIONAUX ET REGIONAUX AFRICAINS RELATIFS AUX DROITS HUMAINS RATIFIES PAR LE NIGER 125, 130 (2003).

<sup>144</sup> *Id.* Article 12 (stating « Nul sera soumis . . . à l'esclavage ni à des services ou traitements cruels, inhumains ou dégradants. »)

<sup>145</sup> See generally Loi no. 2003-25 du 13 juin 2003, modifiant la loi no 61-27 du 15 juillet 1961, portant institution de la code pénal, Journal Officiel de la République du Niger, December 15, 2003, bk. II, tit. III, ch. VI, art. 270.1 et. seq. [hereinafter Loi no. 2003-25].

<sup>146</sup> *Id.* at bk. II, tit. III, ch. VI, art. 270.2.

<sup>147</sup> *Id.* bk. II, tit. III, ch. VI, art. 270.3.

<sup>148</sup> According to the Slavery Convention of 1926, "The state or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Slavery Convention on 1926, League of Nations Treaty Series, Vol 60, p. 253, Article I(I).

status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised; a slave is an individual who finds himself in such a status or condition.”<sup>149</sup> Although no law reformers in Niger articulated this fact, and although there is no indication on the record that any reformers realized what they were doing, the new law’s definition of slavery departs significantly from the indigenous Nigerien institution described in Part I.C., above. That is because it is based on the West’s historical experience with Roman and New World slavery,<sup>150</sup> a history that Niger does not share.<sup>151</sup>

In the West, we view slavery as one human being exercising ownership over another. The slave is a piece of chattel to be bought, sold, gifted, traded, used, or wasted according to the owner’s whim.<sup>152</sup> Not surprisingly, our anti-slavery laws, including the international legal conventions we have formulated, forbid and punish this sort of property relationship.<sup>153</sup>

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<sup>149</sup> Loi no. 2003-25, *supra* note 145, at bk. II, tit. III, ch. VI, art. 270.1. The clause elaborates on this definition and makes clear that women compelled to engage in sexual relations with their masters, and children compelled to work for their masters, are included. It is worthy of note that treating someone as a slave includes the act by a master of receiving tribute, which presumably includes the *laabu albarka*, described in note \_\_, above; however, the tribute must be because of the property relationship described in the fundamental definition of article 270.1. See Loi no. 2003-25, *supra* note 145, at bk. II, tit. III, ch. VI, art. 270.3. Niger’s civil law defines property as the right to enjoy and dispose of things in the most absolute manner, provided one does not make use of the object in a way prohibited by laws or regulations. See Alkache Alhada, *Les Droits Civils et Politiques*, in LES DROITS DE L’HOMME AU NIGER: THEORIES ET REALITES 189 (Theodore Holo ed., 2001) (explaining the definition of private property contained in Niger’s civil code).

<sup>150</sup> OLIVIER DE SARDAN, *supra* note 47, at 27; see James L. Watson, *Introduction, Slavery as an Institution: Open and Closed Systems*, in ASIAN AND AFRICAN SYSTEMS OF SLAVERY 2-3 (James L. Watson, ed., 1980) (stating the English word “slave” conjures historical associations that do not apply in Africa).

<sup>151</sup> See *supra* Part I.C.1.

<sup>152</sup> See LOVEJOY, *supra* note 48, at 8 (arguing American slavery was unique in that its *raison d’etre* was the production of staple commodities); Kopytoff & Miers, *supra* note 102, at 3 (arguing that the English word “slave” carries false connotations of plantations and chattel relationships when applied to African slavery).

<sup>153</sup> See *supra* note 148.

But this historical and cultural construction of slavery as ownership is not universal. According to Orlando Patterson, the scholar of comparative slavery, the very idea of absolute ownership – or *dominium* – was introduced to our culture by the Romans.<sup>154</sup> It was a new and radically different notion that an inviolable relationship of control could exist between a human being and a thing.<sup>155</sup> In other cultures, it was – and in some still is – inconceivable that one could claim and exercise absolute power over a thing, including a slave, without gaining support from one’s social group.<sup>156</sup> In other words, in many non-Western societies property rights arise primarily out of relationships among persons rather than between persons and things.<sup>157</sup>

While it is inconceivable in many non-Western societies that one human being can exercise absolute ownership over anything, including another human being, it is also true in many traditional, non-Western societies that all persons are seen as the legitimate

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<sup>154</sup> See PATTERSON, *supra* note 99, at 30 (arguing further that the Romans’ motivation for inventing the notion of *dominium* was to establish cultural and legal institutions to control its large slave population).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 28. (noting that “property is not one of the constitutive elements of slavery, though it is of course an important concept in the discussion of slavery.”)

<sup>157</sup> It should be noted that many contemporary legal scholars would dispute that the essence of property in Western culture and law is a person’s right to absolute control of things. Some conceptualize property as an expression of personhood and personal identity. See, e.g., Margret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Others describe property as containing both legal and social attributes, and they acknowledge that its social attributes – for example, community based norms about the use of property – are sometimes more powerful and efficient than legal rules. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988). However, in spite of the existence of these more nuanced theories of property, the prevailing Western understanding, one that acts as foundation for most Western legal regimes, see Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1051-52 (February 2007), is that property grants people inviolable rights in things as a means of efficiently allocating societal resources. See generally DE SOTO, *supra* note 11; Ronald Coase, *Problem of Social Cost*, 3 J.L. & Econ. 19 (1960); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32-34 (6<sup>th</sup> ed. 2003). More to the point for purposes of this article, law reformers and development experts in Niger and across the developing world understand their mission as transforming property from an institution ground in personhood and social relationships to one based on individual ownership and law. See *Niger Millennium Challenge Report 2007*, *supra* note 19.

objects of non-ownership property claims.<sup>158</sup> In these non-Western societies, therefore, no one is owned, but everyone is a potential object of property claims and transactions.<sup>159</sup> To take a common example, a Zarma man in Niger must pay a bride price to the bride's family, and both men and women regard the marriage as a sale in addition to recognizing its other social and emotional functions.<sup>160</sup> Similarly, adoption is viewed in many traditional societies as a property transaction involving a child.<sup>161</sup> Likewise, the kinship group itself is considered by its patriarchs to be a form of property, aspects of which can, in certain circumstances, be exchanged or sold for goods or money.<sup>162</sup>

In these cultural circumstances, where no one can be said to own another person, but where all members of society are subject to non-ownership property rights,<sup>163</sup> it simply is not helpful – and as we will see below can be harmful – to pass a law declaring *horso* free from ownership. In fact, what many *horso* in Niger want is not freedom in the sense of being rid of all property claims upon them and restraints on their will,<sup>164</sup> but connectedness; specifically the ability to access resources – land in particular – through connection to the corporate body with which they are associated.<sup>165</sup>

### **Part III. Unintended Consequences of Niger's Legal Westernization**

The new Western laws emanating from Niger's capital are affecting the lives of the country's rural citizens in ways that the law reformers did not anticipate. The

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<sup>158</sup> PATTERSON, *supra* note 99, at 27 (arguing that individuals' status in non-Western society differs only in the balance between their property claims in others and others' claims in them).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 24; Kopytoff & Miers, *supra* note 102, at 8-10.

<sup>161</sup> Kopytoff & Miers, *supra* note 102, at 8-10) (pointing to adoption into clans as the equivalent of a property transaction).

<sup>162</sup> *Id.*

<sup>163</sup> See PATTERSON, *supra* note 99, at 27 (arguing most non-Western slave holding societies had no concept of the "free" person and no slave/non-slave polarity).

<sup>164</sup> See *id.* at 28; Kopytoff & Miers, *supra* note 102, at 17.

<sup>165</sup> PATTERSON, *supra* note 99, at 28.



following discussion will explain three of those unintended consequences and will illustrate each by describing difficulties in particular *horso* communities.<sup>166</sup>

A. The “freedom” granted by Western law is the opposite of what *horso* want.

Niger’s new Western anti-slavery laws declare that Niger’s citizens henceforth shall be free from ownership.<sup>167</sup> According to the Nigerien conception of slavery, however, *horso* are controlled, oppressed and marginalized, but not owned.<sup>168</sup> Freedom from ownership, therefore, provides them with nothing they do not already have. In fact, freedom, at least in the Western conception of that term, is the opposite of what many seek. Take the example of *horso* from the village of Saabu Dey in southwestern Niger.

Saabu Dey is a cluster of grass huts interspersed with occasional mud and wattle one-room structures. It is located fifty kilometers northeast of Niamey, at the nexus of several sand paths, six kilometers from the nearest paved road, far from the nearest electricity or running water. Its population is around 800, approximately twenty percent of whom are *horso*.<sup>169</sup> All of Saabu Dey’s *horso* are associated with one servile lineage that was present at the founding of the village in the late 19<sup>th</sup> century.<sup>170</sup> They have remained in the village and attached to the same noble lineage because of what everyone

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<sup>166</sup> This paper describes only three *horso* communities in detail; however, those three can be taken as representative of a much larger sample. In my own fieldwork I have encountered, directly or second-hand, approximately 20 *horso* communities who are being affected by legal westernization. In addition, Nigerien human rights organizations have documented the plight of many more. See, e.g., *supra*, note 20.

<sup>167</sup> See *supra* Part II.C.

<sup>168</sup> See *supra* Part I.C.2.

<sup>169</sup> Interview with Saabu Dey village chief and group of elders, in Saabu Dey, Republic of Niger (December 5, 2003).

<sup>170</sup> See *id.* (stating the village was founded about 100 years ago); compare Interview with Kare village elders, in Kare, Republic of Niger (December 12, 2003) (stating the village was founded about 150 years ago).

there describes as exceptionally good relations between the groups.<sup>171</sup> Today, the only way an outsider would know who is *horso* and who is not is by observing that the *horso* live in a separate section of the village (*kure*).

Until recently, Saabu Dey's *horso* enjoyed secure access to agricultural land. However, in 2001, political discord among noble village elders,<sup>172</sup> discord that initially had nothing to do with the village's *horso*, led a faction of nobles to split off and establish their own village, which they named Kare.<sup>173</sup> They constructed the new village on a nearby hill, close enough that they could still easily access the agricultural fields they historically had cultivated.

The fissure between the nobles brought to a head questions about the *horsos*' right to increasingly scarce agricultural land. The nobles that split off to form Kare demanded that all of the *horso* from Saabu Dey – approximately 21 heads of household – join their faction and move with them to the new village.<sup>174</sup> The *horso*, who were particularly close to Saabu Dey's village chief, declined.<sup>175</sup> The Kare faction countered that if the *horso* were unwilling to join them, they would reclaim the fields that those *horso* had been farming since Saabu Dey's founding.<sup>176</sup>

The *horso*, backed by the nobles who remained in Saabu Dey, responded that they – as a result of a historical quirk – had a right to continue cultivating the fields.

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<sup>171</sup> See *supra* note 84.

<sup>172</sup> Neutral observers attribute the split, at least in part, to *babize*, a word that translates approximately to “sibling rivalry” and a concept that is deeply engrained in Zarma culture. See Interview with Saabu Dey village chief and group of elders (December 5, 2003), *supra* note 169 (discussing *babize*).

<sup>173</sup> *Id.* When I asked how the Kare faction chose the name for the new village, they indicated that it was a transliteration of the French word *carre*, which they said means “neighborhood,” but in fact generally refers to a small plot of land such as a vegetable garden (*carre de legume*) or in some cases a house lot. Interview with Kare village elders (December 12, 2003), *supra* note 170.

<sup>174</sup> Interview with Saabu Dey village chief and group of elders (December 5, 2003), *supra* note 169.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

According to their story, one of the founders of Saabu Dey was a warrior named Moussa Taffa, who captured many slaves and used their labor to establish the village.<sup>177</sup> As is typical of the founding stories of Nigerien villages, the nobles forced the slaves to dig the well that would become the practical and symbolic center of village life.<sup>178</sup> The water table in this region of Niger – the Zarma Plateau – is extremely deep<sup>179</sup> and well digging is a hazardous activity. One slave, Antwa, was charged with digging the first well.<sup>180</sup> He fainted twice while working deep underground, prompting the noble warrior, Moussa, to declare that he would descend and take over the work. Antwa, however, insisted that the master permit him to finish. He fainted a third time and almost died, but completed the work. For his bravery, Moussa and the other founders of the village granted Antwa land to cultivate for his own account. Antwa and his descendants worked hard to clear the bush and they expanded their holdings over the generations. Throughout that time, they never paid any kind of *laabu albarka*<sup>181</sup> to the descendants of Moussa or the other founders, indicating, according to the contemporary *horso*, that they did in fact control the land to an extent normally inconceivable in Nigerien culture.

Needless to say, the nobles from Kare, the splinter village, dispute this history. They dismiss the well digging story as fiction and claim that their direct ancestor purchased the *tam*, Antwa, from Mousa's family, and they therefore control the fate of

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<sup>177</sup> *Id.*

<sup>178</sup> See Kelley, *supra* note 33, at 663 (telling the story of another village's founding that begins with a warrior capturing slaves to dig the first well); see also OLIVIER DE SARDAN, *supra* note 47, at 89 (discussing the symbolic importance of well digging in Zarma culture). Land typically was parceled out to village founders by designating the well as the center point of the village and then tracing pie shapes outward from it, one slice for each founder. See Interview with Saabu Dey village chief and group of elders (December 5, 2003), *supra* note 169.

<sup>179</sup> The Saabu Dey chief estimates that their present well is 65 meters deep. Interview with Saabu Dey village chief and group of elders (December 5, 2003), *supra* note 169.

<sup>180</sup> The entire story of Antwa is recounted in Interview with Saabu Dey village chief and group of elders (December 5, 2003), *supra* note 169.

<sup>181</sup> See *supra* note 88.

the *horso* who descend from him.<sup>182</sup> Although the Kare faction acknowledges that Antwa's descendants have never paid the *laabu albarka*, they say that this reveals nothing about customary control of the land at issue, only that relations between the noble and slave lineages in the village were exceptionally good.<sup>183</sup> As of 2004, the dispute was unresolved with both sides marshalling customary and, to an increasing degree state adjudicatory, authorities to support their positions. When I asked the splinter faction from Kare why it was so important to them that the *horso* acknowledge their claims over the land, their response was straightforward: "People have babies."<sup>184</sup> They meant that one day, as its numbers grow, the noble family will have to claim the land for its own use.<sup>185</sup>

The story of Saabu Dey and the splinter village of Kare illustrates why Niger's *horso* are uninterested in an abstract, Western form of freedom. What they seek is closer connection to the corporate social units to which they are attached, and through that connection, secure access to agricultural land. In the course of my fieldwork in Saabu Dey, and in a score of other rural *horso* communities, not once did a *horso* refer to his or his ancestors' quest for freedom from ownership. Instead, *horso* consistently offered narratives of historical exception designed to show that, in spite of customs to the contrary, they had valid claims of control over lineage land. In Saabu Dey, it was the extraordinary hard work and loyalty of the *tam*, Antwa, who dug the founding well, that led to the exceptional land access enjoyed by the *horso* lineage.<sup>186</sup> In other nearby

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<sup>182</sup> Interview with Kare village elders (December 12, 2003), *supra* note 170.

<sup>183</sup> *Id.* The Kare faction further maintains that it is ridiculous to claim that any slave could actually control land. Even a manumitted slave would have to borrow land if he wished to continue cultivating in the village.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* notes 177-79 and accompanying text.

communities, contemporary *horso* claim that exceptional political alliances between their *tam* or *horso* ancestors and traditional leaders so closely connected them to those nobles that they were granted extraordinary rights, including the right to control portions of lineage lands in spite of settled customs to the contrary.<sup>187</sup>

We need not resolve whether their stories are historically accurate.<sup>188</sup> We need only note that contemporary *horso* consistently construct narratives by which their ancestors' primal acts of submission are cleansed by intervening historical exceptions, permitting them to transcend the culturally determined divisions between them and the noble lineages and, ultimately, claim durable access to land.

B. The Western laws' introduction of private property ownership is eroding the cultural foundation that slaves rely on for access to land.

In addition to granting Niger's *horso* a version of freedom they do not seek, the anti-slavery provisions of the new Constitution and Criminal Code harm *horso* by absolving traditional chiefs and other nobles from their culturally determined obligation to provide sustenance and land for them. Take as an example the village of Gunti Kwara, located approximately ten kilometers west of Saabu Dey. Like Saabu Dey, it is comprised mostly of grass huts, is remote from the nearest paved road, and has a population of less than one thousand. Unlike Saabu Dey, where many of the *horso* remained intimately attached to their noble lineages through the colonial and post-independence periods, the *horso* of Gunti Kwara live in a semi-independent settlement. Such arrangements were common in the early and mid 20<sup>th</sup> century, when the overall

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<sup>187</sup> See *infra* note 193 and accompanying text; see also Interview with Moussa Hama (village chief) and group of elders, in Tchida Mayna, Republic of Niger (February 26, 2004)(explaining that slaves' control of land is a result of an alliance with a powerful noble).

<sup>188</sup> For a fascinating and readable work on interpreting African cultural narratives, see LUISE WHITE, *SPEAKING WITH VAMPIRES, RUMOR AND HISTORY IN COLONIAL AFRICA* (2000).

population was smaller, land was plentiful, and nobles could send groups of *horso* off to clear uncultivated areas of the bush, make the land productive, and remit a percentage of their harvests back to the nobles.<sup>189</sup>

In this case, in the mid to late 1940s<sup>190</sup> a small group of *horso* under the leadership of two brothers left their village and went looking for a place to establish themselves and their families.<sup>191</sup> The *chef de canton* (a regional chief), who, may or may not have been the horsos' master, wished to ensure that they remained within his domain,<sup>192</sup> and so he offered them a choice of three different locations where wells had been dug but no people were farming the surrounding land.<sup>193</sup> The *horso* brothers inspected the sites and chose Gunti Kwara as a place to settle. After reviving the well, they began clearing and farming the land. In accordance with the *chef de canton's* instructions, they placed themselves under the authority of a nearby village, Gassangourni, and paid a yearly *laabu albarka*<sup>194</sup> to Gassangourni's *chef de village* (village chief), who was, not incidentally, the *chef de canton's* younger brother.<sup>195</sup> Until

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<sup>189</sup> See Olivier de Sardan, *supra* note 85, at 34 (stating that in the modern era there are whole villages of slaves that belonging to a particular chief).

<sup>190</sup> Interview with Hassane Hamani Kanguye, in Niamey, Republic of Niger (October 27, 2003) (stating the village was founded in 1946); Interview with Nouhou Sayni, in Gassangourni, Republic of Niger (October 26, 2003) (stating the village was founded in 1948).

<sup>191</sup> Interview with large group of village elders, in Gunti Kwara, Republic of Niger (December 3, 2003). It is not clear why they left their natal villages, nor is it exactly clear who their master was. See Interview with Moussa Hama, in Tchida Mayna, Republic of Niger (January 14, 2004).

<sup>192</sup> See Olivier de Sardan, *supra* note 85, at 34 (stating that in the modern era there are whole villages of slaves "belonging to" a particular chief).

The *chef de canton's* relationship with the *horso* is unclear. The horsos' contemporary descendants imply that he was their master. Others that the *chef* did not control the *horso* but was kindly disposed toward them because he had taken a concubine from the *horso* family. See Interview with Mousa Hama (January 14, 2004), *supra* note 191.

<sup>193</sup> Interview with large group of village elders (December 3, 2003), *supra* note 191. This story is plausible. Based on elders' accounts I have heard over the years, the Zarma Plateau, where all of these villages are located, was a comparatively dry and barren area that was used until the mid-19<sup>th</sup> century primarily as hunting grounds. The ancestor who dug the well, Gunti, may have used this spot as a hunting camp. According to the Gunti Kwara informants, the landscape was completely wild when they arrived there.

<sup>194</sup> See *supra* note —.

<sup>195</sup> Interview with large group of village elders (December 3, 2003), *supra* note 191.

recently, Gunti Kwara continued as a *horso* settlement,<sup>196</sup> with the slave descendants living independently but reporting and paying annual rent to the *chef de village* of Gassangourni.

In the mid-1990s, a dispute arose over control of the land being cultivated by the Gunti Kwara *horso*. The nobles from Gassangourni claimed that it was theirs as a result of their ancestral ties to the earlier *chef de canton*. The *horso* claimed that the right of control was theirs because of the political alliance that their *horso* ancestors had formed with that chief.<sup>197</sup> They stopped paying the *laabu albarka* and resisted the contemporary nobles' demands that they publicly declare that the land they cultivated belonged to the noble Gassangourni lineage.<sup>198</sup>

In May of 2003, just before the growing season began, a group of young *horso* from Gunti Kwara was walking through millet fields outside the village when they encountered a young noble from Gassangourni who was preparing the terrain for planting. The *horso* told the noble that the land he was cultivating was theirs and that he should leave. Exactly what happened next is unclear because the two sides' versions of events contradict each others' in practically every detail, each assigning full blame to the other. What is known is that more men came from each village and a bloody fight

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<sup>196</sup> Because Gunti Kwara is populated by *horso*, the government considers it a *hameau* (hamlet) rather than a true village. This means that although the village has a leader who was chosen by acclimation, he is not accorded the privileges and responsibilities of a village chief. It also means that Gunti Kwara is not eligible to receive government services such as elementary schools, medical dispensaries, or water pumps. As a result, its residents are even less educated and even more vulnerable to poverty and disease than Nigeriens who live in officially designated villages.

<sup>197</sup> Interview with large group of village elders (December 3, 2003), *supra* note 191.

<sup>198</sup> *Id.*

erupted that resulted in serious injuries on both sides and the death of an elder from Gunti Kwara.<sup>199</sup>

Since then there has been no violence, but the nobles of Gassangourni and the *horso* of Gunti Kwara have continued their struggle over control of the land. At first, both sides appealed to the *chef de canton*, who urged all parties to return to the traditional arrangement under which the *horso* would cultivate the land and pay an annual *laabu albarka* to the nobles, and the nobles would ensure ongoing access.<sup>200</sup> Not satisfied with a return to tradition, the nobles of Gassangourni, who have family connections to powerful, educated elites in the capital,<sup>201</sup> took the unusual step of hiring a lawyer<sup>202</sup> and filing a lawsuit in state court seeking to eject the Gunti Kwara *horso* from the land.<sup>203</sup>

In describing the dispute and the law suit, the nobles of Gassangourni are careful always to employ the Western language of the state legal system. They never utter the words *banya* or *tam* or *horso*, or even the French word, *esclave*. They insist that the dispute is between owners of property (their side) and borrowers of property (the others). When pressed, they acknowledge that the people of Gunti Kwara are *horso*, but, again

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<sup>199</sup> See Interview with Nouhou Sayni (October 26, 2003) *supra* note 190 (telling Gassangourni's side); Interview with large group of village elders (December 3, 2003), *supra* note 191 (telling Gunti Kwara's side).

<sup>200</sup> See Interview with Nouhou Sayni (October 26, 2003), *supra* note 190 (referring to the ongoing legal process).

<sup>201</sup> Gassangourni, though an isolated rural village, is unusual in that – for historical reasons we will not explore – it has substantial, ongoing ties to educated and powerful elites in the capital. One of the village chief's brothers is highly placed in a telecommunications company in Niamey and a nephew lives in Niamey is a former *huissier de justice* who has connections to and understands the complexities of the state legal system. Due to these connections, the village is more comfortable operating in the urban milieu, and is more aware than its neighbors about the land tenure and slavery law reforms emanating from the capital. See Interview with Ali Adamou, in Gunti Kwara, Republic of Niger (February 5, 2004) (a leader in Gunti Kwara complaining that they are at great disadvantage in their legal dispute with Gassangourni because the latter has educated individuals attached to the village and influence with powerful elites in Niamey).

<sup>202</sup> See Kelley, *supra* note 33, at 668 (explaining that both cultural norms and practical considerations deter rural Nigeriens from appealing their disputes to the state legal system); see also *Mission d'Analyse*, *supra* note 8, at (explaining there are few lawyers in the country, most people do not understand their role, and among those who do, most believe that only guilty people hire them.)

<sup>203</sup> Interview with Hassane Hamani Kanguye, in Niamey, Republic of Niger (December 27, 2003).



adopting the language of the new Western slavery paradigm, insist that they have no cultural or legal obligation toward them because they do not “own” them.<sup>204</sup>

The nobles’ strategy of recasting their land dispute as one between owners and borrowers appears to be working. In the written decisions issued by the government trial court and the court of appeals, there is no mention of slavery, customary or otherwise; only of owners and borrowers of land.<sup>205</sup> Although the appeals process has not yet run its course, it appears that the nobles of Gassangourni have successfully taken advantage of the transition to private property to ensure that their customary rights in land are converted to ownership while the *horsos*’ customary rights are extinguished.

Such a maneuver would have been inconceivable only a few years ago. As described in Part I.C.2, above, longstanding, culturally determined mores require nobles to provide sustenance – including access to agricultural land – for the *horso* attached to their lineages. For nobles to ignore this responsibility was unthinkable because it would bring shame upon themselves and their families.<sup>206</sup> The legal re-conceptualization of property implicit in Niger’s newly westernized laws, however, has eroded that custom. Increasingly, chiefs and other nobles who control access to agricultural lands are adopting the culturally novel position that their only obligation to *horso* is to permit them to be free.

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<sup>204</sup> See Interview with Issa Aly Hassan, in Niamey, Republic of Niger (January 26, 2004). The nobles’ claim that they have no responsibility for the Gunti Kwara *horso* requires a delicate parsing of history on their part. They acknowledge that the *horso* of Gassangourni historically paid them the *laabu albarka*, as custom would require a *horso* to pay his master, but claim that the true master of the *horso* was the *chef de canton* who installed the *horso* there in the 1940s, not they. A logical weakness in their argument is that their claim of rights in the land is based partly on their being descendants of that *chef de canton*, yet they disclaim rights in responsibilities in the *horso* who descended from that *chef*.

<sup>205</sup> See Interview with Nouhou Sayni, in Gassangourni, Republic of Niger (October 28, 2003), *supra* note \_ (transcribing and translating written decisions by Niamey tribunals that contain no mention of slavery).

<sup>206</sup> See *supra* notes 107-109.

C. Western land tenure laws are facilitating nobles' attempts to displace *horso*.

Western anti-slavery laws have introduced the notion of "ownership" to slavery, thereby permitting nobles to disclaim their customary obligations to slaves. Simultaneously, Western land tenure laws have introduced private land ownership, which is facilitating the nobles' efforts to wrest control of the land from the *horso*. Events in two villages, Gassangourni and Tchida Mayna illustrate the point.

In Gassangourni, the noble village described in the previous section, the village chief's family has made use of its connections to educated elites in Niamey<sup>207</sup> to initiate the process of establishing formal ownership of the disputed lands.<sup>208</sup> The chief's nephew, who in the past worked as a *huissier de justice*<sup>209</sup> in Niger's state justice system, has traveled numerous times to the city of Kollo, the location of the nearest Land Commission, to fill out paperwork, obtain necessary stamps, and arrange for Commission agents to measure the metes and bounds of his and his relatives' agricultural fields.<sup>210</sup> The nephew's plan is to begin registering plots close to village center where rights of control are uncontested, but eventually to register all village lands including those currently occupied by the Gunti Kwara *horso*.<sup>211</sup> The nephew is fully aware that the Rural Code determines ownership of land in light of tradition and custom, and that the state courts who have ruled on their land dispute have already found that the nobles'

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<sup>207</sup> See *supra* note 201.

<sup>208</sup> See *supra* note 201-03 and accompanying text.

<sup>209</sup> This position combines the duties of sheriff, such as serving process and delivering summons, and bailiff, such as helping judges administer the courtroom. See Catherine Elliott, Carole Geirnaert & Florence Houssais, FRENCH LEGAL SYSTEM AND LEGAL LANGUAGE 104 (1998).

<sup>210</sup> Interview with Issa Aly Hassan, in Niamey, Republic of Niger (November 4, 2003).

<sup>211</sup> See *id.* (saying land registration is necessary because land is growing scarce and "you have to think of the future").

customary rights take precedence over those of the *horso*.<sup>212</sup> It appears, therefore, that within the foreseeable future the nobles of Gassangourni will succeed in using the procedures of the Rural Code to formalize its ownership of the disputed lands.

In another nearby *horso* settlement, Tchida Mayna, nobles from a neighboring village appear to be pursuing a strategy similar to that of Gassangourni's.<sup>213</sup> The *horso* of Tchida Mayna, like those of Gunti Kwara, were installed on the land they now inhabit in the 1940s by a powerful traditional chief. Unlike the Gunti Kwara *horso*, the Tchida Mayna *horso* have cultivated their fields since then without paying the *laabu albarka* to any nobles. In recent times, however, nobles from the village of Kollo Djogonom periodically have attempted to eject the *horso* from the land, sometimes by physically attacking individual farmers in their fields, and in one instance by filling the settlement's well with rocks. Each time, the Tchida Mayna *horso* have either repulsed the attack or rebuilt and hung on. Now, however, the new land tenure rules and the transition to private property ownership threaten to dislodge them.

In 2003, the leader of the Tchida Mayna *horso* received a summons from the *chef de canton* ordering him to appear and respond to an accusation that he and his extended family were wrongfully occupying and cultivating land belonging to the nobles from Kollo Djogonom. A written record (*process verbal*) of the proceeding before the *chef de canton*, composed in French (which not one *horso* of any age in Tchida Mayna could read because they are slave village and have no school), declared that the people of Tchida Mayna were mere borrowers of land and that the owners, the nobles of Kollo Djogonom, had the right to reclaim it. The new land tenure rules ushered in by Western

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<sup>212</sup> *Id.*

<sup>213</sup> The story of Tchida Mayna's conflict with nobles from Kollo Djogonom is drawn from Interview with Moussa Hama, his son and elders, in Tchida Mayna, Republic of Niger (February 26, 2004).

law reform now will now permit the nobles of Kollo Djogonom, like those of Gassangourni, to accomplish through law that which they had been attempting through force: to wrest control of the land from the *horso*.

In Gassangourni, Tchida Mayna, and countless other Nigerien villages, nobles are registering their culturally superior rights and converting those rights to ownership. The introduction of Western law, particularly the Western notion of private ownership of land, is being used as a vehicle to irrevocably push *horso* communities off of agricultural land that in many cases their families have been cultivating for generations.

#### **IV. What is to be done?**

The government of Niger has consistently denied to the world that it has a slavery problem.<sup>214</sup> In one sense, of course, it is correct: there is no – or at least little<sup>215</sup> – slavery in Niger as that term is defined by Western law. There is, however, a form of slavery that arises out of Niger's unique social and political history, and for reasons described in the body of this paper, Western laws – particularly laws instituting private property – are making that indigenous form of slavery worse, not better. They are helping to create a permanent underclass of landless citizens, a development that will give rise to injustice and, very possibly, long term social instability.

##### **A. What is to be done in Niger?**

Assuming Niger is determined to complete the transition to a Western-style legal system, including Western-style property ownership, it must be engineered in such a way

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<sup>214</sup> See *supra* notes 68-69 and accompanying text.

<sup>215</sup> Human rights organizations in Niger report instances of violent, repressive slavery among the Tuareg people of northern Niger. See, e.g., Iday Baraou, *Niger 'Slave' Flees Castration*, BBC NEWS WORLD EDITION, September 4, 2002 (transcript available at <http://news.bbc.co.uk/2/hi/africa/2236499.stm>); see also Robyn Dixon, *Fear, Tradition Hold Niger's Slaves Captive Without Bonds*, CHICAGO TRIBUNE, September 25, 2005, at (reporting harsh conditions among Tuareg slaves in Niger).

that *horso* and other contemporary slaves are provided the opportunity to participate. This would involve a number of politically difficult but necessary steps.

First, Niger's government should debate and adopt another new law, this one recognizing the status of *horso* and equivalent servile categories from Niger's numerous ethnic groups. Such status would not necessarily be linked to the Western conception of slavery, and would not necessarily be subject to all of the criminal penalties provided for slavery practice. It merely would recognize the existence of the non-Western social categories of slaves, employing concepts and terminology from Nigerien culture and history. The law would provide the state legal system with a vocabulary and cultural competence that would permit it to grapple realistically and fairly with disputes between nobles and *horso*.

Second, those who meet the new legal definition of *horso* would be entitled to ownership of the agricultural land that they and their forbearers have cultivated at the sufferance of noble families. In Gunti Kwara, for example, the *horso* would receive ownership and title to the land that they now farm, the control of which is being contested by nobles from Gassangourni. In Saabu Dey, the *horso* would obtain ownership and title to all the lands originally granted to the slave Antwa that since have been expanded and maintained by his descendants.

The mechanism for assigning land ownership to *horso* would be relatively simple to create. Niger is in the midst of revamping its land tenure system through the Rural Code.<sup>216</sup> *Horso* rights could be provided for by inserting a statement into the Rural Code to the effect that their claims of ownership based on historical use take precedence over nobles' ownership claims based on original settlement of the land. Guidelines for

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<sup>216</sup> See *supra* Part II.B.

establishing local and regional land commissions would also be amended to ensure that representatives of *horso* and other traditional slaves have a formal voice in the process of issuing land titles.

These amendments to the Rural Code, strictly speaking, would not constitute land redistribution, which would imply removing ownership rights from one person or group and transferring them to another. Instead, the law merely would privilege one non-ownership property right embedded in Nigerien culture (slaves' right to demand land and sustenance from nobles) over another (noble elders' right to control the use of land historically associated with their lineages), and convert the slaves' non-ownership right to Western-style freehold tenure.

Recognizing the customary property rights of *horso* and converting them to ownership would undoubtedly be opposed by the country's nobles, but the government of Niger could explain and justify the need for such a step by employing language and cultural categories that are comprehensible and persuasive in the vernacular of Nigerien tradition.<sup>217</sup> For example, the government could justify its *horso* land policy by invoking Nigerien nobles' culturally engrained duty to provide for dependents, including slaves.<sup>218</sup> It could explain further that, in circumstances of a global consensus against slavery,

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<sup>217</sup> See CORRINNE A. A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION, TRADITIONAL PRACTICES HARMFUL TO WOMEN'S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 11 (2003)(offering examples in Africa of new laws being accepted when they were introduced and explained using culturally appropriate symbols and ceremonies); see also Abdullahi Ahmed An-Na'im in, *Problems of Universal Cultural Legitimacy for Human Rights*, in HUMAN RIGHTS IN AFRICA 366 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990) (arguing law reformers in non-Western cultures should use the resources of their cultural traditions to explain the laws in ways perceived to be legitimate by the members of that culture).

<sup>218</sup> See *supra* note 109 and accompanying text.

Nigerien nobles' final, culturally appropriate obligation to their *horso* and other slaves would be to permit them to title portions of lineage lands in their own names.<sup>219</sup>

Whatever Niger's leaders decide to do about customary slavery, the present policy of pretending that the issue has been resolved by passing Western anti-slavery laws will not produce a solution. It will cause the continuation of slavery in Niger and, in all likelihood, will lead to political instability as the country's *horso* grow into a permanent, landless underclass.

B. What is to be done regarding legal westernization in general?

Lessons from the specific case of Niger may be extrapolated and applied to the more general project of legal westernization in the developing world. The first and most fundamental lesson is that although legal westernization may be motivated by a genuine desire to spur economic and social development and guide poor countries toward globally connected prosperity, it simply does not work to helicopter in from the United States or Europe and plunk down laws and legal institutions that have no standing in or relevance to the subject country's culture. That approach at best creates meaningless words on paper<sup>220</sup> and at worst – as in the case Niger's *horso* – great harm.

If Western law reformers are determined, as it appears they are,<sup>221</sup> to apply Western laws to people throughout culturally non-Western countries, they must find ways

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<sup>219</sup> It is conceivable that with significant foreign assistance nobles could be compensated in some fashion for land turned over irrevocably to their *horso*. After all, agricultural land in Niger, though increasingly scarce, is still comparatively cheap. Timidria, Niger's leading anti-slavery human rights organization, has successfully conducted pilot slave resettlement projects where, using money raised from international nongovernmental organizations, they purchased land and basic tools for slaves manumitted from their Tuareg masters. See generally Timidria & Unicef, *Projet Accueil et Reinsertion des Victimes d'Esclavage Dans les Arrondissements de Abalak et Tchintabaraden* (June 2002) (a report laying out plans to resettle newly emancipated Tuareg slaves in north-central Niger) (copy on file with author).

<sup>220</sup> See Kelley, *supra* note 5, at 143 (arguing that Niger's new, Western criminal procedure laws will be words on paper unless legitimized in culturally familiar terms).

<sup>221</sup> See *supra* notes 6-9 and accompanying text.

to explain and apply those laws in terms that are relevant to the people living on the ground. The process would be time consuming and laborious, but necessary if the law is to take root.

A good first step would be for domestic and international law reformers to acknowledge that problems they observe in poor countries – for example, a legacy of slavery, or a lack of consistent protections for private property – are cultural matters as well as legal.<sup>222</sup> They must accept that law reform alone is unlikely to transform societies unless the culture in question is prepared to receive and honor the reformed law.<sup>223</sup>

Further, the law reformers must come to grips with the fact that the only way to understand the cultural context upon which new Western laws are to be grafted is to get out of their office chairs,<sup>224</sup> head into the boondocks,<sup>225</sup> and closely study that which already exists on the ground. If law reformers assume the Western laws they wish to introduce are preferable to those that already exist in the developing world, then common sense would dictate that they focus some attention on the old so that they can effectively plot the best way of affecting the transition to the new.<sup>226</sup> If the lawyers are reluctant to leave their libraries, they should partner with other disciplines, notably Anthropology,<sup>227</sup> whose stock and trade is studying and explaining the concrete realities of diverse

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<sup>222</sup> See John M. Conley & William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW AND CONTEMPORARY PROBLEMS 5, 6 (1997) (arguing that those who would understand legal problems need to view them as cultural problems).

<sup>223</sup> See PACKER, *supra* note 217, at 108, 170 (arguing that culture is dynamic and subject to change, and that legislation should come only after public sentiment has evolved); see also OLIVIER DE SARDAN, *supra* note 63, at 150-51 (arguing the only way to avoid cultural resistance to development goals is to explain them from the cultural perspective of the users).

<sup>224</sup> DE SOTO, *supra* note 11, at 187 (arguing that if Western lawyers want to play a role in creating good laws in poor countries, they must step out of their law libraries into the extralegal sector, which is the only source of the information needed to build a truly legitimate formal legal system).

<sup>225</sup> GOLUB, *supra* note 21, at 25.

<sup>226</sup> OLIVIER DE SARDAN, *supra* note 63, at 155.

<sup>227</sup> DE SOTO, *supra* note 11, at 187 (arguing the process of westernizing law, particularly of creating formal property law, is essentially an anthropological adventure).



cultures.<sup>228</sup> In the case of Niger, many of the scholars cited in this paper could have been of use in the law reform process.

Armed with an understanding of the cultures and legal systems they intend to alter, the law reformers' next step would be to translate those Western legal concepts into language and cultural categories that the citizens of developing countries understand and accept.<sup>229</sup> This process of adapting Western norms into non-Western vernacular could include an attempt to educate the populace about the norms of the global community, and sensitize them to the fact that ignoring those norms (particularly for an economically poor country) is not a good option.<sup>230</sup> Having explained the need for Western law reform, the country's leaders could engage its citizens in discussion and eventually consensus regarding how best to adapt to the new law's normative constraints.<sup>231</sup>

## V. Conclusion

This paper has offered concrete, detailed explanations and illustrations of how and why the importation of Western legal concepts to a place that is historically, culturally, linguistically and legally non-Western can cause confusion and even harm. In Niger the importation of Western notions of private property ownership – a foundational concept of

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<sup>228</sup> OLIVIER DE SARDAN, *supra* note 63, at 214-215 (arguing for the necessity of social science research to bolster development efforts and calling for a new profession that includes the skills of social science researchers and international development experts).

There is a plethora of anthropologists and other social scientists who understand Nigerien history and culture. Many from Niger, France and the U.S. have been cited in this article. Sadly, there is no evidence that their wisdom was sought out by those who would reform Niger's laws.

<sup>229</sup> *See id.* at 170-172 (arguing that effective development depends on the effective translation of concepts and mediation between diverging systems of meaning); DE SOTO, *supra* note 11, at 191: (arguing that the government must be able to explain its intent in a way that the poor can understand and relate to).

<sup>230</sup> PACKER, *supra* note 217, at.

<sup>231</sup> *See id.*, at 9 (arguing that consciousness raising is a crucial first step in introducing Western laws and cultural values); *see also* An-Na, *supra* note \_\_, at 355-56 (calling for a process of closely analyzing the incompatibility of Western human rights laws and differing cultural practices and beliefs to better manage the process of reconciling them).

our legal system<sup>232</sup> and one that is at the heart of our efforts to reform and develop Niger – caused unintended havoc in the lives of that country’s customary slaves, a particularly troubling and ironic result given that some of those reformed laws were meant to accomplish just the opposite.

Although much of the body of this paper has been devoted to describing the ill effects of legal westernization in Niger, it does not conclude that all such efforts should cease. Rather, legal westernization in Niger and across the developing world could and should be accomplished more wisely and effectively by slowing the process down, collaborating with anthropologists and others who understand the cultural reality on the ground, and by building bridges of understanding<sup>233</sup> between the existing cultures and the newly introduced Western laws.

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<sup>232</sup> See Purdy, *supra* note 157, at 1051-52 (stating that property as an individual resource has been an important concept since Aristotle and central to Anglo-American legal thought for centuries).

<sup>233</sup> See DE SOTO, *supra* note 11, at 173 (arguing people in developing countries will choose modern, Western law if it is explained to them in terms that are comprehensible in their cultures).