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Truth or Consequences (the Deadly Kind): Oath Swearing in Nigerien Customary Law

Thomas A. Kelley III

University of North Carolina School of Law, takelley@email.unc.edu

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Truth or Consequences (the Deadly Kind): Oath Swearing in Nigerien Customary Law

Thomas Kelley[†]

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I. Introduction

In the customary law of Niger, oath swearing plays a central role

[†] Thomas Kelley, J.D., James Dickson Phillips, Jr. Distinguished Professor Law, University of North Carolina School of Law.

in resolving disputes.¹ However, the swearing of oaths in Niger is altogether more consequential than in typical Global North legal systems. In the United States, oaths serve primarily to remind witnesses of their legal duty to testify truthfully.² Although some oaths in the U.S. justice system include the tagline “so help me God,” the consequences of swearing falsely are mostly legal—the witness may be prosecuted and punished for perjury.³ Any possible divine sanction is vague and temporally remote.⁴ God’s judgment, if there is any, may not become evident until the false witness is standing before the Pearly Gates seeking admission to heaven.⁵

¹ See Christian Lund, *En Attendant le Code Rural: Réflexions sur une Réforme de la Tenure Foncière au Niger*, Programme Reseaux des Zones Arides Dossier, IIED Dossier no 44, September 1993, at 16, n. 9 (arguing many land disputes in Niger are resolved by parties swearing oaths “under the threat of grave supernatural sanctions”); see also Adeline Masquelier, *Witchcraft, Blood-Sucking Spirits, and the Demonization of Islam in Dogondouchi, Niger (Sorcellerie, Esprits Suceurs de Sang et Diabolisation de l’Islam à Dogondouchi (Niger))*, CAHIERS D’ÉTUDES AFRICAINES 131, 145 (2008) (describing oath swearing as a means of settling disputes in Niger); Maud Saint-Lary, *S’il Ment, Que l’Accuse Soit Maudit Par la Mosquée: Anthropologie d’une Épreuve Juratoire au Burkina Faso*, ARCHIVES DE SCIENCES SOCIALES DES RELIGIONS 93 (2008) (describing a common form of oath swearing in Burkina Faso, which borders Niger); Abe Oyeniya, *Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa*, 25 WILLAMETTE J. INT’L & DISP. RESOL. 56, 57, 61 (2017) (referring to the “age old” African method of relying on oath swearing to resolve disputes); Abulumini A. Oba, *Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts*, 52 J. AFR. L. 139, 140 (2008) (arguing oath swearing is an important means of resolving disputes in Nigeria, which borders Niger).

² Richard S. Willen, *Rationalization of Anglo-Legal Culture: The Testimonial Oath*, 34 BRITISH J. SOCIO. 109, 110 (1983) (arguing in contemporary Anglo legal culture the oath is intended to encourage the witness to “take cognizance of the occasion’s significance and the [legal] consequences of perjured testimony”); Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L. J. 1, 20 (2009) (distinguishing some cultures’ “decisory oaths,” which are treated as important evidence in and of themselves, from contemporary common law oaths, which are meant to ensure the truth of a witnesses evidence).

³ Milhizer, *supra* note 2, at 37.

⁴ See Grace Lawrence-Hart, *The Need for Traditional Oath-Taking for Good Governance in the Niger Delta Region*, 12 ARCN INT’L J. SOC. SCIS. & HUMANS. 1, 2 (2018) (arguing Nigerians do not fear swearing false oaths under colonial religions because the sanction is in the “long term,” as opposed to immediate death for family members in the case of customary law oaths); Oyeniya, *supra* note 1, at 72 (arguing in most African societies swearing “so help me God” accomplishes nothing, while swearing on the gods of thunder and iron will lead immediately to truth).

⁵ See Lawrence-Hart, *supra* note 4, at 2 (arguing any spiritual sanction from swearing false oaths is in the “long term”).

In contrast, under Nigerien customary law divine punishment for those who swear false oaths is imminent and dreadful.⁶ Many fall ill and die within hours, days, or weeks of uttering their falsehoods.⁷ Some become *fou*, a French word meaning mad or crazy.⁸ A surprising number are struck by lightning.⁹ Worse yet, the sanction for swearing falsely is not confined to the dishonest individual. Members of his family may be felled by sickness, or they might starve when his crops are blighted or his *grainer* burns down.¹⁰ The consequences for swearing false oaths are deadly, and everyone understands them.¹¹

For more than 25 years, I have been observing and studying law and culture in southwestern Niger. My research has concentrated on that rural region because, as result of Peace Corps service in the mid-1980s, I speak and understand the predominant local language, Zarma. Much of my scholarly work has been ethnographic. I sit in

⁶ See Interview with Village Chief and Group of Elders, in Saabu Dey, Rep. of Niger (Dec. 18, 2003) (arguing a man who swore falsely in a legal dispute over land began falling ill immediately and died eleven days later); Lawrence-Hart, *supra* note 4, at 3; Oyeniyi, *supra* note 1, at 56 (arguing traditional oath swearing in African societies is effective due to widespread belief in “the potency in the powers of different deities, which are used in oath swearing by parties”); Edmond Kwam Kouassi, *Negotiation, Mediation and Other Non-Judicial Ways of Managing Conflicts in Pre-Colonial West African Societies*, 13 INT’L NEGOT. 233, 235 (2008) (arguing in West African societies, traditional oaths brought out the truth because oath-takers fear “real calamities as a consequence of the anger of the gods”).

⁷ See Interview with Village Chief and Group of Elders, in Saabu Dey, *supra* note 6 (recounting an instance where a man who swore falsely died soon after).

⁸ See Interview with Alpha Saidou Issa, Younger Brother of Fandou Berri Chief, Niamey, Rep. of Niger, (Jan. 15, 2004) (recounting an incident where a man swore falsely in a land dispute one afternoon and that night began losing his mind and became *fou*).

⁹ Masquelier, *supra* note 1, at 146 (recounting an incident in Niger where a man swore falsely and was immediately incapacitated by a clap of thunder).

¹⁰ Norah Hashim Msuya, *Traditional “Juju Oath” and Human Rights Trafficking in Nigeria: A Human Rights Perspective*, 52 DE JURE L. J. 138, 148 (2019) (arguing that, in Nigeria, those who swear oaths falsely fear that their parents or families will die); Lawrence-Hart, *supra* note 4, at 1 (arguing in Nigerian customary law “death for family members” is one consequence of false oath swearing); see Philip P. Durand, *Customary Oathing and the Legal Process in Kenya*, 14 J. AFR. L. 17, 17, 28 (1970) (arguing that customary oaths are “woven into the fabric of African traditional life” and that false swearing can lead to the death of family members and livestock as well as abortions and miscarriages).

¹¹ Lund, *supra* note 1, at 16 n.9; Msuya, *supra* note 10, at 157 (“It is a well-known fact that Africans dread traditional oaths. In many communities it is the surest means of ascertaining the truth in matters shrouded in doubt.”).

the shade of village trees or inside grass huts posing questions about customary law and recording the answers. Although I try to pose open ended questions that allow my informants to guide me toward legal topics they think are important, I often have topics in the back of my mind about which I am particularly curious. During one research trip, I dug for answers about how rural Nigeriens identify thieves and other wrongdoers.¹² Other times, I was curious about land rights and land disputes.¹³ Still another, I wanted to hear villagers' views on customary rights and responsibilities related to indigenous slavery.¹⁴

During decades of performing such research, through scores of interviews and countless hours of observation, I never focused on the phenomenon of oath swearing, but my informants often mentioned it.¹⁵ In the course of describing a theft or a land dispute, whether intra- or inter-village, they would casually mention that one of the parties swore a false oath and then, soon after, died, fell ill, went mad, or suffered some other grave misfortune. Perhaps the reason I never focused on oath swearing and what it means in rural Nigerien law and culture is that the rural people I interviewed mentioned the suffering of false oath swearers only in passing, as if it were the most natural and obvious outcome. No one ever expressed surprise or frisson at the accounts of fatal, divine retribution. In other words, they never made a big deal about God (or the gods) smiting people who testified falsely, so I never dug in and made a big deal out of it either. It was only years later, when reviewing my fields notes, personal journals, and memory in preparation for a book I planned to write about customary law in Niger, that I remarked upon how often these stories appeared.

¹² Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 NYU J. INT'L L. & POL. 635, 673–679 (2002) [hereinafter Kelley, *Squeezing Parakeets*]; Thomas Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 7 GEO. WASH. L. REV. 321, 346–361 (2007) [hereinafter Kelley, *Exporting Western Law*].

¹³ See, e.g., Thomas Kelley, *The Death of Custom: Winners and Losers in the Legal Transformation of Peri-Urban Land in Niger*, 47 SYRACUSE J. INT'L L. & COMM. 57 (2021) [hereinafter Kelly, *The Death of Custom*]; Kelley, *Squeezing Parakeets*, *supra* note 12, at 747.

¹⁴ See Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. L. 999 (2008) [hereinafter Kelley, *Unintended Consequences*]

¹⁵ See, e.g., Interview with Alpha Saidou Issa, *supra* note 8.

One might fairly ask why Global North legal scholars, lawyers, and law students should bother to pay attention to the practice of oath swearing in a faraway place. I offer two reasons. First, we in the Global North too often assume that our legal systems, our ways of regulating and bringing order and justice to society, fell from the sky and are universal.¹⁶ We should remind ourselves periodically that different societies around the world make different assumptions about the nature of law and justice, and that we could, if we wished, rethink our own system.¹⁷

Second, since African independence in the 1960s, countries from the Global North have made it a priority to reform and modernize the continent's legal systems.¹⁸ Those efforts, based on the assumption that the adoption of Global North law inevitably would lead to economic growth and social stability, accelerated in the 1990s after the fall of the Berlin Wall.¹⁹ And yet, the legal

¹⁶ Thomas Kelley, *Apples to Oranges: Epistemological Dissonance in the Human Rights Case Hadijatou Mani v. Niger*, 32 QUINNIAC L. REV. 311, 327–30, 350 (2014) [hereinafter Kelley, *Apples to Oranges*]; see Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 743 (1999) (explaining the “Western belief in the superiority of its legal system”); see also Janet E. Ainsworth, *Categories and Culture: On the “Rectification of Names” in Comparative Law*, 82 CORNELL L. REV. 19, 20 (1996) (explaining a student’s assumption that other legal systems developed similarly to the American legal system); P.G. Monateri, *Black Gaius A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. 479, 482–87 (2000) (“[T]he theory that [the legal systems of the Global North] are the cornerstone of the ‘rule of law’ in the modern world, as they have been in history.”).

¹⁷ See Kelley, *Squeezing Parakeets*, *supra* note 12, at 641 (arguing that studying Nigerien customary law might help Americans critique and change their own legal system); see also John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546–47 (1995) (“[Even] when scholarly inquiry concerns topics on which foreign experience is deep and potentially instructive, American legal dialogue starts from the premise that no relevant insights are to be found beyond the water’s edge.”); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 910 (1997) (“[W]e must modify the belief that our ideas and means of social organization are the only true legitimate forms.”).

¹⁸ Kelley, *Unintended Consequences*, *supra* note 14, at 1000–01; W. Paatii Ofoosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 L. & BUS. REV. AM. 551, 554 (2002) (“[L]egal practitioners and scholars from the United States, France, and the United Kingdom went to many of the newly-independent countries during the 1960s, to assist these countries in the early stages of their reform programs.”).

¹⁹ Kelley, *Unintended Consequences*, *supra* note 14, at 1000–01; see Moisés Naím, *Washington Consensus or Washington Confusion?*, 118 FOREIGN POL’Y 86, 87–97 (2000) (arguing that in the late 1980s and early 1990s a consensus formed that developing

transplants almost never worked.²⁰ Even where African states adopted the laws we proffered, the promised benefits rarely materialized.²¹ There were many reasons, but the failure was caused at least partly because the self-described modern law we were pushing was based on assumptions about the nature of law and justice that were foreign to ordinary people in those countries.²² If we in the Global North truly believe that economic and social benefits will redound to the benefit of African countries who adopt our laws,²³ we should make at least some effort to understand the laws and legal institutions that already exist, and we should devise strategies for harmonizing our laws with theirs.²⁴

countries should reform themselves to produce “honest governments, an impartial legal system, properly trained and remunerated public officials, transparent regulatory systems, and so on”).

²⁰ Kelley, *Exporting Western Law*, *supra* note 12, at 39–40; see Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LIT. 973, 973–74 (2006) (“Proponents and critics alike agree that the policies spawned by the Washington Consensus have not produced the desired results.”); Nicholas A. Kahn-Fogel, *Western Universalism and African Homosexualities*, 15 OR. REV. INT'L L. 315, 359 (2013) (“Western pressure for liberal legal reform in developing countries may result in outcomes at odds with reformers’ intentions.”).

²¹ Kelley, *Exporting Western Law*, *supra* note 12, at 39–40; see Maya Berinzon & Ryan Briggs, *60 Years Later, Are Colonial-Era Laws Holding Africa Back?*, WASH. POST (Jan. 20, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/60-years-later-are-colonial-era-laws-holding-africa-back/> [https://perma.cc/FM7B-VA83] (arguing many believed African countries adoption of democracy “would cure ills, from economic underdevelopment to political repression, from low levels of social trust to high levels of corruption,” but many of these goals remain unrealized).

²² Kelley, *Exporting Western Law*, *supra* note 12, at 21–22.; see Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. MOD. AFR. STUD. 571, 576 (2001) (arguing African countries adopted and kept the foreign European colonizers’ legal systems, languages, and political institutions); Salvatore Mancuso, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, 14 ANN. SURV. INT'L & COMP. L. 39, 45–46 (2008) (arguing colonization imposed Western legal systems in African countries where customary law had reigned and that they still coexist).

²³ I have written elsewhere about my suspicion that, even in the long-term, Global North legal transplants to remote countries like Niger will do more harm than good. See Kelley, *Squeezing Parakeets*, *supra* note 12, at 710 (expressing “misgivings” about displacing customary law in rural Niger with “modern” laws).

²⁴ Kelley, *Exporting Western Law*, *supra* note 12, at 40; see Chris Nwachukwu Okeke, *African Law in Comparative Law: Does Comparativism Have Worth?*, 16 ROGER WILLIAMS U. L. REV. 1, 2–3 (2011) (“The African continent is a patchwork and

With those considerations in mind, this paper will explore and explain the important role that oath swearing plays in Niger's customary law. Part II provides necessary context by offering a general overview of Niger with a particular emphasis on its pluralistic law and its peoples' fascinating, syncretic spiritual beliefs. Part III describes in detail the role that oath swearing plays in customary justice and will illustrate its conclusions partly by drawing examples from my ethnographic fieldwork. Part IV proposes several lessons that Global North lawyers and legal scholars can draw from their newly acquired understanding of Nigerien oath swearing practices. Part V concludes that we, as Global North lawyers, ought to leave Nigerien oath swearing alone—it works well within the context of Nigerien society because its particulars were shaped by and adapted to Niger's unique history and culture.

II. The Context: Legal Pluralism and Syncretic Spiritual Beliefs

In rural Niger, where custom predominates, law is not considered a distinct social institution.²⁵ It blends seamlessly with spiritual beliefs and history.²⁶ If one wishes to understand customary law, one must also understand the larger complex in which it is embedded.

A. *Legal Pluralism*

Niger's formal state legal system is largely a product of French

combination of traditional, religious, western common law, and civil legal traditions. At the same time, many of these combinations are not the result of voluntary development of African legal system; rather they are often influenced by domineering colonial powers This requires finding common ground between traditional systems and the colonially imposed Western systems. By analyzing and understanding the genesis, background, and nature of these laws, will Comparative Law scholars better understand them? Perhaps, the scholars will discover common ground in what are thought irreconcilable conflicts in traditional, religious, and Western systems of law.”)

²⁵ Kelley, *Squeezing Parakeets*, *supra* note 12, at 701–02.

²⁶ *Id.*; see Mancuso, *supra* note 22, at 55, 58 (“African legal culture was based on the notion that the tribal or local chief's power was often absolute and legitimized by the supernatural African society is characterized by a vision of life where everything is linked; life and the supernatural, human behaviors and natural phenomena, power and that which is sacred. African traditions are essentially based on the central role played by the group in all its possible forms (family, tribe, village, community) where solidarity within the members of the group is a key factor that renders it difficult to distinguish.”).

colonialism.²⁷ The French did not arrive in numbers in Niger until the dawn of the twentieth century primarily because Niger was (and still is) a parched, barren country.²⁸ Two-thirds of its landmass is in the Sahara Desert, and much of the remaining third, along its southern border, can barely sustain agriculture.²⁹ In addition, Niger had few natural resources worth extracting, though in modern times European and Chinese prospectors have discovered significant uranium deposits and modest amounts of oil and gold.³⁰ Given the lack of plunder, France's main motivation for taking possession of what is now Niger was to prevent the British from expanding their West African colonies northward.³¹

Because there was little to steal or otherwise exploit, France's presence in Niger was more fleeting than in many of its other African colonies.³² Their brief tenure did not prevent them from engaging in characteristic colonial cruelty. They compelled Nigeriens to pay burdensome head taxes and engage in deadly forced labor.³³ They caused periodic famines by compelling rural

²⁷ See Kelley, *Squeezing Parakeets*, *supra* note 12; Richard Higgott, *Structural Dependence and Decolonisation in a West African Land-Locked State: Niger*, 17 REV. AFR. POL. ECON., 43, 44 (1980) ("Niger is clearly the product of French colonialism.").

²⁸ Kelley, *Squeezing Parakeets*, *supra* note 12, at 651; see also Kelley, *The Death of Custom*, *supra* note 13, at 61 (arguing Niger is parched and its soil is poor); Ambe J. Njoh, *The Role and Goals of the State in Urban Development in Niger*, 30 HABITAT INT'L, 540, 544-45 (2006) (explaining that Niger has an "unfavourable natural environment" including sparse rainfall, hot and dry weather, and desert terrain).

²⁹ Kelley, *The Death of Custom*, *supra* note 13, at 60-61; Njoh, *supra* note 28, at 544-45.

³⁰ *The World Factbook (Niger) (Geography)*, CIA, <https://www.cia.gov/the-world-factbook/countries/niger/> [<https://perma.cc/9YDN-GKAH>] (last visited Jan. 15, 2022) (listing Niger's natural resources as uranium, coal, iron ore, tin, phosphates, gold, molybdenum, gypsum, salt, and petroleum); Kelley, *The Death of Custom*, *supra* note 13, at 61 n. 20.

³¹ Kelley, *Squeezing Parakeets*, *supra* note 12, at 651; Kelley, *The Death of Custom*, *supra* note 13, at 68.

³² See Kelley, *Death of Custom*, *supra* note 13, at 72 (arguing because Niger was a "barren hinterland," the French did not arrive on the scene until late in colonial period); Elise Huillery, *History Matters: The Long Term Impact of Colonial Public Investments in French West Africa*, 1 AM. ECON. J. 176, 186, 189 (2014) (asserting France's "colonial strategy was actually extraction," and France did not invest heavily in Niger).

³³ Kelley, *Squeezing Parakeets*, *supra* note 12, at 664 n. 127; BARBARA M. COOPER, *COUNTLESS BLESSINGS: A HISTORY OF CHILDBIRTH AND REPRODUCTION IN THE SAHEL* 15 (2019); see Ewout Frankema & Marlous van Waijenburg, *Metropolitan Blueprints of Colonial Taxation? Lessons from Fiscal Capacity Building in British and French Africa*,

Nigeriens to plant cash crops such as peanuts instead of staples such as millet and sorghum.³⁴ They pursued a strategy of divide and conquer, favoring a minority ethnic group—the Zarmas—with education and economic opportunity and using them to rule over rival ethnic groups such as the Hausa and Fulani.³⁵ But apart from those routine acts of colonial brutality, the French made little effort to engage with Nigerien people³⁶ and did little to spread the supposed benefits of French language, culture, and law beyond the largest cities.³⁷

France's hands-off approach to colonialism in Niger created a legal legacy that has lasted into the 21st century. Because rural people were mostly left to their own devices, they were able to preserve the customary laws by which they had governed themselves for generations.³⁸ This meant that traditional chiefs and Islamic *marabouts* retained significant authority.³⁹ It also meant

c. 1880-1940, 55 J. AFR. HIST. 371, 388–92 (explaining France forced the Nigeriens and other colonial subjects to perform labor and pay high taxes).

³⁴ Kelley, *Squeezing Parakeets*, *supra* note 12, at 651 n. 73; Adeline Masquelier, *Narratives of Power, Images of Wealth: The Ritual Economy of Bori in the Market*, in MODERNITY AND ITS MALCONTENTS: RITUAL AND POWER IN POSTCOLONIAL AFRICA 11–16 (ed., Jean Comaroff & John Comaroff) (1993); Cooper, *supra* note 33, at 15; Food and Agriculture Organization of the United Nations, *Global Partnership Initiative for Plant Breeding Capacity Building* (2004) <https://www.fao.org/in-action/plant-breeding/our-partners/africa/niger/en/> [<https://perma.cc/7YH8-CLLQ>] (last visited Jan. 15, 2022) (explaining France used its colonies to focus on cash crops like cotton and groundnuts); Monica M. van Beusekom, *Colonisation Indigène: French Rural Development Ideology at the Office du Niger, 1920-1940*, 30 INT'L J. AFR. HIST. STUD. 299, 304 (1997) (contending France focused on cash crop production in its colonies).

³⁵ Kelley, *Squeezing Parakeets*, *supra* note 12, at 656; *see* Kelley, *Exporting Western Law*, *supra* note 12, at 13 (arguing the French created an educated class of natives through whom they ruled).

³⁶ Kelley, *Exporting Western Law*, *supra* note 12, at 13–14.

³⁷ *Id.*; *see also* Cooper, *supra* note 33, at 29 (arguing the French colonizers left “the day-to-day management of civilian life . . . to indigenous figures of authority”).

³⁸ Kelley, *Exporting Western Law*, *supra* note 12, at 14; *see* Kelley, *The Death of Custom*, *supra* note 13, at 73 (arguing most Nigeriens simply ignored French laws and “went on with their lives as before”); *see also* Jean Comaroff & John Comaroff, *Introduction* to MODERNITY AND ITS MALCONTENTS, *supra* note 34, at xi–xii (arguing individuals in colonized societies in Africa “struggled, in diverse ways and with differing degrees of success, to deploy, deform, and defuse imperial institutions”).

³⁹ *See* Kelley, *Exporting Western Law*, *supra* note 12, at 21 (arguing rural people prefer to resolve their disputes before chiefs, marabouts and village elders as opposed to state legal authorities); *see also* COOPER, *supra* note 33, at 17, 29 (arguing French colonial rule in Niger was carried out mostly through “traditional” rulers).

that rural people continued to rely on customary legal practices, including oath swearing. In the terminology used by anthropologists and legal scholars, Niger has remained a site of significant legal pluralism.⁴⁰

This is not to say that customary law in rural Niger existed, or exists today, in a pristine bubble, untouched by outside influences.⁴¹ The French presence did have some impact on law, even in remote areas.⁴² For one, it introduced the idea of individual ownership of land and land titling, even if most rural Nigeriens ignored that notion until recently.⁴³ Also, in some instances, the French succeeded in altering or undermining traditional authority structures, both by creating new chieftaincies and sometimes by appointing their “toadies” to vacant chief positions.⁴⁴

In more recent times, customary law has been influenced by the rise of globalization and liberalization.⁴⁵ The Washington Consensus of the 1990s and 2000s, including its notorious “structural adjustment” programs and its package of market oriented legal reforms,⁴⁶ occasionally reached beyond the largest cities and influenced legal practices in rural areas.⁴⁷ Among its many other flawed premises, the Consensus insisted that economic and social development would happen only if countries like Niger transitioned from “communal ownership” (an inaccurate label for the lineage-based control of land that predominates in most rural communities in Niger)⁴⁸ to fee simple ownership with registered title.⁴⁹ Even today, most rural Nigeriens have resisted registering their lands under individual title, but that legally novel concept is slowly spreading throughout the country.⁵⁰

⁴⁰ See Kelley, *Apples to Oranges*, *supra* note 16, at 335–37 (concluding legal pluralism is particularly prevalent in Niger).

⁴¹ Kelley, *Squeezing Parakeets*, *supra* note 12, at 708–09.

⁴² Kelley, *The Death of Custom*, *supra* note 13, at 73.

⁴³ *Id.*

⁴⁴ Kelley, *Squeezing Parakeets*, *supra* note 12, at 654–55.

⁴⁵ Kelley, *The Death of Custom*, *supra* note 13, at 76–79.

⁴⁶ Kelley, *Exporting Western Law*, *supra* note 12, at 1, 6–7.

⁴⁷ Kelley, *The Death of Custom*, *supra* note 13, at 73.

⁴⁸ Kelley, *Squeezing Parakeets*, *supra* note 12, at 683 n. 213.

⁴⁹ Kelley, *The Death of Custom*, *supra* note 13, at 72; see Kelley, *Exporting Western Law*, *supra* note 12, at 1 (arguing Washington Consensus policies led to bread riots and general economic suffering).

⁵⁰ Kelley, *The Death of Custom*, *supra* note 13, at 72–73.

In sum, the forces of French colonialism, contemporary globalization, and liberalism have marginally affected customary law in rural Nigerien communities. More significant changes have come with the recent introduction of so-called reformist Islam, which condemns the use of many legal procedures that it considers pre-Islamic or non-Islamic.⁵¹ The complicated, multi-layered influence of Islam is described in the following subsection.

B. Syncretic Spiritual Beliefs

Islam was introduced to West Africa in the eighth century, but for generations its influence was confined mostly to trade routes⁵² and a few centers of Islamic learning such as Timbuktu, located in present-day Mali.⁵³ The territory that is now Niger was always off the beaten track, so Islam spread slowly there, especially in rural areas.⁵⁴ Even after Islam arrived in Niger, for centuries it remained a “stain not always so deep.”⁵⁵ Until well into the 1980s and 1990s, a form of mystical Sufi Islam predominated, one that was supple and flexible, and that tended to accommodate and sometimes incorporate pre-existing beliefs and practices.⁵⁶

1. Blending of Islam and Spirit Worship

The result was a vibrant, multi-faceted complex of spiritual

⁵¹ *Id.* at 75 (“Young men in particular are increasingly attracted to what Nigeriens refer to as ‘reformist’ Islam, partly because it is presented by its promoters as a truer, purer, unsullied version of their religion.”).

⁵² Kelley, *Squeezing Parakeets*, *supra* note 12, at 648; see Scott S. Reese, *Islam in Africa / Africans and Islam*, *J. AFR. HIST.* 17, 19–20 (2014) (explaining Muslims in Africa point to trade routes as one of the ways they became connected to Islam).

⁵³ See William F.S. Miles, *Shari’a as De-Africanization: Evidence from Hausaland*, 50 *AFR. TODAY* 51, 52 (2003) (arguing Islam began penetrating Hausaland (in eastern Niger) in the fourteenth century but was limited to traders and larger cities).

⁵⁴ Kelley, *Squeezing Parakeets*, *supra* note 12, at 648; see Masquelier, *supra* note 1, at 134–35 (arguing Islam had few adherents in Niger until the mid-twentieth century and that Muslim identity did not become a “common denominator” until after independence from France).

⁵⁵ JEAN ROUCH, *LES SONGHAY* 59 (1954) (“En fait, l’Islam n’est qu’une teinture plus ou moins profonde.”).

⁵⁶ Kelley, *Exporting Western Law*, *supra* note 12, at 337–38; see Miles, *supra* note 53, at 53, 55 (arguing traditional Islam in Niger, which was associated with Sufi brotherhoods, was “impure” and “syncretic,” because it incorporated non-Islamic spiritual practice); see COOPER, *supra* note 33, at 24 (arguing that by independence most Nigeriens professed Islam but also “held strongly to beliefs through which spirit veneration and occult practices endured”).

beliefs.⁵⁷ When I lived for two years in a small, isolated village in southwestern Niger in the mid-1980s, all of my neighbors considered themselves devout Muslims.⁵⁸ Five times a day they performed ablutions, pointed themselves eastward, and said their Muslim prayers.⁵⁹ During the holy month of Ramadan, they abstained from food and water during daylight hours even as they performed grueling agricultural labor under a baking sun.⁶⁰ Although no one could afford it, they aspired to make the holy pilgrimage to Mecca. One respected elder in the village had, as a young man, spent eleven years walking from Niger to Mecca and back.⁶¹

And yet, my neighbors also talked constantly about the influence of the spirit realm on their daily lives.⁶² It was commonly understood that the original spirits, referred to in the Zarma language as the *gangi bi* or black spirits, occupied the land before humans arrived.⁶³ The villagers' ancestors who first settled the land had made pacts with those spirits.⁶⁴ Over the generations the *gangi bi*, along with a constellation of other, later arriving spirits, including ancestors who had died and departed the temporal realm, watched over the village and its people.⁶⁵ Sometimes the spirits were helpful, protecting the village from enemy attack, droughts, and epidemics.⁶⁶ However, when villagers acted inappropriately and the spirits were displeased, they could be vengeful.⁶⁷ They were capable of causing sickness and drought, or sending locusts and other pestilence.⁶⁸ If sufficiently riled, they could even send lightning

⁵⁷ COOPER, *supra* note 33, at 24; see Masquelier, *supra* note 1, at 135 n.3 (reasoning many in Niger consider Islam and spirit worship as compatible and part of a "wider religious enterprise").

⁵⁸ Kelley, *Squeezing Parakeets*, *supra* note 12, at 650.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.* at 667.

⁶² *Id.* at 650.

⁶³ *See* Kelley, *Squeezing Parakeets*, *supra* note 12, at 680 n. 168.

⁶⁴ *See id.*

⁶⁵ *See id.* at 647–48.

⁶⁶ Masquelier, *supra* note 1, at 139.

⁶⁷ Kelley, *Squeezing Parakeets*, *supra* note 12, at 647–48.

⁶⁸ *Id.* at 646; Masquelier, *supra* note 1, at 139 n. 12.

to strike down the bad actors.⁶⁹

Because of the dynamism and proximity of the spirit realm, my neighbors regularly reminded me never to whistle, because doing so attracts the spirits' attention.⁷⁰ They told me never to compliment a baby's appearance, because it would encourage the spirits to take the infant away.⁷¹ They urged me not to leave the village before sunup, because that is when the spirits—who prefer to live in the bush—are most active.⁷² They encouraged me to purchase magic amulets to protect myself from sickness and violence. One close friend assured me that if I wore a certain amulet on my body, an attacker's knife would melt onto the ground in front of me before piercing my skin.⁷³

When living in the village, I also learned certain people were particularly skilled at communicating between the temporal and spirit realms. When misfortune struck, villagers who felt connected to the spirit realm—most of them self-professed Muslims—would organize a spirit possession ceremony.⁷⁴ I witnessed one such ceremony in a remote Zarma village in 1987.⁷⁵ A storm had destroyed several huts in the village center and its residents, assuming vengeful spirits had caused the destruction, wanted to know why.⁷⁶ Three men sat playing traditional musical instruments while several others processed in a broad circle before a small crowd of onlookers in front of the village chief's hut. Although I left before the denouement (I wanted to get back to my village before sunset), the participants assumed that eventually a spirit would take possession of someone's body—it might be a dancer or a bystander—and, using the person as an instrument, communicate with the throng.⁷⁷ As I was leaving the village, I asked several

⁶⁹ Masquelier, *supra* note 1, at 146; see Interview with Bachirou Djibo, in Fandou Berri, Rep. of Niger (Nov. 11, 2003) [hereinafter Interview with Bachirou Djibo] (recounting an incident where a *zima* from a neighboring village induced the spirits to send a lightning bolt to Fandou Berri).

⁷⁰ Kelley, *Squeezing Parakeets*, *supra* note 12, at 650–51 n. 70.

⁷¹ *Id.* at 650.

⁷² See *id.* at 650–51 n. 70.

⁷³ Kelley, *Exporting Western Law*, *supra* note 12, at 339–40.

⁷⁴ Kelley, *Squeezing Parakeets*, *supra* note 12, at 647; see Masquelier, *supra* note 1, at 139 (referring to spirit possession in another region of Niger).

⁷⁵ Kelley, *Squeezing Parakeets*, *supra* note 12, at 647 n. 50.

⁷⁶ *Id.*

⁷⁷ *Id.*

participants where their plea was directed; in other words, with whom were they trying to communicate? They responded “*irikoy*,” which translates roughly to “our keeper,” and is the Zarma word for Allah.⁷⁸ Clearly, customary spirit worship and Islam had melded.⁷⁹

Possession ceremonies were not the only means of communicating with the spirit realm. Certain people, known as *zimas*, had specialized knowledge and the ability not only to communicate with spirits, but also to summon them to the temporal realm.⁸⁰ Sometimes, *zimas* were forces for good.⁸¹ In the 1980s in the village where I lived, parents with sick children would consult a *zima* who would instruct them on how to assuage the spirits who were causing the illness. Those same parents might hedge their bets by also consulting an Islamic holy man and,⁸² if they could afford the transportation, medical professionals in a town twenty kilometers away. But some *zimas* were known to summon the spirits for nefarious ends.⁸³ When I was living in the village, lightning struck a large tree only 150 meters behind my hut. Neighbors later told me that the bolt had been sent by a *zima* from a neighboring village at the behest of someone involved in a land dispute.⁸⁴ They assured me that the lightning was meant to kill the rival, who lived in my village, but the bolt had missed and struck the tree instead.⁸⁵

Islamic *marabouts* are yet another category of individuals who act as intermediaries between the temporal and spiritual realms.⁸⁶

⁷⁸ *Id.*

⁷⁹ See COOPER, *supra* note 33, at 41 (arguing that in Niger the spirit world coexists with Allah, who is viewed as a “single all-powerful god”).

⁸⁰ Kelley, *The Death of Custom*, *supra* note 13, at 67.

⁸¹ *Id.*

⁸² See Interview with Bachirou Djibo, *supra* note 69 (concluding many people in the village “follow two paths” by consulting both the *zima* and the *marabout*).

⁸³ Kelley, *The Death of Custom*, *supra* note 13, at 67 (arguing some *zimas* summon the spirits to the temporal world to visit punishments upon living people).

⁸⁴ Interview with Bachirou Djibo, *supra* note 69.

⁸⁵ *Id.*

⁸⁶ See Kelley, *Exporting Western Law*, *supra* note 12, at 338–39 (arguing Islamic *marabouts* in Niger use their spiritual powers to “protect travelers from harm, cure outbreaks of measles, compel love and devotion from reluctant members of the opposite sex, and serve countless other protective and preventative functions”).

Marabouts' education and training vary widely.⁸⁷ Some, particularly those in larger cities and towns, are learned and literate in multiple languages, including Arabic.⁸⁸ In many rural villages, *marabouts* cannot read or write but have memorized the Koran and have accumulated stores of knowledge about Islam, though their supposed knowledge is often inaccurate.⁸⁹ They lead Islamic prayers, sometimes teach Islamic doctrine to village children,⁹⁰ and often participate as respected elders in resolving village-level disputes.⁹¹ But many also possess mystical powers to heal people and protect them from harm.⁹² In the 1980s, when my American girlfriend was visiting me in Niger and was uncertain about continuing our relationship, I asked her to accompany me to a *marabout* in Niamey who was renowned for, among other things, creating love potions.⁹³ He wrote selected verses of the Koran on pieces of paper, prayed aloud, then directed my girlfriend to drink the remnants of the ink he had used to write the verses.⁹⁴

Years later, when a measles outbreak killed a child in my Peace

⁸⁷ See, e.g., Geert Mommersteeg, 'He Has Smitten Her to the Heart with Love' *The Fabrication of an Islamic Love-Amulet in West Africa*, 83 ANTHROPOS 501 (1988) (noting that "not all marabouts, especially not those who have specialized in legal or theological studies, practise the manufacture of charms").

⁸⁸ See, e.g., Mauro Nobili, Book Review, 82 J. AM. ACAD. RELIGION 869, 872 (Sept. 2014) (reviewing GEERT MOMMERSTEEG, *IN THE CITY OF MARABOUTS: ISLAMIC CULTURE IN WEST AFRICA*, JOURNAL OF THE AMERICAN ACADEMY OF RELIGION) (noting that "learning the Arabic language is not the aim of the [*marabout*] elementary school, whose goal is to teach the students how to recite the Qur'an The study of Arabic is part of a more advanced stage of learning to which only a limited number of students attain and includes all the traditional Islamic sciences").

⁸⁹ For example, rural *marabouts* have assured me that the Koran forbids women from inheriting any agricultural land. They also have also assured me that the *gon*, an oracle that rural people consult to identify thieves and other wrongdoers, is laid out in the Koran. Neither is true.

⁹⁰ See Nobili, *supra* note 88, at 872.

⁹¹ See, e.g., Kelley, *Squeezing Parakeets*, *supra* note 12, at 668 (recounting a customary legal proceeding in which a *marabout* played a central role).

⁹² See Kelley, *Exporting Western Law*, *supra* note 12, at 338–39.

⁹³ See *id.* at 339 (arguing *marabouts* prepare potions to "compel love and devotion from reluctant members of the opposite sex"). The "love potion" example in the text is based on my (and my wife's) memory and on surviving photographs of the incident.

⁹⁴ See generally COOPER, *supra* note 33, at 55 (describing the practice of drinking the "wash water" of *marabouts'* written Islamic prayers). For the benefit of the curious, the love potion worked. For more than 32 years I have been married to the young woman who drank the ink.

Corps village, my good friend assured me that he had purchased *safari*, or “medicine,” to protect his children. I later discovered that “medicine” meant a protective amulet prepared by a local *marabout* and hung in leather pouches around his children’s hips.⁹⁵ Villagers consult *marabouts* to cure sickness, impotence, and mental illness.⁹⁶ They also seek their supernatural support for business ventures or for general protection when traveling.⁹⁷ In fact, Islamic *marabouts’* penchant for mystical cures and protections has become so common that, according to the anthropologist Adeline Masquelier, in certain regions of the country witchcraft has come to be seen as a primarily Muslim tradition.⁹⁸

Obviously, there is significant overlap in the roles played by *zimas* and *marabouts*.⁹⁹ *Zimas* are grounded in and draw their legitimacy from ancestor veneration and spirit worship.¹⁰⁰ *Marabouts’* power is rooted in the mystical, West African, Sufi version of Islam.¹⁰¹ Both have the power to heal and protect. As discussed in Part III of this paper, both have the power to preside over potentially deadly oaths in connection with customary law.

In some villages, *zimas* and *marabouts* vie with one another for legitimacy.¹⁰² In one village where I have performed research over the years, the local *marabout* and local *zima* consider themselves rivals but they coexist respectfully.¹⁰³ However, as the following discussion reveals, the recent ascendance of conservative “reformist” Islam in Niger has diminished the role that *zimas* play

⁹⁵ *Id.*

⁹⁶ See *id.* at 339 (arguing *marabouts* serve countless “protective and preventative functions”); David Owusu-Ansah, *Prayer, Amulets, and Healing*, THE HISTORY OF ISLAM IN AFRICA 478–79 (Jan. 2012) (explaining the use of amulets and charms as “protective or healing agents”); see also Interview with Oumarou Alzuma, in Niamey, Rep. of Niger (Apr. 14, 2004) (arguing his work as a *marabout* includes healing the sick and writing verses that will help his clients intercede with God and get the result they are seeking).

⁹⁷ Kelley, *Exporting Western Law*, *supra* note 12, at 352.

⁹⁸ See Masquelier, *supra* note 1, at 133.

⁹⁹ See Kelley, *The Death of Custom*, *supra* note 13, at 74 n. 135 (arguing *marabouts* have taken over many of the spiritual functions once filled by *zimas*).

¹⁰⁰ See *id.* at 67 (arguing *zimas* are skilled at communicating with the spirits).

¹⁰¹ See Vincent Monteil, ISLAM IN AFRICA 87 (James Kritzeck & William H. Lewis eds., 1969).

¹⁰² Interview with Djibo Baba Djibo (ne Djibo Hama), in Gunti Kwara, Rep. of Niger (Feb. 5, 2004) (arguing there is competition between *zimas* and *marabouts*).

¹⁰³ *Id.* (claiming that in the village of Gunti Kwara, the *zima* and *marabout* coexist peacefully).

and has strongly discouraged *marabouts*' mystical practices.

2. *The Recent Rise of "Reformist" Islam*

Niger's longstanding mutual accommodation between Islam and customary spirit worship has been strained in recent decades by what political scientist William F. S. Miles describes as the "phenomenal rise of global Islam."¹⁰⁴ Efforts to purify Niger's Islam—meaning force it into conformity with ultra-conservative Wahabis interpretations that emanate from the Arabian Peninsula—began in the late 1970s with the rise of Izala movement in northern Nigeria.¹⁰⁵ This latter-day *jihad*,¹⁰⁶ supported and funded by Saudi Arabia, vehemently rejected the accommodating, syncretic nature of Nigerien Islam.¹⁰⁷

At first, this so-called reformist movement made little headway against Niger's Sufi traditions.¹⁰⁸ However, it gained momentum with the rise of democratization in the 1990s.¹⁰⁹ Before democratization, the Nigerien state had promoted Islam as a means of unifying the country's disparate and sometimes rivalrous ethnic groups, but it always maintained close control over Islam's public expression.¹¹⁰ Democratization loosened the state's control and created a free-for-all in the country's civil society sector, permitting a welter of well-funded reformist Islamic associations to

¹⁰⁴ Miles, *supra* note 53, at 51.

¹⁰⁵ *Id.* at 56.

¹⁰⁶ Today's efforts to purify Niger's Islam are not the first. Usman dan Fodio, a religious leader and founder of the Sokoto Caliphate, engaged in *jihad* against his northern neighbors in present-day Niger from 1804 to 1812. His goal was to purify Islam by eliminating Nigeriens' tolerance of spirit worship. Miles, *supra* note 53, at 53; COOPER, *supra* note 33, at 46–47. Although he succeeded in expanding his empire into what is now Niger, he largely failed at purifying Islam there. See Miles, *supra* note 53, at 66 (arguing the Hausa people of Niger fought against the "de-Africanization" of dan Fodio's *jihad*).

¹⁰⁷ Miles, *supra* note 53, at 65.

¹⁰⁸ See Thomas Kelley, *Wait! That's Not What We Meant by Civil Society! Questioning the NGO Orthodoxy in West Africa*, 36 BROOK. J. INT'L. L. 993, 1006 (2011); see Interview with Group of Men, in Niamey, Rep. of Niger (Mar. 4, 2009) (arguing Islam is "just a fad" that most Nigeriens reject).

¹⁰⁹ See Kelley, *Unintended Consequences*, *supra* note 14, at 1008 (arguing democratization allowed conservative Islamic forces to rise to gain strength in Niger).

¹¹⁰ Miles, *supra* note 53, at 55; Kelley, *Unintended Consequences*, *supra* note 14, at 1006.

aggressively pursue their religiously conservative agenda.¹¹¹

The conservatives inveighed against the Sufi brotherhoods that had encouraged Nigerien Muslims to follow the guidance of religious elders (including *marabouts*) and venerate certain Muslim saints.¹¹² They rejected all supernatural intervention such as the wearing of amulets, including the ones that melt knife blades, prevent measles, and cause love to endure.¹¹³ They forbade all drumming and dancing because they viewed such traditions as “satanic temptations.”¹¹⁴ In a move that proved popular among young Nigerien men, they preached against the longstanding custom of making bride wealth payments to women’s families.¹¹⁵ Amidst the pressures to conform to this conservative, essentially Arabic version of Islam, traditional spirit beliefs have survived, but in many parts of the country they do so “more in a context of mild embarrassment than cultural pride.”¹¹⁶

3. *Where Things Stand Today*

Today, spiritual beliefs in rural Nigerien communities are an unpredictable mix.¹¹⁷ People usually describe their beliefs and laws as Islamic; but, in fact, they are a syncretic blend of Islamic and non-Islamic custom.¹¹⁸ Thus, villagers and their *marabouts*, many of whom are illiterate, will assert with confidence that the land customs that forbid women from inheriting are taken directly from

¹¹¹ Kelley, *Unintended Consequences*, *supra* note 14, at 1005–08; *see* Miles, *supra* note 53, at 61 (arguing democratization “enabled some radical forms of Islam to emerge”).

¹¹² Miles, *supra* note 53, at 56.

¹¹³ *Id.* at 57. More information can be found in notes 94–97 and the accompanying text that describes Islamic spells and amulets.

¹¹⁴ Miles, *supra* note 53, at 57. *See* Interview with Gibirou Djibo and Cousin, in Fandou Berri, Rep. of Niger (Nov. 21, 2003) (recounting with disgust the fact that village religious leaders recently had banned the traditional post-harvest drumming and dancing).

¹¹⁵ Miles, *supra* note 53, at 57; Interview with Young Man Working in Auto Parts Store, in Niamey, Rep. of Niger (Mar. 3, 2009) (articulating that young men are attracted to Izala because “they forbid big marriage ceremonies and bride payments, so it means we can get married earlier” and more easily save money to start a business); Interview with Group of Men, in Niamey, Rep. of Niger, *supra* note 108.

¹¹⁶ Miles, *supra* note 53, at 66.

¹¹⁷ *See* Kelley, *The Death of Custom*, *supra* note 13, at 74 (arguing most Nigeriens follow the Five Pillars of Islam but also acknowledge and respect the spirits).

¹¹⁸ *Id.*

the text of the Koran. In fact, the Koran says no such thing.¹¹⁹ Similarly, villagers rely on a magico-religious oracle called the *gon* to identify thieves and other wrongdoers.¹²⁰ They claim that the *gon* is Islamic, and that all of its procedures are laid out in detail in the Koran.¹²¹ In fact, neither the Koran nor any other source of Islamic law describes the *gon*, and although present day *marabouts* preside over *gon* ceremonies, it is almost certainly a pre-Islamic practice that has been adapted and incorporated into local Islam.¹²²

Oath swearing, which is a mainstay of Nigerien customary law, also falls into this syncretic category of spiritual/legal phenomena. Everyone who engages in oath-swearing or refers to it as a method of dispute resolution attributes its efficacy to supernatural power, but the origin of the power is nebulous. In some instances, it is the *gangi bi* or other spirits who punish false oaths. In recent times, it is more often *irikoy*, or Allah, who metes out the punishment. No matter the source, Nigeriens consider the retribution to be swift and certain.¹²³ The following section examines oath swearing in more detail.

III. Oath Swearing

In countries and cultures across Africa, including Niger, oath swearing is “decisory” in nature, meaning the oath itself is considered persuasive evidence of innocence or guilt.¹²⁴ This is in

¹¹⁹ Kelley, *Squeezing Parakeets*, *supra* note 12, at 649 n. 63 (arguing the Koran provides that men inherit full shares of real property while women inherit half-shares).

¹²⁰ *Id.* at 673.

¹²¹ *Id.* at 679.

¹²² *Id.*; see Msuya, *supra* note 10, at 146 (arguing West Africans who profess Christianity or Islam “live under the influence of traditional culture” and some believe that God “delegates varying degrees of power to divinities, who are referred to as gods or deities, giving them particular domains of influence”). It should be noted that the formal state legal system contributes to the confusion between customary law and Islamic law. Niger’s constitution requires state courts in many circumstances to apply customary law in matters of adoption, inheritance, and other areas. But in such instances the courts apply Islamic Malaki law— even though they call it custom— because it is easier than trying to discern local customs that vary by region. See Miles, *supra* note 53, at 55 (arguing Nigerien courts apply Islamic law from the Malaki tradition).

¹²³ See Lawrence-Hart, *supra* note 4, at 4 (arguing that punishment by African gods is “instant”).

¹²⁴ Milhizer, *supra* note 2, at 8 (defining a decisory oath as one that constitutes “direct and additional evidence, not merely a guarantor of witness credibility”); see Msuya, *supra*

contrast to oath swearing in most Global North legal systems, where the role of the oath is generally limited to encouraging witnesses in legal proceedings to testify truthfully.¹²⁵ These African decisory oaths are rooted in pre-colonial spiritual beliefs, such as those described in Part II. However, over the last century, decisory oath swearing practices in Niger have evolved. The following section begins by describing African oath swearing practices in general, then narrows the lens to Niger where comparative isolation—both from colonial influence and, until recently reformist Islam—have led to unique, syncretic forms of oath swearing that combine Islam and pre-Islamic spirit worship.

A. *African Oath Swearing: Invoking (and Sometimes Antagonizing) the Spirits*

Traditional African oath swearing practices entered the Global North's popular imagination in the 1950s during Kenya's struggle for independence from Great Britain, a movement sometimes referred to as the Mau Mau Rebellion.¹²⁶ Led by Jomo Kenyatta, the man who became Kenya's post-Independence president, the Mau Mau movement ensured loyalty among its followers by requiring them to swear traditional oaths that, if broken, would lead to death by supernatural forces.¹²⁷ As discussed in Part II, invoking the gods' intervention in the temporal realm is nothing new or extraordinary from the African perspective, but Global North actors provided lurid, sensationalized accounts of the traditional African practice.¹²⁸

note 10, at 147 (arguing that in traditional societies, a resort to oath does not constitute the verification or guarantee of veracity of the oath, as in the common law where every witness is required to be sworn, but an appeal to the gods. In most instances, oath is resorted to when there is insufficient evidence to establish the guilt of person or the genuineness of a claim. Its use displaces the need to weigh oral evidence of the parties and their witnesses).

¹²⁵ Milhizer, *supra* note 2, at 1.

¹²⁶ See generally, Aofie Duffy, *Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure*, 33 L. & HIST. REV. 489, 490 (2015).

¹²⁷ See Durand, *supra* note 10, at 17–18 (arguing those participating in the struggle were required to swear oaths of loyalty).

¹²⁸ See generally, ROBERT RUARK, *SOMETHING OF VALUE* (1955). To this day the Global North press delights in sharing titillating accounts of traditional spirit worship practices on the African continent. See, e.g., Helene Cooper, *In Liberia, an Executive Mansion Fit for a President – And Ghosts, Too*, N.Y. TIMES (October 29, 2017),

In fact, in Kenya,¹²⁹ and in many countries and cultures across Africa, traditional decisory oaths have long been an ordinary, essential aspect of customary law used to establish truth, innocence, and guilt in a wide range of legal disputes involving land, adultery, defamation, theft, and other matters.¹³⁰ Traditional oath swearing takes many forms, but typically involves invoking particular gods or spirits¹³¹ or, in some instances, swearing in the presence of artifacts that are associated with particular spirits.¹³²

Perhaps the most thoroughly documented African traditional oaths are so-called *juju* oaths from Nigeria. There, the oath is worded so that the swearer calls upon himself a conditional curse, asking the *juju* spirits to punish him if he swears falsely.¹³³ If the oath is about control of land, the oath swearer will enter and take possession immediately after the oath has been sworn.¹³⁴ Then, all concerned must wait.¹³⁵ If he has sworn falsely, he will be dead or smitten with grave misfortune within a fixed time period, usually a

<https://www.nytimes.com/2017/10/29/world/africa/liberia-executive-mansion.html> [<https://perma.cc/4VGP-33UQ>] (arguing successive Liberian presidents refused to sleep in the presidential mansion because it was haunted by ghosts); Sharon LaFraniere, *A Ghost Story Turns Very Scary for Malawi Journalists*, N.Y. TIMES (Mar. 29, 2005) <https://www.nytimes.com/2005/03/29/world/africa/a-ghost-story-turns-very-scary-for-malawi-journalists.html> [<https://perma.cc/544E-F2K2>] (reporting the Malawians' belief that their president fled his palace because it was haunted by spirits); Denise Grady, *Deadly Virus Alters Angola's Traditions*, N.Y. TIMES (Apr. 19, 2005), <https://www.nytimes.com/2005/04/19/health/deadly-virus-alters-angolas-traditions.html> [<https://perma.cc/SG52-PQVK>] (noting that funerals must be conducted according to tradition to avoid neglecting spirits who might turn vengeful); Michael Wines, *Rain Queen is Dead, But Debate Over Her Power Lives On*, N.Y. TIMES, June 21, 2005, at A2 (discussing the death of a South African queen whose family is widely believed to have the power to produce rainfall).

¹²⁹ See generally, Durand, *supra* note 10, at 24–26.

¹³⁰ Msuya, *supra* note 10, at 148.

¹³¹ See Kouassi, *supra* note 6, at 235 (arguing “ritual objects are brought together and the gods are invited to be the guarantors of the ceremonies and punish those parties who violate the spirit or terms of the agreement.”); Lawrence-Hart, *supra* note 4, at 3 (arguing Nigerian oaths call upon “the gods and ancestors”); Oyeniyi, *supra* note 1, at 72 (arguing traditional oaths are sometimes sworn to the “gods of thunder and iron”).

¹³² See Masquelier, *supra* note 1, at 146 (describing oath swearing on the axes of the spirits of rain and thunder).

¹³³ Msuya, *supra* note 10, at 148.

¹³⁴ See *id.*

¹³⁵ See *id.*

year, and the property will revert to the other party.¹³⁶ There will be no need for further judicial action because the oath swearer's relatives will be anxious to give up the property lest further harm befall them.¹³⁷ If the oath swearer survives beyond the one year mark, he is deemed to have told the truth and he is in the clear,¹³⁸ because *juju* oaths are considered "conclusive and unimpeachable."¹³⁹

In African societies that rely on oath swearing as a means of traditional dispute resolution, the oaths are widely considered to be more reliable and effective than the countries' formal justice systems.¹⁴⁰ In fact, it is widely believed that those who swear oaths in formal legal proceedings, or politicians who swear oaths of office, take them lightly.¹⁴¹ It is only the oaths to the traditional spirits that have enough teeth to compel adherence.¹⁴²

Although traditional oaths have long been an essential and helpful tool for resolving disputes under customary law, they also are used for nefarious purposes.¹⁴³ In Nigeria, legal scholars claim that oath swearing plays an essential role in perpetuating the country's large-scale and widespread political corruption.¹⁴⁴ According to these accounts, wealthy and corrupt "godfathers" in

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *Id.*; see Durand, *supra* note 10, at 26 (arguing in Kenyan oath swearing tradition the "matter is settled without further inquiry" if supernatural forces do not punish the oath swearer within the prescribed time).

¹³⁹ Msuya, *supra* note 10, at 148.

¹⁴⁰ *See* Msuya, *supra* note 10, at 147–48; Benson O. Igbion, *A Critical Exploration of African Spirituality and Democracy in Africa*, J. AFR. RELIGIONS 435, 441 (2014) (arguing a recent Nigerian government official urged his colleagues to "forget the police, use juju" when investigating murders); Oyeniui Abe & Smith Ouma, *A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa*, 6 AVE MARIA INT'L L.J. 1, 13 (2017) (noting spirits oaths are far more effective than oaths in Nigeria's formal court system).

¹⁴¹ Lawrence-Hart, *supra* note 4, at 5.

¹⁴² *Id.*

¹⁴³ *See* Lawrence-Hart, *supra* note 4, at 4 (contending corrupt "godfathers" in Nigeria control politicians by forcing them to swear traditional oaths); P.O. Oviasuyi, S.O. Ajagun & Lawrence Isiraoje, *Fetish Oath Taking in Nigerian Politics and Administration: Bane of Development*, 27 J. SOC. SCI. 193, 193–94 (2011) (similar); Msuya, *supra* note 10, at 139 (arguing human traffickers force their victims to swear traditional oaths that they will not reveal the traffickers' identities).

¹⁴⁴ Lawrence-Hart, *supra* note 4, at 4; Oviasuyi et al., *supra* note 143, at 193–94.

Nigerian society control politicians, partly by compelling them to swear traditional oaths of loyalty.¹⁴⁵ Having sworn the oaths, the politicians know they will be struck down by the spirits if they fail to obey the godfathers' orders.¹⁴⁶ The result is that "Government Houses in Nigeria are centers for the practice of *juju*, witchcraft, and voodoo."¹⁴⁷ Those same politicians blithely swear their oaths of office with a hand on the Bible or Koran because everyone knows there is no sanction, at least no immediate sanction, for that sort of false oath.¹⁴⁸

Oath swearing has also reportedly become a tool used by Nigerian criminals involved in human sex trafficking.¹⁴⁹ Traffickers convince women to pay for transport to Europe with the promise of gainful employment when, in fact, they often are being forced into prostitution.¹⁵⁰ But, before departing Africa, the criminals force the victims to swear traditional oaths to pay their debt and to remain silent about the identity of the traffickers.¹⁵¹ The trafficked women who, like many Africans, believe in the deadly consequences of swearing false *juju* oaths, rarely cooperate with criminal justice authorities—whether in Africa or Europe—for fear that doing so will invite devastating supernatural punishment upon themselves or their families.¹⁵²

To summarize, the swearing of traditional oaths is a widely accepted and effective tool of African customary law. In some countries, including Nigeria, the power of oath swearing has been highjacked by criminals and by corrupt politicians and their

¹⁴⁵ Lawrence-Hart, *supra* note 4, at 4; Oviasuyi et al., *supra* note 143, at 193–94.

¹⁴⁶ Lawrence-Hart, *supra* note 4, at 4; Oviasuyi et al., *supra* note 143, at 193–94; *see* Igbion, *supra* note 140, at 435 (arguing Nigerian politicians form "hidden loyalties to African spirituality," which they typically disavow in public).

¹⁴⁷ Oviasuyi et al., *supra* note 143, at 193–94.

¹⁴⁸ Lawrence-Hart, *supra* note 4, at 5.

¹⁴⁹ Msuya, *supra* note 10, at 139; *see generally* Luz E. Nagle & Bolaji Owasanoye, *Fearing the Dark: The Use of Witchcraft to Control Human Trafficking Victims and Sustain Vulnerability*, 45 SW. L. REV. 561, 569 (2016) (arguing traffickers use witchcraft to seal agreements).

¹⁵⁰ *See* Nagle & Owasanoye, *supra* note 149, at 569 (arguing traffickers use "ritualistic validations of contracts to trick parents into sending their children to other countries" and traditional oaths "to ensure obedience and silence").

¹⁵¹ Msuya, *supra* note 10, at 139.

¹⁵² *See id.* at 145 (arguing trafficking victims' reluctance to break their oaths must be understood from within the context of powerful African traditional beliefs).

“godfathers,” but among members of the broader population, decisory oath swearing serves as an effective tool for identifying thieves and other wrongdoers and resolving disputes.

B. Oath Swearing in Niger: Blending the Power of Spirits and Islam

In the region of Niger where I study customary law, the swearing of decisory oaths is a commonplace technique for resolving disputes.¹⁵³ However, due to Niger’s unique history, such oaths take a different form from oaths found in other parts of Africa. Because of its place at the distant edge of France’s colonial empire, because of Islam’s late arrival, and because syncretic spiritual practices were allowed to develop for many decades without significant outside interference, Niger’s oath swearing blends the power of the *gangi bi* and other spirits on one hand and Islam on the other. The following discussion begins with an example of Nigerien oath swearing drawn from my own fieldwork, then expands to a more general exploration.

1. A Dispute in the Village of Saabu Dey

In 2003, I was researching a land dispute in Saabu Dey, an isolated village located fifty kilometers northeast of the capital, Niamey.¹⁵⁴ Because Nigerien customary law inevitably involves both spirituality and history,¹⁵⁵ disputes can be difficult for outsiders to understand, particularly when those outsiders are lawyers who have been trained to focus only on empirically proven facts.¹⁵⁶ As the following paragraphs reveal, customary legal proceeding in Niger may turn on historical events that took place a century ago, as well as supernatural intervention. The Saabu Dey dispute was about control of a parcel of agricultural land, but the question of who rightfully controlled it today was dependent upon contested versions of the community’s history.

One side of the Saabu Dey argument contended that the village’s ancestors had given a large tract of agricultural land to a lineage of

¹⁵³ See Lund, *supra* note 1, at 16 (finding land disputes are often resolved by means of oath swearing).

¹⁵⁴ Kelley, *Unintended Consequences*, *supra* note 14, at 1026.

¹⁵⁵ See *supra* Part II.B.3.

¹⁵⁶ See *infra* Part IV.A.

formerly enslaved people.¹⁵⁷ They had an elaborate account of how this historically unusual occurrence had come to pass.¹⁵⁸ The other side acknowledged that the slave lineage cultivated the land at issue for several generations, but insisted that the village ancestors had merely loaned the land to the enslaved people under a customary tenancy arrangement referred to in the Zarma language as *laabu albarka*.¹⁵⁹ A key disputed fact was whether or not the enslaved people had been paying a symbolic tribute to the noble family after each year's harvest, as recognition that the land was merely borrowed.¹⁶⁰

As often happens with such intractable disputes, the parties agreed to seek a ruling from Islamic religious authorities.¹⁶¹ In those days, the Nigerien Islamic Association,¹⁶² located in the capital, was a preferred forum.¹⁶³ When the parties were before the Association,

¹⁵⁷ Kelley, *Unintended Consequences*, *supra* note 14, at 1027–28.

¹⁵⁸ *Id.* The essence of the story was that a particular enslaved man had acted courageously when digging the village's first well and was rewarded with a grant of land for himself and his ancestors. *Id.*

¹⁵⁹ *See id.* at 1015 n. 88 (describing the *laabu albarka*). English language social scientists sometimes refer to this arrangement as a "tithe tenancy." The French refer to it as the *dime*, which translates to the English "tithe."

¹⁶⁰ *Id.* at 1028.

¹⁶¹ *See* Interview with Hamza Maman Bako (called Issa), in Niamey, Rep. of Niger, (Feb. 6, 2004) (arguing many Nigeriens began turning away from more traditional dispute resolution mechanisms and toward oath swearing before Islamic authorities after Niger's President Kountche established the *Association Islamique du Niger* in the 1970, and that now people go there to "swear on the Koran").

¹⁶² In French, *l'Association Islamique du Niger*.

¹⁶³ *See* Ursula Meyer, *Négocier l'accès, la propriété et l'autorité publique en marge de la ville. Enjeux foncier à Niamey et production d'État au Niger* (2016) (Ph.D. thesis, University of Lausanne (on file with author) (arguing the Islamic Association of Niger sometimes acts "in place of the state" when it comes to resolving land disputes)); *see* Kelley, *Unintended Consequences*, *supra* note 14, at 1005–06 (arguing the Islamic Association was Niger's predominant voice of Islam until the rise of democratization in the early 1990s). As I have explained elsewhere, rural disputants rarely air their arguments before the formal state legal system's courts. Rural people consider the state system to be foreign, expensive, slow, and hopelessly corrupt. Instead, they prefer to resolve their disputes by appealing to a variable array of customary chiefs and Islamic religious authorities. From the 1970s through the 1990s, the *Association Islamique du Niger*, located in the capital city, Niamey, was a preferred forum for dispute resolution. In those days, it was the only significant Islamic association permitted by Niger's government. Since democratization and the opening-up of civil society, numerous rival Islamic groups have formed, and the *Association Islamique du Niger* is no longer the only venue for

the head of the faction arguing against the enslaved peoples' right to control the land offered to swear an oath on the Holy Koran that the slaves had been paying the *laabu albarka* over the decades.¹⁶⁴ Within minutes of swearing that oath, he began falling ill.¹⁶⁵ He grew progressively weaker and died eleven days later.¹⁶⁶ Everyone knew why: he had sworn falsely, and God had punished him.¹⁶⁷

This story of divine punishment was recounted to me in a matter-of-fact tone. My Nigerien informants' eyes did not widen in amazement, nor did their voices hush when describing God's wrath. It did not even seem to occur to them that I might be skeptical. For them, this sort of contact between the spiritual and temporal realms was quotidian, even banal.¹⁶⁸ Oath swearing is an ordinary aspect of customary justice in Niger¹⁶⁹ and, whether the participants believe that false oaths will anger God (the ascendant view) or the gods (the more traditional view), everyone understands the consequences are fatal.¹⁷⁰

2. *Syncretic Oaths in Niger*

Oath swearing as part of customary law in Niger has a long pedigree. Anthropologists and other social scientists have described

Islamic dispute resolution. See Kelley, *Unintended Consequences*, *supra* note 14, at 1005–06.

¹⁶⁴ See Interview with Village Chief and Group of Elders, *supra* note 6.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *supra* notes 6–9 and accompanying text; Saint-Lary, *supra* note 1, at 96.

¹⁶⁸ Kelley, *Unintended Consequences*, *supra* note 14, at 1027–28.

¹⁶⁹ See, e.g., Interview with Yaye Iday and Elders, in Fandou Berri, Rep. of Niger (Feb. 4, 2004) (arguing oath swearing was part of the resolution of land dispute between two isolated villages); Interview with Alpha Saidou Issa, *supra* note 8; Interview with Yaye Iday and Djibou Iday, in Fandou Berri, Rep. of Niger (May 29, 2000) (arguing all elders who participate in resolving land disputes must swear on the Koran to tell the truth).

¹⁷⁰ In a somewhat lighter-hearted illustration of Nigeriens' widespread fear of oath swearing, I was in Niger in 2004 in the run-up to a national election. A law was passed that required Nigerien magistrates to swear an oath to remain neutral. The magistrates publicly objected on grounds that Niger was a secular republic. However, there were rumors in the capital that their refusal was because many of them were corrupt, and they feared the consequences of swearing falsely. See *Violation du Principe de Séparation Entre l'État et la Religion*, ECHO MAG. (Apr. 24, 2004), <https://www.cath.ch/news/niger-les-magistrats-refusent-de-preter-serment-sur-le-livre-saint-pour-les-elections/> [<https://perma.cc/SZN3-RTPG>] (reporting on the magistrate oath swearing controversy). But see Interview with Bachir Tidiani, Niamey, Republic of Niger, Apr. 13, 2004 (arguing the magistrates' refusal was based on constitutional grounds).

traditional oath swearing practices in Niger that are not unlike Nigerian *juju* oaths described in Part III.A, where the oath is taken in the name of certain spirits or in the presence of ritual objects associated with the spirits.¹⁷¹ In certain parts of Niger, those traditional oath swearing practices continue. Adeline Masquelier, an anthropologist who writes about the syncretic spiritual beliefs of Nigerien people around the city of Dogondoutchi in southern Niger, describes the practice of swearing on the axes of the spirits of rain and thunder as a way to extract truth or settle disputes.¹⁷² She recounts an incident in recent memory where a man was asked to swear two oaths on the spirits' axes that he was not a witch.¹⁷³ After his first oath, he was unable to utter another word and a thunder clap threw him to the ground.¹⁷⁴

However, the oath swearing practices that I have encountered in my fieldwork over the past twenty-five years have had a more Islamic tinge. In the case of the land and slavery dispute in Saabu Dey, a party swore a high stakes decisory oath, but rather than swearing in the name of the *gangi bi* or in the presence of artifacts associated with the spirits, he swore on the Koran before Islamic holy men.¹⁷⁵ I have heard a score of similar accounts over the years, although I have not always recorded them in my field notes. The truth is, Nigeriens recount stories of oath swearing—including stories of people who have died or been driven mad by swearing falsely—with such matter-of-fact indifference, that I often skipped right over the incidents myself.

Despite Nigeriens' bland acceptance of the consequences of oath swearing, I did record several such instances. For example, while interviewing a group of elders about an intractable land dispute between the villages of Fandou Berri and Kallesi, they mentioned offhandedly that part of the resolution involved multiple Fandou Berri residents swearing oaths that they had the right to cultivate the land.¹⁷⁶ In that instance, no one fell ill or died, so the Fandou Berri side prevailed. During an interview about a different

¹⁷¹ Masquelier, *supra* note 1, at 146.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *supra* Part III.B.1.

¹⁷⁶ Interview with Yaye Iday and Elders, in Fandou Berri, Rep. of Niger (Feb. 4, 2004), *supra* note 169.

land dispute between the villages of Darey and Fandou Berri, my informant told me that the village chief of Darey swore publicly that he had no intention of taking the land at issue, and that God should punish him if he were lying.¹⁷⁷ That night, he lost his mind and became *fou*.¹⁷⁸ At a later stage of the same dispute, control of the land was settled definitively when my informant, who was from Fandou Berri, insisted on swearing on the Koran that his family was entitled to the land.¹⁷⁹ In still another interview—this one not about a land dispute—I was posing questions to a learned, respected Islamic religious leader about the nature of Islamic dispute resolution.¹⁸⁰ Apropos of nothing in particular, he recounted an incident from his childhood when he watched a man falsely swear on the Koran, then immediately fall down and die.¹⁸¹

It seems that Niger has developed a practice of ritualized oath swearing¹⁸² in which Islamic religious authorities have taken the place of *zimas*,¹⁸³ and a vengeful, interventionist Allah has taken the place of the *gangi bi* and other spirits. As with traditional spirit oaths, the community still believes that the false swearer might “die on his way home, become insane, or disappear in flames,”¹⁸⁴ but in this contemporary version of decisory oath swearing the Islamic religious leaders act as the instrumentality to deliver Allah’s judgment.¹⁸⁵

This is not a version of oath swearing that would be endorsed by more orthodox, non-Nigerien Islam. The Koran, and more broadly *sharia*,¹⁸⁶ have much to say about the truth telling and oath

¹⁷⁷ Interview with Alpha Saidou Issa, *supra* note 8.

¹⁷⁸ The Darey faction claimed that their village chief died not because he had sworn falsely but because the Fandou Berri faction had placed an evil spell on him. If nothing else, this illustrates the continuing syncretic nature of Nigeriens’ spiritual beliefs. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Interview with the President of the Nigerien Islamic Association, a Cadis, and the Chef de Canton’s Secretary, in Say, Rep. of Niger (Feb. 25, 2004).

¹⁸¹ *Id.*

¹⁸² See Saint-Lary, *supra* note 1, at 96–97 (describing the rituals accompanying Islamic oath swearing in a region of Burkina Faso).

¹⁸³ *Id.* at 96–97.

¹⁸⁴ *Id.* at 96.

¹⁸⁵ *Id.*

¹⁸⁶ Sharia is not a single text. It is a set of legal principles drawn from multiple sources including the words of the Holy Koran, the *sunnah* (the way Muhammad lived his life—

swearing by Muslims. *Sharia* requires Muslims to be truthful, and to avoid concealing or evading the truth.¹⁸⁷ It also forbids bearing false witness and requires adherents to be strict in observing justice.¹⁸⁸ Those who tell lies and bear false witness are placed with unbelievers, hypocrites, and *li'an*, or cursed, and are deprived of God's blessings.¹⁸⁹ Oaths must only be taken in the name of God, not Muhammed or anyone else—anyone who does so commits “*shirk*, the gravest of sins and unpardonable.”¹⁹⁰

In terms of evidence in legal proceedings, Islamic oaths share some attributes with Niger's customary oath swearing practices. Unlike oaths in the American legal system, in certain circumstances, Islamic oaths can serve as substantive evidence, rather than merely as a guarantor of a witness's veracity.¹⁹¹ For example, if a plaintiff has insufficient proof of his claim, he can request that the defendant take an oath declaring his innocence.¹⁹² A refusal would be considered evidence in support of the plaintiff's claim.¹⁹³ However, Islam does not state or imply the possibility that the false swearer will fall ill on his way home or be struck by lightning.¹⁹⁴

In sum, Nigerien customary law has developed a highly effective, widely accepted, syncretic form of decisory oath swearing that melds oaths to the gods with Islamic oaths sworn to God. Some Nigeriens, particularly in rural communities,¹⁹⁵ are conceptually

customs, deeds, and practices that are considered the will of God), the *hadith* (the words and sayings of Muhammad, along with the verbal approval or disapproval he gave to the words of others), and the *ijma* (the consensus of learned scholars). Milhizer, *supra* note 2, at 45; see Kelley, *Exporting Western Law*, *supra* note 12, at 15–16 (arguing *ijma* includes the consensus of the community of believers).

¹⁸⁷ Milhizer, *supra* note 2, at 47.

¹⁸⁸ *Id.* at 52.

¹⁸⁹ *Id.* at 48.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 56.

¹⁹² Milhizer, *supra* note 2, at 56.

¹⁹³ *Id.*

¹⁹⁴ See Lawrence-Hart, *supra* note 4, at 1, 5 (arguing Islamic oaths, unlike traditional oaths, postpone punishment until judgement day, “not immediate death for family members”).

¹⁹⁵ The examples of oath swearing drawn from my experience and my field notes tend to focus on rural communities because that is mostly where I performed my research. But oath-swearing and similar spiritually syncretic legal practices, including the *gon* oracle, are practiced in urban areas, including among highly educated Nigeriens. I have had

fuzzy about exactly to whom they are appealing and who will punish false swearers. As was true of the spirit possession ceremony I witnessed in the 1980s¹⁹⁶ and the *gon* oracle ceremonies I have studied and witnessed in more recent years,¹⁹⁷ villagers often blur the lines that divide the spirits (*gangi*) from Allah (*irikoy*).¹⁹⁸ Yet, those same villagers are perfectly clear and consistent when it comes to their understanding of the efficacy of oaths and the dire consequences of swearing them falsely.

IV. What Can We Learn (About Us and Them) from Niger's Oath Swearing Practices?

Decisory oath swearing works well as a form of customary law in Niger. The practice has been shaped by Niger's singular history on the periphery of France's colonial empire and on the tail end of the global spread of conservative reformist Islam. For Niger's people who have clung to syncretic spiritual beliefs, oath swearing fits perfectly with their world view, delivers truth and justice without fail, and contributes to the peace, stability, and cooperation that predominates in most Nigerien villages.¹⁹⁹ We should support it—or at least leave it alone—not because it is exotic, but because it is effective. However, if we are to forswear our tendency to exoticize and diminish the value of unfamiliar laws and legal institutions, we must learn to shed certain Global North biases.

A. *Avoid Analyzing Oath Swearing Through a Global North Lens*

Global North lawyers and legal scholars should eschew the practice of evaluating and analyzing oath swearing practices (along with other magico-religious legal customs) through the lens of our

conversations with university-educated Nigeriens who repeat some version of “I don't know how it works, only that it does.” See Kelley, *Exporting Western Law*, *supra* note 12, at 33–34 (recounting conversations with highly educated Nigeriens who endorsed the veracity of a customary oracle).

¹⁹⁶ See *supra* notes 73–77 and accompanying text.

¹⁹⁷ See generally Kelley, *Exporting Western Law*, *supra* note 12, at 3–6, 29–32 (describing numerous observations of the *gon* oracle).

¹⁹⁸ See Kelley, *Squeezing Parakeets*, *supra* note 12 (recounting a villager's uncertainty about whether a spirit possession ceremony was an appeal to God or the spirits).

¹⁹⁹ See Kelley, *The Death of Custom*, *supra* note 13, at 106.

positivist, rationalist, secular legal traditions.²⁰⁰ We should accept that people in different parts of the world take different approaches to determining truth and achieving justice.²⁰¹ In Niger’s case, the approach involves the spiritual realm.

Unlike us, Nigerien people do not consider it strange or alarming that the spirit realm—whether defined by Islam, non-Islamic spirit worship, or a blend of both—intervenes in the daily lives of human beings.²⁰² For us, supernatural phenomena are the stuff of ghost stories that send chills up children’s spines.²⁰³ However, in the Zarma language, there is no word for “supernatural” because Nigeriens believe that mystical and spiritual phenomena are perfectly natural²⁰⁴ and “the only mystery concerns how and when its actors will intrude upon and affect, positively or negatively, the lives of the living.”²⁰⁵ From the perspective of rural Nigeriens, our laws and our ways of proving guilt and innocence are ludicrous.²⁰⁶ How could legal authorities in the U.S. or Europe possibly hope to determine truth or falsehood without consulting the all-knowing spiritual realm?²⁰⁷ How could they hope to arrive at a just result without understanding the history of the parties and their

²⁰⁰ Kelley, *Exporting Western Law*, *supra* note 12, at 25 n. 198; *see* Igbion, *supra* note 140, at 440 (“It does not make sense to assess the coherence of a system based on the tenets of another.”); Rene R. Gadacz, *Folk Law and Legal Pluralism: Issues and Directions in the Anthropology of Law in Modernizing Societies*, 11 *LEGAL STUD. F.* 125, 126 (1987) (arguing that, in the past, legal anthropologists who study non-Western law wrongly “endorsed the use of a set of originally Western concepts as valid conceptual tools” and “viewed their data in ways that more accurately reflected their own backgrounds than the social matrix of which their informants were a part”).

²⁰¹ Kelley, *Apples to Oranges*, *supra* note 16, at 329; Kelley, *Squeezing Parakeets*, *supra* note 12, at 709–10.

²⁰² *See* Kelley, *Exporting Western Law*, *supra* note 12, at 20–22.

²⁰³ *See id.* at 31.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See id.* at 30. It should be noted that even our positivist, rationalist legal system routinely incorporates irrational practices. We convict people of crimes based on eyewitness testimony, even though it has been repeatedly, empirically proven that such evidence is unreliable. *See, e.g.*, BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 46–83 (Harv. Univ. Press, 2011); Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, *NEW ENG. L. REV.* 769, 769–74 (2012).

²⁰⁷ Kelley, *Exporting Western Law*, *supra* note 12, at 30–31.

ancestors?²⁰⁸

Skeptics may ask how it serves rural Nigeriens to persist with their reliance on spirit-infused customary legal practices. Will such practices not prevent Niger from establishing its place in the world economic order, growing its economy, and eventually creating wealth for its citizens?²⁰⁹ Is it not true that Coca-Cola Corporation will be reluctant to open a new bottling factory in Niger— and, in doing so, create employment opportunities— if its contracts are to be vetted and enforced with reference to the spiritual realm?

There are two responses to this economic growth argument. First, as discussed earlier, Niger is a legally pluralistic society.²¹⁰ Although the majority of its citizens, particularly its rural citizens, settle their disputes and order their lives according to customary law, a formal state legal system, based largely on French law, exists and holds sway in Niger's larger cities.²¹¹ If Coca-Cola or another global economic behemoth wants to enforce a contract in Niger, it can bring the matter before a state court and be reasonably confident that supernatural forces will not intrude.

Second, the Nigerien subsistence farmers who rely on customary law will never be plugged into the global economic order and are exceedingly unlikely to improve their economic circumstances even if they abandon customary law and embrace formal, rational, positivistic state law.²¹² Niger's material poverty and its persistent place at the bottom of the United Nations' Human Development Index is the result of a host of factors including geographic isolation, poor soil, a lack of significant natural resources, weak transportation infrastructure, and a weak energy

²⁰⁸ See Kelley, *Squeezing Parakeets*, *supra* note 12, at 640.

²⁰⁹ See *id.* at 106 (arguing Western lawyers believe that Western-style law will transform Nigeriens into "rational economic men and women who are ready to participate in the global economy"); see also Kelley, *Exporting Western Law*, *supra* note 12, at 1–2 (arguing proponents of the Washington Consensus believe that Western law will propel poor countries toward First World prosperity); Gadacz, *supra* note 200, at 128 (arguing Westerners assumed "that if Western law were imposed on traditional societies, economic progress would follow").

²¹⁰ See *infra* Part II.A.

²¹¹ See Kelley, *The Death of Custom*, *supra* note 13, at 85–86 (arguing French style law, particularly land law, began to have effect in the capital city, Niamey, during the colonial period and continued post-independence).

²¹² See *id.* at 105.

infrastructure.²¹³ Those hindrances to economic growth will not be cured by law reform.²¹⁴ It is simply unrealistic to assume that if Niger imposes a uniform, rational, Global North-style legal system on its people, industries from around the world will find their way there and open factories that will provide jobs for the farmers and their children and grandchildren.²¹⁵ Thus, in choosing what law to live by, a Nigerien farmer will do better to stick with what has worked well for generations, including a reliance on decisory oath swearing. We of the Global North should not stand in his way.

*B. Avoid the “Country and Western Tradition” and
“Convergence” Thinking Typical of Global North Legal
Scholars*

Global North legal scholars too often confine themselves to the “country and western tradition” of comparative law. “Country” in this expression alludes to the fact that scholars tend to ignore legal norms and traditions that are not grounded in countries’ formal state legal systems; this is in spite of the fact that much of the world’s population governs itself and brings order to its social and commercial relations based on customs that have little to do with formal state law.²¹⁶ “Western” alludes to the fact that Global North legal scholars tend to look inward rather than outward; that is, we tend to confine our study to European and North American laws and legal traditions.²¹⁷ When we do deign to turn our gaze to non-state, Global South legal traditions, we focus on “reveal[ing] or

²¹³ See Kelley, *Squeezing Parakeets*, *supra* note 12, at n. 214 (arguing lack of economic progress in Niger is due to factors other than antiquated laws).

²¹⁴ See Kelley, *The Death of Custom*, *supra* note 13, at 105 (“Niger has no equivalent of mid-20th century Detroit or Chicago where former agricultural workers can migrate to seek factory jobs.”).

²¹⁵ See *id.*

²¹⁶ See Thomas Kelley, *Corruption as Institution Among Small Businesses in Africa*, 24 FLA. J. INT’L L. 1, 3–4 (2012) [hereinafter Kelley, *Corruption as Institution*] (arguing “entrepreneurs in developing countries often choose to operate their businesses in the informal sector of their countries’ economies”); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 6 (2000) (arguing that in developing countries, a great deal of property is not officially titled or registered, titles are subject to contesting claims, and legal systems are generally less formalized).

²¹⁷ See John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657, 658 (2008); Kelley, *Apples to Oranges*, *supra* note 16, at 313.

encourage[ing] ‘convergence’ between legal traditions that will permit the spread of market-driven capitalism and democracy.”²¹⁸ In other words, in the rare moments when we pause to understand legal traditions unlike our own, our tendency is to declare that, with just a few tweaks, their law can begin to look more like our law, which will set them on the path to stability and prosperity.²¹⁹ We rarely accept that different people in different parts of the globe construct and categorize the world around them differently, and that those differing epistemological constructions lead to different assumptions about law and justice.²²⁰ We should acknowledge that our legal traditions grew out of our particular history and culture, and attempts to foist it on others is not only a waste of time, but often harmful to the people we claim to be helping.²²¹

C. *Avoid Specious Evolutionary Analysis*

A related but distinct bias we should shed as we evaluate Nigerien decisory oath swearing is our tendency to view such practices in evolutionary terms, assuming legal practices that involve the spirit realm are primitive anachronisms Nigeriens inevitably will grow beyond, just as the Global North did centuries ago.²²² This common trope of Global North social sciences assumes that world history, including legal history, is an “epic story about the passage from savagery to civilization” where the peoples of the Global South inevitably are guided toward “the rationalization of [their] beliefs and practices.”²²³ It is a “linear view of history-as-progress, a unidirectional movement orchestrated by and from the ‘complex’ societies of the northern hemisphere.”²²⁴ “[F]or most

²¹⁸ See Kelley, *Apples to Oranges*, *supra* note 16, at 313.

²¹⁹ *Id.* at 315; Kelley, *Corruption as Institution*, *supra* note 216, at 5.

²²⁰ See Kelley, *Apples to Oranges*, *supra* note 16, at 313 (arguing Global North legal scholars tend to ignore customary law and, when they examine it, focus on revealing or encouraging convergence that will permit the spread of market-driven democracy).

²²¹ See WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 5 (2d ed. 2006) (arguing comparative law should move toward tolerance of diversity, not forced uniformity).

²²² See Keebet von Benda-Beckmann & Betram Turner, *Legal Pluralism, Social Theory, and the State*, 50 *J. OF LEGAL PLURALISM AND UNOFFICIAL L.* 255, 268 (2018) (arguing lawyers and legal anthropologists created an evolutionary theory that assumed “unilateral [legal] development from ‘primitive’ to modern state law”).

²²³ Comaroff, *Introduction*, *supra* note 38, at xii.

²²⁴ *Id.*

Western social thought, modernity remains the terminus toward which non-Western peoples constantly edge—without ever actually arriving.”²²⁵ In fact, as this paper has repeatedly argued, the contours of a society’s legal system is based on its own history, culture and epistemology. Rather than a unidirectional evolution, “[t]he law moves this way and that in response to the demands of [the particular] society.”²²⁶

Global North scholars’ urge to label Niger’s oath swearing practices as primitive or unevolved will no doubt be exacerbated by the fact that Anglo-American legal history includes a medieval form of decisory oath swearing known as compurgation. Starting before the Norman Conquest²²⁷ and lasting at least into the fourteenth century,²²⁸ English law included decisory oath swearing as a form of substantive evidence. The procedures varied by time and location,²²⁹ but, in general, an accused person could ask to prove his innocence by engaging in an oath swearing ritual.²³⁰ With his hand on the gospel he would invoke God and the saints, and swear he was innocent of whatever accusation had been lodged against him.²³¹ He would support his profession of innocence by finding a varying number of “compurgators,” also referred to as oath helpers,²³² who would follow a similar procedure and swear they

²²⁵ *Id.*; see Benda-Beckmann & Turner, *supra* note 222, at 256 (arguing Western scholars assume a natural evolution toward “hierarchical societies with property regimes based on individual ownership”); see also David 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) (decrying “ethnocentric and evolutionist generalizations from Western history” which cannot deal effectively with the realities of legal life in the Third World).

²²⁶ James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Around*, 40 *TULSA L. REV.* 579, 587 (2005).

²²⁷ Charles Gross, *Modes of Trial in the Medieval Boroughs of England*, 15 *HARV. L. REV.* 691, 695 (2002).

²²⁸ *Id.* at 704; see John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 *L. & HIST. REV.* 197, 206 (1992) (arguing oath swearing was disfavored by many courts by the end of the thirteenth century but hung on in manorial courts until well into the fifteenth century and even later).

²²⁹ See Gross, *supra* note 227, at 696 (arguing the number of oath helpers varied from a low of four to a high of forty).

²³⁰ See Beckerman, *supra* note 228, at 203.

²³¹ See *id.* at 211.

²³² Gross, *supra* note 227, at 691.

believed he had sworn truthfully.²³³ The compurgators were typically chosen by the accused, but judges would screen them for suitability.²³⁴ They had to be of good repute, free from public crime or infamy, familiar with the character of the accused, and of equivalent social status.²³⁵ They were not asked to swear to the substantive truth of the accused's statement, nor were they even expected to be familiar with the underlying facts.²³⁶ Their only role was to swear to their belief that the accused had sworn truthfully.²³⁷ If the requisite number of oath swearers supported the accused, and if they completed the ritual of oath swearing without faltering,²³⁸ he was acquitted. If some failed to swear, or faltered in the process of swearing, the accused was assumed guilty.²³⁹

There are important differences between oath swearing under Nigerian customary law and medieval English compurgation. One such difference is that medieval English oath swearers may have dreaded eternal damnation,²⁴⁰ but there is no indication in the historical literature that they swore in fear of immediate death by lightning strike or sudden fatal illness. The English decisory oath system, with its oath helpers swearing to the veracity of the accused, implies a community judgment on the character and veracity of a peer rather than a sudden and dramatic intervention from the spirit realm.²⁴¹ However, even if English compurgation

²³³ R. H. Helmholz, *Crime, Compurgation and the Courts of the Medieval Church*, 1 L. & HIST. REV. 1, 13 (1983); Beckerman, *supra* note 228, at 211.

²³⁴ Helmholz, *supra* note 233, at 16.

²³⁵ *Id.* at 17; Beckerman, *supra* note 228, at 205; *see* Gross, *supra* note 227, at 698 (arguing the oath helpers had to be "good and true men of the borough").

²³⁶ *See* Helmholz, *supra* note 233, at 13.

²³⁷ *See id.*

²³⁸ Beckerman, *supra* note 228, at 204 (arguing the accused could lose her case if any of those swearing "withdrew his hand from the book while swearing, used the wrong hand, neglected to kiss the book afterward, or did not say the words clearly enough"); *see* Sanjeev Anand, *The Origins, Early History and Evolution of the English Criminal Trial Jury*, ALTA. L. REV. 407, 409 (2005) (arguing the oath would "burst" if the oath swearers "varied in any manner from the formal oath required").

²³⁹ *See* Gross, *supra* note 227, at 698.

²⁴⁰ Beckerman, *supra* note 228, at 203; *see* Anand, *supra* note 238, at 407 (speculating oath swearers feared both punishment for perjury and endangering their immortal souls).

²⁴¹ Gross, *supra* note 227, at 696; *see* Beckerman, *supra* note 228, at 213 (arguing compurgation faded in the early fourteenth century because communities had grown large enough that people "probably had less intimate knowledge of each other's doings than before").

and Nigerien oath swearing were more closely aligned, it would be a mistake to assume an evolutionary connection between the two practices.²⁴² In sum, Global North legal scholars should resist the tendency to falsely assume that all legal systems across the globe are moving ineluctably down a straight path toward a universally ideal system of law and justice that just happens to look just like our own.

D. Avoid the Assumption that the Spread of Reformist Islam is Inevitable.

This section of the paper began by asking what lawyers and legal scholars from the Global North might learn by understanding oath swearing in customary Nigerien law. Thus far, the answer has been that oath swearing works as a form of dispute resolution and that we should shed our biases and leave it alone. I feel comfortable speaking about the biases and perspectives of Global North lawyers and legal scholars because I am one of them. When it comes to discussing reformist Islam's perspective on Nigerien customary law, I have no such grounding. I am neither Muslim nor a scholar of Islam, so I will tread lightly and speak briefly.

As described above in Part II.B., conservative Islamic forces, inspired and funded largely by Saudi Arabia, have set their sights in recent decades on "reforming," meaning displacing, Niger's tolerant, flexible, often syncretic version of Sufi Islam.²⁴³ Sufi adherents in Niger acknowledge the primacy of Allah and obey the dictates of *sharia*, but they emphasize the flexibility of *sharia*, noting that its sources include *ijma*, or the consensus of the community of believers.²⁴⁴ Historically, *ijma* has "validated Nigerien rituals and beliefs that otherwise might have been censured by orthodox Muslims."²⁴⁵ Many Nigerien Muslims believe that spirits, including their ancestors, watch over them from a separate realm and sometimes intervene in their daily lives.²⁴⁶ They do not pray to those spirits, and they acknowledge that all beings, whether living in the spirit or temporal world, are subject to Allah's

²⁴² See *supra* notes 222, 225, and accompanying text.

²⁴³ See Kelley, *Exporting Western Law*, *supra* note 12, at 19 (arguing Niger's brand of Sufi Islam is supple and flexible and "tolerates divergent traditions and world views").

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 16.

²⁴⁶ See *supra* notes 64–68 and accompanying text.

judgment.²⁴⁷ In spite of worshiping only Allah, the supple nature of Sufi Islam has permitted them to incorporate into their belief system certain valuable traditional spiritual and legal practices. One of those practices is decisory oath swearing.

Several English-language scholars, including William F.S. Miles, Adeline Masquelier, and Barbara Cooper, all cited in this paper, have described the spread of reformist Islam in Niger. However, they also emphasize that many of Niger's people have succeeded over the decades and centuries at repelling, or simply outlasting, those who would foist upon them foreign beliefs and foreign laws.²⁴⁸ The Zarma people of southwestern Niger were largely successful in holding at bay Usman dan Fodio's nineteenth century Islamic *jihad*,²⁴⁹ an earlier effort to force a self-described "orthodox" version of Islam on the people of what today is Niger.²⁵⁰ Throughout the early and mid-twentieth century, a majority of Niger's people succeeded in resisting, or simply ignoring, the French colonialists' *mission civilisatrice*, including efforts to "modernize" their laws.²⁵¹ When the colonizers decamped in 1961, most Nigeriens, particularly those living outside the largest cities, still ordered their affairs according to laws and customs of their own devising.²⁵² In the late twentieth and early twenty-first centuries, rural Nigeriens have succeeded in ignoring, or at least blunting, the onslaught of globalization and liberalization.²⁵³ Given this history of defending against outside cultural and legal incursion, one can hope that effective local legal practices such as syncretic decisory oath swearing will survive the pressure from reformist Islam.

V. Conclusion

The customary legal practice of decisory oath swearing is prevalent in contemporary Niger. Due to Niger's unique history on the fringes of France's colonial empire and the outer reaches of global Islam, its people have developed their own version of oath swearing that blends elements of pre-Islamic spirit worship and

²⁴⁷ See *supra* Part II.B.3.

²⁴⁸ COOPER, *supra* note 33, at 47.

²⁴⁹ See *supra* note 106 and accompanying text.

²⁵⁰ See COOPER, *supra* note 33, at 46 (describing the *jihad* of Usman 'dan Fodio).

²⁵¹ See *supra* notes 37–40 and accompanying text.

²⁵² See *supra* note 37 and accompanying text.

²⁵³ See *supra* note 50 and accompanying text.

Islam. Before the rise of Islam, Nigerien people believed that the spirits would punish individuals who swore falsely. In contemporary Niger, oath swearing has been incorporated into Islamic practice. Individuals involved in legal disputes swear on the Koran and believe that those who swear falsely will be struck by lightning, felled by illness, or driven mad. There is sometimes conceptual ambiguity about exactly who is meting out the punishment, but most agree that Allah is the ultimate judge.

Nigerien oath swearing works well in rural communities where it is universally respected as an accurate and just means of resolving disputes. It is certainly preferable to the formal state legal system. Unlike the formal system, which is based on foreign conceptions of justice, decisory oath swearing is in harmony with rural Nigeriens' general understanding that the boundaries between the spiritual and temporal realms are permeable and that God and/or the spirits take an interest in the affairs of humans and sometimes intervene. Furthermore, unlike the formal state legal system, oath swearing is close at hand, rapid, and not corrupt. To swear a Koranic oath, all one has to do is find a respected Islamic leader to preside. Finally, unlike the state system, the judgment of God (or the spirits) is infallible, as the many stories I heard and recorded over the years attest—those who swear falsely inevitably suffer.

Decisory oath swearing and similar “irrational” legal practices in Niger are under siege from the Global North. For decades, the United States and Europe have funded programs aimed at “modernizing” Nigerien law. By “modernize,” we mean adopt laws and legal institutions like our own, which, we claim, leave no room for reliance on the irrational or supernatural. Only then, we counsel, can Niger and countries like it reap modernity's economic and social benefits.

Oath swearing and similar spiritually syncretic practices in Niger are also under siege by reformist Islam. Saudi-inspired and funded Wahabism and its various offshoots, including the Izala movement, believe, much like the Global North, that only their institutions and their beliefs are legitimate and that “backward” societies such as Niger must find the true path and evolve toward the apogee of civilized justice.

The question for Global North legal reformers and proponents of reformist Islam is “why?” Why should the Global North push its rationalist, individualistic, market-oriented legal beliefs on Niger when it should be plain to all that the promise of rapid economic

development is chimeric? Why should reformist Islam intervene to destroy Niger's supple, syncretic Sufi version of Islamic worship and law when that which exists is so highly adapted and attuned to Niger's unique history?

The answer, I assert, is that there is no good reason. Niger's decisory oath swearing practices, the particulars of which arise out of the country's uniquely liminal historical experience with Islam and colonialism, are well adapted to resolving disputes in rural Nigerien society. With its roots in pre-Islamic spirit worship, more recently adapted by Niger's mystical, spirit-tolerant brand of Sufi Islam, oath swearing is an effective means of resolving disputes and establishing truth. Because Nigeriens believe it is effective, it is. That is why Global North legal reformers and proponents of reformist Islam should leave it alone.