THE NYIMANG LAW OF PROPERTY

BY

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ABSTRACT

This thesis relates to the customary law of property among the Nyimang of the Nuba Mountains in the Sudan. Besides other forms of property dealt with here, the major emphasis of the investigation is laid on land as property. The research is also oriented to investigating rules governing property relations in the traditional sector and changes in attitude and practice due to modern socio-political and economic developments in the Nyimang area. It further involves the investigation of the traditional process of dispute settlement and how customary rules operate alongside or within the general national legal framework.

Chapter I is a general description of the people's history and social and political institutions. Chapter II deals with the concept, classification and the effect of property relations in the Nyimang society.

Chapters III and IV are about property and domestic relations. There the nature of the Nyimang family, the concept of illegitimacy, the position of the Nyimang father and his role in the management of the Nyimang type of family property are discussed.

In Chapters V, VI and VII the nature of the rights and interests in land is investigated. It is shown there that, as a rule, title to land among the Nyimang is held individually.

Disposition and acquisition of rights and interests in property by way of gift, sale, pledge and gratuitous tenancy are dealt with in Chapter VIII.

In Chapter IX rules governing succession to property and hereditary offices are shown. Under Chapter X the modes of protecting rights and claims over property are discussed.

TABLE OF CONTENTS

Page

PREFACE AND ACKNOWLEDGEMENTS

It is still true today, as it was almost a decade ago, that any person writing about any legal aspect in the Sudan must consider himself a pioneer "exploring uncharted seas of knowledge and unearthing fresh information with every step he takes in his research".[1]

Indeed the challenges and the efforts required of the present writer in stating the Nyimang customary law of property were daunting. Hitherto, no systematic or detailed study of any aspect of Sudan customary laws has - to the best of the writer's knowledge - ever been attempted by a lawyer. Even Dr. Deng's works on the Dinka and Howell's study of Nuer law are largely anthropological. It is, of course, conceded that an anthropological background and perspective are necessary for a study of customary law, though not of themselves sufficient. This study is therefore a pioneering step to expose one aspect of customary rules in the Nyimang tribe as seen by a lawyer.

Being myself a member of the Nyimang tribe, I had the advantage of knowing their language and was thus able to receive first-hand information from informants or otherwise by observation without the assistance of interpreters.

Various techniques have been used in collecting the research data. These include (i) reading as many cases as possible in the Local People's Courts and those decided by the Resident Magistrate on appeal at Dilling: (ii) during the whole period of the fieldwork I used to attend sessions of the local courts whenever it was possible.

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1. See Z. Mustafa, "Preface" in his book, The Common Law in the Sudan: An account of the 'Justice, Equity, and Good Conscience' provisions, Oxford, 1971.

This proved useful as yielding invaluable information through personal observation: (iii) oral interviewing of the elders (individually or in panels), in which tape-recording was employed, was the basic method of collecting the data.

In this type of research one expects many people to be involved. In my case there were too many of them for me to mention them all by name. In short, I must express deep gratitude and appreciation to all Nyimang elders, to the Presidents and members of the Local Courts and their clerks for all the help they were anxious to offer. In particular, to Elias Ika Dein of the Tundia Local People's Court for his invaluable help. Among the court clerks I must single out Salah Assousa of the Nitil Local People's Court for arranging and copying all the cases from the Resident Magistrate's Court at Dilling.

My warm thanks are also due to my colleague Sayed Faisal M. Mussalam, the then Dilling Resident Magistrate, and to Yousif Shami, without whose help it would have been most difficult to achieve anything of value.

I would also like to thank by brother, Bersham Abia Kadouf, and all his colleagues - especially the headmaster Sayed David Babiker - in the Salara Primary School for offering me not only good company, but food and shelter during the whole six-months period in the field. In this respect I must extend my thanks to Sayed Abdel Rahaman Younis, Assistant Medical Officer at Salara.

To Dr. John W. Bruce, former representative of the Ford Foundation in Khartoum, I owe a great deal. Not only did he take every opportunity to assist me, by discussion, comments and direction, but he took the trouble to visit me in the field.

The Judiciary of the Sudan released me from my judicial duties to allow me to be seconded to the Faculty of Law, University of Khartoum, for the collection and restatement of Sudan Customary Law since 1974. It further agreed to extend the initial period of the secondment for the purpose of this research. I therefore wish to express my thanks to the Sudan Judiciary. Thanks are also due to the Faculty of Law, University of Khartoum, which made it easy for me to carry out the fieldwork by providing me with a car and all possible facilities.

The Ford Foundation made it possible for me to conduct this research by awarding me a generous grant. I am very much indebted to this great Foundation.

At the University of London, I am uniquely indebted to Professor A.N. Allott of the Law Department, School of Oriental and African Studies. Under his kind, patient supervision and free discussion I benefited a great deal from his profound knowledge. I know I will not be able to express all my gratitude, but I also know that without his inspiration and proper guidance this research would not have been completed. To him I shall remain grateful all my life. I would also like to extend my warmest thanks to Professor Jim Read for making it easy for me to join the School in the first place.

I must put on record my thanks and gratitude to my wife Fatima (Awadia), who shared with me all the miseries of the research and who actually assisted me in proof reading and typing many parts of the first draft of this research.

Finally, my thanks are due to Miss Janet Marks and Mrs. Annette Percy for typing the final text.

TABLE OF ABBREVIATIONS

A.U.F.S.	American Universities Field Staff
CS	Civil Suit
E.J. Exp. Agri.	Empire Journal of Experimental Agriculture
Harv.L.R.	Harvard Law Review
J.A.Hist.	Journal of African History
J.Ad.O.	Journal of Administration Overseas
J.A.L.	Journal of African Law
J.Mod.A. Stud.	Journal of Modern African Studies
J.R.A.I.	Journal of Royal Anthropological Institute
LS.	Sudanese Pound
M.E.J.	Middle East Journal
S.L.J.R.	Sudan Law Journal and Reports
S.N.R.	Sudan Notes and Records

TABLE OF STATUTES

Sudanese Statutes

The Civil Procedure Act 1974 (1974 Act No. 65)

The Land Settlement and Registration Ordinance 1925 (Laws of the Sudan, Vol. 7, 5)

The Lost and Unclaimed Property Ordinance 1905 (Laws of the Sudan, Vol. 8, 143)

The Peoples' Local Courts Order 1977

The Peoples' Local Courts Act 1977

The Permanent Constitution of the Sudan, Khartoum, 1973

The Prescription and Limitation Ordinance 1928 (Laws of the Sudan, Vol. 10, 179)

Sudan Penal Code 1974 (1974 Act No. 64)

The Unregistered Land Act 1970 (Amendment 1971)

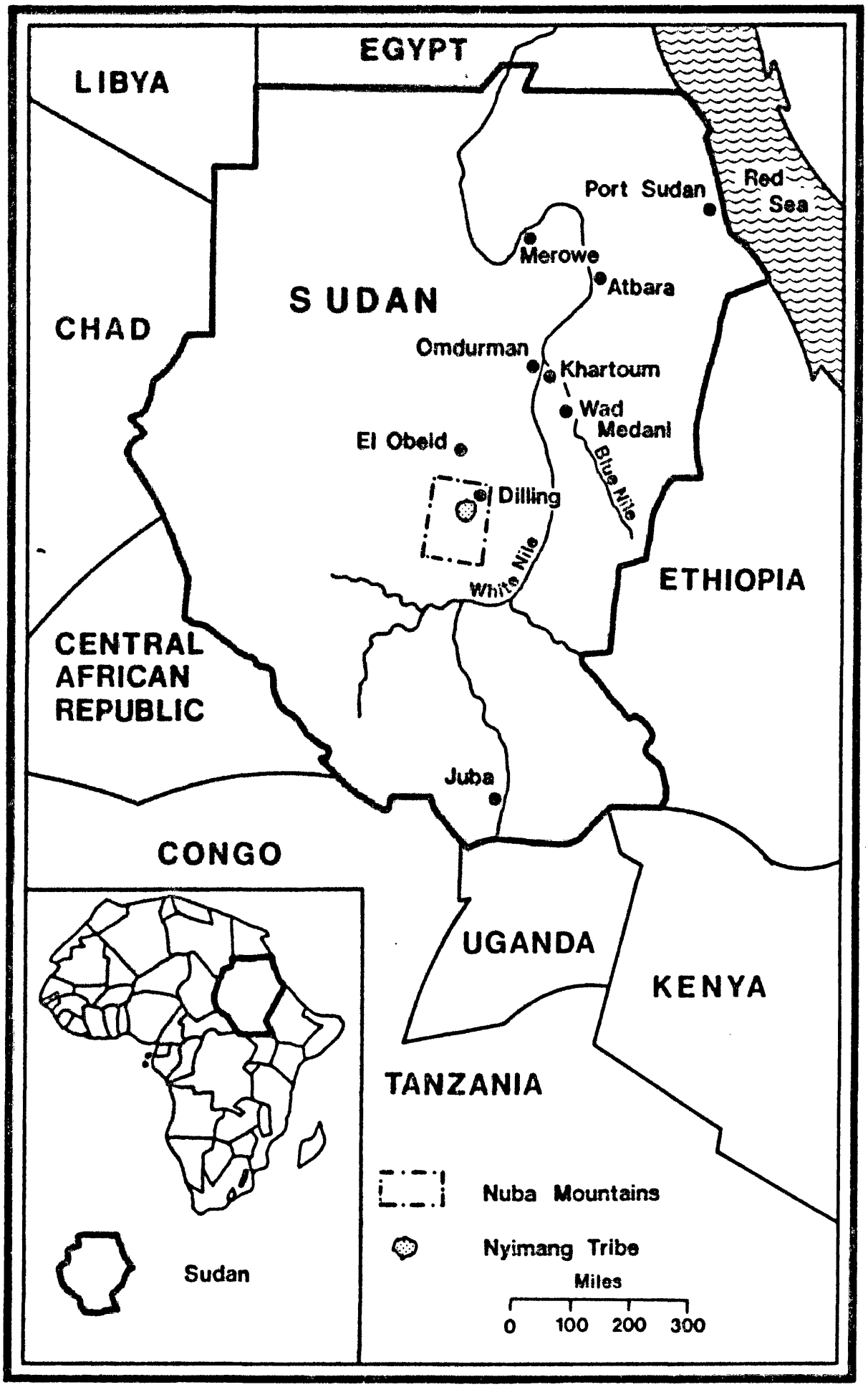
English Statutes

The Law of Property Act 1925 (15 & 16 Geo.5 c.20), s.205(1)(ix)

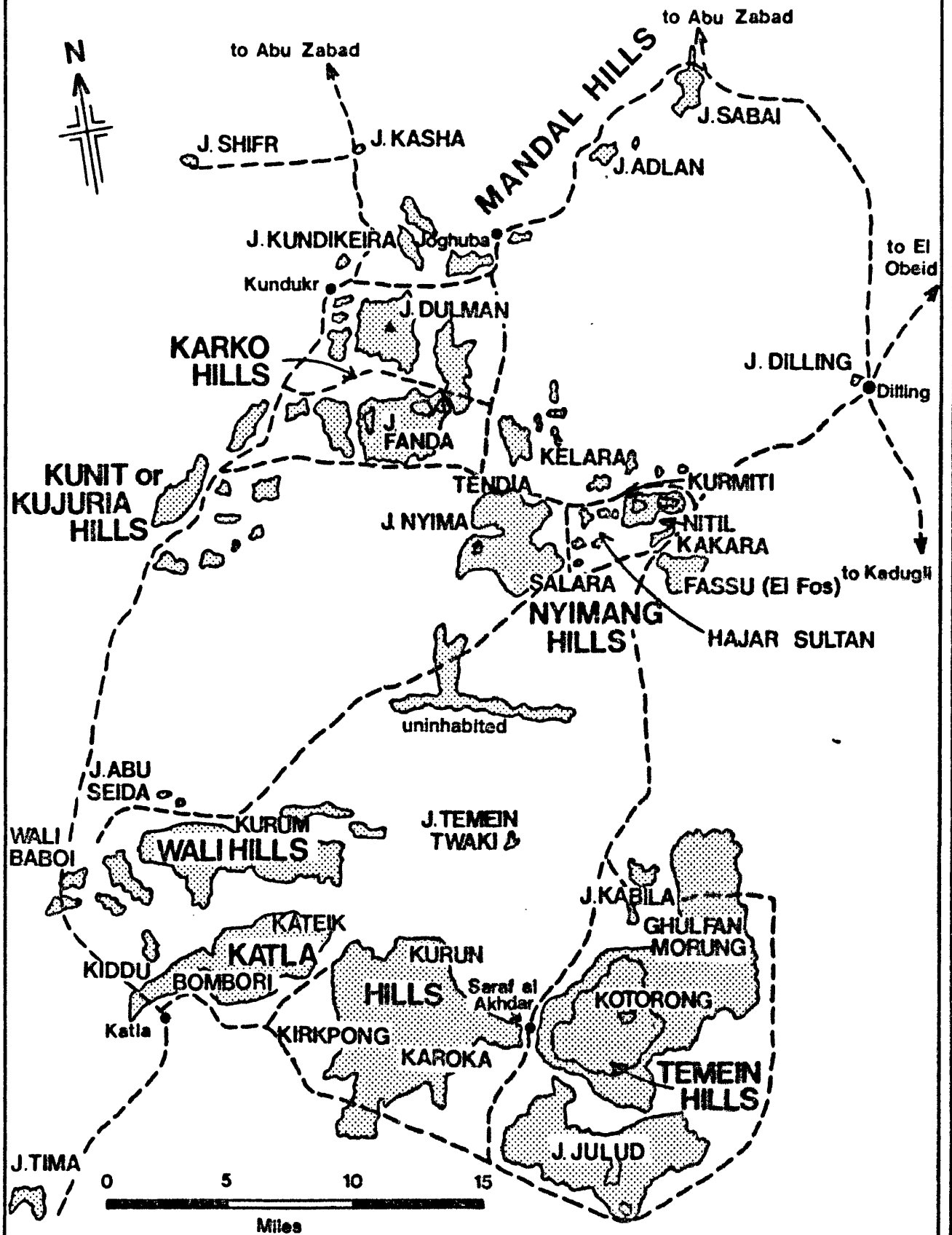
TABLE OF CASES

Unreported Cases from the Local People's Courts

English Cases


EGYPT
LIBYA
Red Sea
Port Sudan
Merowe
Atbara
SUDAN
CHAD
Omdurman
Khartoum
Wad Medani
El Obeid
Blue Nile
Dilling
White Nile
ETHIOPIA
CENTRAL AFRICAN REPUBLIC
Juba
CONGO
UGANDA
KENYA
TANZANIA
Nuba Mountains
Nyimang Tribe
Miles
0 100 200 300
Sudan

Nyimang Hills and the Neighbouring Tribes



CHAPTER I

INTRODUCTION AND BACKGROUND

1. The Nyimang People (Ama)

i) Geographical location

The Nyimang, who occupy an area of approximately 100 square miles,[1] inhabit a savannah land north-west of the Nuba Mountains in southern Kordofan Province. Their land consists of a semi-compact range of hills varying from 300 to 1,000 ft. in height.[2] This range of hills, with occasional broken valleys in the centre, extends up to 15 miles in rocky masses west of Dilling town. According to the Sudan Census of 1955/56, the population of the Nyimang tribe was estimated at 33,473,[3] making it one of the largest tribal groups in the Nuba Mountains. Linguistically, the Nyimang are classified, according to Greenberg, as belonging to the Eastern Sudanic group of the Nilo-Saharan family.[4]

In the Handbook of the Anglo-Egyptian Sudan, the Nyimang people were referred to as "the most formidable hill group" in the Nuba Mountains.[5] Father Ohrwalder, a missionary who spent some time at Dilling, mentioned that the inhabitants of the Nyimang hills "are known as the bravest of the Nubas".[6]

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1. See R.C. Stevenson, "The Nyamang of the Nuba Mountains", (1940), SNR, 76.
2. A Handbook of the Anglo-Egyptian Sudan, 1922, 38.
3. See R.C. Stevenson, 'The Nuba Peoples of Kordofan Province: An Ethnographic Survey', MSc(Econ) thesis, University of Khartoum, 1965, 141; cf., S.F. Nadel, The Nuba, London 1947, 362, who estimated Nyimang population in the 1940s at 37,000.
4. J.H. Greenberg, The Languages of Africa, Bloomington 1963, 85.
5. A Handbook of the Anglo-Egyptian Sudan, op.cit., 182.
6. Father J. Ohrwalder, Ten Years' Captivity in the Mahdi's Camp (translated by Major F.R. Wingate), London, 1892, 223.

Stevenson for one thinks of them as having a "great independence of mind and rigorous tribal traditions which are deterrent to much outside influence".[1] This, until recently, has kept the Nyimang people impervious to early Islamic influence.[2] But, nevertheless, whether all these contentions are true is for us to see in the following pages.

The Nyimang, when speaking in their own language, call themselves ama, which simply means people, or human beings.[3] This is used in contradistinction to other races, and perhaps reveals their arrogant belief of their superiority over other peoples. The word "Nyimang" itself is used in common parlance when members of the Nyimang tribe converse in Arabic, or when they are referred to by other people. The exact origin of the word, which is occasionally spelled as "Nyuma", "Nyima" "Naima" and "Nyamang", is unknown. It is invariably used, however, to denote the tribe, the people and their language.

To many writers "Nyimang" is an improper variant of Nyima, the latter being "the name of the highest peak (1088 ft.) in the Westernmost ridge"[4] of the Nyimang hill-range in Tundia subtribe. Nadel points out, perhaps rightly, that the hill ridge known as "Nyima" served as a landmark to the Arabs, which has eventually suggested to them (the Arabs) a tribal name for

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1. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 17.
2. J.S. Trimmingham, Islam in the Sudan, London 1965, 245.
3. In recent years the Nyimang have also been popularly referred to as alman.
4. Stevenson, 'The Nuba Peoples of Kordofan', op.cit., 138.

the inhabitants of these hills.[1] It is further noted that another hill-ridge called Nyimding is found in Kurmiti sub-tribal area. Stevenson considers this to be the correct origin that was later applied to the western peak (Nyima) of the Tundia.[2] The Nyimang people themselves are less helpful as to the origin of the term "Nyimang".

The Nyimang specifically identify themselves as ama mɛdɛ kwalad sue edu (the people of the seven-and-a-half hills). This simply means that there are seven Nyimang subtribes with another incomplete subtribe making the actual total of eight hills. The incomplete hill, according to the Nyimang, is the sub-tribe of the shira (rainmaker). It is thought to be incomplete as they do not have a sacred hill of their own. According to tradition, the Shiro wa were one section of the Nitil subtribe and migrated to their present locality after a disagreement.

Each Nyimang subtribe identifies itself with a particular hill around which their progenitors were believed to have settled first from time immemorial. These hills are associated with certain clan deities and ancestral spirits and are further regarded as sacred places for these clans. Each hill has its priests, drawn from the members of the clan who first settled in the area, and are known as medo iran (masters or owners of the hill). The seven, or rather the eight, Nyimang subtribes are:

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1. S.F. Nadel, The Nuba: an Anthropological Study of the Hill Tribes in Kordofan, London 1947, n.1. It should further be noted that another hill ridge called Nyimding exists in Kurmiti subtribal area.
2. Stevenson, The Nuba Peoples of Kordofan, op.cit., 138.

Shiro wa[1] (the people of the rain-maker) (also known as Hajar Sulfan, which is an Arabic name meaning the hill of the sultan/chief); Salara, Ngdil (Nitil), Twana (Tundia), Kwodungol or Kwol (Kurmiti), Fwojini (Fassu - or El Foss), Kâre (Kakara), and Kellara.

ii) History and myth of origin

It has been said that "beginnings are frequently matters of conjecture".[2] This is emphatically true about the ancient history of the Nuba peoples in general and that of the Nyimang in particular. Because of the total lack of any archaeological researches or any written documents regarding the origins of the Nuba peoples (and indeed of the Nyimang),[3] one is left with the option of reconstructing their history from casual incidents and hints that leave much room for speculative guesses.

On the origins of the Nuba there is much controversy. MacMichael thinks that the ancestors of the Nuba of Kordofan used to live in central Kordofan, being driven southwards by other stronger tribes, were later pushed further south by the Arab invaders into the recesses of their present hills.[4] Whether this story is true or not need not be considered here. However, it seems almost certain that most of the Nuba tribes (including the Nyimang) were subject to continuous migrations since the 16th century until the early part of the 19th century.

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1. It should be noted that the underlined names are indigenous terms, while the bracketed ones are Arabic names for these subtribes.
2. L.T. Hobhouse, G.C. Wheeler and M. Ginsberg, "The Material Culture and Social Institutions of Simpler Peoples", in Frank W. Moore (ed.), Readings in Cross-cultural Methodology, 1966, 26.
3. Stevenson, The Nuba People, op.cit., 49.
4. H. MacMichael, The Tribes of Northern and Central Kordofan, London 1967, 1, 4, 88.

In any case, tribal movements and migrations were a dominant feature throughout Africa for many generations. According to Colson:

> Large-scale migrations have been a feature of African life for many centuries, both in the form of conquering hordes...and in the peaceful form of a slow infiltration of small groups seeking new land.[1]

The oral history of the Nyimang people tells strongly in favour of this general statement. Suggested reasons for such migrations are numerous. In the Nuba case, Nadel mentions famine and attacks by other hostile tribes as among major factors which led to some drastic movements of certain Nuba tribes.[2] Nevertheless, many of the Nuba tribes have only a vague idea about their early migrations and thus are less able to trace their history back to their origins.

The Nyimang history of origin is no less obscure, and although Nadel thinks that the Nyimang "have a strong sense of history and tradition",[3] they are unable to tell us precisely their old history or any of their previous movements. However, Arkell thinks that the Nyimang are the descendants of an old tribe that lived somewhere in the northern Sudan. He writes:

> In Hatshepsut's temple at Deir el Bahri chiefs of Irm and Nimiu are shown bringing gold to the queen from the south. The Nimiu have negroid features, and their name suggests that they may possibly have been the ancestors of the Nyima Nuba of southern Kordofan.[4]

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1. E. Colson, "Migrations in Africa: trends and possibilities", in I. Wallerstein, Social Change: The Colonial Situation, 1966, 107.
2. See Nadel, The Nuba, op.cit., 5.
3. Ibid., 362.
4. A.J. Arkell, Early History of the Sudan to AD 1821, London 1955, 106.

This is a daring speculation which has been duly criticised by Stevenson as being untrue simply because the term "Nyimang" itself is not an indigenous name of the Nyimang tribe.[1] Thus, as has been indicated, the term "Nyimang" (which is a hill name - Nyima) is of a more recent origin.

Sagar, however, mentions a legend that the Nyimang were originally neighbours of Koalib of the eastern hills. They used to occupy jointly the hills of Shiama, Kulur, Dering (now uninhabited) and Dilling; but were driven away from their place of settlement by stronger tribes who occupied their area forming a wedge between the Nyimang and the Koalib.[2] In support of this legendary story, Sagar mentions that there exist certain similarities in appearance, customs and language between the Nyimang and the Koalib. Unfortunately, Sagar was unable to give specific examples in support of his contention.

Stevenson puts forward a more cogent theory indicating that the Nyimang are an earlier offshoot of the Afitti tribe of Jebel Dair who speak the same language as the Nyimang.[3] But this suggestion also remains only a splendid guess since there is no scientific evidence to support it, apart of course, from the language similarity.

Turning to the Nyimang themselves, one discovers that they hold widely different ideas and myths about their origin. One such common myth tells us that Wujé (the progenitor of the

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1. Stevenson, The Nuba Peoples, op.cit., 143.
2. J.W. Sagar, "Notes on the history, religion, and customs of the Nuba", (1922), 5 SNR, 138-139.
3. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 144.

people of the Shira) had descended from the sky on top of a Nitil hill called Urum.[1] Wujé and his family were originally members of a clan of Shira Koymon in the heavens. The legend continues to state that when the people of Wujé descended to Earth, they settled on beberda on top of the hill and lived peacefully until the rains stopped. They offered a sacrifice to the rain deity by killing a bull belonging to two orphan brothers. The orphans were highly indignant and started a civil war in which most of the inhabitants were killed and the rest flew back to the skies after having been converted into rainbows. A pregnant woman called Idɛnɛ was the only survivor and was hidden in a pig pen. Later she was discovered by Masoud, the patriarch of the Foy clan who then used to live in the valley below Urum and who used to possess the art of rain-making. Idɛnɛ later gave unnatural birth (through her knees) to Wula who became the great ancestor of the Shiro wa. From his birth Wula was believed to have possessed supernatural powers, and hence showed early manifestations of magical qualities which later enabled him (instead of Borei the eldest son of Masoud) to inherit the magic ring (tūm) of rain-making and thus become the founder of the Shiro wa.

The above mythology relates only to one section of the Nyimang people. Most of the Nyimang trace their genealogy back to Kudout, whose children have become the founders of the Nyimang clans. The following diagram, drawn by Nadel,[2]

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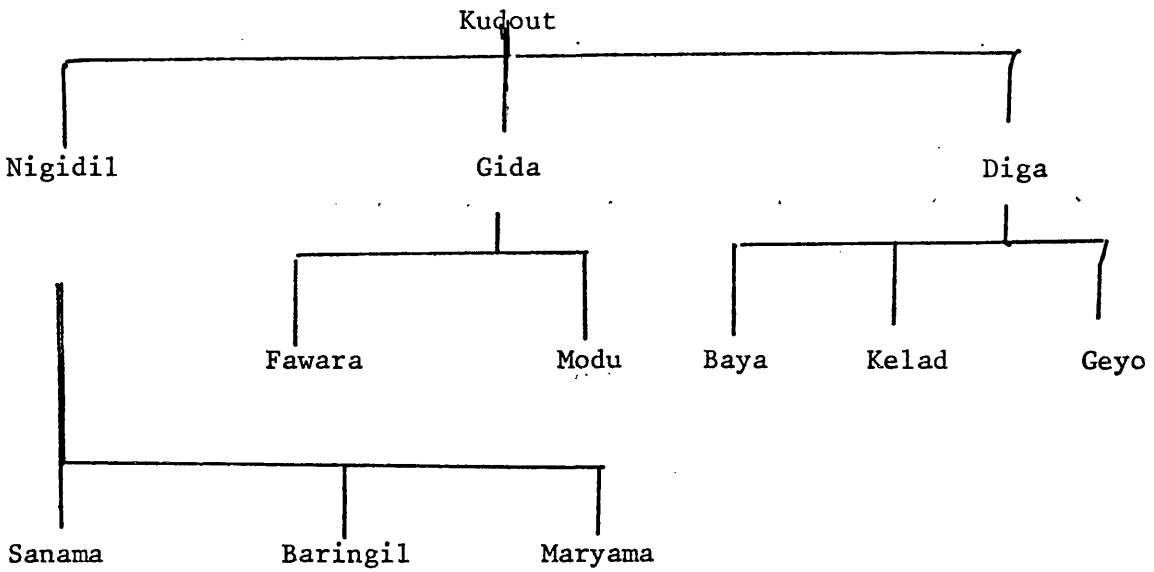
1. People would say that there are footprints in the rock made by Wujé and his family, together with their animals when they first descended.
2. Nadel, op.cit., 380.

represents the names of the ancestors who are considered as the founders of the main Nyimang clans.

Figure I



Two things must be made clear: (i) the above diagram is by no means complete, and (ii) that while the Nyimang can possibly trace their genealogies and those of their clans back twelve or fifteen generations, yet this cannot shed enough light on their previous places of migrations. This is so since many of their genealogies do not go back beyond the time of the occupation of their present settlements.[1]

A common and a popular tradition, told by the Nyimang themselves, mentions that the Nyimang migrated at a remote date[2] from a country in the west from a place known as Tima-Kwuja. Nadel, however, thinks that the indicated place is beyond Tima and Abu Ginuk and that the Kwuja itself "may well have been the Kugya in El Odeya district".[3] But in the opinion of

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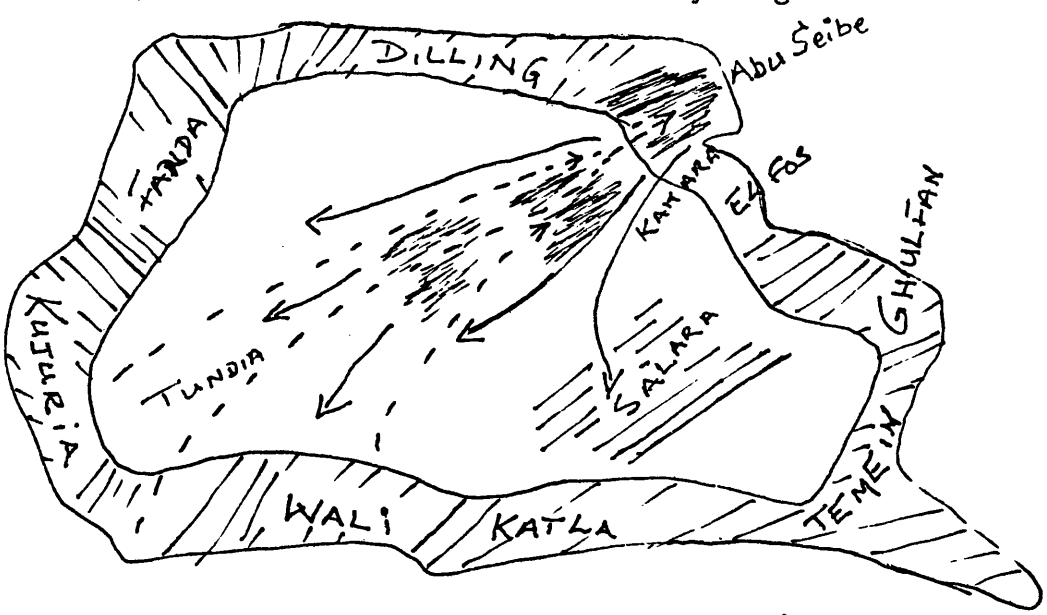
1. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 143.
2. This can be estimated as approximately between the 16th and 17th centuries.
3. Nadel, The Nuba, op.cit., 362, n.2.

Stevenson, "the village of Kwuja [is] about seven days' journey by foot to the west, near Jebel Tima".[1] The Nyimang cannot tell the exact whereabouts of this area, but say vaguely that it is now occupied by the Tima tribe.

According to tradition, the Nyimang, when they first came to their present home, settled in the east in the then-unoccupied area of Boji (Abu Seibe) and parts of Nitil and Kumiti. Here, one may note, the migration story and the myth of origin of the Shiro wa coincide in that in both situations Nitil was the first area of settlement. Later on they pushed their way westward to the other parts of the present Nyimang area.

Figure II : Early Movement of the Nyimang



Key: ----→ early movements of the Nyimang
←—— later spreading and movements
first occupied areas
later areas acquired either by hostile or peaceful means

Note: The map shows early and subsequent movements of the Nyimang people. On their first arrival they proceeded to the east and settled at Abu Seibe village (Boje). From there they started to move westward occupying the rest of the area.

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1. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 77.

These internal movements involved the Nyimang in bitter wars with the already existing tribes in the area. These tribes were the Hill Nubians of Dilling, Karko, Ghulfan and Kunit, some of whom were then displaced by the Nyimang forming a wedge between them. The expansion of the Nyimang area continued to its present boundaries, with the Salara being the last occupied area. This last Nyimang area (Salara) was inhabited by Kunit (Kujuria) and other tribes such as Wali and Temein all of whom were pushed further apart through warfare.

Speaking about the early history of the Nyimang tribe, Stevenson states that:

> When they came to the present home they found the Hill Nubian peoples in possession, and established a place for themselves by warfare, wedging themselves in amongst them and driving the Nubian further out. It is a fact that today the Nyamang occupy a central position, encircled by Nubian speakers.[1]

This statement, however, was later contradicted by Stevenson himself, who writes:

> The Nyimang must surely have been established in part of their present hills before the coming of the Hill Nubian speakers who appear to have flowed round them.[2]

One would disagree, with respect, with Stevenson's last suggestion and say that rather the other way round is true.

However, the state of affairs in the whole Nuba Mountains area in the pre-colonial era seems to have been that of constant strife and wars between the different tribal groups, either amongst themselves or between the Nuba and the Arabs.

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1. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 77.
2. Idem, The Nuba Peoples of Kordofan, op.cit., 144.

Speaking generally about the Nuba situation, Sagar notes in the 1920s that "most of the jebels [mountains] have long-standing feuds with the majority of their neighbours and many villages with other villages within the same jebel".[1]

Turning to the Nyimang people, it is an almost indisputable fact that they were known to be the most ruthless cattle-raiders and slave-hunters in the area. Bearing this in mind, and the fact that the Nyimang occupy a central position between a group of Hill Nubian speakers, it is not difficult to imagine the continuous hostilities between the Nyimang and other neighbouring tribes. Nadel rightly notes that: "The relations of the Nyima with the surrounding tribes were mostly hostile leading to constant wars and raids".[2] In another work Nadel writes that:

> In the past the Nyima were a most bellicose tribe, at war with many of the neighbouring groups and also divided among themselves, hill community fighting hill community.[3]

It is thus true that the history of the Nyimang people, particularly that falling beyond the era of the Condominium Regime, was marked by incessant and turbulent wars with both the Arabs and with other Nuba tribes. Many of the wars are still remembered in songs comparable to epic poems.

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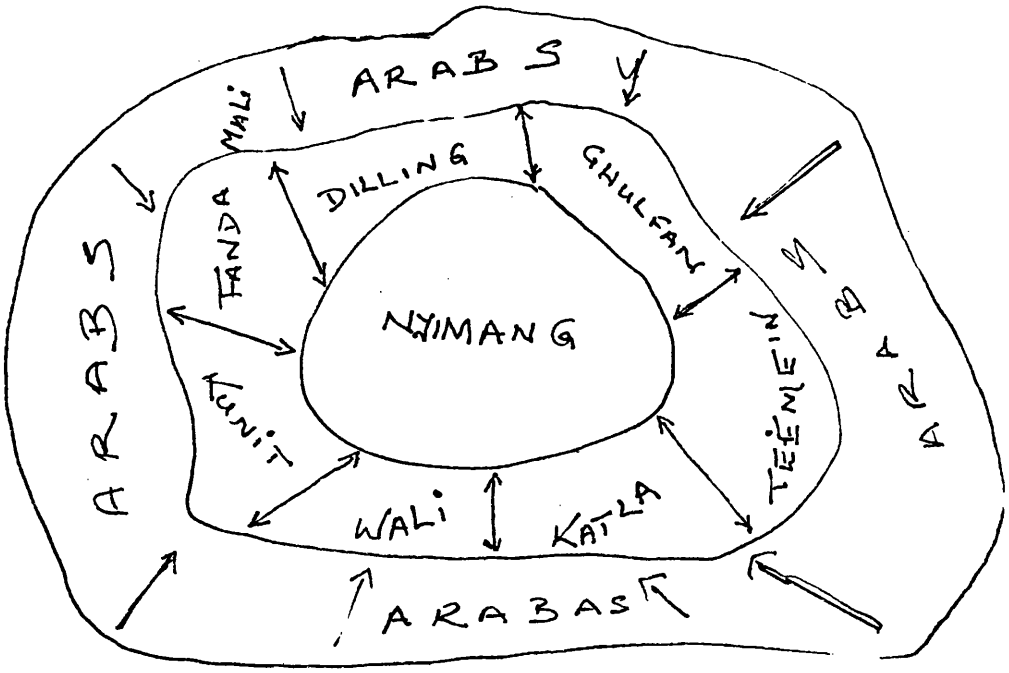
1. Sagar, op.cit., 151. See also I. Pallme, Travels in Kordofan, London 1844, 168.
2. Nadel, The Nuba, op.cit., 363.
3. Idem, "A Study of Shamanism in the Nuba Mountains" (1945/46), 76 JRAI, 31.

Figure III : The Central Position of the Nyimang Tribe



Note: This diagram explains the central position of the Nyimang tribe between the opposing elements. Note the encirclement of the Arab elements from almost every direction.

Nyimang wars were not fought solely with non-Nyimang tribes. Among themselves the Nyimang were not all at peace. Informants indicate that some of the most ferocious wars were fought between the Nyimang themselves. When they were not fighting a distant common enemy, they would turn upon themselves and loot each other's villages. In effect they were in a constant state of "fission" and "fusion", a term used by Evans-Pritchard to describe the Nuer. In fact, they used to live, if one may use a modern phraseology, "under a permanent state of emergency".

According to Sagar, during the Fur and Fung Sultanates (both of which held sway in Kordofan), the Nuba were left very much to themselves.[1] However, the freedom of the Nuba was greatly jeopardised by the presence of the Baggara Arabs in the

1. Sagar, op.cit., 139.

plains in the 19th century. As regards the relations of the Nyimang with the central government during the Turkish administration and the Mahdist regime, the Nyimang, like most of the Nuba Mountains, remained virtually independent and out of the direct rule of the Turks. The Turkish viceroy failed to secure any success in obtaining slaves among the recalcitrant Nubas, which prompted him to demand sterner action against them. Thus Hill writes:

> Slave raiding in the northern foothills of the Nuba country....was too small for the sanguine Viceroy who later reminded the Daftardar: 'You are aware that the end of all our effort and this expense is to procure negroes. Please show zeal in carrying out our wishes in this capital matter'.[1]

As regards the Nyimang, Stevenson notes that:

> Always formidable fighters and with hills difficult of access, the Nyimang had not suffered much from the organized slave-raids and were left to themselves by the Turkiyya government.[2]

However, not only were the Nyimang able to keep the same status quo of independence even during the Mahdiyya, but they also managed to defeat the strong army of Hamdan Abu Anga,[3] one of the strongest and most renowned leaders of the Mahdiyya. Father Ohrwalder, who was a missionary at Dilling, reports that:

> Abu Anga attacked almost all the Nuba mountains...Talodi, Gedir, and lastly Naima, were scenes of bloody combats, and at the last-named place [Nyimang] Abu Anga in spite of his artillery - which was commanded by Said Bey Guma - was heavily defeated and driven back.[4]

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1. R. Hill, Egypt in the Sudan, 1820-1881, London 1959, 13.
2. Stevenson, The Nuba Peoples of Kordofan, op.cit., 146.
3. Ibid., 148. According to Stevenson these wars took place between 1886 and 1887; Sagar, op.cit., 140.
4. Father J. Ohrwalder, Ten Years' Captivity in the Mahdi's Camp, op.cit., 181-182.

During the early years of the Condominium, the Nyimang were again left largely on their own with little interference on the part of the Central Government into their internal affairs. But their defiance of the Central Government continued, and their area witnessed a series of disturbances and general unrest in the following years. In 1902, for example, they were reported to have raided Dilling: in 1906 and 1907 they raided Julud, and there were other incidents in 1908, 1914, 1916 and 1917.[1] Most of these incidents constituted a flagrant disregard of government authority by refusing to pay taxes due or by involvement in organized raids into other neighbouring tribes. MacMichael writes that in 1908 the Nyimang:

> ...which had never been subdued, refused to acknowledge the government or hand over captives they have taken. A patrol was dispatched in October and the Mountain was occupied.[2]

In 1917, which MacMichael refers to as a "serious affair", the Nyimang led by the Shira Agabna, went into open rebellion against the Anglo-Egyptian Government.[3] However, certain Nyimang subtribes such as the Nitil and part of the Tundia headed by Kwueer Nimra remained loyal to the government and thus did not take part in this rebellion. A District Commissioner was killed and "one of the largest patrols ever held in the Sudan", known as the "Nyima Gebel Patrol (Patrol 32) was employed".[4] It was larger in number than that prepared

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1. See A Handbook of the Anglo-Egyptian Sudan, op.cit., 181-182.
2. H.A. MacMichael, The Anglo-Egyptian Sudan, London 1934, 100.
3. Ibid., 176.
4. See Major A.J.R. Lamb, "Operations against the Nuba Gebels", 25 The Cavalry Journal, 556.

for the reconquest of Darfur in 1916.[1] After some resistance Agabna and his men were captured and both he and his deputy leader Kilkun were hanged.[2] This, however, ended any further troubles in the Nyimang area.

2. Traditional Organization of the Nyimang Society

i) Social organization[3]

The Nyimang live in rather densely populated and large clustered settlements that are found mainly near the foothills which they occupy, although individual homesteads may be discovered hidden in the valleys or between the numerous hills. In the old days, and until the Nyima Patrol 1917, many if not all of the Nyimang settlements were built on the hill slopes or summits. Since Nyimang history at all times, as already mentioned, was a story of continuous wars, building on the hill summits was necessary for defence purposes.

Both these settlements and single homesteads are known as beshi (home). For social and political purposes, these settlements are divided into villages that are in turn arranged in groups which one may conveniently call hamlets. They are known as güdi. Each of these villages and hamlets has its own name derived mainly from the nearest natural site.

It must be remembered that Nyimang villages are not founded entirely on a kinship basis, but are composed of an agglomeration of persons from scattered kinship groups, and members belonging

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1. Loc.cit.
2. For a fuller account of this war, see Major Lamb's article cited above.
3. See generally, Nadel, The Nuba, op.cit., 378-414, Stevenson, The Nuba Peoples of Kordofan, op.cit., 138-206.

to different lineages and clans. This agglomeration may be identified as forming the local unit, and since they occupy a common locality its members usually co-operate and participate (though not necessarily) in both political and social activities of the village. Thus, among the Nyimang, a member of a clan or a lineage will not necessarily reside in a village where his own group predominates. Continual internal or inter-village movements are a dominant feature of the Nyimang settlements. At times one may notice new homes (beshi kanyer) built in different villages, some of which may belong to persons newly moving to that village.

Because of these relative fluctuations in the village population, political and social allegiance may be at variance. A person who moves from one village to another might find himself owning two allegiances; one to his clan headman who demands from him the government taxes, and another to the village sheikh of the settlement into which he has moved.

Most important of the Nyimang social organizations is the nuclear family or the household, which forms the basic residential grouping and is further regarded as an essential economic unit. This unit, as will be seen,[1] consists of a man, his wife or wives and their minor yet unmarried children. It may also include (at times) an aged father or a widowed mother.

All the members of the household or the nuclear family usually occupy a single homestead (beshi - home) consisting of a number of huts enclosed by a thick fence in a compound called wir. In the case of a man having several wives, all of them

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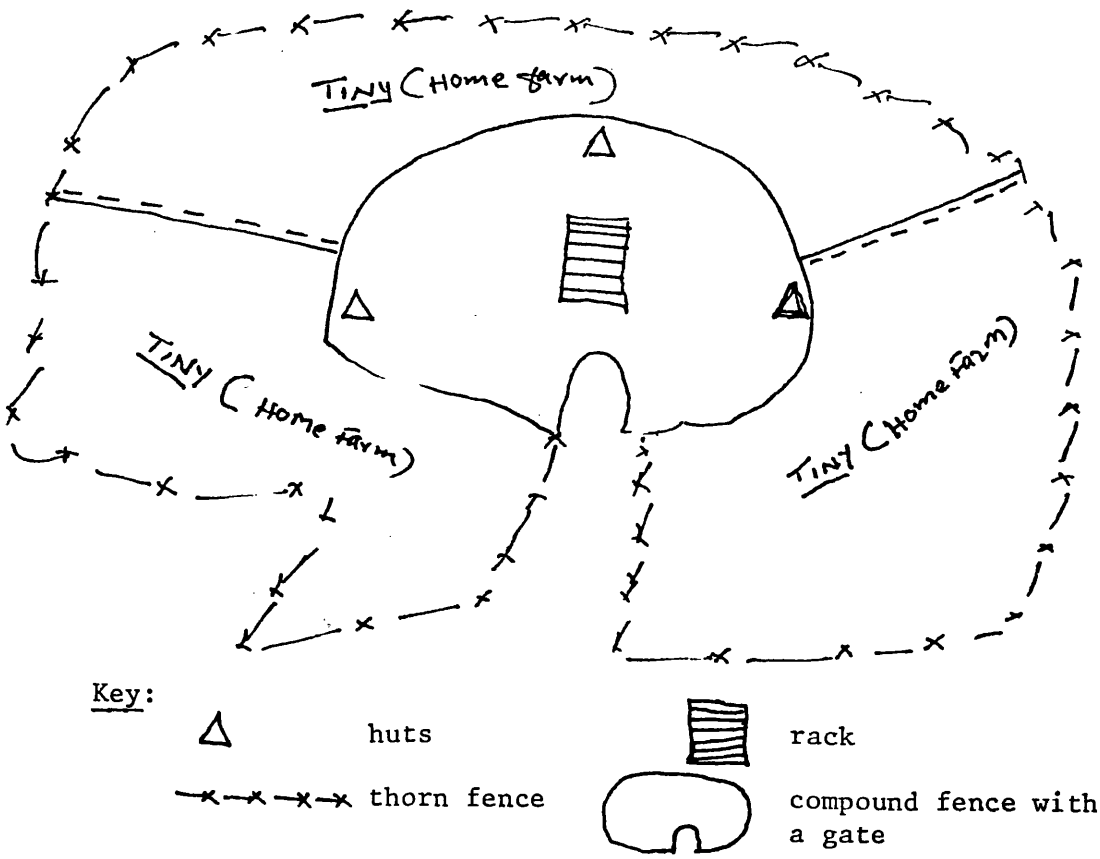
1. See Chapter III below.

must live in the same compound. But each wife and her children, forming a separate subfamily, must occupy a different hut (wel).

Figure IV : A Typical Nyimang Homestead with a Homefarm



Subject to the few years spent by the wife with her family of birth, the traditional Nyimang marriage is viri - local. And being a patrilineal society, the rules of exogamy (save in certain Islamized areas) are strictly followed. Such rules are observed on the clan and not on the village level.

a) The Nyimang clans (ara)

A rigid segmentation into non-localized clans and co-clans is one of the dominant features of Nyimang social organization.[1] They call their clans ara. For Nadel,

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1. See Nadel, "A Study of Shamanism in the Nuba Mountains", op.cit., 31.

this name is taken from ara (bullrush millet). According to him, "Ara means literally 'bullrush millet'; the clan is thus likened to the stem and ears of corn".[1] One must disagree with Nadel simply because in the Nyimang language the words ara (millet) and ara (clan) are absolutely different. Stevenson, in disagreeing with Nadel, points out that ara means the 'interior place', especially that of the compound which seems to indicate that the people belonging to the same clan membership have sprung originally from the same compound.[2] However, Stevenson's interpretation must be treated with care. The word ara (clan) in Nyimang does not necessarily mean the compound interior. It can have three possible meanings: (a) stomach, (b) capacity of a container, and (c) the interior or middle of a place or a thing. In Nyimang, when ara is used to refer to a clan it is always understood in sense (a) which will also mean womb. The people of the same ara are the people who came from the stomach - meaning womb - and share a remote common ancestor.

Although Nyimang clans may be regarded as a group of persons who share and recognize a remote common ancestor, they are also highly segmented. These segments are of unequal sizes which may further be divided into subclans and lineages which Nadel calls nwonwa[3] (sic). But as has been pointed out by Stevenson, the term ningon(g) wa (people of

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1. Idem, The Nuba, op.cit., 379, n.2.
2. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 190.
3. Nadel, The Nuba, op.cit., 380.

so-and-so) or woung wa (our people) are used not only to refer to subdivisions, but also to other divisions including smaller or larger lineage groups.[1]

The basic characteristics of the Nyimang clan are:[2] (a) a clan, name; (b) a founding ancestor; (c) clan spirit; (d) a clan home or place of origin, and (e) certain ritual observances shared only by the members of a given clan. However, the degree of the ritual observances varies from one clan to another. The divergences of ritual observance, for example, are seen in the emphasis laid by one clan or another on such matters as relating to moral conceptions and the fear of supernatural sanctions behind them.[3] This is evident in the general attitude of members of a given clan to the premature consummation of marriage or the strict compliance with the circumcision rites.

b) The age-system

Among the Nyimang men are initiated into manhood by the performance of a circumcision rite, known as shelo kiro or medei tai, after they have attained puberty. An initiated man is called kwai kanyer (new man). The ceremony marks the end of the carefree life of the child and the beginning of adolescence, and will normally be followed by marriage. In the old days, girls too were initiated by having their ears pierced. In the initiation ceremon priests known as medo iran (hill masters) play an important

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1. Stevenson, The Nuba Peoples of Kordofan, op.cit., 191.
2. See ibid., 194; Nadel, The Nuba, op.cit., 384.
3. Nadel, ibid., 384-386.

role in blessing the candidates. Gifts must be offered to these hill priests by those intending to be initiated. In the old days, the circumcision ceremony was regarded as a group activity where a group of youths of approximately the same age would be initiated within the same period. Nowadays, no such requirement is necessary and any youth can perform the rite individually without even consulting the hill master.

In the old days the initiates were obliged to live in seclusion in the hills until their wounds had healed. After that they would come down into the village and a series of festivities and parades would follow. In modern times no such segregation is necessary, but celebrations do take place as they did in the old days. As a strict rule no full brothers will be initiated into the same age-class, and there must be at least four years between one brother and another. This ruling does not, however, apply to half-brothers.

However, each initiated age-class known as kwaida (persons of the same age) will be considered the head of the three successive age-classes that follow. The overlapping of these age-classes is inevitable with the effect that the three junior groups and the senior one all belong to the same age-group, and are all called kwaida.

There is no group name for the initiates. But each initiate must receive a new name which he will bear throughout the rest of his life instead of his childhood name. All those who belong to the same age-class must

observe a strict code of behaviour towards each other. They usually refer to each other as temel (axe).[1] They ought not to quarrel with each other and must have a different way of greeting one another in which both hands are employed. In short, group solidarity is more pronounced amongst those who have undergone the initiation ceremony at the same time, or at least belong to the same general group of the age-class. Nadel says that:

> The age-classes nevertheless constitute groups closely integrated in themselves. The bond between men who went through age-grade life together, stretching across kinship and clan, is strong and lasting.[2]

Another important stage of the age-class is attained by performing the ceremony of ashio twil (lit., "beer drinking"). But before a person can be qualified to perform this later ceremony in one's life, he must go through a series of ceremonies the most important of which, as mentioned above, is the initiation by circumcision. The ceremony of ashio twil or ashio lida marks the beginning of the old age which must be characterised by wisdom and general responsibility. Traditionally the children of a person who has not yet performed this ceremony will not be allowed to have any sexual intimacy at all, and would not therefore be allowed to get married lest their marriage prove barren. Further, the performance of the ceremony carries with it privileges enjoyed by the Nyimang patriarchs over the younger generation.

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1. Presumably from the axe used in the former years for cutting the outstretched foreskin.
2. Nadel, The Nuba, op.cit., 407.

However, before the ceremony of ashio twil is performed, candidates must perform a series of communal tasks before they can qualify for this final ceremony.. This work may include collective labour on the farms of the responsible kwuni (shaman) and the shira (rain-maker) and the digging of a wordi (water-hole) for the common use. The performance of these activities is governed by elaborate group disciplinary rules in which groups, i.e., the senior age-class, the present candidates, and the junior age-class all play their respective active roles. The role of the senior age-class is mostly advisory and it is they who would give a name to the new age-group that has performed the ceremony of ashio twil, and the junior age-class must assist the candidates and learn from their experience.

After a person has performed this rite, he will then retire to the tranquillity of old age and will usually be referred to by the name of his first-born child - nige ma (father of so-and-so). However, it must be noted that while at the initiation ceremony the gap between the full brothers is four years, it virtually doubles when the rite of ashio twil is performed.

From this sketchy outline one can presumably infer that the institution of age organization is the most important feature of the Nyimang social structure. Its constitution contributes in a more subtle way to the integration of the Nyimang community otherwise divided into rigid segmentation. The cutting across the barriers of the clan and lineage divisions has been suggested by the

fact that people belonging to different clans and lineages are utterly forbidden to quarrel with each other if they are of the same age-class or grade, i.e., if they have been initiated or have performed the rite of ashio twil at the the same time, and by the general respect owed by the junior age-class to the senior one irrespective of the clan membership. Nadel has lucidly emphasised this subtle unity by saying that:

> The meaning of these various age-grade ceremonies goes beyond that of marking off phases of adolescence. The sacrifices...are meant to secure health, prosperity and fertility. The ritual procedure and the grouping of the congregation, besides, underline with the weight of supernatural associations, the social structure of the group: they throw into relief the existing group units - local group, the hill community, the tribe; and they affirm the hierarchy of accepted allegiances - to the local spirit priest, to the hill priests, and to the rain-maker of the tribe.[1]

Furthermore, the functional aspect of the age organization is equally important, and is demonstrated by the collective activities of the age-class either by defending the whole community (in the old days) in times of war, or by rendering communal services such as that of digging wordi (reservoirs) for the common use and the rendering of free services to the shira and kwuni for the sake of the community. All these are illustrations of the structural relationships that exist between the community at large and these age organizations which, in effect, introduce another dimension to the social cohesion.

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1. Ibid., 412.

ii) The Political Organization of the Traditional Nyimang Society

In The Nuba, Nadel, writing about the Nyimang political organization, says that:

> The Nyima is still close to the level of 'stateless' societies: traditional political control was largely diffuse and rudimentary, and rose to conscious unitary leadership only in tasks of war.[1]

It is true, however, that the Nyimang social system at its early levels lacked any centralized political authority. But to say that a given society has no political superstructure does not adequately indicate that such society suffers a total lack of any form of social mechanism or a kind of co-operation which fosters social cohesion.[2] The Nyimang, one would say, maintained their political system through various institutions including tribal functionaries such as the shira (rain-maker), the kwuni (shaman), wa didia (lit., big people) representing family groups or lineages in addition to the age organization. All these contributed effectively and in some varying degrees to the maintenance of the political life of Nyimang traditional society. Thus, as indicated, and despite the fact that there was no structural political office in traditional Nyimang society, one can equally claim that there existed a "form of institutionalized political leadership",[3] although the nature and the extent of its authority cannot properly be defined.

Despite the Nyimang tribe being ethnically and culturally homogeneous, its social system (as seen) is based fundamentally

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1. Ibid., 447. See also idem, "A Study of Shamanism in the Nuba Mountains", op.cit., 25.
2. See J. Tosh, "Colonial chiefs in a stateless society" (1973), 14 JAHist, 474.
3. Cf., J. Middleton and D. Tait, "Introduction", in J. Middleton and D. Tait, Tribes Without Rulers, London 1958, 16.

on a rigid segmentation into clans and lineages. It is only in relation to these internal divisions that one can properly understand the nature of the Nyimang political structure. Among the Nyimang "Human life", says Nadel, "almost in its totality is dominated by the principle of descent".[1] In the old days, individual loyalties were owed primarily to the lineage group and not to any individual kwuni or a shira.

However, the power of the family heads known as wa didia (big people) was not absolute; but in acting as group spokesmen, they nevertheless wielded considerable power in resolving internal problems within their families, or indeed any lineage or clan disputes. In addition, the organization of the Nyimang society into age-sets (most important are the initiates and those of advanced age who have performed the rite of ashio twil - beer drinking) had played an important role in maintaining the basic political order in the Nyimang society. Thus, while the younger generation of the age-class acted as warriors in tasks of war such as defending the community against assailants or raiding into other tribes either for cattle or slaves, the elders played an advisory role and helped in resolving disputes between the parties. Furthermore, inter-clan disputes and questions concerning relations between territorial communities of the different Nyimang subtribes or that which existed on the tribal level were dealt with properly by ritual functionaries.

Traditionally, each of the "seven-and-a-half" Nyimang subtribes was politically autonomous, and acted independently

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1. Nadel, "A Study of Shamanism in the Nuba Mountains", op.cit., 31.

of each other. Nevertheless, a closer look into the Nyimang tribal structure reveals a hidden tribal consciousness and a unity which, in fact, transcends this apparent diversity noticeable throughout their political and social structures. According to Nadel,[1] this unity remains more or less at the level of an idea and finds its basis in the conviction of the Nyimang people of their common culture which, as they believe, distinguishes them sharply from other tribal groups.[2] Moreover, the practical aspect of this unity could be encountered in times of calamities warranting the mobilization of the whole tribal group into a joint action against a common enemy.

In the following pages a brief account will be given about certain political functionaries who may be regarded as the nearest form of the institutionalized political leadership in the traditional Nyimang society.

a) Wa didia (lit., "big people")

Despite the fact that the Nyimang, as has been indicated, did not have any ruling chiefs in the strict sense, there existed in each Nyimang subtribe certain individuals who were reputed either for their immense courage and bravery, or for their wisdom. Such persons were regarded as spokesmen of their groups and thus acted as headmen or as leaders in times of war. Furthermore, village elders known as wa didia ("big people"), who themselves represented heads of larger families, used

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1. Idem, The Nuba, op.cit., 364 and passim.
2. Although it is not the case that the Nyimang hate strangers, it is true that until recently they never intermarried with other tribes whom they considered (unjustifiably) as culturally inferior.

to play a significant role in the general politics of their villages. As a rule, these patriarchs used to meet formally or informally under a gŭdi (being a day-time resting place for the village elders) for the general administration of their village affairs. Important issues concerning day-to-day life and the general policy of the village would usually be decided in these day-time resting places. When the need arose, these patriarchs exercised jurisdiction (though informally) to settle disputes between the parties.

b) The role of the kwuni (ancestral spirit)[1] in the traditional Nyimang politics

The term kwuni in the Nyimang language applies basically to the spirit faculty alone. The human medium is properly referred to as kwunidu koydi (the expert or a person who is skilled or is specialised in the affairs of the kwuni). The Nyimang say that spirit possession is comparable to mounting or riding a horse. Thus, the term mordu koydi (an expert horse-rider) is borrowed and used, though improperly so, when speaking about the spirit-medium relation.[2] However, the modern usage of the term kwuni may apply both to the spirit faculty and to the human medium as the case may be. For our present purpose the word kwuni should be understood as referring to the spirit unless otherwise is implied.

The kwuni enjoyed an important role, especially in the old days, and was of a high significance in both social and

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1. A consecrated kwuni is called kwueer which is equivalent to kujur.
2. See Nadel, The Nuba, op.cit., 441, n.1.

political life of the Nyimang people. Even today, their role in the Nyimang social life should not be disregarded. In the old days, and to a lesser degree in modern times, they were regarded as patriarchal heads and exercised both spiritual and secular powers over the fate of the people. In the past many of the kwuni acted as tribal functionaries and some of them were specialised in one aspect or another of the tribal life. Even today, while certain of these kwuni are firmly bound up with the institutional life of the group, such as circumcision, age-system and fertility cults, others act as soothsayers and are specialised in other spheres of tribal life, such as rain, famine, the discovery and punishment of offenders and (in the old days) were concerned with leadership in times of war.[1]

Of all the above shamans the war spirits known as kidangi or kidangu iran (the master of the expedition) who used to lead and direct the expedition raids into other tribes, were considered the most important figures in the traditional Nyimang politics. And although there existed besides the kwuni spirits, certain individual warriors who themselves acted as leaders of their people in times of war, the leadership of the kwuni spirit undoubtedly ranked supreme.

The spirit faculties responsible for war owned emblems, mostly a club (dɔ) that carried the shaman's distinguishing marks. When intending to organize a kedang (war) the possessed shaman would nominate a strong warrior to whom the

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1. See idem, "A Study of Shamanism", op.cit., 26.

dɔ would be entrusted to carry it and run through the villages non-stop announcing the declaration of the war. As a rule, the organizers or the leaders of the kedang, whether they be normal warriors or spirit faculties, were entitled to a specific share of the booty amounting to one head of cattle known as dɔ-u-bar (lit., "the cow of the club).

In addition to the war tasks, i.e., choosing the place to be raided and protecting the warriors against enemies, many of these spirit faculties used to sanction peace and reconciliation among the kin-groups. In many cases they used to officiate at rituals and ceremonies that led to the ending of blood feuds, or which resulted in the formation of peace pacts either between the Nyimang communities themselves or between the Nyimang and other tribes with whom they were at war. Nadel, in a sense, is right in suggesting that the kwuni represented the only institutionalized leadership in the traditional Nyimang society.[1] He further states that:

> [S]hamanism introduced into the lineage framework a different order of alignment. The spirit priest is the centre of a new, more fluid grouping, which extends as far as does his reputation. This extent is localized, and coincides with the zone of community life. Shamanism thus provides a spiritual focus for a community otherwise rigidly divided along lines of descent.[2]

It is thus true that the spirit cult of the kwuni provided the Nyimang people (in their traditional political organization) with a form of a mechanism that was politically viable within the general framework of their social system.

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1. Ibid., 25.
2. Ibid., 31.

But in agreeing with Nadel it must be remembered that the role and the acts of leadership of the individual shamans were more transient and were exercised primarily within the confines of their immediate communities. For example, a kwuni spirit who acted as a war leader in a given Nyimang community would not have any influence over individuals residing in other Nyimang communities. In addition, so much of the element of rivalry existed between the kwuni themselves that this eventually had its weakening effects on the fragile unity of the parties within the same community.[1]

As the leadership of the kwuni itself was not absolute and hence was not hereditary, and because it was closely associated with the personal qualities of the kwunidu koydu(i) (shaman), it seemed almost certain that the leadership of the kwuni was bound to cease and wither with the death of his medium or (to a lesser degree) when such leadership had been successfully challenged or contested by a rival spirit. It appears therefore, that despite the overwhelming importance of the role of the kwuni in the traditional Nyimang society in both the social and political spheres, this role, in as much as it related to the political cohesion "was irregular, fluid, and often conflicting", and thus "did not make for the real unity"[2] of the Nyimang people.

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1. Loc.cit.
2. Loc.cit.

c) The Shira (rain-maker)[1]

The word shira, which itself is a Hill Nubian loan word,[2] and probably came from the Dilling shil (king or chief), means chief in the Nyimang language. It is invariably used to refer to the rain-maker. Often it is translated into Arabic as "sultan", and the tribal area of the rain-maker is thus known as Hajar Sultan (the hill of the sultan) or shiro li (the place of the shira). However, the word shira may also be used to denote any person who exercises power and authority (however limited or whether secular or religious) over other people.

Traditionally, the shira is associated with the duties of rain-making. Thus, as the custodian of the rain (vital to the people's livelihood) the shira always holds a special position among the Nyimang people and his office is the focus and interest of the whole tribe. For that reason he wields unlimited power over the Nyimang people. Unlike the kwuni, the shira is not possessed by ancestral spirits but receives his powers of rain-making directly from the abradi (the creator), and is helped by a spirit messenger known as muslum or kurshal. According to Nadel:

> His office binds the people more strongly together: the religious rites of Nyima are consciously focused on the person of the rain-maker, through offerings and ritual obligations.[3]

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1. See generally, Nadel, The Nuba, op.cit., 446, 452 and passim: idem, "A Study of Shamanism", op.cit., 33: see also A. Kronenberg, "Some notes on the religion of the Nyimang" (1959) 7 Kush, 208-209.
2. See R.C. Stevenson, A Survey of the Phonetics and Grammatical Structure of the Nuba Mountain Languages, with particular Reference to Otoro, Katcha and Nyimang, in Afrika und Übersee, Band XL, Berlin 1956, 107, n.47.
3. Nadel, The Nuba, op.cit., 452.

In the old days, the shira was regarded as a paramount leader of the whole Nyimang tribe in times of war, but that was so "without yet entailing full tribal unity".[1] People believed strongly that the shira, through the aid of his supernatural faculties, was capable of leading them either to victory or into utter defeat. He was also though of as being capable of plunging the whole tribe into plagues of diseases and famines. In the old days, and on occasion, he would employ his supernatural powers to resolve disputes between individual members of the communities. In short, he was regarded as the most venerated figure in the Nyimang community and no member of the community would dare disobey his orders, otherwise he (the shira) would sanction the village by stopping the rain.

Despite this seemingly overwhelming authority of the shira in the traditional Nyimang society, enough evidence exists to demonstrate beyond doubt that the shira was regarded more as a mere spiritual leader than someone enjoying any absolute political supremacy over the Nyimang tribe. On many occasions his authority was not strong enough to prevent attempts by individual Nyimang subtribes to withdraw from this loose unity holding the Nyimang together as a tribe.[2] He was therefore unable to stop wars which were commonplace among the Nyimang subtribes.

In addition, defiance by other war spirits to the authority of the shira was also a common occurrence. The story of the war spirit (kwueer Abishet) of Salara who

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1. Loc.cit.
2. Loc.cit.

disagreed with a shira to the extent of stabbing him, was well known. The war spirit of Fassu or el Fos was so displeased with the shira that he prevented his people from giving any gifts or customary dues to the shira until now. Most recent of these defiances is the story of kwueer Nimra of Tundia who during the rebellion of 1917 defied Shira Ajabna and sided with the government. According to informants, the shira was in almost constant dispute with the people of Kurmiti subtribe. Similarly, informants relate a story indicating that the Shiro wa (the people of the shira) were originally a section from Nitil subtribe and used to live there. They came to their present locality approximately six to seven generations ago at the time of Shira Kurmede. The reasons, as told by the informants, was that the shira was threatened with death because he maliciously led these people to continuous defeats whenever they went out raiding other tribes. From the above stories one can infer that the shira was not capable of politically unifying the Nyimang tribe under the banner of his sacred leadership. As a matter of fact, and in a varying degree, now only three out of seven Nyimang sub-tribes, namely Salara, Kurmiti and Tundia, still owe allegiance to the present shira. The rest have broken away (long before the Condominium Regime) from the shira and claim to have their own functionaries for rain-making.

It must be remembered, however, that Nyimang external affairs in the old days were not always dominated by warfare. There were times when they needed peace to

regain breath. For that reason peace pacts existed, either amongst the Nyimang communities themselves, or between the Nyimang and other tribes.

As regards the inter-tribal pacts, they were entered into both on individual and group levels. When made on group levels these pacts used to comprise the concern of a single Nyimang subtribe. Internal pacts existed between the Nyimang subtribes themselves as between Salara and Tundia and Salara and Shiro wa. On the inter-tribal level, the Salara subtribe (Nyimang) kept broken pacts with Ghulfan, Katla, Tima, Wali, Kujuria; the Tundia (Nyimang) with Fanda and Karko; the Kurmiti with Mandal and Dilling; the Nitil with Dilling, and the Shiro wa with the Hawazma Arabs. Stevenson, however, mentions that there was once a pact on tribal level between the Nyimang tribe and the Kortala tribe.[1] However, it must be remembered that most of these pacts were short-lived and subject to infringements at the whims of both individuals and the groups of either side.

Peace pacts between the Nyimang and other tribes were made by sending to the intended tribes persons known as bwiru iran (masters of the path). These persons were for the most part warriors who had already been captured and ransomed and who were reputed for certain personal qualities such as bravery and wisdom, and capability of negotiating

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1. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 142.

the terms of peace. It was not necessary that they should be of kujur (shaman) origin, although a shaman might sometimes be needed to officiate at the performing of the rite resulting in the peace treaty.

As a rule, the bwiru iran (masters of the path) used to enjoy immunities similar to those of ambassadors as they would not be captured or molested by the enemy tribes while on their mission. This inviolability arose from the fact that such a person had already been captured by the enemy tribe which fact gave rise to a peculiar relationship akin to that of bloodbrotherhood that exists between the person and his ex-captors. The two families became tusul (ochre). The ex-captive, if he later visited the tribe of his former master, must be defended by the whole family of the ex-captors against recapture by other members of the enemy tribe. It was because of this available protection that only ex-captives were considered as best able to serve as ambassadors into enemy territories.

During the Condominium the changes within the Nyimang political structure from its traditional form to that of the modern system were most pronounced.[1] The new political structure was based on the appointments of the Meks (chiefs) and Sheikhs in each subtribe. The appointment of the Sheikhs in particular was done on a clan basis, thus preserving one of the most important features of the Nyimang social structure.[2] At the head of these Meks and Sheikhs was the Nazir, the Paramount Chief of the Nyimang

1. Nadel, The Nuba, op.cit., 470.
2. Ibid., 471.

Confederacy. His jurisdiction (both administrative and judicial) embraced not only the Nyimang subtribes, but also certain neighbouring tribes, viz., Mandal, Wali Karko, Temein, Katla and Julud, all of whom are non-Nyimang tribes.

It is thus true that the introduction of law and order enforced by government-appointed chiefs as a means of effective administrative of the area made massive changes in both the political and social structures of the traditional Nyimang society. But, as mentioned by Nadel:

> Territorial chieftainship, though in itself a new principle in this tribe, has emerged from the remarkably happy fusion of traditional structural features - local units and clan organization. The favourable constellation of Nyima grouping, with its tendency towards a territorial concentration of clans, has no doubt greatly helped towards a smooth development.[1]

However, the system of Native Administration was abolished in the early seventies, and ever since the Nazir with his Meks and Sheikhs has been devoid of any administrative or judicial powers. The administration of customary law is now entrusted to the Local People's Courts situated in Nitil, Tundia and Salara. Administrative affairs are in the hands of the Salara People's Council, while the political affairs are handled by organizations (found in bigger villages) such as the Youth Union, the Village Development Committee, the Parents' Council, etc., all of which owe their allegiance to the SSU (the Sudan Socialist Union). Although one could observe that all these organizations are mere novelties and do not, in fact,

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1. Ibid., 472.

find any broad acceptance with the villagers, one could equally admit that once again the Nyimang society is in the process of being transformed into yet another different form of society by adding a new formula of wider territorialism.

CHAPTER II

CONCEPT AND CLASSIFICATION OF PROPERTY AMONG THE NYIMANG

A. INTRODUCTION

The Nyimang conception and classification of property present some basic problems to the investigaros. Among such problems, which commonly exist in most African customary systems, is how to find an appropriate language capable of describing and hence analysing a particular system of traditional law. The enormous diversity of economic, social, political, religious practices and attitudes have a major impact on any people's ideas of property. This diversity includes the difficulty inherent in analysing the cluster of rights and duties which define and govern the proprietary relationships of members of any given traditional society. Thus, students of African traditional laws have expressed concern in finding it difficult to describe African tenure systems in terms "of familiar legal and linguistic concepts".[1] Allott, however, though he accepts in principle the use of vernacular terms, does not completely agree with the "notion that a a correct or satisfactory account of a given customary law X can only be written in the X language".[2] On the other hand, he further warns

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1. D. Biebuyck (ed.), African Agrarian Systems, 1963, 52; see also, T.O. Elias, The Nature of African Customary Law, 1956, 163-166, 173-175; P. Bohannan, "'Land', 'Tenure' and Land-Tenure", in D. Biebuyck, ibid., 111.
2. A.N. Allott, "Law and social anthropology", (1967) 17 Sociologus, 17.

unheeding introduction of alien terms into indigenous systems which may have misleading effects. One has therefore been warned by writers on the subject to resist the temptation of using an alien language for purposes of description and analysis because this would inevitably lead to distortion of the indigenous systems.[1] Nevertheless, most African systems of customary law are juristically unsophisticated and hence fail to evolve and finally accommodate some basic jural concepts. The resulting lack of appropriate legal terms in the vernacular words meant that there has to be eventual turn to the borrowing of alien legal terminology, whether for practical purposes or academic analysis.[2]

B. CLASSIFICATION OF PROPERTY

In considering the traditional Nyimang mode of property classification, it must be mentioned at the outset that the Nyimang people have never developed any systematic classification of various types of property into a given set or pettern of terms as with the antitheses movable-immovable, corporeal-incorporeal, or real and personal property such as obtains under Anglo-American jurisprudence. But in the common parlance of the Nyimang people all types of property are referred to by the generic term mălé.[3] To them mălé would cover the following categories:

1. Land: keil - soil
2. Trees: tuma
3. Movables: these may be divided into the following:

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1. For a fuller account of some linguistic problems involved, see Allott's "Language and property: a universal vocabulary for the analysis and description of proprietary relationships", (1970), African Language Studies, 12ff.
2. Cf., Introductory chapter by Allott, Epstein and Gluckman, in Ideas and Procedures in African Customary Law, 1969, 15-21.
3. This is borrowed from an Arabic word - mâł - which means wealth.

i) Livestock: kiyé;

ii) Chattels (crops, household utensils and other personal property, including heirlooms and office insignia);

iii) Money, and

iv) Debts.

1. Land (keil)

Hawkesworth wrote that:

> The Nuba does not regard land as a form of real estate in itself, but rather as a medium which can be utilized for certain purposes, such as building, cultivation, hunting, grazing, the cutting of timber, the collection of honey, etc.[1]

Indeed, these are the most important facets of any tribal land use; but this point must not be taken to obscure the proprietary rights enjoyed by the Nubas over most of their plots. Hawkesworth suggests that the land as such (in the form of soil) apart from other rights and interests in it, is incapable of proprietary ownership by the Nubas. The present writer believes that Hawkesworth is wrong in assuming that the Nubas do not hold and enjoy defined rights and interests in land. Indeed Nadel has observed that in the Nuba Mountains people have absolute property rights in cultivated land to the extent that they enjoy the right of sale and disposition by will.[2] But one has to remember that Hawkesworth wrote in a period when the study of African legal systems was in its

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1. D. Hawkesworth, "The Nuba People of Southern Kordofan", (1932/33) 15 SNR, 187.
2. S.F. Nadel, The Nuba, London, 1947, 22, 23, 30; see also D. Roden, "Changing patterns of land tenure amongst the Nuba of Central Sudan", (1971) 10:4, J.Ad.O, 296.

infancy; it is not surprising therefore if he made a false comparison between the tribal system of landholding and that of the highly sophisticated and very technical English tenurial system. Under English law, it is true, all lands - of whatever nature - must of necessity be held of some superior lord or from the Crown.[1] Thus, and since the English law is generally concerned with the concept of possession rather than with the concepts of ownership,[2] the doctrine of estates gave rise to separate and fragmental interests over land. This is a product of an historical evolution which Noyes had truly describe it as "fractions of property".[3] This peculiar English concept of property in land is fundamentally different from the Nyimang idea of property-holding.

The basis of land-holding among the Nyimang is, as Obi has put it for the Ibo, that "....the....individual enjoys interests in the land as of right and as an integral part of the land-holding unit".[4] The piece of land that an individual has appropriated from virgin land or has bought by his own cattle, goats, or crops etc., forms an inseparable part of his own property (i.e., not subject to any superior interest or control). Such a person would enjoy an absolute proprietary right in respect of that property, a right which in all cases would be permanent and heritable.

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1. Cheshire's Modern Law of Real Property, London, 12th edition, 1976, 14, 28.
2. Ibid., 28-29ff.
3. C.R. Noyes, The Institution of Property, 1936, 311; see also, H. Forbes, Real Property Law, London, 1974, 13-14.
4. S.N.C. Obi, The Ibo Law of Property, London, 1963, 31; see also, Elias, op.cit., 165.

It is apt therefore to note in this connexion that the Nyimang language contains nouns and pronouns which precisely express proprietary relationships between a person and the thing he owns and over which he exercises power of control. Words such as anong or anon - his or theirs, wong or wuong - mine or ours, and nyūn - yours, are usually used extensively in terms of proprietary right so as to convey the idea that the person in question enjoys a right equivalent to "ownership" in the property mentioned. The word iran - master or owner, is used to describe the proprietor and hence legally define his position as a holder of a certain object vis-à-vis other members of the community.

The following features are characteristic of Nyimang ideas of property:

i) Land among the Nyimang is originally acquired by families through occupation of an unappropriated portion of land and its conversion to their personal use. But these family lands are in pracrice enjoyed by the individual members of the family in their own right and for their own benefit. This illustrates the strongly individual character of property rights among the Nyimang.

ii) Despite the ceremonial festivities at the beginning and the end of each agricultural season, land has never been worshipped as a deity.

iii) In the egalitarian society of the Nyimang people, the tenets of their religious philosophy emphasize that land is the creation of abradi ("creator"), and therefore no human being has power to deny its utilization to his fellow men.

iv) Land has always been plentiful, and hence sufficed for the needs of all citizens.

v) Being acephalous, the Nyimang society never acknowledged any sort of landlords or supremacy of powerful chiefs over their lands.

The Nyimang are principally agriculturalists, so that their major concern is about the use and control of cultivable lands. To begin with, title to land is acquired and held by families; but as soon as a particular portion of land is appropriated by an individual member of the family group, title to that land vests absolutely in the individual concerned. Thus once a person has acquired a piece of land in this way, the rights that accrue to him are not determinable unless, of course, they are alienated through gift or sale. Death by no means terminates the relationship between the deceased iran (master) and the piece of land which he held absolutely. There is metaphysical relationship between the person as a land-holding unit and the land he holds. It is believed that his soul and the piece of property he holds become intermingled, thus investing him with an absolute and unfettered title throughout his life. In many cases this connexion is unchallengeable and therefore perpetual. In other words, among the Nyimang, the idea of the "man/thing" relationship, as pointed out by Bohannan,[1] is so strong that a stranger who wishes to settle on another's land must call upon the original

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1. Cf., Bohannan, op.cit., 102; see also Sumner and Keeler, The Science of Society, 1946, vol.1, 247ff.

landholder to perform ceremonies to the spirit that abides within that land. If the real iran (landholder) cannot be found or is dead, any person of the iran's (master or owner) family or any member of his clan may be called upon to perform the ritual known as tanyari, or li shil wurda ("rite of cooling the place"). In settlement areas, especially in the old days, where a new homestead has been constructed with the intention of removing a new wife, then besides the above ceremonies, children of the village from both sexes would be invited to spend the night in the new house eating, singing special hymns and generally being permitted to behave as they please. The idea was that the presence and activity of a group of children would expel evil spirits from the new place and thus bring good luck and prosperity to the would-be inhabitants.

In the agricultural lands, however, gifts of fowls and ashi (beer) would be presented to the person who is required to make sacrifices and to offer prayers and invocations to the deities. The Nyimang clearly deny any idea that these sacrifices are presented to the land spirit; for them land is not a form of a deity, and hence does not possess a sacred nature of its own. There are no professional priests for such sacrifices. Informants say that these sacrifices are made to

the abradi ("creator"). In many cases, libations are made to the spirit of the deceased or his ancestor so as to turn the land into a pleasant and prosperous place. Appeasing the forces that abide within the land is part of the job of the keilo iran ("landowner"). Likewise, the powers of the original landholder to invoke religious sanctions contribute to the peaceful and orderly borrowing of land and settlement of disputes relating to property among the Nyimang people.

Analysis of the Nyimang ideas of property, as already noted, reveals an important cultural conviction which professes a general dogma that the keil (land) is the creation of abradi ("creator"), and must be open to all members of the community The underlying principle of this conception may find a parallel support in the philosophy of Natural Law. John Locke, the classic exponent of the theory of the natural right of men to convert those things which are naturally common into their personal property, believed this right to be derived from nature (as a gift from God) and that it should therefore be inviolable. This basic right, according to Locke, entailed an important interaction between the property so affected by a man's labour and the personality of the person who has rendered the labour. It is this interaction, according to Locke, which eventually endows the person with an exclusive proprietary right in that object. He states that:

> Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person".... The "labour" of his body and the "work" of his hands, we may say, are properly his. What-

> soever, then, he removed out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.[1]

Locke's theory, as will be seen, is not inconsistent with the Nyimang traditional conceptions of property. However, the remarkable feature of the Nyimang customary law of property lies in its emphasis on the principles, on the one hand, that the occupation of unappropriated land coupled with labour would invest the occupant with full "ownership", and on the other hand, that even if property had been so converted, other members of the community are entitled to exercise limited rights of enjoyment over the land. This principle would only apply so long as the latter acknowledge the paramount title and superiority of the first occupant.

That the general public has this potential right over an individual's property seems to contradict the principle of the individualization of landholding among the Nyimang. This, it is submitted, is only an apparent contradiction, which is explained by the Nyimang themselves who ascribe the creation of land to God. Here the Nyimang philosophy takes on a strongly communitarian tinge. It further emphasizes that any land, though individually held, must not be denied to anyone who requires it for his livelihood. In effect, the frequency of land borrowing among the Nyimang might be explicable in

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1. J. Locke, Two Treatises of Civil Government, Everyman edition, reprint 1949, 130.

the light of this general philosophy. This, as has been indicated above, is a conflict of two fundamental and competing principles, i.e., the sanctity of the individual's claim of benefit exclusively from his labour, and the sovereign claim of members of a community to share in the community's assets. Thus, and despite this individuality, any member of the community may requisition any piece of land for his own use subject to prior permission from the landholding unit. In ordinary cases, permissions are never refused; but often no permission would be sought. Nadel is therefore right in noting that borrowing of land among the Nyimang is widely spread and hence is firmly institutionalized.[1]

One may therefore suggest that whether or not there is an absolute interest-holding or not in a certain plot of land is probably less important than the fact that Nyimang law conceives of such rights in terms of function rather than definition.[2]

As Nyimang customary law does not recognize trespass or prescriptive rules, principles of adverse possession and the effect of lapse of time play no part in determining rights in land. Nevertheless, Nadel thinks that the landowner - O - can evict the licensee (i.e., permissive occupier) - H - after the "second harvest".[3] It is true that among the Nyimang, O, the

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1. See Nadel, The Nuba, op.cit., 36. See also R.C. Stevenson, "The Nuba Peoples of Kordofan Province: an ethnographic survey", unpublished MSc(Econ) thesis, University of Khartoum, 1965, 155.
2. Cf., W. Friedmann, Law in a Changing Society, London, 1972, 96.
3. Nadel, The Nuba, op.cit., 36. It is also noted that Stevenson in "The Nuba Peoples", op.cit., 155, has relied on Nadel's findings and thus arrived at the same erroneous conclusions.

"landowner", finds it most difficult (i.e., social obstacles rather than legal) to regain possession of his land once it has been parted with, whether this be with his express permission or not. But the time limit mentioned by Nadel is inaccurate, as he has presumably confused this with another customary rule, viz., where the original holder, O, of the land is barred from immediately re-entering and hence cultivating land that has been reverted to him. This is a negative customary rule which makes the immediate re-entry to the land kwir (taboo) and thus incapacitates the original holder from unjustifiably enjoying land that has been developed[1] by the labours and efforts of another person (i.e., in this case, H). This bar continues until the lapse of a period of about two to four years. During this period the former possessor of the land, H, retains the right of utilization of the land. This period may be abridged if H opts to relinquish his right, in which case O, or anyone else who might be interested in the land, would offer a token gift to the possessor, H. The latter would then be expected ritually to "spit" on the kadang (hoe) of the new cultivator or settler as a blessing to remove the taboo.

The following factors which characterize and govern the parties' relationships are crucial in the system of land borrowing among the Nyimang people.

a) Despite the original permission being gratuitous and there being no rent, the licensor and heirs would under

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1. Development here means the clearance and manuring of the land. This is always due to happen in residential areas where land is constantly manured and also in the far farms where cattle camps are made particularly for manuring purposes.

no circumstances be allowed to evict the licensee and his heirs.[1] This rule, in theory, might seem to inflict unnecessary hardship on the original holders; and might appear to non-Nyimang as if it would perpetually deprive a person of his land. In practice, however, the rule has been accepted and sustained, and has endured for generations. The reason may perhaps be found in agricultural practices, which are based on shifting cultivation, as the system of land borrowing is firmly institutionalized, pieces of land are frequently exchanged, and it is indeed rare to find a landholding unit which confines itself strictly to lands in which it holds the absolute title. It could, therefore, be argued that among the Nyimang a licensor in one way or another will always also be a licensee.

b) The right of the user is not a mere personal right, and it can therefore be inherited by the heirs of the licensee as a matter of course.

c) The dominant idea in the minds of the licensee and his heirs is that of the attachment of the spirit of the iran (original holder) to the land. It would thus be futile, or even dangerous for the licensee or his heirs to try to dispute the title to that land, knowing full well that the iran of the land always has power to stir up the wrath

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1. Notwithstanding this customary rule, people in practice evict each other, especially if the borrower tries to deny the title of the original landholder. In cases of homicide, the land would be automatically forfeited, as the culprit would definitely choose to banish himself for ever.

of the deities and cause or render the land unproductive (by flooding it with snakes, locusts, termites and all such elements destructive to crops and harmful to the human soul).

This leads us to the important fact that to the Nyimang ideas of benefit and control of property are inseparable, for, as indicated, the holder of the land who lends it to another person for cultivation ("eating grass") or for settlement purposes by that act voluntarily loses a considerable degree of control over his land. Since the award is gratuitous in essence, the grantor neither expects economic reward in any form nor has power to sell the land to a third party whilst it remainds used by another. The grantor is also unable to eject the possessor and retain the land either for his own use or for the benefit of a fellow citizen.

The situation whereby a piece of land must revert to its original holder, no matter after how many generations, coupled with the idea of the attachment of the holder's soul to the land, is at the basis of the concept of proprietary "ownership" of the people over particular pieces of land they hold. But there is a fundamental distinction between the ways in which land and other goods are respectively seen. Land for the Nyimang too is permanently fixed, and as it is vital to the needs and existence of the whole society, must be "a subject-matter in which rights may be granted to persons other than the ostensible owner".[1]

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1. Cheshire's Modern Law of Real Property, London, 1976, 7.

Furthermore, every aspect of the land tenure system among the Nyimang is founded firmly on the tenets of their religious beliefs. Most dealings in land in the Nyimang area are affected by various taboos. These taboos together with the abundance of the land and a relative sparse population have helped in limiting the number of land disputes in the area.

2. Trees (tuma)

In African customary systems of property, there exists a sharp distinction between rights and interests affecting the surface of the land, i.e., the soil, which is in itself static, and rights and interests affecting what is within or upon it, e.g., trees, houses, water-holes, etc., which are either produced by human activities or simply introduced by the act of nature. These latter rights and interests are believed for the most part to be transient and may be held separately from the land itself. This distinction has been attested by scholars as forming a common feature of most African customary laws. T.O. Elias has said that:

> The feature of this fascinating concept of customary ownership is the fact that a person can own in the true sense of the word the plants which he has grown and the house and other structure erected on his allotment, while the ultimate title to the land itself remains in the owning group.[1]

Allott, in describing the Ashanti land law has stated that "the Ashanti conception of land extends only to the soil itself",[2]

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1. Elias, op.cit., 166.
2. A.N. Allott, The Ashanti Law of Property, Stuttgart, 1966, 138, 143; see also C.K. Meek, Land Law and Custom in the Colonies, 1968, 47; Obi, op.cit., 32; A.K.P. Kludze, The Ewe Law of Property, London, 1973, 103; cf., N.A. Ollennu, Principles of Customary Law in Ghana, London, 1962, 1.

but does not embrace interests in objects on it or those which might have been brought into existence by human labour. In the general law of the Sudan the statutory definition of land follows the English definition, and is so wide as to include trees and other things subjacent to, or fixed to the surface of the land as part of the land itself.[1] But, notwithstanding this general definition, Section (27) of the Land Settlement and Registration Ordinance, 1925, modifies this definition by providing that land may also be held subject to liabilities of other customary practices, and that "rights to date trees and other trees..."[2] may be vested in different persons. This section, however, embodies the property conceptions of the larger part of the tribal communities of the Sudan.

The case of Mohamed Salih Abdel Rahman and others v. Omer Idris and another,[3] though fundamentally a prescriptive case concerning date trees, may be taken as an illustration of the above concept. The case confirms the principle and further emphasizes the difference between the land, as soil, as distinct from other interests on it, e.g., trees, houses, wells, etc., which may be held and controlled by persons other than the person who holds absolute title to the land.

The law prevailing among the Nyimang is no different from the principle stated in Mohamed Salih's case. The Nyimang state

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1. See Land Settlement and Registration Ordinance, 1925, s.3, and Prescription and Limitation Ordinance, 1928, s.2.
2. See Land Settlement and Registration Ordinance, 1925, s.27(e).
3. Mohamed Salih Abdel Rahman and others v. Omer Idris and another, (1962), SLJR 54,

that rights and interests in tuma (trees), wel (houses), bidi (wells), never form part of the keil (land) under which or over which they exist. Principles such as "a person who controls the land prima facie controls the things on it", or the maxim quicquid plantatur solo, solo cedit - whatever is planted in the soil accedes to the soil[1] - simply do not form part of the Nyimang conception of property. As property in tuma may be held separately from keil, rules that govern the rights in them are also slightly different. It is pertinent to point out that tuma is here treated and classified as a separate category of property among the Nyimang. It should further be added that here the word tuma is used as a generic term which includes all types of trees, i.e., those that grow naturally and are used for timber and fencing purposes, or those that are economically rewarding (e.g., fruit trees), whether they be wild or planted by humans, in this example, orchards.

3. Movables

Because land is abundant and there is no pressure on it, the Nyimang generally consider movable property and rights in it more significant in their day-to-day lives than rights in land. Movable property is usually acquired to satisfy the individual's aspiration and hence improve his image in the society. However, some chattels are as much cherished for their social and religious significance than for any economic reward. Such examples may include the invisible sacred ring known as tum, this ring is believed by the people to be owned by the shira - the rainmaker. Also the bangles, spiral cuffs,

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1. Cheshire's Modern Law of Real Property, op.cit., 138.

beads, decorated whips, etc., which are usually worn by the shamans - kwuni - symbolize office insignia and are prestigious objects upon which no economic value may be placed.

Among the Nyimang, one may legitimately describe an acquirer of a movable property as absolute owner of it,[1] endowed with an unfettered right to use and enjoy it for his benefit and to the exclusion of other members of the society. It is thus not uncommon in the Nyimang society to find an ungenerous person (known as tulum) who would refuse the benefits of his property even to the closest members of his family.[2] In other words, there are social as well as legal obligations which attach to the holding of movable property: but the holder has the legal capacity to ignore such social obligations without legal penalty.

As mentioned above, the Nyimang have never developed any schema of property capable of categorization for juridical purposes. Nevertheless, all chattels may be referred to by the general term of ki - thing. Thus, in the common parlance of the Nyimang language, the word ki denotes anything whether of substance, i.e., economically useful, or not. It includes

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1. See Allott's "Towards a Definition of 'Absolute Ownership'", (1961), JAL 101, where the learned author enumerates instances where a person may properly be assumed to be an "absolute owner" under the African customary law. However, in the Nyimang case, the term is consciously used to imply the full and extensive meaning in terms of rights and control over the property.
2. The independence of mind once observed by Stevenson in his article "The Nyamang of the Nuba Mountains", op.cit., 77, accounts for the individualistic attitude of the Nyimang people. But it should also be understood that an individual's interests are, in many cases, subordinated to conform with the common interests of the larger community.

personal belongings, livestock, land and such other things as a piece of grass, worms, etc. Persons may also be referred to as ki if degradation or abuse is intended. Sometimes the word ki may be used to mean wealth. Thus, when a Nyimang says that so-and-so é ki do ha wo, he simply means that such a person owns nothing, in other words, he is dūwa (poor) or barngul.

The word ki, in the sense of wealth, is not strictly allied to land as property. But although the sale of land was not an uncommon phenomenon in the Nyimang history, it was not regarded as a commercial commodity, and hence was not taken as a form of wealth on the same level as cattle.

Movable property includes the following:

i) Livestock - kié

ii) Household and other personal property

iii) Money

iv) Debt

v) Livestock: Is commonly known as kié (animals), and includes bar (cattle), goats, sheep and, in former years, pigs. This is debisde donkeys and other domestic pets. When Nyimang speak about wealth, they are thinking principally of kié. They represent the backbone of their economic and social life. Traditionally bar (cattle)

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1. The word dūwa literally means "weak", a physically invalid person or a person of a weak character. It is not, therefore, a necessary antonym of the word kwurdo - a wealthy person.

were reckoned (apart from land) as the most important of all Nyimang property and used to play a more prominent role in the social life than it does today.[1] It used to indicate the power and wealth associated with prestige in society.

In recent years, the relative importance of the kié has started to diminish. This can be attributed to the changing attitudes of the people themselves who have been strongly influenced by the introduction of the cash economy and of education. People (especially the old) indicate with regret that it has become more difficult to look after livestock than was the case in former days. Reasons adduced were that:

1) The kié have become more vulnerable to the hazards of nature, e.g., annual shortages of grass and water present a major problem.
2) The Nyimang land lies within an area where there is not a single veterinary hospital, and animal disease is a continuing menace which is thought to be most discouraging to herd owners.
3) Even if a herd is kept, an onerous animal tax renders it intolerable for those owners who have nothing more than a very limited income.
4) Most important is the absence of proper care. Livestock no longer occupies the attention of all family

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1. Stevenson thought the same about forty years ago: see his article "The Nyamang of the Nuba Mountains", op.cit., 81.

members; children prefer to go to schools, the youth depart to become migrant labourers seeking money to satisfy their person needs and to pay as marriage consideration. The elders, unable to handle the difficult task of herding and watering the animals, have to look after farm plots to ensure their own livelihood.

Fowls too are regarded as a different species of property possessing a unique ceremonial significance in the Nyimang traditional religion. There is an adage that "The chickens protect the home from perishing, and that when the worst comes to the worst, the importance of a chicken surmounts all worldly treasures". This was based on the belief that gifts of chickens would be readily accepted by the supernatural powers.[1]

ii) Household and Personal Property: This comprises cooking utensils and general household furniture tigir ("ornaments") including beads, clothes, etc.; crops; modern goods; defensive weapons, mudang - gun, kora - spear, shibidi - sword, koni - knife and clubs. Heirlooms, fetishes and insignia which mark the holding of an office are special types of property, and are valued for their intrinsic and ritualistic qualities. The most important of these is the already mentioned rainmaking ring known as tūm; this invisible ring is believed to be owned by the

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1. See Nadel, "A Study of Shamanism", op.cit., 28; A. Kronenberg, "Some Notes on the Nyimang Religion", (1959), 7 Kush 207, and passim; Hawkesworth, op.cit., 164.

shira, the rainmaker. The kuni - the shamans - especially those who were consecrated, wear a big white bead around the neck, spiral cuffs, a ceremonial axe and a spear; all of these constitute the insignia of priestly office.

iii) Money (girshi) was not used as a traditional means of exchange and was not therefore known as a form of wealth in the Nyimang society.[1] It is believed that money gained popularity only at the end of the nineteenth century. With the advent of the cash economy, however, money has started to attract the attention of the whole Nyimang society and has since superseded some important traditional forms of property such as cattle.

iv) Debts (ameshi) refers to the transaction governing the relationship between the parties themselves and to the rights and obligations arising from such transaction. As in most African societies,[2] the Nyimang actions on a debt would endure for generations and could also be inherited and thus would never be abated by the death of either of the original parties.

C. PROPERTY AND SOCIAL EQUILIBRIUM

Students of African customary law of property have regarded transfer of property as creating relationships which form part

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1. See I. Pallme, Travels in Kordofan, London, 1844, 160, where the writer states that "The Nuba negroes do not know the value of money, and always accept such goods as they reckon among their wants for their commodities". See also Nadel, The Nuba, op.cit., 166.
2. See Elias, op.cit., 170.

of a general network that constitutes a web of a social organization. Others suggest that property in traditional Africa should be understood "to be the cement which holds the social structure together".[1] Thus, in addition to and apart from their function of contributing to the "checks" and "balances" within society, property relations reflect, in a deeper and more subtle way, the underlying social traditions, cultures and values of the people.[2]

Some scholars, such as Gluckman, have advocated that property rights in certain African societies are closely associated with status.[3] He apparently takes his theme from the famous hypothesis of Sir Henry Maine that "The progressive societies has hitherto been a movement from Status to Contract". This implies, as indicated, that property rights are connected with and are enjoyed according to the status of the individual within a society. With due respect, one must note that the Nyimang egalitarian society apparently offers a contrary example. In addition, it is submitted that ample evidence has already been adduced by scholars to prove the general fallacy of this proposition.[4]

However, if it is accepted that an integrated society is best; then one should note that among the Nyimang too, property relations serve the interests of the individuals and society alike by preserving the interplay of the society and the values which it incorporates. For this reason and for the proper understanding

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1. Allott, The Ashanti Law of Property, op.cit., 143.
2. Cf., F.M. Deng, "property and value-interplay among the Nilotes of the Southern Sudan", (1965) SLJR, 588.
3. M. Gluckman, The Ideas of Barotse Jurisprudence, 1965, 151-156 and passim; Id., "Property rights and status in African traditional law", in Gluckman, ed., Ideas and Procedures in African Customary Law, 1969, 260-263.
4. Cf., Allott "African Law", in J. Duncan M. Derrett, ed., An Introduction to Legal Systems, London, 1968, 149-150.

of the functions of property in Nyimang society, it is essential first of all to understand the people's social, political and economic institutions. In doing so, the criterion should be that:

> Man cannot live alone; the individual cannot do without the family; and although family groups can be conceived as independent and self-sufficing, the family has from very early times been in like manner part of a larger society, whether it be a clan, a tribe or a nation, with which it is bound up. No society can continue without some uniform practice and habits of life. Individual impulses have to be subordinated to this need; and this subordination is a never-ending process.[1]

In the Nyimang society the family is its most important institution, and the family in its turn depends fundamentally on the co-operation and interdependence of its members.[2] To ensure that each member of the family received an equal and fair share of the family income, the rule is that all property gained by the family members must be regarded as the property of the father as the head of the family unit. Property of all types must be pooled in the father's compound, and he alone is endowed with absolute power and capacity to dispose of that property.[3] However, although the Nyimang society has managed to retain most of the family solidarity in the face of new changes, it is evident that some of its most cherished and basic principles have started to crumble. Vinogradoff is, in a sense, right to suggest that:

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1. F. Pollock, Jurisprudence and Legal Essays, London, 1961, 2.
2. The family in the Nyimang context, as will be shown below, typically comprises a man, wife (or wives) and their children. It is a nuclear parental family which is headed by the father.
3. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 79, 82; see also Hawkesworth, op.cit., 186.

> The development of modern economic ideas and relations is unquestionably breaking the primitive conceptions of family solidarity.[1]

In the modern Nyimang society, for instance, the authority of the father is weakened (relatively) by his son's ability to earn money outside the family.

There are no classes in the Nyimang egalitarian society; but reverence for the aged is still widely observed. Generosity is an entrenched social virtue. A generous person is ironically referred to as koshil (cold person). Gestures of generosity and acts of kindness by the youth to the elder folk are immensely cherished. Living in a strictly exogamous society, a Nyimang man must have good personal relations outside the circle of his family and clan. Busia rightly observed that in Africa:

> In the kin-group the emphasis is on helpfulness and generosity, a member fulfils his obligation not by what he accumulates for himself, but by what he gives to the other members....Esteem and prestige depend on what a member gives to his group.[2]

This generally accords with the Nyimang ideas of benevolence where, in time of famine, rich members of the society give part of their property as gifts or loans to their needy kin and neighbours. In many instances bloodbrotherhood and marriage relations are created as a result of such help. But these rules of generosity are social expedients which conform with general values of the society. They do not constitute, in the Nyimang concept, any legal obligations on

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1. P. Vinogradoff, "The Joint Family", in L. Krader, ed., Anthropology and Early Law, 1966, 122.
2. Busia, The Challenge of Africa, 1962, 32, quoted by S.K.B. Asante, in Property Law and Social Goals in Ghana, Accra, 1875, 21.

the part of the wealthy members of the kindred. It is true that, especially in the old days, when settlements were centred around groups of kin, this wider group may share the benefits of free food and drinks offered by other wealthy members; but this never constituted any legal obligation on the part of the "haves". For example, when an animal was slaughtered for sacrifice, certain portions of it would be freely given to certain relatives and neighbours. This was done in anticipation of work that might be rendered by these relatives and neighbours, e.g., in looking after the neighbours' animals, to freely watering or herding them, helping recover them when lost or giving assistance when self-help was needed. However, with the advent of the modern life, social and family ties have grown less strong, and hence the scope of the benefits enjoyed by the larger community on individual's property have narrowed. Nevertheless, personal relationships outside the family circle are highly honoured and are strengthened by exchange of goods as gifts. This transaction is customarily known as twida. One special example of this is presented by friendship between young people of opposite sexes. This as a recognized social institution is highly platonic in nature, especially in the old days, and gifts are constantly exchanged between the parties.

The institution of marriage is one area where the complexity of property relations can easily be seen. In a strict legal sense, the amount paid as marriage consideration is fixed at five head of cattle and twenty-one goats; but the amount of payment fluctuates in practice depending on how good are the relations of the parties involved. The Nyimang say that payments to one's

in-laws are never limited while the marriage subsists as a continuing social obligation. The customs of su and koru (incomplete part of the marriage consideration) are intended primarily to revive these ties and to preserve family relations by continuous property transfer. It is rare for a person to deny any kind or any part of his property to his andir (mother's brother).

The system of sacrifices and prayers which express certain awe and reverence to the dead fathers, in the traditional Nyimang society, expresses the continuing attachment of the dead to their living families. Hawkesworth notes that:

> This veneration, almost amounting to worship, of Ancestral Spirit is the basis of Nuba religion....
>
> All communications are addressed, not to God, but to the Ancestral Spirit, and are usually supported with gifts.[1]

The deceased members of a Nyimang family still continue to share in the family property by some indirect influence and control over the fates of living members. Property rights of dead members must be strictly observed by steady presentation of tangible gifts in the form of sacrifices to the spirits of the dead. There is in fact mutual interdependence between the dead and the living members of the family, as has been stated by Hawkesworth:

> As the living are still dependent upon the dead, so the dead are dependent upon the living. Those who have died, though spirits only, still require water and food, and for these they are dependent upon the living. Great is the misfortune of those who die childless, for they will remain for every hungry and thirsty. It has been seen that on marriage during the various other

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1. Hawkesworth, op.cit., 161.

ceremonies, goats and other animals are slaughtered to the deceased ancestors.[1]

Failure to comply with these observances may entail bad luck, sterility and the spread of diseases within the family.[2] Posterity, and hence continuity of the family line, is maintained by the continuous recognition of the members through the links of property.

D. CUSTOMARY DUES

Another important aspect of the role of property in the social structure of the Nyimang society is manifested in the customary dues paid by the people to some of the tribal functionaries. These payments establish social rather than, strictly speaking, political allegiance. Most renowned of these functionaries are the shira (rainmaker) and some consecreate kwuni (shaman). Both of these tribal dignitaries are believed to possess supernatural powers necessary to the existence of Nyimang society. These tributes should not be regarded as in any sense a form of taxation or rent levied upon the people. These payments have no basis in legal obligation, as these tribal dignitaries lack any sort of paramountcy or legal ownership over Nyimang lands. The social interests inherent in the payment of property as customary dues exhibit the fact that some of these gifts are used according to tribal prescriptions, e.g., goats given to the shira for inducement of the rain must all be slaughtered. Failure to conform to these requirements or prescriptions is believed to be fatal to the

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1. Ibid., 190-191.
2. Cf., Nadel, "A Study of Shamanism", op.cit., 32; see also, A. Kronenberg, op.cit., 203 and passim.

existence of the whole tribe. It thus follows that the person to whom property is given as customary dues would not, in most cases, regard them as his exclusive personal property. He must use them, at least in part, to keep the community intact, to maintain social well-being by presenting sacrifices to the deities to "cool" the supernatural powers, and thus drive away diseases and enhance social balance through added posterity.

Other Nyimang customary payments include:

i) Payments to the Shira (the rainmaker)

The office of the shira is both sacred and secular. It thus embraces the concern of the whole Nyimang community as representing an impregnable symbol of tribal unity.[1] For this reason, the office of the shira is jealously guarded, and is sustained through presentation of gifts of property to the office-holder. Nadel has emphasized the importance of the shira in the Nyimang society in the following words:

> The religious rites of the Nyima are consciously focused on the person of the rain-maker, through offerings and ritual obligations; moreover, behind all the rulings which he might issue stands the supreme sweeping sanction of stopping the rain.[2]

However, the customary tribute paid to the shira include livestock, grains and carrying out of manual work on his farm; and in former years, when there were organized tribal raids into the other neighbouring tribes, the shira used to receive a certain share of the booty (if he was responsible for the

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1. See Nadel, "A Study of Shamanism", op.cit., 33; Nadel, The Nuba, op.cit., 446.
2. Ibid., 452.

organization of the expedition). Generally gifts to the shira are presented shortly before the beginning of the rainy season so as to induce the rain. It is customary for everyone to contribute to help the shira to perform and fulfil the onerous and expensive duty of his rainmaking office. Each year at the commencement of the rainy season, an annual festival is held where the clan of the shira brews large quantities of ashi (beer), and when all the goats that are given as gifts will be sacrificed to the rain deity. Any member of the community, including strangers, will enjoy the free consumption of food and drink.[1] In theory, the individual member always has the right to abstain from paying the tribute; but this right is exercised to the detriment of the whole society. It is believed by the people that if the shira knew that, then he would withhold the rain unless his anger is appeased by presentation of additional gifts.[2] It should be noted in this respect that (unlike in former years) only three out of the seven sub-tribes, viz., Salara, Tundia and Kurmiti, are expected to pay gifts and hence to give customary allegiance to the shira. Even within these three sub-tribes only the old folk follow the custom, and then reluctantly when there is a catastrophe imminent. Stevenson noted almost four decades ago that gifts to the shira had

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1. Cf., Gluckman, The Ideas in Barotse Jurisprudence, op.cit., 154ff., where he mentions that most of the goods brought as tribute to the Barotse king would go to the people themselves.
2. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 98.

been greatly reduced in number.[1] This tendency is emphatically true of the present-day position of the shira in the Nyimang society.

ii) Payments to the Kwuni (ancestral spirit)

The Nyimang use the words kwuni and abidi interchangeably to refer to one and the same thing. The word kuni, in its primary meaning refers only to the spirit; the person in whom the spirit reveals itself is known as kwunidu koydi.[2] But modern usage of the word kwuni tends also to refer to the person who acts as the medium of the spirit. Kronenberg was thus not far from right in suggesting that "the person so possessed, as well as the spirit itself, is called kuni or kujur".[3] It is customary that in order to maintain good relations with the kwuni and the abidi of the deceased father all sorts of property must be dedicated to them.

The kwuni in the Nyimang concept possesses a separate and a distinct legal personality capable of owning and disposing of property. The kwunidu koydi or the vessel medium, is regarded as a mere caretaker of the property of the kwuni. In certain cases, property that belongs to the kwuni is left entirely unguarded under the protection of kwuni himself. As a general rule kwunidu koydi, whose kwuni is not yet consecrated, is not allowed to drink or eat from the property given as gifts to the kwuni (though this would not apply to the rest of his family members). If this rule is disregarded the kwunidu

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1. Ibid., 98.
2. See Nadel, The Nuba, op.cit., 441, n.1.; See Chapter I above.
3. Kronenberg, op.cit., 204.

koydi would die. The kwunidu koydi has no capacity to dispose of or make any decision likely to affect the nature of the property of the kwuni unless an express permission is obtained from the spirit himself.

As indicated, as in the case of the shira people pay tribute to the kwuni to provide the office holder with economic assistance and also in consideration of special services rendered by the kwuni on behalf of the community. In other words, the public is expected to use that property and perform manual work necessary to assist the kwuni discharge those duties that are considered to be in the best interest of the public. In former years, the kwuni played a leading role in Nyimang public life. This led Nadel to conclude correctly that the spirit of the shaman provided "a spiritual focus for a community otherwise rigidly divided along lines of descent".[1] Part of the job of the kwuni is to act as an oracle, thereby prophesying the future, predicting the expected evils and hence informing the people what type of sacrifices are needed as an appropriate remedy.[2] If a bad omen is foreseen by the kwuni (e.g., by him having had a bad dream), he would collect the village elders and declare what he has seen. The dream may be put thus: medé é wuru du (de) tamu, (lit., "the hill is having a headache"), i.e., the spirits of the hill are restless. This indicates that an impending evil or a catastrophe will befall the community unless the spirits of the hill are appeased by presentation of sacrifices. Such

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1. Nadel, A Study of Shamanism", op.cit., 31.
2. Ibid., 26, 31; see also Kronenberg, op.cit., 205.

sacrifices include a ram or a goat (in the old days the sacrifice of a pig would have been most appropriate). Things required for sacrifices would be obtained freely from any member's herd. No permission need be sought from the animal's owner, and no compensation would be paid. It is noted that in cases where public safety is at stake. individual freedom is already readily infringed.

Since people have more direct contact and hence easier access to consult the kwuni than the shira, property transactions between the people and the kwuni are relatively more frequent. The people know that the ultimate purpose of any property is to preserve human life. Thus, in their view, property paid as customary dues must be directed to achieve that objective. It thus follows that in times of difficulties, e.g., famines, good kwuni are expected to part with most of their property by way of loans or charitable gifts to the deprived members of the community by way of help. In order to develop good will, a kwuni must be generous to the point of extravagance so that people may give him more gifts. People always expect to enjoy reverse benefits in return for their own goods given out as gifts to the kwuni or to the shira.

However, although there is no surveillance on the part of the public in the ways the property of the kwuni or the shira are spent; they say there are (like human beings) good, generous and trustworthy kwuni as well as bad, deceitful and ungenerous ones. People are always loath to surrender their fates and property to a kwuni who has been proved to be a sham. It is said that the kwuni themselves are aware of this fact, and so have to compete in order to preserve good relations with the people, otherwise their influence will be diminished in the eyes of the community.

CHAPTER III

PROPERTY AND DOMESTIC RELATIONS

1. THE NYIMANG FAMILY

i) The Nature of the Nyimang Family

The discussion of the topic of property and its effect on domestic relations presupposes an important question concerning the nature of the Nyimang family. The institution of the family, as the smallest social unit, forms the most basic structure in any human society.[1] The psychological, social, economic and religious impact of the family institution upon its members is not to be disregarded. From the legal point of view, all aspects of law among the Nyimang, including marriage, succession, legal proceedings, and indeed, rights in property, can only be understood in their relation to the general structure of the family.

But what does the word 'family' mean? Scholars, almost unanimously, agree that there is no precise or exact definition to the word 'family'. There are two ways of answering this question. The first is to consider the term family in English language and law, the second is to investigate in Nyimang society the kind of social grouping which is recognized at the domestic level as family. Under English law, Bromley has understood the term 'family' to mean the following:

> "The word 'family' is one which it is difficult, if not impossible, to define precisely. In one sense it means all blood relations who are descended from a common ancestor; in another it means all the members of a household, including

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1. Cf. W.J. Goode, The Family, 1964, 44 ff, who says that "Almost all the world's population lives in family units, but the structures or forms vary not only from one society to another but also from one class to another within the same society".

husband and wife, children, servants and even lodgers."[1]

This is a wide definition which prompted Bromley later to adopt a much narrower definition for his purpose. The modified and more precise meaning of 'family' for Bromley is:

> "... a basic social unit which consists normally of a husband and wife and their children."[2]

Allott for one says that:

> "The word 'family' in English is a word of many varied and loosely defined meanings. This vagueness of the popular term is mirrored by the lack of precision of the legal term 'family' in modern English law."[3]

The reason for this vagueness, according to Allott, is that modern English life is not necessarily controlled or arranged along family lines.

In the Nyimang context the family is even more difficult to define. There is not a single vernacular term in the Nyimang language which refers precisely to what we might term 'family'. Thus, words such as wel (house/hut), which refers to a sub-unit within a polygamous family, wir (compound), and more generally nigwun/nigun wa or woun wa ("people of so-and-so" and "our people" respectively) which refer to both parental and grand-parental family, may also roughly denote the idea of family. The problem is that some of these words may also be employed to refer to other social groups. This depends on the circumstances and the context in which the words are used.[4] Stevenson notes that:

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1. P.M. Bromley, Family Law, London, 1971, 1.
2. Loc. cit.
3. A.N. Allott, "The Law of inheritance, family structure and modern economic order in Africa", (1970) 71, Z. Verg. Recht., 106; see also R.F. Gray and P.H. Gulliver, eds., The Family Estate in Africa, London, 1964.
4. Cf. Stevenson, The Nuba Peoples of Kordofan, op. cit., 191-92.

> "The term wer (lit. 'compound') is the most usual way of expressing patrilineage, of theoretically indeterminate depth. According to requirement, wer may be used for the nuclear family, or to include the father-generation or the grand father-generation; lineages of greater than the wer one is speaking of at the time may, however, if a distinction is needed, be referred to as wer dia ('big compound')."[1]

Although one may generally agree with Stevenson, a caveat must be entered when the phrase wir dia (big compound) is used in the Nyimang language. Stevenson has apparently used the phrase to mean "lineages of greater depth". One is obliged, with the greatest respect, to disagree with Stevenson. The suggestion that wir dia may be used to refer to a larger group of people with a common descent and which may go beyond the parental or the grand-parental generations proved not to be true. The reason is that among the Nyimang, as has been correctly pointed out by Stevenson himself,[2] each group of brothers in the lineage system constitutes a source of future segmentation, each new segment taking one of the brothers as its origin or founder. In the Nyimang language, one may also refer generally to one's whole segment as wir. This may, as has been suggested by Stevenson, mean 'family' or a lineage, according to the implication of the context. But if a qualifying word, dia, is added, then the phrase ceases to carry the simple meaning of family as such and is confined to the literal meaning of 'compound', which is the spatial area of a given homestead. It may also correspond to beshi (home). Here it specifically refers to the parental or grand-parental homestead and no more. If the phrase wir dia is used at all to refer to the people as a family, it may only

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1. Ibid. Note that Stevenson prefers the spelling wer to wir. However, both are acceptable.
2. Loc. cit.

signify the ritual connexion of persons of the same male descent which does not go beyond grand-parental generation. Thus, among the Nyimang, a person who wants to refer to a "lineage of greater depth" may employ such terms as wa nyala (one people) or wir nyalu wa (people of the same compound).

Several factors must be taken into consideration if the nature of the Nyimang family is to be properly understood. In the Nyimang polygamous society a person may have as many households as he has wives. These households are segmented along house lines, with each wife and her children, with husband as the head of the household, forming a sub-unit. The sub-unit occupies a separate hut, cultivates its own land (allotted by the husband), and may well be regarded as a primary sub-division in terms of property devolution when the father dies.[1] This sub-family may virtually be regarded as a separate and independent economic unit as regards the produce of farms held and managed by them in relation to other units within the same larger household (i.e. other co-wives and their children).

In general terms a Nyimang family may be regarded as a group of people linked by blood relationship and who share common economic interests together with ritual and social functions.[2] This inevitably excludes, as will be shown, illegitimate children and married daughters but includes wives.

Thus, for the purpose of property devolution, the word wir (compound) may be construed more strictly to mean nigwun wa (people of so-and-so) referring only to the parental family. This should not be

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1. Cf. Allott, "The law of inheritance, family structure and modern economic order in Africa", op. cit., 111.
2. Cf. Radcliffe-Brown's 'Introduction", in A.R. Radcliffe-Brown and C.D. Forde, eds., African Systems of Kinship and Marriage, London, 1950, 3.

confused with the other usages of wir which, though it may also mean nigwun wa (people of so-and-so), refers to the segment or a larger lineage. The latter usage includes other persons who, though sharing a common ancestor and perhaps sharing various rituals which enable them to sit on the manda (hearth) of the family, are not close enough to be entitled to succession upon the death of a proprietor. But, nevertheless, should a person die without an heir (male children), then a next-of-kin may be found from this general body of kin to succeed to the deceased's property. If we bear this in mind, then the Nyimang family may be said, in the strictest sense, to comprise a man, his wife or wives and their children. This group of persons, consisting of a man, his children and wife or wives, is what the anthropologists term the 'elementary family' or 'nuclear family'.[1] These persons may be treated, in the Nyimang sense, as a complete social and economic unit that enjoys a separate and independent legal entity with the father as its head. It is, in effect, a 'family' in its own right which does not depend legally on any larger family corporation.

Generally speaking, illegitimate children are treated in most respects as members of the household in which they live. They may share the social and economic life within the family, but nevertheless are segregated when ritual or religious performances are conducted within the family. Such illegitimate children are excluded from sitting on the manda (hearth) where the ancestral spirits of a given family are believed to gather to receive prestations. This means that they are not, in the strict legal sense, considered as members of one's family.

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1. See A.R. Radcliffe-Brown's 'Introduction', in A.R. Radcliffe-Brown and C.D. Forde, eds., African Systems of Kinship and Marriage, London, 1950, 4.

Thus, since the majority of the patrilineal Nyimang clans do not regard the illegitimate male children as members of their families, it follows that the general criterion that a person becomes a member of a family into which he is born is not without exceptions and is therefore not universally applicable to all Nyimang clans. That is to say a physical test alone is not sufficient fact whether a person belongs to the family.

ii) Family Membership

According to Nyimang ideas a person belongs to his/her family as an incident of birth. This means that birth (with certain exceptions) is the most important criterion for the determination of Nyimang family membership. In the Nyimang patrilineal society a person belongs to his father's family which is traced unilineally through the male line. In the old days this also had an important political aspect, as kin groups of the same patri-descent used to live in one area for defence purposes. Nowadays, patrilineal divisions on a political basis have ceased; but the aspects of kinship ties through patri-descent are taken into account for the purposes of tax collection. Thus for the purposes of tax collection, people are divided and segmented following their lineage affiliations. All lineage members and hence clan members have their own headman and a sheikh who is responsible for tax collection for the government. In other words, sheikhship and headmanship among the Nyimang are necessarily based entirely on the principle of patri-descent. Nevertheless it must be remembered that citizenship among the Nyimang is not arranged on a segmental basis.

To recapitulate: family membership through ritual connexion is a matter of degree. That is because married daughters, though they have

certain ritual connexions with the families of their birth could not effectively be claimed as members of such a family. They (the married daughters) have now become members of another wir (compound). However, even within the same polygamous household (where a person has more than one wife), each house (a single wife with her children which now forms a sub-unit) performs certain ritual ceremonies that are uniquely connected to that sub-family to the exclusion of other sub-units within the larger household, i.e., to the exclusion of other co-wives and their children. A salient example is the tanyari (ritual) of tunu ki (a night thing) or what some may call kubangu ki[1] (a thing of the plank).[2] The rite is a sacrifice to abradi (the creator), where a ram may be killed in the night when all other people have fallen asleep. The meat of the sacrifice must be eaten only by the members of the sub-family to the exclusion of others (other co-wives and their children). Here the sub-family is regarded in a sense as a different body of persons. They may sometimes be referred to by a more precise, though inelegant phrase: ker nyalu budu, referring to the children of the same womb or of the same woman who form, especially for property purposes, a separate sub-family. The sub-family may also be known as a wel (house/hut), referring to the house of one wife as distinct from other co-wives and their children.

Thus, although in a plural household all children share the blood ties and have a common ancestor, each of the households stands (relatively) in a different category of its own. This is what made

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1. Some people say that tunu ki and kubangu ki are different rituals performed for different purposes though most of the informants think that it is the same ritual with different names.
2. A kubang is a wooden plank which forms Nyimang traditional bed.

Stevenson note correctly that, in the Nyimang "brothers are constantly the founders of new clan segments".[1]

Along with the word wir, "the term fun is used to distinguish cognates outside the patrilineage".[2] The indication is that all affinal relationships are properly called fun (relatives) and are never regarded as part of one's wir (compound/family). Similarly sisters and daughters upon marriage, though they will not immediately discontinue the membership of their birth families, will become more appropriately a mere fun since by now they have become members of another clan and are therefore attached to a different wir (family). This argument leads to another important question: what is the effect of marriage on the women's family membership? The question to be answered is whether Nyimang married women join their husbands' families or whether they continue to retain the membership of their maiden families even after marriage. This will be our next consideration.

iii) The effect of marriage on family membership

In the Nyimang patrilineal society marriage is viri-local. However, although the contract of marriage does not directly alter the subordinate status of women in Nyimang society, yet marriage has a radical effect on a woman's family membership. By virtue of her marriage, a woman joins her husband's family. She loses the membership of her birth family and becomes legally, socially, ritually, and perhaps politically totally affiliated to her husband's family.

Nyimang society is strictly exogamous in that members of the same clan do not marry each other.[3] Thus in the anticipation that sisters

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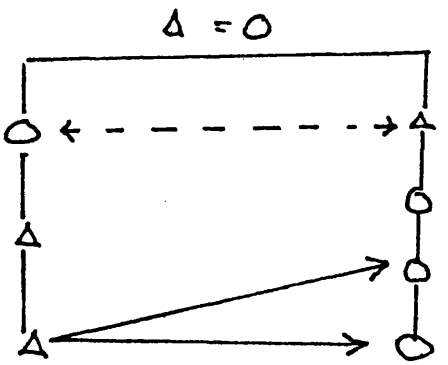
1. Stevenson, The Nuba Peoples of Kordofan, op. cit., 188.
2. Ibid.
3. Some individual cases exist in Nitil and Kurmiti sub-tribes where, due to education and Islamic influence, the rules of exogamy have been flagrantly disregarded.

and daughters would eventually be married into different clan groups and hence be attached to a different wir, the Nyimang sometimes ironically speak of their daughters and sisters as wa bar (strangers). They say that wa kar de woung wa ha ne di (women are not our people).[1] This indicates that there will come a time when our own daughters and sisters will get married and join the membership of another group.

According to Nyimang ideas marriage between karing (a female's child) and kasheling (a male's child) is permissible provided such marriage takes place after the lapse of four generations. Here the married couple may have a common ancestor. However, the emphasis is laid on the point that the great grand-parents of the married couple must have been of different sexes, e.g. as brother and sister. In anthropological terms they must be termed as cognates. The following diagram is illustrative:

Figure : V.



Thus, although parallel cousins in the third generation are not allowed to be married, the rule is relaxed in the fourth generation where the boy may marry his cousin in the fourth generation or her daughter in the fifth and so forth.[2]

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1. Note how as will be shown, these principles have presumably misled some writers to say that the Nyimang do not adopt wives into their families.
2. For what is meant by "generation" here, cf., A.R. Radcliffe-Brown and C.D. Forde, eds., African Systems of Kinship and Marriage, London, 1950, 27 ff.

Much has been said about the general attitude of the Nyimang people towards their daughters and sisters as being seen as potential members of groups other than those into which their fathers belong. Now we should examine critically some of the writers who otherwise claim that married women, among the Nyimang, do not join the membership of their husband's families.

Considering the position of the wives, and whether they join the family membership of their respective husbands, Nadel observes that:

> "The clan identity of wives is somewhat obscure. The Nyima practise no formal, symbolic adoption of wives into their husbands' group. Nor do we find any eating or other avoidances between newly weds, which would later be lifted ceremonially to indicate the completed social identification of husband and wife ..."[1]

One is obliged, with great respect, to disagree with Nadel about almost every aspect of what has just been quoted. It is submitted that the exact opposite seems to be true among the Nyimang. To begin with, there is no obscurity as to the identity of the clan membership of Nyimang wives. Before marriage women are regarded as the same clan members as their fathers. But although after marriage, as will be shown, they join their husbands' families, their assimilation into a new family will not deprive them completely of their original clan names. However, to retain one's original clan name does not necessarily mean that wives among the Nyimang do not join their husbands' 'groups' for legal purposes.

Nadel also got it all wrong when he argues that there are no eating avoidances between the newly wed. Let us put this contention straight before we turn to the important question of women's adoption

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1. Nadel, The Nuba, op. cit., 393.

into their husbands' families. In contesting Nadel's views, two important factors, both of which are necessarily interconnected, must be heeded. First, it is an unforgivable disgrace in traditional Nyimang society for a wife to eat fowls or eggs in her husband's home so long as their marriage subsists.[1] Secondly, and also contrary to Nadel, a newly-wed bride among the Nyimang would never eat or drink in her husband's home, especially in the first few months (or weeks as the case may be). In some extreme cases she will continue this practice until at least her first child is born. But as she will be required to visit her husband's family occasionally, in which case she may stay for some days, she will arrange to have her food brought to her from her own family's home. If her home is far off (if she is from another Nyimang sub-tribe) then she will arrange to eat and drink with some other relatives or with any people of her own clan who live in the neighbourhood of the husband's family. The length of the time of avoidance depends on the circumstances of each case. Hawkesworth is therefore correct in noticing that:

> "The final ceremony (ker ula qwoh)(sic)[2], generally does not take place until the bride has given birth to at least one child ..., but for a whole year the woman must feed with her parents. Any premature disregard of this rule is for some reason considered as a disgrace."[3]

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1. The great majority of Nyimang women still observe this custom; yet exceptions exist due to the general social change in the area. Also cf. Hawkesworth, op. cit., 189.
2. The right spelling is ker wolau kwa (the going or removing of the wife to her husband's home).
3. Hawkesworth, "The Nuba proper of Southern Kordofan", op. cit., 182-183. However, it is apt to note that although any newly wed Nyimang bride is likely to abstain from taking food in her husband's home for sometime, yet the period of avoidance varies and at times does not exceed a day or two. This is so especially where brides are eloped or are taken away immediately after marriage to some distant township away from the Nyimang traditional area.

Thus before a bride could be made to eat in the home of her husband's family, a token gift, mostly a goat or money, must be given to her as an inducement to eat. This gift is known as bongau ilig or kadiau ilig (to induce someone to drink or eat). It is a disgrace for a bride to eat or drink in her in-laws' house unless something is offered to her. The gift, though by no means signifies a formal adoption per se, may indicate, contrary to Nadel's suggestion, the complete social identification of husband and wife.[1]

Being unable to reconcile what seems apparently a contradictory practice, Nadel continues rather reluctantly to modify his previous statement and say that while women are not adopted into their husbands' groups:

> "Yet the people describe the adoption of wives into their husbands' clan and kinship groups as complete, and wives are always spoken of as members of their husbands' clans."[2]

Nadel has tried genuinely to eliminate what appeared to him an obscure situation, but his attempt has been unsuccessful all the same. Stevenson, however, has made an important point by saying that mothers and the paternal grandmothers are regarded as one's wir in contrast to a mere fun (relative). However, later on, Stevenson seems to accept the conclusion arrived at by Nadel and says that:

> "We should note also that the Nyimang, although practising no formal adoption (incorporation) of wives into their husbands' groups ..., nevertheless speak of wives as members of their husbands' kinship groups. This is indicated by the extension of the term wer to wives: ego's mother and paternal grandmother are wer not fun, and his sisters on marriage are regarded as fun since they have attached to another wer."[3]

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1. Cf. Nadel, The Nuba, op. cit., 391, n. 1.
2. Ibid., 393.
3. Stevenson, The Nuba Peoples of Kordofan, op. cit., 188-189.

What has just been quoted appears to be misleading and in no way clarifies the previous line of argument taken by Nadel. For to say that the Nyimang do not practise "formal adoption (or incorporation) of wives" into their families but at the same time regard their wives as part of their wir or "as members of their husbands' kinship groups", is contradictory and leads to unnecessary confusion.

It is submitted that a critical analysis of the existing facts, as regards the wives' situation in the Nyimang society, will lead to a different conclusion from that arrived at by both Nadel and Stevenson.

Without going into unnecessary details of Nyimang traditional religious beliefs, it is pertinent to say that the Nyimang people universally claim that the geshin (deceased person's soul) of a woman upon marriage moves from her birth family's home to that of her husband's.

This is connected by the event of the mass slaughter of marriage goats known as orgolu kwodo (goats of the gate of the compound).[1] As its name suggests, the performance of this rite is intended to pave the way for the wife (here her geshin) to come out of her father's orgol (gate) and enter a new orgol of that of her husband, i.e. to join the new family. It is because of this significant incorporation of the woman into her husband's family that people say that one of the most detestable ways of divorcing a wife, among the Nyimang, is to drag her by the hand and lead her out through the compound gate (orgol). Should a woman be divorced in this humiliating manner, then it becomes kwir (taboo) for her to re-enter that compound again unless an animal

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1. A distinction (in purpose) must be made between orgolu kwodo and tengo kwodo. The latter are slaughtered prior to the former for different objectives which will be made clear later.

has been slaughtered and rites of purification are performed to appease the offended ancestral spirits.

Thus, the slaughter of the marriage goats (orgolu kwodo) is meant to pave the way for the wife's geshin to join the membership of the new family. The Nyimang would say that this is to buy the geshin of the wife from her ancestral spirits. These animals are given as gifts to the geshin or to the spirits of the deceased ancestors so that they may be pleased and quietly discharge the soul of their daughter from the membership of the family. According to Nyimang ideas, should these gifts not be given, married women would suffer illnesses and bad luck which may result in barrenness.

Moreover, should a married woman die in her maiden family, her husband must bear the full expenses of her burial. Her corpse must be carried from her birth family's home and be buried with her husband's family. This is because, in terms of Nyimang religious ideas, a deceased person is believed to meet the geshin of his beloved mate after death. It is common among the Nyimang to hear lonely old people (of both sexes) saying that it is time that they should die and join the geshin of their missing mates, or that the geshin of the deceased partner is calling upon him or her to join in.

Furthermore, in answering the question of who will have the right over certain types of property acquired by a married woman, it may presumably be taken as a valid point to discredit either of the views held by both Nadel and Stevenson, and hence to determine to which of the two families a woman belongs after her marriage. According to the traditional Nyimang law a woman remains under permanent tutelage. She lacks legal capacity to "own" durable valuables (livestock and land)

in her own right.[1] Customarily, whatever a woman acquires, she does so on behalf of her male guardians. If she is still unmarried, any valuables (apart from her personal effects) acquired by her belong to her father or a brother or whoever is her guardian. However, upon her marriage her husband takes over the responsibility of guardianship and is thereby held answerable for all her debts and tortious liabilities; her birth family cannot be called in or be blamed for her actions (civil or criminal). After her husband's death it is her male children who take over this responsibility, and not her family of birth. In such circumstances, all property acquired by a wife (especially livestock and land) is legally considered as that of her husband and thus does not belong to her family of birth. In addition, should a married woman die, her family of birth have no right of inheritance. In the same way she has no right of succession to property in her family of birth. She can never take part in any decision-making concerning the smallest matter within her family of birth, let alone have a say in any property distribution. By contrast, within her husband's family a wife has a larger role to play.[2] In many cases she may be appointed as a guardian to her children (if she is old enough) and hence of her deceased husband's property until her children come of age. This would appear to contradict the assertion that a Nyimang wife does not acquire membership in her husband's family.

Another noteworthy factor which supports the proposition that

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1. This archaic attitude is beginning to wither due to Islamic notions and other social influences. This is so especially where, due to new chances of economic development, some women have started to grow economically independent.
2. Cf. Hawkesworth, "The Nuba proper of southern Kordofan", op. cit., 188.

Nyimang do absorb their wives into their families is that of the practice of child adoption within the same family. This occurs in situations where a husband with several wives may "hand over" or give a male child of one of his wives to be adopted by another co-wife who is barren or has no male children.[1] The rationale is that, as the geshin of the wife, after she dies, will permanently remain in her husband's compound and would still continue to occupy her hut, someone is needed to look after it. Since a husband cannot make sacrifices to his wife (perhaps because her geshin is regarded as inferior to his), a male child is needed to keep the worgol (the door-way of the hut) of the deceased wife and hence keep her mir (fire). Just as it is necessary that a man's line must continue; then the adoption of the male child by the woman assures the continuation of the wife's line within her husband's family group. All burial and any other accompanying rites will be carried out by this adopted son.[2] One might justly ask why the Nyimang accord such importance to the continuation of the wives' lines after their death if wives do not actually form part of their husbands' families.

In conclusion it must be remembered that the last cow in the series of the marriage payments is known as amiu bar (the cow of the bone). This cow is collected by the woman's relatives when a woman, whose procreativeness has proven high and who has grown old, is about to die. As her bones will eventually rest with her husband's family, a cow is paid to her birth family as if to buy in her remains and

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1. Although this custom exists among the Nyimang, it is becoming obsolete. Furthermore it is not a must that every woman, who has no male child, should be allowed to adopt another wife's child. Each case depends on its merits.
2. The property rights of such adopted children will be discussed in the following pages.

further to signify the final incorporation.[1]

For the reasons adduced above, it is submitted that Nadel's and Stevenson's suggestions that married women are not adopted into their husbands' families are therefore untenable.

2. PARENTHOOD AND LEGITIMACY

i) A Note on Nyimang Morality

Before discussing the concept of legitimacy in Nyimang society it is pertinent to state categorically that the Nyimang (at least in the old days) possessed a high standard of sexual morality, which all commentators consider outstanding in comparison with other neighbouring Nuba tribes.[2] The strictness of the observance of sexual morality among the Nyimang may vary as to with whom,[3] where,[4] and when such sexual activity or proximity takes place. Hawkesworth[5] reports a custom (still observed today) where a girl's chastity has been marred by a mere touch or caress of her breasts by a male partner while both were in the cattle camp. He (Hawkesworth) mentions a case in which a girl brought an action in the then Native Court claiming that an offender against this custom should be made to perform the necessary rites of purification. In granting the girl her request, the court

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1. The payment of amiu bar has grown obsolete.
2. Cf. Hawkesworth, op. cit., 182 passim; Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 90; Nadel, The Nuba, op. cit., 385 passim.
3. E.g. when a kwuni is consecrated (becomes a kwueer) all his members, of both sexes including his viziers, must not marry or enter into any sexual intercourse of any nature unless the consecration period is over.
4. E.g. no sexual games are allowed when youths are staying in cattle camps.
5. Hawkesworth, op. cit., 198.

made the offender provide a he-goat to be sacrificed in wurngal (the camp). The thinking behind this order was that unless the rites of purification were performed at that time then, her children would die after the girl's marriage unless the spirits of the camp had been appeased and the girl had been purified.

The code of sexual morality may of course be infringed on occasion. But while there may be some apparent divergencies in the moral conceptions of each clan, yet one can notice that the pattern of behaviour regarding sexual morality among Nyimang has a common motif which can be stated in general terms.[1] Thus, according to Nadel, any "premature consummation of marriage is forbidden".[2] Although disregard of this moral rule by some clan members may entail supernatural sanctions, it is also noticeable that infringements of this rule are a commonplace among the Nyimang. In any case, virginity or pre-marital chastity is highly valued among the Nyimang. Thus any girl who allows herself to have illicit intercourse before marriage may be socially ostracised and may often be ridiculed by songs and gestures by other young people. Such girls, especially if they got pregnant, were punished in the old days by their families, either by being sold into slavery or by being married to elderly husbands. As for the infringement of the sexual morality, Stevenson rightly indicates that the society is always ready to forgive "if no illegitimate child is born".[3] In any case, seduction or intercourse with betrothed girls or adultery with married women is a crime

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1. Nadel, The Nuba, op. cit., 384-85.
2. Ibid.
3. Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 90.

punishable by imprisonment and fines.[1] As mentioned, the society is generally ready to forgive any sexual flirtations by young people. In other words, although illicit pre-marital intercourse does generally take place, it is considered as a minor transgression where the offenders will be censured or ridiculed by public songs, and will not be subjected to any severe penalties if no pregnancy ensues.

However, the requirement of pre-marital chastity among the Nyimang takes various aspects and may vary from one clan to another or even between the sexes. In clans such as Baya, Maryama[2], Kelang and Gyo, it is the boy who must observe the rules of chastity and thus ought not to marry or impregnate any girl before he has had his circumcision rite performed. The sanction is that the issue of such union will never be legitimated, even after the boy has performed the expiatory rites of purification known as sobodu.[3] A circumcised boy in the period of seclusion is known as fwir tegli. He is forbidden to have any sexual intercourse during this period. Should he disregard this rule and cohabit with a woman who bears him a child, such a child will be known as soboding. The father of such a child is forbidden to eat, drink or appropriate any kind of property brought by such a child lest either of them dies.

There is however "a pronounced dichotomy of male and female principle, which pervades the moral code and ritual obligations".[4] Thus, the emphasis on the duty of boys to maintain the sexual integrity

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1. Ibid.
2. Girls who belong to Maryama clan are also under taboo.
3. Some informants indicate that the child may be legitimated after the performance of the sobodu rite. The Maryama clan is more particular about the observance of the chastity rule of their boys.
4. Nadel, op. cit., 479.

in some clans is balanced by the reverse emphasis in such clans as the Fande, Togi, Kenya, Maryama, Modu, Sanamu-wa and Shiro-wa, in which it is the girl who is required to observe the strict rules of the moral code and must not be allowed to be impregnated. These girls are known as akwiri (having a ritual taboo). The most akwiri of these girls are those belonging to Modu and Shiro kira. It is interesting to note that should a girl belonging to one of the above-mentioned clans be defiled (especially if impregnated), it is the boy who would be compelled to bear the onerous economic expense of performing the ceremonies for the girl's purification. Thus, should a Shiro kira be impregnated, then a rigorous ritual ceremony is needed to atone for the guilt. This is so whether the girl has been impregnated by her fiance or by her lover before she is formally married. The defiled girl will not be allowed to share food with her brothers. She will be sent away from her parental home during the whole period of gestation lest her brothers die. As a rule, such a girl will not get married unless purification rites are performed. In this rite nine goats and a ram may be slaughtered simultaneously and meat with drinks will be offered free to the public.

It would neither be appropriate nor relevant to go into greater detail of the Nyimang moral and sexual code in the context of this thesis. The background of sexual morality has been mentioned only in so far as it relates to and hence explains the underlying conceptions of the people as derived from their general moral code and their subsequent effect on the legitimacy of children in the legal system. Property rights may well be affected by the legal status or the social position of a person in Nyimang society. For this reason,

the discussion in the following pages relates to the delicate question of legitimacy in Nyimang society and its effect on the property rights of illegitimate children.

ii) Rules Governing Legitimacy of Children among the Nyimang

The existence of a concept of illegitimacy is debated or disputed by some scholars writing about the laws of traditional Africa. Indeed some have even gone so far as to suggest that the notion of illegitimacy in Africa is absent altogether.[1] So far as the Nyimang is concerned, this general assertion is inappropriate. Illegitimacy is recognized in Nyimang society as a distinct social as well as legal status. As regards Nyimang society, the position of illegitimate children will be discussed with a view to answering such questions as: To which family does an illegitimate child belong? What are his rights within that family, and what is the nature of his relationship with his parents?

Illegitimate persons are known as tudu. Apart from the general social stigma attached to illegitimate persons, the status of a person who is born tudu (illegitimate) carries with it certain social as well as legal disabilities. Thus, persons born tudu are not allowed to attend certain rites at which other family members are present, and they are completely prohibited from sitting on the manda (the family hearth in the compound centre).[2] As to legal disabilities, illegitimate children are not allowed to inherit either within their mother's husband's family (unless of course they have been duly

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1. See E. Cotran and N.N. Rubin , eds., Readings in African Law, 1970, 44.
2. When one says that illegitimate children are not allowed to sit on manda, one refers only to the male children. That is because females are not usually associated with the manda as they do not make libations to the ancestors.

accepted) or within their maternal grandparental family (unless a property is donated to them as an act of grace by the grandfather). An illegitimate child will not inherit from his natural father unless he has duly been acknowledged by him. On the other hand, even if an illegitimate child has been acknowledged, he will always rank below his legitimate brothers for property purposes. However, cases exist where a childless person may acknowledge his illegitimate male child for the purposes of property inheritance and of keeping the line (mir) of the person.

One of the common principles often discussed by students of African traditional legal systems is that the payment of the marriage consideration and the legitimacy of children are inseparably connected. This assumption must be treated with great care when the Nyimang case is considered. It is true that payment of the marriage consideration among Nyimang also confers rights over children born during coverture. But, as will be shown in the following pages, this general rule is not without exceptions.

While some informants may indicate that illegitimate children are regarded as lawful children of their mother's husband, further investigations reveal the interesting fact that, in certain clans, illegitimate male children (tudu) are not regarded as members of the wife's husband's family and hence are not entitled to inherit property within that family. Thus, clans such as Togi, Maryama, the whole of Shiro-wa, etc., reject the idea of accepting or incorporating into their family membership male children born in adultery by their wives. In contrast, certain clans such as Baya and Sabyang readily accept them as their own children. In the Kellara sub-tribe informants go so far as to indicate that the word tudu is growing obsolete in their area.[1]

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1. This is a new development which does not go back to more than a decade.

But even within those clans which do not accept illegitimate children into their families as full members, such children may enjoy equal economic rights and other social benefits with the legitimate full members of their mother's husband's family, except that they are not allowed to inherit property from their mother's husbands. Conversely, the mother's husband has no right over property brought by such a child into the family pool.

In the light of these discrepancies in the rules governing the position of the illegitimate child, one must warn against such general statements as that made by Nadel, that in Nyimang society:

> "The aspect of the bride-price ... is manifested ... in the equally familiar rule that children go with the bride-price."[1]

This statement, with due respect, is misleading. The rule among the Nyimang is that children and marriage consideration always go into opposite directions and not in the same direction as may be understood from Nadel's statement. Among the Nyimang, as is the case in most African societies, marriage considerations (or 'bride-price' as it is called) is paid on behalf of a woman so that she might bear children for her husband. It is because of this ultimate objective that should a woman fail to discharge this duty (as when she dies or is divorced) that marriage consideration should be refunded. In any case, as will be made clear below, deductions from the refunded property are inevitable if the deceased or the divorced woman has had any children. However, if Nadel has meant that payment of property gives rise to the legal claim over the woman's children by her husband, then that too

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1. Nadel, The Nuba, op. cit., 401.

must be qualified. This is so since it is submitted that while the rule, suggested by Nadel, may apply to the female tudu, it does not have the same force in the case of a male tudu of a wife who has been impregnated by a person other than her lawful husband. In fairness to Nadel one should remember that his prime concern was not with legitimacy or illegitimacy of children as such, but rather with the social significance of the payments of what he calls 'bride-price' in Nyimang society.

The circumstances in which an illegitimate child is regarded as the lawful members of a certain family will depend largely upon crucial factors such as (at least for some Nyimang clans) whether such a child is a male or a female or whether the child's mother is married or unmarried. It must further be noted that, for the purpose of legitimacy of children, Nyimang customary law treats formally betrothed girls as if they were already married women.

It is a firm customary rule that a child born tudu will continue to be regarded so (at least socially) until it has been formally acknowledged and adopted by its natural father. In other words, the acknowledgement and the subsequent adoption of the child fundamentally changes the legal position of the child in terms of its property rights and ritual connexions. As will be shown, mere acknowledgement of paternity coupled with the performance of the ceremony of wurau ilig (to make to enter the compound) are enough to signify the final incorporation of the child into the family membership of the natural father. This leads us to the significant conclusion that notwithstanding the existence of the concept of illegitimacy in the Nyimang patrilineal society, Nyimang customary law does not require marriage

as a necessary ingredient for the assertion of paternity claims, or indeed, for the legitimacy of the child. In other words, and in certain instances, legitimacy may be conferred by mere acknowledgement of paternity. There is, therefore, nothing in the nature of the procedure of legitimation per subsequence matrimonium such as obtains under the Roman and Canon Law and which has been introduced into English Law.[1]

Before any detailed discussion of legitimacy is attempted, a further summary is necessary to indicate some of the uncertainties that exist in this area of Nyimang customary law. The position of a child born tudu by an unmarried mother (while she is not betrothed as yet) may differ from one case to another. In one case, such a child is adoptable only by the mother's husband (incestuous children) upon the payment of a fixed amount of legitimation fee. In another situation, an illegitimate child may be adopted by the maternal grandfather, and in certain cases an illegitimate child can always be adopted by its natural father through acknowledgement of paternity.

This anomaly regarding the position of the illegitimate child in Nyimang society is explicable by the general principle which rejects the idea of the incorporation of the male illegitimate children (tudu) into the family membership (wir) of a person to whom the child is not connected by blood relationship. This rejection is based on an assumption that illegitimate children cannot be entrusted to keep the line (mir) of a person. In addition, it is widely believed by the people that should an illegitimate male child sit on the manda and roast meat together with legitimate ones, then the latter would die.

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1. See Bromley, op. cit., 239-341.

No such fears exist in cases of female tudu, who do not make libations on the manda in any case and thus can readily be adopted by all Nyimang clans. In the following pages an attempt will be made to discuss in detail the position of illegitimate children in Nyimang society.

a) Illegitimate Children of Unmarried Mothers

As a general rule, each individual in Nyimang society must have an acknowledged father. This means that he must be a member of a certain 'family' group. Even illegitimate children have acknowledged fathers; or at least a putative or legal father. This rule was followed more strictly in the old days when sexual promiscuity and illicit cohabitation were highly reprehensible. Furthermore, in the old days, as is the case today (in the traditional Nyimang area) there is a general belief that any woman who has been illegally impregnated will not give birth to her child unless she names its father. The belief is so strong that should such a woman fail to name the culprit, then she will die in the process of delivering the child. In fact, the effect of this sanction is so strong that there are virtually no fatherless children in Nyimang society. A person in whose name a child has been born becomes legally and socially the father of that child.

Nowadays, one may add, education, economic and general social changes have introduced massive changes resulting in a relaxation in the moral values of the people. It is because of this moral laxity that the old rules as evidenced by the supernatural sanctions are not feared any more, especially by the educated girls. This laxity has also been fostered by the new medical facilities where women can deliver their

children safely with the assistance of midwives or in hospitals. In the modern customary law, if for any reason a child is born without a father, then it will belong to its mother's family. Although such a child cannot become a full member of that family, yet if it remains with it it can enjoy certain property benefits. As the child grows older, he or she will not have any succession rights, but may be given gifts by the grandfather or his or her mother's brothers. In certain cases if such a child continues to live permanently within that family, then it will be given land and may be helped to get married.

Complications are likely to arise should an illegitimate child who has been brought up by his maternal family or his mother's husband later run away to his natural father. If an illegitimate child chooses to move to his natural father's people, then he may be allowed to take all his movable property, including livestock, with him. As regards right in land, it seems that the right of such a person automatically lapses from the moment when he moves from the locality. This is because, inter alia, it is practically impossible for him to utilize the land, especially if the tudu person moves physically to another sub-tribe. In certain cases, the late discovery by the tudu of his/her real identity or status of illegitimacy involves grave psychological and emotional problems. The emotions and loyalties of such a person are inevitably divided between the family which has brought him up and the people of his natural father. There are cases where persons may even choose to desert the tribal area altogether, and thus voluntarily abandon all rights to any kind of property to which they might have been entitled.

b) Legitimation of Children

If circumstances permit, e.g. if the child is not the issue of an incestuous union, then the natural father can always legitimate his illicitly begotten child if he (the father) wants to. Certainly a natural father has the right to renounce his paternal rights over his illegitimate child. In other words, a person does not automatically become the legal father of his illegitimate child unless he acknowledges paternity. Mere acknowledgement of paternity without more is not enough to confer paternity rights. In order to claim any future legal rights over the child, the natural father must contribute to bringing up the child. This is so even if the child stays with its maternal grandfather.[1] Conversely, an illegitimate child does not automatically become a member of its natural father's family unless it has been duly recognized by the natural father. As has been indicated above, if the natural father fails to acknowledge his illegitimate child by an unmarried woman, then the child will remain with its mother's birth family and may accompany her to her husband's home when she marries. In such cases (for which see below) the mother's husband must pay a legitimation fee for the child and then becomes its legal father.

Legitimation fees are payable for purposes of affiliating an illegitimate child to a family other than the family of the natural father of the child. Thus, if an unbetrothed or unmarried woman gives birth to a child as a result of illicit cohabitation, one of the following situations may arise:

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1. It is indicated that a natural father who later wishes to legitimize his grown-up child must pay a cow. This convention is controversial as some informants say that the natural father need not pay a cow (though a token gift is always payable). The child can always opt to run to his natural father any way.

i) If the seducer of the mother marries her then, under Nyimang law, no question of illegitimacy arises. The child becomes the legitimate issue of the parents. This is so even if the child was born long before the actual marriage took place. But, as mentioned above, a child whose father has not performed a circumcision rite as yet will be known as soboding ("the child of the uncircumcised man") even after the parents of such a child have married. This is not to say that the position of such a child is equivalent to the tudu; but that, unless his father performs the rite of sobodu tiflé then he may suffer some social (though not legal) embarrassment. In any case, should the seducer marry the girl whom he has impregnated, then no additional legitimation fee is required apart from the normal marriage consideration.

If the impregnated girl is a member of a clan which is considered akwiri (having a ritual taboo), then she must be purified before she can be married.[1] The payment and the performance of the purification fees are necessary in addition to the normal marriage consideration.

ii) If the seducer refuses to marry the girl, then the child will remain with its mother until she finds a husband. In these circumstances the new husband may be required to pay a legitimation fee for the child. It all depends on whether the future husband wants to accept the child as his own. Generally a person marrying a woman with an illegitimate child is most reluctant to

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1. The seducer must pay the animals required for the purification ceremony, even if he does not intend to marry the girl.

pay any legitimation fee for the child. This is because it is a well-known experience that, in the majority of cases, the illegitimate male child will (sooner or later) run off to his natural father when he discovers the truth about himself. For this reason, a person paying the legitimation fee may sometimes require witnesses and must make sure that the natural father is present to renounce all paternity claims and any later rights over the child. If necessary, the natural father will be made to take an oath on a fetish to confirm forfeiture of any future claims over his natural child. On certain occasions the natural father will be given a goat known as kenyu kwodu (lit. "a goat of the semen").

Customarily, the amount payable as a legitimation fee is one cow. However, some informants insist that a bull must be paid in addition to the cow to effect the legitimation.[1] It is a rule of law that the legitimation fee must be paid separately and in addition to the normal marriage consideration. However, children so legitimized are ironically known as baring ("the young of the cow"). They become the lawful children of their mother's husband.

It must be pointed out that, even if the husband does not want to legitimize his wife's illegitimate child, the child may accompany its mother (especially when so young) to her new home and become part of the mother's husband's household. In such cases the child may be brought up by the mother's husband by way of charity.

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1. From the personal observation of the present writer, while in the field, it seems that the prevailing practice nowadays is that only one cow is payable as a legitimation fee. This does not overrule the additional payment of a bull, as every case has its special circumstances.

> Sometimes the child will remain with the mother until he or she gets married. But most important of all is the fact that there will never be created any legal rights and duties (such as exist between parent and child) between such a child and the mother's husband.

Since Nyimang clans and co-clans are exogamous, intra-clan marriage is strongly prohibited. This does not mean that there are no endogamous sexual relations in fact. As put by Nadel, such relations are considered as repulsive and hideous, and may be followed by supernatural sanctions if they lead to pregnancy and childbirth. As stated by Nadel:

> "... neither the parents nor the child of sin will 'grow old' - sooner or later illness or misfortune will end their lives prematurely. The child born of this unnatural union must never go to his father, but will be brought up by its maternal grandfather."[1]

According to the old Nyimang law, children born as a result of illicit cohabitation of parties belonging to the same lineage, clan or even co-clan, will not be claimed or legitimated by the natural father, and must therefore be brought up by the maternal grandfather. This old rule is no longer universally acceptable to all Nyimang tribes and is challenged persistently by individuals in areas such as Kellara, Kurmiti and Nitil - sub-tribes where cross-cousin marriage is becoming common-place. As Nyimang society has undergone considerable changes since the time of Nadel four decades ago, the rigour of Nadel's statement must therefore be qualified and taken to refer to incestuous relationships, e.g. brother/sister and father/daughter relationships.

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1. Nadel, The Nuba, op. cit., 389.

Thus children born as a result of incestuous cohabitation, if they have not died young, will necessary accompany their mother upon marriage, and the mother's husband will be required to pay a legitimation fee. Such children will not remain in their maternal grandfather's home.

c) Illegitimate Children of Married Women

Subject to the rules set out above which govern the legitimation of male children among the Nyimang, any child borne by a married woman as a result of illicit cohabitation belongs to her husband as his legal child. This is a presumption of law which does not require any further evidence. Thus, in order to uphold the presumption, there must be a valid marriage such as obtains under the Nyimang customary law. A mere betrothal (especially where a person has paid part of the marriage consideration, or where the fiancé has paid a borang - spear - or its equivalent) is enough for the purposes of the above general rule. This is so even if the actual marriage has not publicly taken place as yet. Here it makes no difference under the customary law whether the girl has been impregnated by her fiancé or per alios. In such cases, the claim over the child is substantiated provided that the fiancé proceeds to marry the impregnated girl and thus completes the rest of the marriage consideration. Should the fiancé refuse to marry the girl, then his part-payment will be refunded to him and the child will be treated as if borne by an unmarried woman, and its affiliation will be governed by the same rules as shown above in the cases of unmarried women.

However, the old customary rule was that, even if the married parties had separated, a valid marriage existed unless marriage consideration was repaid or unless the marriage was formally dissolved.

Here it seems that under the old law the mere payment of a marriage consideration or even part of it might entitle the husband to claim paternity rights over children borne by that woman. This rule must be read in conjunction with another rule, which asserts that Nyimang are always loath to acknowledge or affiliate illegitimate male children, sometimes known as shel baaring ("children of different penis"). This, however, leads us to another important area of how paternity is established.

Among the incidents which signify, to some extent, assertion of paternity claims, is the performance of the naming ceremony known as douso ki (a thing of the neck). The ceremony of douso ki may differ, in time-span, from one clan to another. Referring generally to the rationale behind the performance of douso ki, Nadel says:

> " ... in ... birth observations, we discover a differentiation of custom which can have no meaning beyond demonstrating the individuality of clans. Thus couvade, a certain birth rite called dussoke (sic), meant to safeguard the health of the new-born, and the naming ceremony, identical throughout the tribe, vary from clan to clan, only in one purely 'formal' feature, the time-table."[1]

It is submitted that the "birth observances"pointed out by Nadel in the above quotation are closely related, in the Nyimang concept, to the idea of legitimacy of children. Thus, the naming of the new-born child raises a strong presumption of paternity. However, informants are unable to say whether such a presumption is rebuttable by adducing any other evidence to the contrary.

In certain clans an extra ceremony known as korongada must be performed two months after the birth of a male child. A feast will be held where a ram is killed and drinks of ashi (beer) are presented

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1. Nadel, The Nuba, op. cit., 384.

to the clan members. As a rule, the father of the child must be present to be the first to taste the meat and the parents will be blessed by those present.[1] However, Nadel says that apart from the general fertility significance attached to the rite of korongada:

> "The symbolic meaning of the various features of this rite is not always obvious".[2]

Present field research has established that the symbolic meaning of the korongada ceremony is the assertion of paternity and the due incorporation of the newly-born child into the family membership of the father. It is interesting to note that the group of the clans who usually perform the korongada rite, as mentioned by Nadel himself, viz. Maryama, Togi, Modu, Kenya, Fuy, Anamu wa, Fande, Kuder and Kwolngala, is the same group of clans who do not accept or incorporate illegitimate male children into their families. According to Nyimang ideas, a newly-born male child of these clans would die unless the rite of korongada has been performed. Conversely, should a korongada rite be performed for an illegitimate male child by the mother's husband, then such a child is believed not to live for long. Furthermore, informants indicate that a husband who suspects that a newly-born child may not be his own will perform the korongada rite hastily before the prescribed period of two months. This is to ensure that, should his doubts prove true, then the child will die after the performance of the rite. This is presumably a crude way of proving the legitimacy of a child. In any case the above argument establishes beyong doubt that the symbolic nature of the korongada rite is to determine both paternity and the legitimacy of children.

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1. The requirement of the presence of the father is not necessary in some clans.
2. Nadel, The Nuba, op. cit., 388.

However, the general customary rule which prescribes that illegitimate children of a married woman belong to her husband is strictly followed where a person impregnates his brother's wife or the wife of any clan or co-clan member. In such cases, the child is regarded as the legal child of the mother's husband and the natural father can never claim paternity rights. This rule is applicable universally to all Nyimang clans, including those who do not normally incorporate illegitimate children into the membership of their families. The reason is not derived from the fact of the payment of marriage consideration, as some might think, but from the special nature of the kinship relation that exists between the natural father and the woman's husband. Thus, although impregnating a brother's wife or the wife of a clan member is considered a hideous sin which may lead to the breaking of relationships, the Nyimang would argue that since the natural father and the woman's husband are of the same shel (penis), then the blood that runs in the veins of the child is the same as the mother's husband. The child can therefore easily become a legal member of the woman's husband's family. This notion is in accordance with the practice of leviratic marriages that exists among the Nyimang.

d) Illegitimate Children of Divorced Women

As a general statement, the illegitimate child of a divorced woman is treated as belonging to her family of birth. In such a case, the general rules that govern the position of illegitimate children of unmarried women, as mentioned above, would apply. In discussing the position of illegitimate children of divorced women, Nadel says that:

> "Boys born out of wedlock belong to the woman's father; the natural father can claim the child, whether or not he intends to marry the divorced wife, on the payment of one cow. Girls 'go with the bride-price', i.e. belong to

> their legal father, if he received the reduced bride-price, from which the deduction for the girl or girls has been made."[1]

It is submitted that the above statement is misleading and tends to confuse the whole issue of the law as it relates to the legitimacy of children, the payment of the legitimation fees and the paternal rights over illegitimate children. To avoid unnecessary repetition the position of the male children born out of wedlock has already been discussed in the above pages. In the above quotation it is not clear what is meant in the context by the statement "girls belong to their legal father". It is obvious that the subject under discussion is that of girls borne by divorced women, but who, one may ask, is the legal father in this case? Certainly he is not any member of the divorced woman's family, nor could he be the natural father, and indeed he cannot be the former husband of the divorced woman. If, however, by "legal father" is meant the former husband of the divorced woman, then one may say that the whole argument is untenable, as under the Nyimang customary law a former husband of a divorced woman has no legal rights over the children of his divorced wife. This is a firm rule which does not allow of any modification. The rule applies fully even if the claim by the husband of the repayment or the refund of the marriage consideration is still pending. In such situations no question of set-off would arise, as has been suggested by Nadel. However, the case would certainly have been different if the former husband of the divorced woman was himself the father of the children. It is true then that no full refund of marriage consideration would be made, as part

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1. Ibid., 403.

of it must be deducted according to the number of children. Here no question of legitimacy arises, as obviously the husband is both the natural and the legal father of the children.

e) Illegitimate Children of Widows

As in most African tribes who practise leviratic marriages,[1] marriage among the Nyimang does not terminate merely at the death of the husband. The old customary rule (which is less observed now) was that upon the death of a husband a woman must take a leviratic husband from one of the family members of the deceased husband. She will then still be regarded as the deceased person's wife, and any children borne by her must in law belong to the deceased husband. This is so unless the marriage has been formally dissolved.

The stringency of this old customary rule is, nowadays, being constantly challenged by widows who have obtained a great deal of freedom of choice to lead their own independent lives separate from their husband's family. Thus, although customarily a widow must be married to one of the deceased's family members (preferably his brother), she is not legally obliged to do so. If she refuses to take a leviratic husband, then at least part of the marriage consideration (in modern times)[2] will be refunded to the deceased's family and the marriage will be considered as dissolved.

Should a widow bear children before the formal dissolution of the marriage, then the following rules would usually be applied:

a) If the natural father is of the same clan as the deceased

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1. Cf. A. Phillips and H.F. Morris, Marriage Laws in Africa, London, 1971, 52 and passim.
2. In the old days all marriage considerations would be refunded after the necessary deductions for the children were made.

person, then such a child must be considered as the lawful child of the deceased husband.

b) On the other hand, if the natural father is of a different clan, then it depends on whether the deceased husband's clan are in the habit of incorporating illegitimate children into their family membership. In any case, the husband's family have the option either to divorce the woman and claim recovery of the marriage consideration or to keep the woman, claiming guardianship rights over the child. Nadel is not far from right when he states that children born as a result of illicit cohabitation by widows belong "to the legal husband's family".[1]

f) Choice of a Child of his Father

Illegitimate children in Nyimang society are always subject to social ostracism. It is thus commonly known, among the Nyimang, that sooner or later the illegitimate grown-up child will "run" off to his natural father when he (the child) discovers the truth. Thus an adult child, or even a fully grown-up person (including married persons), may choose to repudiate his/her former father and thus physically move away to settle with his newly-discovered father's family. The reasons for change may be due to such factors as when the tudu (illegitimate person) discovers the identity of his natural father, or that the family group with whom he resides does not treat him as an equal member. This may happen especially when the other legitimate brothers find in the tudu a strong rival in property questions. In

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1. Nadel, The Nuba, op. cit., 404.

certain cases, such a person may be instigated by the family members of the natural father who, for one reason or another, would like to have their child back.

Normally, the new father would not reject paternity. Thus, should an illegitimate child run off to his natural father, the father who acknowledges paternity must perform a rite known as wurau ilig (to make to enter the compound). This ceremony, which indicates the acknowledgement of paternity and the welcoming of the newcomer, also signifies the incorporation of the child into the family membership. In such cases the natural father may be required to pay a token by way of compensation or expenses to the people who have brought up the child. However, informants are not unanimous as to the nature and the amount of such payment. In one incident at Salara sub-tribe a certain Sheikh Alouf impregnated a woman from Tundia sub-tribe when he was in his early youth. One day, after many years, a married woman appeared carrying a child and identified herself to Alouf as his daughter from Tundia. The old man remembered the incident and happily acknowledged paternity. To make the acknowledgement public, he performed the ceremony of wurau ilig. To assert his paternity rights even further, he called upon the woman's husband to provide him (Alouf) with marriage goats to slaughter. The husband readily agreed to do so, although he had already performed the same ceremonies in the home of the former reputed father of his wife.

A person who wants to change his father must move physically from one family group and join the family of the new father. This is so, especially if the new father, who is also the natural father, belongs to a different sub-tribe from that of the reputed father of the child.

The new father, as has been pointed out, must acknowledge paternity by publicly accepting the new child and performing the ceremony of wurau ilig. A fowl or a goat will be slaughtered, coupled with the pouring of libations. In addition prayers are uttered to the ancestors so as to bring prosperity and good luck to the child as a new member of the family.

A question might arise as to whether a reputed father who has been rejected by a child would have a remedial claim against the newly-chosen father. Although informants are unable to state the law precisely, it seems that a rejected father can either get a declaration from the court to assert his paternal rights, or that he can seek remedy from the child himself. A striking case (though most complicated) has been recorded by the present writer while undertaking field research in Salara People's Court. There the legal father, who had been rejected by his child, sued his ex-wife and her husband in the Salara People's Court accusing them of instigating the child to reject him. The facts are as follows: Plaintiff A was formerly betrothed to the first defendant T. One of the clan members of A impregnated T who gave birth to a male child, B. A married T, but later divorced her after the birth of the child. According to Nyimang custom the child was declared a lawful son of A. The natural father being a member of a co-clan could not claim any rights over such a child, and was made to forfeit any future paternal rights at an early stage. A divorced T, who married E, the second defendant, who belonged to Shiro wa. T took her small child to her new husband's home. E, the second husband, who himself belonged to a group of people (Shiro wa) who do not legitimize or incorporate illegitimate children into their families, did not pay

any legitimation fee for the child, and hence never claimed any paternal rights over the child. He only accepted to bring up the child of his wife by way of charity. When A asked to have his child back, the latter, who is himself a grown-up youth, refused to acknowledge him as father, and thus would not go with him. Plaintiff A held his ex-wife and her husband responsible by acting behind the scenes to instigate the child to deny him, and therefore sued them to enforce his claim over the child.

It should be noted that the dispute is not between the legal father as against the natural father of the child, but between the legal father and a third party who has been chosen by the child as a father. However, in answering the claim both defendants denied the allegation of influencing the child to deny his father. T, the child's mother, stated unequivocally that she had always regarded the child as A's son. When the boy himself was asked to testify he denied being influenced by anyone else, but still maintained his position in categorically refusing to recognize A as his father. When asked by the Court to mention his father, the boy replied that the man who had brought him up (E) was the only man he acknowledged as father. The reasons, as indicated by the boy, were that the legal father never once regarded him as his son and had never actually reared him or given him any clothing; if A had really thought of him as his child, then he (A) should have been called after his (the child's) name when A performed the age-grade ceremony know as <u>ashiu lida</u> (rite of drinking beer).

Here it must be pointed out that, among the Nyimang, a person who performs the age-grade rite will no longer be called by his previous

name. He will be called after the name of his first-born child (male or female), e.g. ninge ma (father of so-and-so). In this case, A, when he performed the rite, significantly failed to take the name of his first-born child (here the child subject of dispute). It is for these reasons that the child fervently denied his legal father. The novelty of the present case lies in the fact that the child is not rejecting his legal father in favour of a natural father, as is usually the case, but in favour of a third party who himself is not interested in the child and in no way could confer paternity to illegitimate children as is the custom.

Bewildered by this strange situation, the local court did not discuss the niceties of the law as to whether the child has a right to reject his legal father and choose a person other than natural father as his father. As part of the marriage consideration was deducted when A divorced T so that A might take the boy instead, it was thus not made clear as to who should repay the remaining property to A if the boy continued to deny A. That is because all T's family of birth, who had received the marriage consideration, were now dead. However, the problem is further complicated by the fact that even if the child had been allowed to choose a new father of his own the choice would not have been upheld in this case as the present father could not accept or incorporate the child into his family membership. As the whole issue of a child choosing a father other than his natural or legal father is in itself an innovation, the court was unable to reach any decision on any point of law, and thus referred the case to the elders to try and reconcile the child and his legal father.

According to custom, should the intended father or his family

reject the child, he will become virtually fatherless. Such a rejection is not rare in Nyimang society. The following Kurmiti case is illustrative. There a certain Wujein, a member of the Kelang clan, died and left a widow called Sadiya. Kabdan, who was the deceased's brother, married S on a leviratic basis on behalf of his deceased brother. While S was still legally married, she entered into an illicit sexual relation with another man from Kushi clan and gave birth to Hamad. Under Nyimang customary law H, although illegitimate, was regarded as the legal son of the deceased Wujein and thus bore his name. Long after H had grown up and married he discovered that neither W nor K was his true father. When difference arose between H and his legal father's brother K, the former refused to recognize his reputed father any longer and decided to "move" to the family of his natural father. Unfortunately, the natural father himself was dead and thus there was no one to confirm paternity. The family members of the deceased natural father were reluctant to acknowledge the newcomer H, and thus could not absorb him into their family membership. In view of this awkward situation H, who had already changed the name of his previous family through court proceedings, was unable to join either of the two family groups and hence became fatherless. Furthermore, the rejected family group demanded that H repay them all the expenses of bringing him up and also the property paid as marriage consideration for H's wife. It is submitted that should an illegitimate person change his family membership, then he will lose all property rights previously acquired within the rejected family. Such a person will be entitled only to his personal effects. As a rule the rejected father or the family group,

as the case may be, will ask to be compensated either by the new father or by the illegitimate person. This is so especially, as in the above cited case of Hamad, where the reputed father has brought up the child or has paid any marriage consideration.

3. OTHER MEMBERS OF THE NYIMANG FAMILY

The basic assumption in the Nyimang patrilineal society is that family membership is necessarily created by birth, and is conferred exclusively by blood descent through a male line. But this assumption is not wholly true; a person may also become a member of his/her maternal family if his/her paternity is otherwise denied. Similarly, family membership is not wholly agnatic as may be assumed, since it also includes wives. In addition, there are other instances where a person who has no blood or affinal connexions may acquire membership of a Nyimang family. Such persons include slaves, blood brother and adopted person.

i) Slaves (Koydo, Kamdo and Shirado)

In the old days when slavery was firmly institutionalized among the Nyimang, persons of slave descent were known as koydo kering or kamoding. Although such persons did not form any separate class as such, they were regarded as inferior to the other members of the society. In the past the koydo was one who had been captured in warfare, bought from other tribes as kamodo, or had been found wandering in the wilderness as shirado. Each of these three categories of persons had their own peculiar social as well as legal position in relation to membership of their master's family.

a) Toro-koydo

As a general customary rule, slaves captured in warfare were never absorbed into their masters' families. They were kept in a tora (forked wood tied to their necks) until a ransom was paid by the family of the captive. Nadel is therefore right when he says that:

> "Slave-raiding and slave-ownership were on a large scale in the Nyima hills .... The very efficiency and ruthlessness of the Nyima slave raids forbade that the captives made on such raids should ever be adopted into the captor's family."[1]

Thus, war captives (toro-koydo) were never regarded as part of one's family. They were kept to be ransomed at seven or eight head of cattle for a male slave, and four head of cattle if a female.

It is important, however, to note that relationships between the emancipated slaves and their families would be strengthened with the family of the captor after the slave had been ransomed. These ex-slaves became special members of their former captors' families and were known as "sons" or "daughters" of their ex-masters. The two families became tusul (literally ochre),[2] which signified a ritual relationship which forms a sort of "blood brotherhood". Such persons would be highly respected and would never be captured again. If they were captured again by mistake, no ransom was demanded and they would be released at once or else all the captor's family would suffer death for violating the tusul relationship. Should such persons visit

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1. Ibid., 393.
2. This terminology refers to the rite of wile kire (literally, blood cutting) which signifies the ending of a blood feud between the parties concerned.

their ex-master's home, they would be treated cordially and were entitled to enjoy certain property privileges. For example, an ex-slave cannot be denied any type of property touched by him or her in the home of the ex-master lest the latter and his family suffer grave misfortunes.

b) Kamdo (purchased slaves)

The word kamdo, though sometimes used as a synonym for the word koydo (slave), should be distinguished from it; it refers specifically to a certain class of slaves who were bought to work for their masters. This kind of slave, as indicated by Nadel,[1] was readily adopted into the master's family with the status of son, daughter or wife. These slaves, together with their descendants, were regarded for all legal purposes as family members of their master, with the same collateral property rights as the other free-born family members.

c) Shirado/i (foundlings)

A shirado is a lost person who has been found and taken into slavery. According to Nadel, this category of slaves comprised wandering persons "who had left their country and tribe - because of quarrels, or blood feud, or famine".[2] When they were found, the use of force was not necessary, as the shirado/i himself would be willing to join his finder and become his servant so as to be protected by him. Such persons were readily adopted and finally incorporated into families as children or wives.

Finally, it should be pointed out that descendants of ex-slaves,

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1. Ibid., 393.
2. Ibid.

whether bought or found as shirado, may also hold hereditary offices and some of them have actually become quite famous as tribal functionaries.[1] They used to succeed to property like any other free-born family members.

ii) Blood Brotherhood

According to Nadel, blood-brothership among the Nyimang is that institution which:

> " ... revolves round that relationship between a bridegroom and his 'best man' which comes into play at the pre-consummation rite ... the 'bloodbrother' as well as the whole institution are known as kordi (or kordik)."[2]

From the present writer's personal experience as a member of the Nyimang tribe, supported by extensive field investigation, it is clear that Nadel must be wrong in regarding the institution of the kordi system as a form of blood-brotherhood. The reasons for objection are as follows:

a) According to Nyimang, the kordi relationship is not created between the bridegroom and his 'best man' as suggested by Nadel, but between the bride and a young boy (preferably) from her husband's own clan.[3]

b) As has later been pointed out by Nadel,[4] the kordi relationship is, more or less, similar to the relationship between in-laws. The avoidances in the case of the kordi are even stronger than in the case of the proper in-laws. Such avoidances between the two kordi can be explained by this peculiar relationship which is similar to that of in-lawship, and not

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1. According to tradition the great great grandmother of the present Shira was a Kamdo.
2. Ibid., 394.
3. Nadel seems to contradict his early statement on p. 385 where he mentions that the kordi ceremony relates to girls of certain clans.
4. Ibid., 395.

the fact that the parties have become "intimate friends".[1]

Nadel, with respect, is right when he further expresses his doubts as to the use of the following terms. He says:

> "The terms 'blood brothership', 'friendship', 'adoption' are, of course, quite incapable of expressing the implications of this relationship. The term 'blood-brother-in-law-ship' though more correct, hardly recommends itself."[2]

In generally agreeing with Nadel on this point, one must try to answer questions such as: What is meant by bloodbrotherhood in the Nyimang context? How is such a relationship created?

It must be remembered at the outset that bloodbrotherhood, especially in the old days, was a recognized form of establishing friendly relations between strangers. It was created at both the individual and the tribal level. Brotherhood created as a result of inter-tribal pacts for political reasons, and which concerned the whole tribe, does not form part of the present topic, and will therefore not be dealt with here.[3] We are concerned only with the creation of that type of "artificial" brotherhood whereby two persons of different ancestry join legally and become members of one family for most social and property purposes. In this sense blood brotherhood, in the Nyimang context, is understood to refer to:

> "a relation of alliance or co-sociation by which individuals not related by kinship acquire ties of pseudo-kinship, the rights and duties that compose the relationship being modelled on those of brotherhood."[4]

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1. Ibid., 394.
2. Ibid., 395.
3. For the information on how these inter-tribal pacts were created between the Nyimang and its neighbours, see Nadel, ibid., 453.
4. J. Gould and W.L. Kolb (eds.), A Dictionary of Social Sciences, London, 1964, 58.

Two types of this kind of blood brotherhood used to exist in the Nyimang society. The first was closely connected with the institution of slavery. As has been indicated above, a ransomed or emancipated slave would gain the status of a son or daughter of the ex-master and thus stand in the position of a blood brother to the children of the ex-master. The two families became tusul (lit. ochre)[1] or blood brothers. Although the ex-slave would not enjoy all property privileges as a full member of the family, he might be treated well and presented with gifts each time he visited his or her ex-master's home. These freed slaves used to move freely in their ex-master's tribal area without fear of being harassed or recaptured or killed. The institution of blood brotherhood of this type was "a common device by which people are enabled to visit or traverse the territory of potentially hostile neighbours".[2]

It was this category of persons who were employed as ambassadors for peace between different warring tribes. They were known as bwiru iran (masters of the road). They were not necessarily of kujurs origin.[3]

In the old days, a good deal of self-reliance was necessary among the Nyimang. Lonely persons had to find brothers and create alliances so as to secure protection of limb and property. For that reason a system of blood brothership existed where complete strangers, who are not connected by any kinship relation, performed certain rituals after

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1. In former years tusul material was usually used when the ceremony of wile kire (lit. "cutting the blood") was performed to settle a blood feud. It is thus perhaps improperly used to refer also to the persons who take part in the ceremony and who become bound by its sanctions.
2. Cf. Gould and Kolb, A Dictionary of Social Sciences, op. cit., 58.
3. Cf. Nadel, The Nuba, op. cit., 453.

which they may be regarded as complete brothers in the eyes of the law and of society.

Usually, blood brothership is created between the homeless strangers (especially in the old days), individuals who had left their communities because of famine or because of deaths in their families or because of a blood feud and quarrels within their families and some individuals of the new tribe to which they have moved. People would say that so-and-so have become brothers when they performed the rite of tasting bisheru ilu (the milk of a heifer). The making of libations of a heifer on the manda (family hearth) to the ancestral spirits signifies the creation of blood brotherhood. Thus, parties who want to become brothers must drink or sip from the same gourd of the same milk which they have made libations from. A fowl may perhaps be killed. The element of alliance and brotherhood is the core of the ceremony of "milk tasting". The sitting on the same manda of the family signifies the unity of brothers with the same ancestral spirits who share the manda. It is not the same as obtains between a person and his in-laws. Thus, in the case of the in-lawship certain avoidances are necessary and there is not sharing of food on the manda as happens between brothers. It is because the kordi inherently carries with it the meaning of in-lawship that should a bride choose her kordi from her husband's clan, then that kordi will no longer sit or share the same manda with the bride's husband, even though both the kordi and the husband may belong to the same clan membership.

However, the legal position of a "blood brother" is similar to that of a real brother. Both parties must observe the rules of exogomy. They become ritually connected and make libations on the same manda to

the same ancestral spirits. Upon the death of either party and in the absence of a nearer relative (e.g. children), then the surviving party is entitled to succeed to the property of his deceased blood brother.

iii) Adopted Persons

Although there is nothing under Nyimang law which prohibits adoption of complete strangers into one's family, yet nothing is known of the adoption of such strangers. However, adoption within the same family is permissible and is commonly practised. There is no specific procedure to effect a valid adoption. As a general rule only male children may be adopted for the sake of keeping mir (fire) and this ensures continuity of the line of the adoptive parent.[1] Both men and women are capable of adopting children. However, there are two situations in which children may be adopted within the family.

a) Where a person hands over one of his sons to his childless brother as the latter's mir (fire), so as to keep the line of the brother. It must be remembered that this procedure is different from situations where a brother may be required to take up guardianship of his deceased brother's widows and children until they come of age.

b) Another instance is where a husband may take one of his wife's sons and give it to another childless wife of his as her worgol (entrance to the hut). This is to ensure the continuity of the wife's line. In both situations the idea is that somebody must be found to take care of the geshin

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1. Kronenberg in his article "Notes on the Nyimang religion", op.cit., 202-03, says that: "If somebody had no children, his brother's son is charged by the family to 'make fire' (mwero-ben), e.g. ... 'to make fire' for the geshin, to prolong his existence".

(deceased person's soul) of the adoptive parent after his death. The adoption here is mainly inter-familial. One of the main objectives of the transfer of the child is to find a legal heir to the adoptive parent after death.

Thus in both cases the adoptive parent must take the child and treat him as if the child is his or her own natural son. In each case the rights and duties that govern the relation between the natural parents and children will prevail. In other words, the legal incidence of this type of adoption is that it confers the same rights and duties as exist between parent and child born in legal wedlock. Thus, as soon as the child has been appointed by his natural father to be adopted and has been accepted by the adoptive parent, then such a child becomes a lawful child of the adoptive person for all legal purposes. As all parties, *viz.* the natural parent and the adoptive child, will virtually belong to the same family membership, the child will still be regarded as a member of his original family group.

As regards devolution or disposition of property, one must note that since the legal position of the adopted child has changed, the child loses all property rights as against his natural parents and acquires new proprietary rights as against his new parents. This is so especially in cases where a brother adopts his brother's son. The adopted son bears a new name of his father's brother and hence becomes his sole heir. His compound becomes separate from that of his natural father and he will be required to make libations to his deceased adoptive father and not to his natural father. He becomes the *mir* (fire) of the new father and must preserve his line and keep his *geshin*.

Similarly in the case where a wife adopts one of her co-wives'

sons, the adopted son becomes attached to a separate sub-family within the same compound family. He forfeits all proprietary rights in his former "house" and acquires new rights within the new "house". Upon the death of the adoptive mother he becomes her sole heir and hence succeeds to the property of that "house". This arrangement, however, does not preclude him from his share in the common family property held by the father.[1]

4. INCIDENCE OF FAMILY MEMBERSHIP

It has been pointed out that, for strictly legal purposes, the word "family" as used here in reference to the Nyimang includes only those persons who are entitled to hold property interests within a certain family group. This narrow legal definition should not rule out the general meaning attached to the word "family", even in the Nyimang context, as being regarded as a kinship unit which also includes persons belonging to the same patrilineal descent.

As a rule the age and sex of a family member are immaterial as regards the legal status of that member. General rights of enjoyment to property cannot therefore be denied to a person by reason merely of sex or age. However, in practical terms, women and children generally occupy inferior positions within the Nyimang family. For example, women and children have less effective roles in the general decision-making on family matters or the disposition of property. Neither women nor minor children are competent to make libations or perform any rituals connected with the ancestral spirits.

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1. For a detailed discussion of the rules of succession between various houses, see below under Succession.

As for the children, their period of minority ends at the time of initiation (circumcision). After his initiation, a male child, provided his father is no longer alive, acquires capacity to make libations.

Deceased persons also form an important sector of the Nyimang family. Their needs and rights in property must be fulfilled and honoured by the surviving members as a matter of religious duty. In many cases, certain properties treated as belonging to deceased members, would not be disposed of for fear that living members would suffer some misfortune. All types of property, including cattle, can be sacrificed to the deceased members. According to Nyimang ideas, the spirit (geshin) of the deceased person always hovers over the homes of his living family members and is ready to avenge himself if not duly appeased from time to time by sacrifices and prestations of property.

Sometimes property must be used to marry a wife to a deceased male member who had died unmarried (in this case only unmarried brothers deserve to have women married on their behalf by such 'ghost marriage'). Thus a father may force one of his children to be adopted fictitiously by the father's deceased brother, and hence marry a wife on behalf of the deceased unmarried brother to keep his line going. This marriage is most likely to take place especially if the deceased person has left property of his own. A wife thus married is known as geshinu ker. Before such a marriage is consummated by the living husband, the newly-wed woman must remain untouched for four days. She will be reserved or linked solely with her deceased husband. After the fourth day a sacrifice of a goat will be performed to the deceased person on whose behalf the woman is married. Informants indicate that the

purpose of this sacrifice is to buy the kubang (traditional bed) which signifies the right of cohabitation. After the lapse of the four days and the performance of the sacrifice, the living husband may enjoy his normal conjugal rights. But the woman herself is legally considered as the wife of the deceased person, and will continue to be known as geshinu ker.

As marriage among the Nyimang is viri-local, a married woman normally moves from her own birth-family group to settle with her husband's people in the new matrimonial home. Soon after a woman has validly entered into a marriage relationship with another man, she loses the membership of her birth family and becomes an integral member of her husband's family. In other words, and although the status of dependency of a woman does not change by the fact of her marriage, all her connexions with her previous family in matters relating to proprietary rights must necessarily be terminated. Even ritually she becomes more attached to her husband's family than to her birth family. As the Nyimang would say, she becomes upon marriage a wudang baar (a stranger)[1]. This, however, should not be taken to mean that there is a total and absolute severance of relations between the married woman and her birth family. All other social relations are preserved. To this end, it is the duty of the husband to foster good relations with his in-laws.

Any member of a Nyimang family (including wives) is entitled, as of right, to have sacrifices and other religious ceremonies performed on his/her behalf, especially if she/he becomes ill. It is the duty of the father or, in his absence, the guardian, to perform these ceremonies. In the old days when self-help was the rule, a member of

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1. This is as regards her family of birth.

the family was entitled to the support and protection of his co-members. Today, as it was in the old days, the father as the custodian of the family fortune is held responsible for all the wrongs and debts of unmarried children and his wives. In addition, each son has an equal right to have marriage consideration paid from the common family herd. Conversely, an individual member must share in and hence bear the general duties within the family in return for the enjoyment of family privileges and other property rights. To give a particular example, every single member is under a legal obligation to look after the family herd by herding, watering and finding it if lost. The grown-up males must contribute to the payment of the animal tax to the Government. The majority of the informants indicate that a father can always use his prerogative and refuse to pay marriage consideration on behalf of a child who refuses to assist in the keeping of the family herd.

5. BREAKING OF FAMILY TIES

The Nyimang generally term the breaking of family ties as awaida (separation). Today, as it was in the old days, fission within the Nyimang family group, whether by individuals or by family units, is not a totally unnatural phenomenon. However, there is no legal process by which an individual member may sever his family ties, or indeed which a whole family unit may go through so as to indicate its total disintegration. Nevertheless, informants recall that in the old days people who wanted to sever their relations completely would kill a turtle (deg) and taste its liver. This alleged procedure, however, appears a fiction which could not be verified and hence cannot

be regarded as a legal process by which family connexions would be terminated.

Incidents which lead to the breaking of family ties are as follows: (i) If a person kills one of his family members, then he becomes wilei (having blood) and must move away to another area. Some informants suggest that, when a person kills his brother, then a ritual of wile kire (cutting the blood feud) will be performed and the killer will go round the grave three times and then break a kudu (gourd). After this ceremony the killer will be allowed to come back and visit the rest of his family members. But nevertheless, all his ritual and social connexions with the rest of his family members will be discontinued. Should he come home, he will not be allowed to enter into the compound of his father or share food with the rest of the family members. Their property must be separated. If he is married, then these prohibitions will also apply to his wife and children, but not to his brothers. He must therefore move away from the area.

(ii) Acts of sorcery through gümo nida (lit. "killing by a hole") are considered as the most terrifying activities in the Nyimang society. People normally resort to sorcery of this kind in order to kill an unknown thief. Sometimes an envious brother may apply it to kill a rival brother. Should one of the family members, with the intention of eliminating one of his brothers, commit any acts of sorcery of gümo nida, then the whole family unit must disperse upon the discovery of such action. They will be considered as if having a blood feud. They must not eat or drink from the same plate. They will separate their property and will not sit on the same manda (hearth) any more. The members of such a family simply become strangers to each other.

Should any one of them disregard these tough measures, then he will die immediately. However, informants indicate that the curse can be undone by performing the tanyari of teshida (the rite of uncovering). After the performance of this rite, family members may come together if they wish to do so. But in most cases it is said that once a family group has been separated because of the action of gümo nida, then it becomes difficult to heal the wound again. In short, they will never reunite.

(iii) Famine, especially in the old days, was regarded as a main factor which led to the severance of family membership. It was mostly because of famine that people used to sell their family members into slavery. Delinquent persons who were considered to be a menace to the rest of the family group were also sold into slavery. Informants indicate that since the sale of a family member into slavery would inevitably invoke future grievances, then the act of selling must necessarily lead to a complete severance of the family ties, and the person so sold must lose family membership together with any property rights. If he had children, then they would take over his property. Accordingly should such a person subsequently obtain his freedom, he would not be allowed to return home or enter the compound of his father. He will neither eat nor drink with any one of his previous family members. He becomes a complete stranger.

In the majority of cases, breaking of family relations is done largely on a personal level. This may happen where two brothers are involved in a serious conflict, e.g. over property, in which reconciliation becomes impossible. Such disputes may take different aspects. Most serious of such disputes is where a brother commits

adultery with the wife of his brother. In such cases the breaking of personal relations between the two is inevitable. The offender will be prohibited from attending religious ceremonies on the manda when the other brother is present.

(iv) Another situation which may result in the breaking of family ties occurs when brothers quarrel at the manda over meat distribution. Usually, when a tanyari (ritual ceremony) is performed, especially where a beast is slaughtered, all family members and sometimes lineage and clan members may be called to share and enjoy free meat. As a rule all clan members are entitled to sit at the manda of another clan member. For organizational reasons, when a beast is slaughtered, certain members of the family (usually young men) will be held responsible for the skinning, roasting and distribution of the meat to the members present. A knife is usually used for such purposes. It is absolutely against custom for any member to grab in protest at the distributor's hand that holds the knife, especially when the person holding the knife is in the process of cutting and distributing meat. People say that the grabbing of the knife by an impatient or a dissatisfied member is a most serious offence which leads to the breaking of relations between the two parties. Both the knife-holder and the grabber will sever any relations as from that moment. Each one of them will never be allowed to enter the compound of the other, and will never share food or drink in each other's home. The breaking of the relations will not affect their children or the rest of the family members. It is a cutting of personal ties. If the parties are brothers, then the father must immediately distribute property amongst his children so that the offender will take his share

and go away until purification rites are performed.

However, the breaking of relations by "grabbing a knife" can be restored if the respective parties so wish. A tanyari (religious ceremony) will be performed where prayers and libations must be made to appease the offended ancestral spirits who have been disturbed while they gathered on the manda to receive prestations. In performing purification rites the knife-grabber must bring a bull and the knife-holder will bring a ram and the person in whose compound the offence was committed is required to prepare ashi (beer) and the other members may contribute by bringing fowls. Branches of a sagi tree (Albizzia sericocephala) will be brought. The bull, the ram and the fowls must all be slaughtered by a brand-new knife bought especially for the occasion. After the performance of the purification rite the two persons can now become brothers again, and may assume their normal relations.

It must be pointed out that mere division of property between children by a father before death, or any subsequent division of property amongst brothers after their father's death because of a dispute or any disagreement between them is not regarded as aweida (separation) as would legally amount to the breaking of family ties. In such cases the division is counted as a purely individual matter and not treated as a family severance proper. Both parties will still be ritually connected and the rest of the family members will remain intact. Thus, except in cases of blood feud, gümo nida and selling a member into slavery, where the severance of family ties is absolute and will affect the issues of the parties concerned, the severance of family ties for any other reason can be restored on the parties' initiative.

CHAPTER IV

PROPERTY AND DOMESTIC RELATIONS (continued)

THE POSITION AND AUTHORITY OF FATHER IN THE NYIMANG FAMILY AND HIS ROLE IN THE MANAGEMENT OF THE COMMON FAMILY PROPERTY

GENERAL

For the purposes of property rights and its legal devolution therein the "family" among Nyimang is understood as referring strictly to the nuclear parental family, viz., the man, his wife or wives and their children. By "Nyimang family property" is meant property over which the father enjoys the absolute title. Should such property continue to be kept intact after the death of the father, then it may also be called "family property". In the latter sense, "family property" means the undivided property in which the absolute interest is jointly held by the children of the deceased as being his bodily successors. This is not, according to Nyimang ideas, a corporation but a partnership which can be dissolved any time at the whim of any individual member.

It is a constant customary rule without exceptions that all property in the family pool belongs to the father while he is alive, i.e., the legal title to the so-called "family property" is held by the father alone. In other words, among the Nyimang the ultimate title, control and management of property (especially livestock and land) within a family group vest in the father as an individual. The father's right to dispose of such property, especially in the old days, is absolute. The wives and children have only rights to maintenance. The children, however, have rights in posse as being the potential interest-holders in the event of their father's death.

Speaking generally about the dominating authority of a Nuba father, Hawkesworth says:

> The power of the paterfamilias is extreme, and is analogous to the patria potestas of Roman times. All the distribution of family property is vested in him, and he may marry his offspring to whom he wishes.[1]

While the above quotation in principle describes the legal status of the father with accuracy, a caveat must be entered against the use of the term "patria potestas". It is true that the power of a Nyimang father, especially in the old days, was considerable (as indeed was the case in the majority of other Nuba tribes). Thus, among the Nyimang in the old days, a father had the right and power to sell his family members into slavery. Nevertheless, it is wrong to equate such power with that of the Roman patria potestas. A Roman patriarch had, among other things, the power of life and death over his family members. Indeed, the status of his own child vis-à-vis the father was little better than that of the actual slave.[2] This has never been true in Nyimang or other Nuba societies.

Stevenson's summary of the power and authority of a father in Nyimang society as regards the management of the family property is as follows:

> All cattle, including that of the married sons, is under the father's control. Buying and selling of cattle are strictly regulated by him. If a son wishes to sell a cow, or to give her to his wife's family, he must obtain permission; if he buys a cow, it technically belongs to his father. Milk for family use is normally divided by the father, but sometimes he places a cow at the disposal of a son's family; the son's wife or wives will then take milk and divide it.[3]

It is true that the father's rights over his child's property will not terminate simply because a child has acquired an independent position

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1. Hawkesworth, op.cit., 181.
2. See W.W. Buckland, A Manual of Roman Private Law, 1925, 60-64.
3. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 79.

of his own, i.e., by marrying and establishing a separate homestead. Indeed, property links between the father and his married sons continue to operate so long as the father is alive. This may be due to the fact that, despite the apparent economic independence of the son, a married child is still regarded as unqualified to perform any religious ceremonies to the ancestors during the lifetime of his father. As in many African societies such as the Arusha of Tanzania,[1] the father who is versed in religious matters is the only one who has the capacity and the necessary expertise to perform sacrifices to appease ancestral spirits, and hence obtain their blessings for the general welfare of the living family members. For this reason, even married children must continue to pay their tax to their father so that the latter may keep contact with the ancestors.

This having been said, one must still qualify Stevenson's general statement and add that, despite this wide authority of a father over his children's property, the situation changes slightly when a child gets married. It is customary that, in the majority of cases, married children will build separate compounds of their own where they are sometimes allowed to keep their privately acquired property, including livestock. Thus, unlike with unmarried sons, any property acquired by a married son belongs to him and to his children. If a married son occupies a piece of virgin land, then it belongs to him and not to his father. Informants indicate that a married son with a separate compound has an option either to separate his property and keep it privately in his own compound, or to let it be kept in the father's compound. In the former case he enjoys a considerable right over such property, but in the latter the father has the right of control.

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1. See P.H. Gulliver, "The Arusha Family", in R.I. Gray and P.H.Gulliver The Family Estate in Africa, London, 1964, 203.

By marrying, a son may establish certain rights over his privately held property. Thus, it is strict law among the Nyimang that a father has no right to dispose of property refunded to the family as a result of the death of a son's wife. This property is known as durangu ki. The father also has no authority over property refunded to the family in cases of a divorce of a son's wife. The refunded property in each case becomes, in law, private property of the son and the son alone is free to dispose of it in whatever manner he sees fit without reference to his father. This property never goes back into the family pool and the other members of the family gain no rights over it after the father's death. This is so even if the refunded property continues to remain in the father's compound. However, as a general rule, a father will advise a married son, upon marriage, to separate his own cattle from the rest of the family herd so that the other unmarried sons may not claim rights over them after the death of the father. But even if livestock belonging to the married son and the father are kept together for herding purposes, the absolute and private right of the married son over his livestock will never be doubted.

It should be conceded that a father still has certain proprietary rights over his married child's property even if their herds are kept separately. Thus a married son is totally prohibited (as being taboo) from slaughtering a ram, a he-goat, a cock or an ox in his compound while his father is still alive. In Nyimang custom these categories of animals belong to the father, and the married son must give them to his father whenever his father wishes to dispose of them in any way he pleases. In addition, a married son must give certain amounts of his farm produce to his father every year.

1) Management of Family Property

The creation of a common property in the Nyimang family and

its subsequent increase may be achieved through various means. This may include property left by the intestate deceased father. It may also include property brought as marriage consideration for one's daughters or sisters, or that which is brought by any other member of the family group, viz., father, wife and children either through gift, purchase or, as in days gone by, by occupation of vacant land. Customarily, any such property must be pooled in one place under the direct authority and overall supervision of the father. After his death, the children, if they so wish, may preserve the wealth intact under the general guardianship of the eldest brother.

One of the remarkable features of the Nyimang system of property held within the family group is that each individual member can identify exactly the type of property brought into the family pool by him or by his mother, through his sisters' marriage considerations, or by a full brother. This is crucial, as it is law among the Nyimang that everyone is eneitled to his respective property after the father's death. Male children have the right to property acquired or brought by their sisters or mothers in preference to other step-brothers. But, as has been indicated, during his lifetime a father is free to use the common family property indiscriminately without consultation with or without consent from the rest of the family members. A father may, out of courtesy, ask the permission of his child to use the child's property. It is rare for a child to withhold his permission in such cases. But if the impossible happens and the child does refuse to permit his father to take the property, then the father can still dispose of the said property as of right.

Although the legal principle is that all property in the common family pool belongs to the father, other members of the family have equal rights of enjoyment. There is, however, no difference in the quantum of enjoyment as between an adult person and a minor, or between a male and female member. As it is customary that marriages amongst one's children must be entered into in order of senority, older brothers have priority over younger brothers in getting married. For that reason alone, the senior brother may be the first to reap the benefits of the joint family property. For the application of the seniority rule it makes no difference whether the remaining stock is insufficient to meet the needs of the rest of the children. After the senior brother has married, the whole family unit must co-operate to find a wife for the second senior brother, and so on. In theory, this rule of co-operation will continue even after the death of the father. Here an important fact must be pointed out, that the rule of seniority does not necessarily apply to step-brothers. Thus, while a full brother must wait until his elder brother gets married, a junior step-brother can, if the resources of the family permit, marry before his senior-step brother.

The enjoyment of common family property carries with it an obligation imposed upon every family member to take care of such property. It is therefore incumbent on the children and wives to water and herd the family herd. Wives may contribute in watering the animals while the children are responsible for herding, bringing the animals back when they have strayed, and protecting them against theft.

Although a father is legally responsible for the tortious liability and debts of his children, a father can refuse to pay debts frequently incurred by his delinquent child who has proved to be a burden on the other family members. This is so especially if such a child does not work hard enough to increase the family property.[1] Thus, in certain cases, a delinquent son on whose behalf a heavy debt has been paid, has no right to request his father to pay a marriage consideration for him. The payment of the debt may be regarded as the child's share of the family fortune which he has taken, and hence he must forfeit any subsequent claims over family funds.

Despite the overwhelming authority of the father in disposing of family property, the father's powers of disposition are liable to be challenged by his children through the support of the elders should he abuse his authority. Thus, a father must not use property to marry a new wife while his son, who himself is of marriageable age, remains unmarried. Indeed, in many situations the authority of the father can be questioned, for instance, if he should try to overlook a senior son and attempt to pay marriage consideration to a junior son without strong reasons. In each of the above situations the father must show good cause for his action, e.g., that the senior son is physically handicapped or is not his legitimate child

A family head (usually a father) with several wives must exert his authority to maintain the obligatory co-operation and unity between the various members of the different houses. He must suppress individual rivalries and other personal aspirations between brothers in matters relating to property. After the death of the

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1. In the old days such children were sold into slavery, especially in times of famine.

father the unity between the family member may or may not be maintained. It all depends on the individual circumstances of each case, and on the elder brother and whether it is convenient for the half-brothers to maintain good relations in property matters. In the majority of cases, the death of the father may be the beginning of the breakdown of the nuclear family. Younger members may be taken care of by their senior married brothers until they (the youngsters) get married. After that each brother may, if he wishes, be regarded, at least economically, as an independent person from the rest of his brothers and himself become the head of his nuclear family.

Socially and ritually, however, the compound (wir) of the deceased father must be preserved by the joint efforts and responsibility of all brothers. The younger brother of each house must be responsible for the manda (hearth) of the deceased father, while the eldest son of the senior wife becomes a spiritual father and hence becomes responsible for all religious performances. In this manner the family unity will be kept, viz., through social and ritual connexions. If a deceased person has small children his brother may act as a spiritual father. The brother may act as a guardian and will perform all ritual ceremonies. In law the deceased's brother has no legal rights over the deceased person's property. But it is not surprising among the Nyimang, especially in the old days, to find a father's brother who has been appointed as guardian, to use his position to rob his brother's children of their property. This is most likely to happen where the deceased person has left a widow of marriageable age and minor children. Here the deceased's brother may marry the widow and in some cases

may merge the two families together. The new husband may then use his deceased brother's property for his own benefit under the pretext of bringing up the children. This misappropriation, especially in modern times, has been the subject of lengthy law suits between some rapacious men and their brothers' children after the children come of age.

After the death of the father, the relation between the different houses becomes that of inter-house relation. The division of the common family property is inevitable and is done, at this stage, per stirpes. The independent identity of each house grows strong as time goes on, with the senior brothers of each house as the main actors.[1] Thus, any property brought by junior brothers or as a marriage consideration of a sister must, as a strict law, be kept within that particular house. However, although each married brother may establish his own compound with a nuclear family of his own, and although relations between full brothers are always stronger than with half-brothers; yet there is nothing like complete independence or total disintegration of the father's compound after his death. His wives will still continue to reside in the compound and will continue to enjoy the remaining property and cultivate the land allocated to them by the deceased husband. The younger son of each wife, as has been pointed out, will continue to reside in his father's compound even after his marriage so as to keep his father's manda and other shrines. He does not build a new house but will stay in his mother's hut and bear the responsibility of keeping his mother who must allow his wife to utilize the tiny (home farm).

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1. Cf., P.H. Gulliver, The Family Herds, London, 1972, 174.

After the death of the father the eldest son assumes authority and his mother and younger brothers must follow and accept his lead. He becomes the only one who has the capacity to perform the necessary tanyari ("religious ceremony") in his father's compound. He has the right to refuse to allow his father's brothers to take any part in such ceremonies so that he can wield considerable power over the rest of his younger brothers. But, as has been pointed out, this does no mean that the younger brother has to abandon his rights in the family property, especially if the property is kept undivided under the general control of the elder brother. Thus, a married senior brother cannot refuse to pay marriage consideration to his junior brother (from the common family property) in order to contract a second marriage. Conversely, a wealthy brother is under no legal obligation to pay marriage consideration to his disobedient junior brother out of his own (senior brother's) personal property.

2) Alienability and Redeemability of the Common Family Property

On the strength of his unlimited power of control of the father over the common family property, he must ensure that all family members enjoy the benefits of such property equally. However, no member other than the father has the right or capacity to alienate any portion of the family property without the father's express consent. Any property transaction entered into by any family member without the father's knowledge must, in law, be ratified by the father. In other words, the father has a right to revoke a sale transaction entered into by a family member in relation to a commonly held property without the express permission of the father. However, instances exist where children may be

justified in disposing of their father's property without first obtaining his permission. Such instances are when a grown-up son remains unmarried because his father would not pay a marriage consideration on his behalf. In this case, according to informants, a son has a right to take part of his father's property without the father's consent, and pay it as a marriage consideration to obtain a wife. In such circumstances the father may be prevented by law and custom from recovering any part of the property paid as marriage consideration for his son's wife.

Furthermore, informants indicate that should a father refuse to feed his family in times of famine, then any family member (including wives) has a right to dispose of any property to obtain food. Any rpoperty disposed of for the above reasons can only be reclaimed by the father through offering a substitute to the third purchasing party. The third party must accept the substitute, especially if the property so disposed of belongs to a kwuni, or if it has ritual connexions with the family ancestors.

As a rule no family member has a right to revoke a contract of sale entered into by the father. However, property thus alienated by the father can be redeemed by other family members. Should any property be redeemed by a child, then it also becomes his father's property who has the same rights as before to alienate it again. After the father's death the redeemed property will not fall into the family pool, as it will be considered as if freshly bought by that member. Such property must be inherited by the person who has redeemed it from his own pocket. If, however, a person wishes to share such property with the rest of the family members, then he is free to do so.

MARRIAGE CONSIDERATION AND OTHER PAYMENTS

1) General

It must be mentioned at the outset that the payment of the marriage consideration by the Nyimang who have lived in towns for many years may or may not conform with the traditional payments. That is because some of these people have adopted the Arab way of settling marriage payments. However, many of the Nyimang who live in urban areas still follow the traditional form of marriage payments. Indeed, some of them have the misfortune of celebrating their marriages in both traditional and the modern Arab way, thus becoming liable to incur double expenses.

Transactions involving the payment of marriage consideration are most complicated among the Nyimang. At least four main types of such payments exist. These include a large spear known as borang, livestock, guns and foodstuffs in addition to manual work. The payment of a gun is not a necessary requisite. But as a customary rule it is most likely that if a gun had been paid for a woman, then it is also highly probable that a gun will be demanded by her husband when her daughter is being married. This is regarded as a compensation for the gun that was lost when the mother was married. In the old days the payment of a gun was equivalent to only one cow. Now informants indicate that payment of a gun as part of marriage consideration is equivalent to three head of cattle. But should a gun be paid as part fulfilment of an outstanding debt of a marriage consideration, e.g., if paid as su (the incomplete part of the marriage consideration), then it must be counted as one head of cattle and no more.

In days gone by it was the father who was held legally responsible for the payment of his son's marriage consideration. Even today the same responsibility exists; but for practical reasons the son must obtain the property for his marriage consideration. The following are the main payments.

A person who has been accepted as a suitor for a girl must first of all give a large spear called borang. The giving and accepting of the borang mean that a provisional promise has been made to the suitor and that other suitors must now stop asking for the girl's hand. The payment of the spear has a further ritual significance as it is later used to slaughter the marriage goats. The borang is therefore an important item in the series of marriage payments and must be paid first before any other property. Nowadays, and because of the growing importance of the cash economy, suitors are asked to pay money instead of the actual borang, or in addition to it. The money thus paid instead or in addition to the borang is also known as boranguki (lit., a thing of the spear) or bagshish, which is an Arabic word for a tip. The amount payable as bagshish or as boranguki is not standardized, but ranges between LS50 and LS500. Until then the engagement will not be considered as formal until further payment are made.

After the suitor has given the borang, the girl's father calls upon the suitor's family so that the two parties may agree upon the amount to be paid generally. This is known as korè, which must be shown at this early stage although its full payment may take generations. Nadel, however, thinks that "the bridge's father does not formulate his demands all at once, but specifies them in

the course of time".[1] It is submitted that the casual demands of the bride's father relate only to small gifts and manual work, and although he may keep asking for payment of the marriage consideration every now and then, the actual amount must be known by the parties beforehand. This amount is standardized through Nyimangland.

In bygone days, the amount payable consisted of 21-30 goats and 14-15 head of cattle. This was greatly reduced in 1927 through government intervention.[2] Now the first instalment consists of two cows and one bull and 6-15 goats. This, as will be shown, will be completed by a later generation to make a total of five head of cattle or six in the case of a Shiro kira (a girl from the Shira clan) and 21 goats. The husband will be asked to pay only part of the amount and leave the rest as su (incomplete) and koru. It is a kind of intentional debt which must be incurred by a coming generation.

Thus the marriage consideration can be divided into the following categories:

a) Borang

b) The korè which consists of 15 goats, six of which (or less depending on the circumstances) will be sacrificed as tengo kwudo (goats of the gourd).

c) Orgolu kwudo (goats of the gate) which will be sacrificed when a woman moves to her husband's home. This will bring the required total of 21 goats. In practice, however, the number of goats given to the in-laws may exceed the standard requirement.

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1. Nadel, The Nuba, op.cit., 397-398.
2. Ibid., 400.

d) Five head of cattle, two of which must remain as su.

In the old days an additional cow known as amiu bar (bone's cow) was paid for an old woman as buying her bones.

2) Payment of Tengu Kwudo (goats of the gourd)

A teng (gourd bowl) is a traditional plate for holding food. However, although the actual procedure of the payment of the marriage consideration is known as bar badig or kié badig, the first batch of the property thus paid is known as tengo kwudo. The first amount varies depending on the circumstances. But as has been indicated, the first six or 15 goats, some of which are intended for sacrifice, must include at least one cow. The goats are sacrificed as an invitation and indication that the two families have now become relatives and that food can be exchanged and consumed freely without shame. The kwudo themselves are sacrificed for the geshin of the deceased members of the bride's family. The rationale is that the dead members must be appeased so that they may stay calm and not look with a grudging eye on the living members when the latter start to enjoy the food given by the daugher's husband.

On the day of the sacrifices of tengo kwudo gifts of coffee, sugar, tea, oil and other foodstuffs must be given by the groom to the bride's family. Thereafter, gifts are regarded as the sole property of the bride's mother who will distribute some of them to her friends and relatives. The presentation of gifts of clothing to the bride and other occasional gifts to the bride's family will continue even after the couple have been married. These gifts are important as the whole relationship between the two families may sometimes depend entirely upon the goodwill of the groom and his family. During the engagement period it is incumbent on the

fiancé and his family to help the bride's family in various farm work and any work as may be asked by the family of the bride. Informants indicate that, in the old days, a person could obtain a wife by working for his in-laws. Such a person would be treated as a "son" of his father-in-law and would continue to repair his in-laws' houses, fences, clear their farms and harvest the crops. However, this arrangement was made on the understanding that the actual marriage consideration would be paid at a later stage by the coming generation.

3) Payment of Orgolu Kwudo (goats of the compound gate)

As a rule a married woman will not be moved to her husband's home unless sacrifices of orgolu kwudo are made to her deceased ancestors. The ceremony may be performed whether the rest of the marriage consideration has been completed or not.[1] thus, the rite of orgolu kwudo is performed by the husband giving six to eight goats to be sacrificed to the bride's ancestors so that the bride's soul (geshin) may be released to join the new family. As in the case of tengo kwudo, the sacrifices of orgolu kwudo must be accompanied by gifts of sugar, coffee, oil and other small items. However, informants indicate that without the tanyari (rite) of orgolu kwudo the married couple will be regarded as if living in a "camp" and not in a proper matrimonial home. Notwithstanding this, some informants indicate that the rite would not be performed for a bride if the same was not performed for her mother when she was married. In other words, the husband of a woman could, if he wishes, refuse to give the amount specified as orgolu kwudo to his in-laws if he discovered the ceremony was not performed for his wife's mother.

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1. Cf., Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 91.

4) The Su (the incomplete) and the Koru

One of the most striking features of Nyimang customary law, as regards the payment of marriage consideration, is that some of the property must deliberately be left unpaid to be paid by the coming generation. In The Nuba, Nadel says that among the Nyimang:

> A portion of the bride-price is not produced on marriage, and not by the husband himself, but is left to be paid later, by his descendants.... The deferred payments, called su, have an essentially different meaning: they are meant to bring the bride-price to a theoretical total which is standardized for the whole tribe. This standard total amounts to ten cows and four bulls, goats and other commodities not counting.[1]

Thus, as has rightly been pointed out by Nadel, no marriage consideration among the Nyimang will be paid outright even though the actual marriage may be consummated after the necessary rituals have been performed. According to Nyimang ideas, a full payment of the marriage consideration on the spot is considered as a bad omen. Nyimang say that marriage is not like a commercial transaction, that women are not chattels for which the full price must be tendered before or upon delivery. Instead, marriage is a link between two families in which good relations must be preserved for generations to come. Thus, a woman on whose behalf property is being paid must first prove worthy of the property paid by bearing children for her husband. It is because of this implied condition that, should a woman be divorced or die prematurely, the su will be forfeited and the rest of the marriage consideration be refunded to the husband.

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1. Nadel, The Nuba, op.cit., 399. See also Hawkesworth, op.cit., 182; Stevenson, The Nuba Peoples..., op.cit., 180; cf., also E.S. Stevens, My Sudan Years, London, 1912, 278.

The payment of the su is not regarded as a new or additional marriage consideration apart from the first which was agreed upon, but as a debt inherited by the descendants from the preceding generation. The collection of the su itself depends on the marriage of the woman's daughters. In other words, the su is demanded only from the property that has been offered as marriage consideration for the daughter of the woman. This means that the bride's family must wait until their daughter's daughters get married before they can validly claim the payment of the su.

Usually when the time comes, it is the mother's brother who will have the right to collect the su. That is because the father may have been dead by that time. Thus, the mother's brother, known as andir or dir, is the one who collects the su each time marriage consideration is being paid to one of his sister's daughters until the remaining marriage consideration is completed. If, however, the woman has only one daughter, then the mother's brother will collect the su from his sister's daughter, and then wait for another generation until the sister's daughter's daughter is married, whereupon he or his heirs will have the right to ask for the completion of the marriage consideration. At this stage the su is known as koru, which will complete the su.

Informants indicate that should a woman give birth to only male children, then only one bull will be demanded when a senior son is married, and there will be no koru. In any case, the right to the su will be abated should a woman bear no children at all.[1] It has

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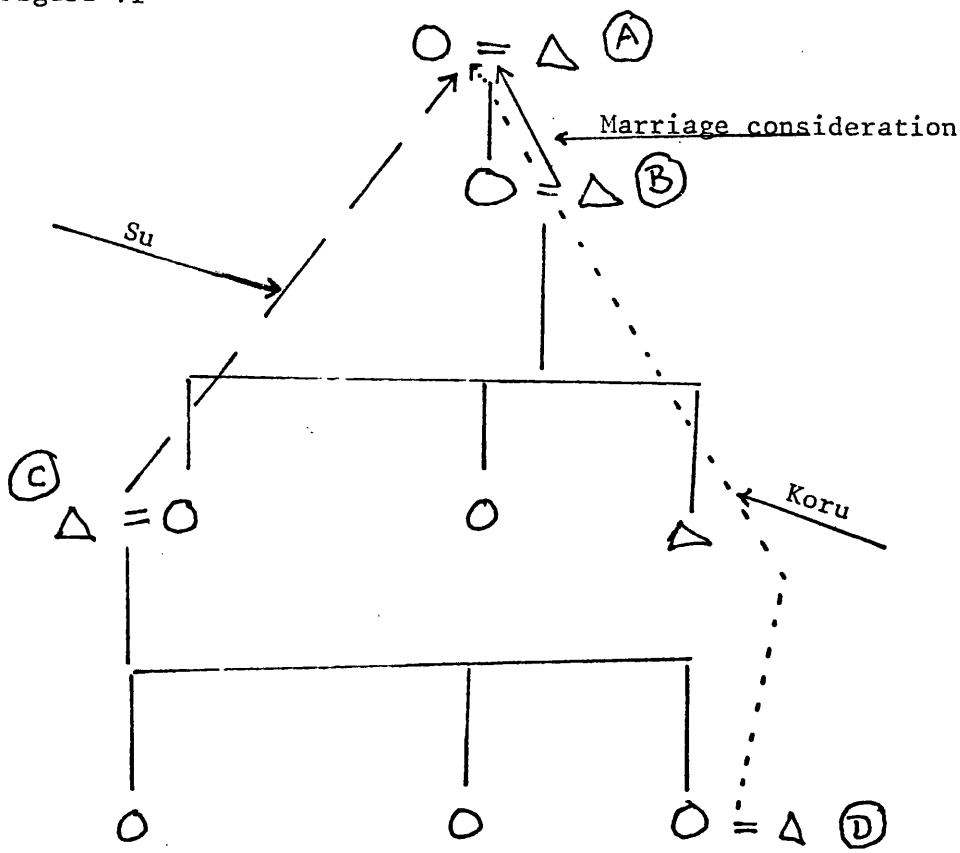
1. Cf., Hawkesworth, op.cit., 182.

been shown that the su must be demanded by the woman's family in the second generation. If, however, the woman has no more than one daughter, then only part of the su is payable and the rest of the debt will survive to be discharged by the third generation. The following diagram is illustrative:

Figure VI



In the above diagram B married A's daughter, but has not paid the full amount of the marriage consideration, which has intentionally been left out as su. When B's daughter gets married to C, A (or his heirs) has the right to collect the remaining marriage consideration as su from property paid on behalf of B's daughter. If, however, the debt is still remaining, then A's heirs can still claim it, this time directly from C when marriage consideration is

paid to C's daughter (now the grand-daughter of A). It is law among the Nyimang that the su can be demanded by the wife's family whenever marriage consideration is being paid to any of her daughters or grand-daughters. But people indicate that as a custom, no su is demanded on the marriage consideration of the wife's first daughter. However, informants further say that in the case of koru only property paid on behalf of the eldest daughter of the wife's grand-daughter may be demanded as koru. In practice, the demands of the wife's family will never come to an end. People say that payment of goats and other gifts to one's affinal relations, especially to mother's brothers, is unlimited.

Apart from the obvious economic reasons for the su institution of relieving the present generation of the onerous burden of paying the full amount of marriage consideration, it has also a hidden spiritual meaning. In this connexion Nadel says that:

> ....the payments [of the su] have the meaning of securing the good wishes of maternal relations for these marriages in the second generation. These good wishes mean, above all, one thing - fecundity. The Nyima bride-price institution thus entails a "guarantee" of marriage which is both concrete and spiritual, and which, transcending the single generation, envisages the continuity of the lineage.[1]

Furthermore, the contractual aspect which pervades the whole system of the Nyimang marriage considerations should not be disregarded. As a firm customary rule among the Nyimang the husband has a right to have his marriage consideration refunded should his wife die or be divorced. For that reason the institution of su

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1. Nadel, The Nuba, op.cit., 401.

was devised so that people should not demand excessive or full payment of marriage consideration for their daughter so as to spare future trouble in refunding the marriage payment in cases of unfortunate events such as the death or divorce of their daughter. In other words, apart from the spiritual aspect of perpetuating the link between affinal relations, the payment of marriage consideration is a condition and a guarantee to the success of the marriage between the parties.

It is this important notion behind the Nyimang system of marriage payment that has been completely disregarded by both Sharia and Civil State Courts at Dilling. The State Courts (acting either as trial or appellate courts) have systematically, though wrongly, declined to acknowledge or enforce the indigenous law as it relates to the su system. This unfounded attitude has its damaging effect on the organizational aspect of the Nyimang society. Fathers, knowing that there will be no way of enforcing a future debt left out as su, tend to ask for the full payment of the marriage consideration. The repercussions on the society are deep and have already led to:

a) the increase of an already higher age of marriage of both sexes in comparison to other Nuba tribes;

b) many girls remaining unmarried, and

c) the most valued Nyimang moral code becoming increasingly meaningless, with the result that more illegitimate children than ever are being born in the Nyimang society.

It is not claimed that the reason for the above-mentioned problems is due solely to the State Courts' refusals to enforce

indigenous laws. What is meant is that laws reflect the people's soul more clearly and truly than any other organism,[1] any misapplication or disturbance of such laws may lead to the disruption of the whole social system. Indeed, Nadel has rightly criticized government policy in trying, unsuccessfully, to reduce the amount of marriage consideration in the Nyimang area in 1927 without taking into consideration the underlying social principles of these payments. He says that:

> ....the intervention of the Government failed to take into account the existence of the theoretical bride-price total and its deferred instalments....Ineasing the economic burden of the present generation, the Government has increased that of the next; it has, unwittingly, intensified that kinship link between the generations embodied in the Nyima bride-price rules. We discover the rather rare instance of a Government-sponsored change of native custom which makes for greater social integration.[2]

It is submitted that the same criticism can be made of the State Courts in Dilling. When faced with the problem of the choice of law, the State Courts used to apply (unwittingly) the Sharia law in matrimonial cases in which both parties are non-Muslims. Such problems are partly due to the parties themselves, as when some individuals tend to take advantage of the Sharia Courts to get round traditional rules that are against their interests. It is unfortunate, though, that the State Courts have played their part in wrongly determining that the Sharia law is the appropriate law applicable in the matrimonial cases when both parties are not established Muslims or have not consented to the jurisdiction of the Sharia Court. In any case, the State Courts would justifiably

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1. D. Hughes-Parry, Haldane Memorial Lecture, 1951, 2, quoted by J.N.D. Anderson, Law Reform in the Muslim World, London, 1976, 1.
2. Nadel, The Nuba, op.cit., 400.

refuse to apply any customary rule if to do so would inflict greater injustice.

TO WHOM IS MARRIAGE CONSIDERATION PAYABLE?

It is a firm customary rule among the Nyimang that only the bride's father, or in cases of his death anyone *in loco parentis*, is entitled to receive the marriage consideration as of right. The father has the absolute right to dispose of such property in whatever manner he sees fit without recourse to the other members of his family. His brothers and children have the right of free consumption of the meat when sacrifices are made; but otherwise have no right to interfere in the way in which such property is disposed of. However, in the case of the father's death, the brothers of the bride have equal rights in the property paid as marriage consideration for their sister. Nadel, however, says that:

> The bride-price is as a rule divided up by the bride's father, who keeps a large share for himself, allots other shares to his sons and brother or brothers, and pays a final share to his wife's brother, as part of the outstanding *su* payment.[1]

It is submitted that, although among the Nyimang a bride's father may opt to divide part of the marriage consideration of his daughter amongst his brothers and children, yet the rule as stated by Nadel is misleading since it suggests that the father has a legal obligation to divide such property between his relatives. The wife's brother (or brothers) alone has a legal right to demand part of the marriage consideration of his sister's daughter "as part of the outstanding *su*".

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1. *Ibid.*, 400.

However, the State Courts in Dilling have taken a different view and stated that only the wife is entitled to the marriage consideration. This, it is submitted, is a totally different notion which does not fit into the general schema of Nyimang customary law. The reason is that the underlying principle of the whole system of the Nyimang marriage consideration payments is remarkably different from that of Sharia law. One such major difference is that the non-payment of the marriage consideration under the customary rules does not necessarily invalidate the marriage contract; while under Sharia law no marriage could be held valid unless mahr has been paid, or at least has been provided for the benefit of the woman. Another major difference between Sharia and Nyimang law is that deferred payment of su is strikingly dissimilar to that known as mu'akhar el sadaq, or the deferred payment of the mahr under Islamic law. According to the Sharia law the mahr and mu'akhar el sadaq or the deferred payment of the mahr, must by law be paid to the wife, either after a specified period of years or in the event of the husband's death or wife's divorce.[1] Under Nyimang law both the original marriage consideration and the deferred payment must be collected by the woman's family. One should therefore agree with Farran when he says that:

> ....As in non-Mohammedan Africa generally it is axiomatic that payment of the bridewealth is not made to the bride herself (for will she not pass at once into the control of her husband and his family?), but to her father and the other members of her family.[2]

It is submitted that this is also true among Nyimang people. However, there has been a systematic and alarming confusion in both civil and

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1. See J.N.D. Anderson, Islamic Law in Africa, London, 1978, 369.
2. C. D'Olivier Farran, Matrimonial Laws of the Sudan, London, 1963, 284.

Sharia State Courts as to who is entitled to the marriage consideration. As has been indicated, the answering of this question involves the question of choice of law.

Investigations of case records in both civil and Sharia courts situated in Dilling have yielded the most interesting facts in which both courts are unwilling to uphold customary rules in matters relating to matrimonial causes. In the following pages an attempt will be made to discuss the attitude of these courts by giving examples of cases tried or disposed of through appeal by the civil or Sharia courts. It must also be pointed out that both civil and Sharia courts have instructed the courts in the Nyimang area not to entertain any actions between parties in which matrimonial causes are involved. Thus, in A'bdin Imam A'bdin v. Uthman Sanousi Atroun,[1] plaintiff raised his action before the Sharia Court (as directed by the Native Courts) against the defendant (his sister's husband) asking for the payment of four head of cattle remaining from marriage consideration for his sister. The District Sharia judge, A'dam Salih Sabil, dismissed the case summarily on the basis of no cause of action.

In a similar case of Elias Mirtin v. Hamad Tia,[2] complainant sued defendant (his sister's husband) for three head of cattle remaining as su of his sister's marriage consideration. The Sharia Court, A'dam Salih Sabil presiding, refused complainant's claim and stated that: "The wife alone has the right of claim to mu'akhar el sadaq. The Nuba custom whereby marriage payment is made to the wife's brother runs contrary to Sharia principles and should not be enforced".[3] It is submitted that the Sharia

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1. A'bdin Imam A'bdin v. Uthman Sanousi Atroun (plaint No.1197/1977- Dilling Sharia Court).
2. Elias Mirtin v. Hamad Tia (plaint No.1021/1977 - Dilling Sharia Court.
3. My translation from Arabic text.

judge is wrong in his decision for two reasons. First, the record does not show that the trial judge had made any inquiries to ascertain whether the parties to the case were established Muslims or had at least celebrated their marriage according to Islamic principles. Such inquiry, in my view, is an important factor in determining any choice of proper law for the application in such cases. This is so, particularly in an area like the Nyimangland, where the majority of marriages are celebrated according to the customary rules. Secondly, on refusing to uphold a customary rule, the judge should at least have indicated that such custom is contrary to "justice, morality or order" as required by the statute. It is not, however, a sufficient reason to reject enforcing a custom merely because it does not conform to the Sharia rules.

REFUNDABILITY OF MARRIAGE CONSIDERATION

One of the various aspects of Nyimang customary marriage is that it renders the whole payment of marriage consideration conditional on the fact that unless the marriage subsists, then any property paid for such marriage must be refunded. This general rule must be read in conjunction with another rule which provides for the deduction of the refunded property in case any children are born of the marriage. It is thus a firm customary rule that marriage consideration should be refunded in the event of the wife's death or divorce.[1] In cases of the death of a woman, the rule is that:

a) if the deceased woman has no children, then the whole marriage consideration, including small gifts, is refundable;

b) if the deceased woman has given birth to children, then deductions are made before property is refunded by the woman's birth family.

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1. See generally, Nadel, The Nuba, op.cit., 401-402.

As these deductions are made per child, viz., one cow per child, the amount to be deducted therefore depends largely on the number of children borne by the woman. If there are many children, then the whole marriage consideration may be swallowed up by these deductions and the husband or his family is left with nothing.

Nevertheless, in any situation of the wife's death, and whether such a woman has given birth to children or not, the husband must be given a ram by the woman's family. In certain cases where a husband has already paid and thus completed the full amount of the standard marriage consideration, then the deceased woman's birth family must give a cow, known as durangu ki to the husband.[1]

It should be pointed out that rules of refundability as outlined above are an old form of customary rules which have undergone some changes in the modern era. Even in the old days, a husband or his family was not always entitled to recover the marriage consideration (apart, of course, from the durangu ki) each time a wife dies. For the husband to be entitled to the recovery of the marriage consideration, the wife must have died while she was still of child-bearing age. Thus, should an old woman die, then no property would be refunded even if such a woman had died childless.

Nowadays, refunding of marriage consideration because of the wife's death, is not done quite so often as it was in days gone by. The general trend is towards the abolition of the rule. This is due partly to the intervention of the State Courts and other social changes in the Nyimang area.

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1. A durang is a sort of braided hard rope tied around the waist of a mourning widow instead of the traditional girdle of blue beads.

According to the old law, should a wife be divorced then her husband is entitled to have the marriage consideration refunded. In theory, the complete marriage consideration is refundable if a divorced wife has no children. But if she has children, then deductions are made similar to death cases, viz., one cow per child. However, the law existing now, as indicated by informants, is that: If a husband is to blame for the divorce of his wife, then he will not be entitled to the refunding of the marriage consideration. Some informants state that the same rule should apply even if a wife deserts her husband (while she is still in his home) and the husband subsequently divorces her. This is so unless it could be established that the wife's birth family is held responsible for the wife's desertion. Conversely, a husband is entitled to the full refunding of property paid as marriage consideration should his wife be held responsible for the divorce, or should she desert him or refuse to return to him while she still lived with her birth family.

If a wife has eloped (while she is still living with her birth family), then her guardians must be held answerable for the repayment of the full marriage consideration to her first husband. As a rule, under the law no immediate refunding is enforceable unless the wife's birth family has ready property. In the majority of cases, the husband has to wait until his divorced wife gets married to another man, whereupon the husband may claim his rights. If no property is paid, then the debt will be pending to be recoverable by the next generation.

In the following divorce case the tension that exists between Sharia and customary rules and the subsequent injustice done by the refusal to apply customary rules is obvious. In Jumā Hassan Arjoun v. Doura Ariny,[1]

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1. Jumā Hassan Arjoun v. Doura Ariny (10/78 - Tundia People's Court).

plaintiff's father married defendant's father's sister and paid two head of cattle and eight goats as part of marriage consideration to the defendant's father in his capacity as the guardian of his sister. The marriage did not prosper and the woman was subsequently divorced, whereupon she got married to another man. According to Nyimang customary law any property paid as marriage consideration (subject to the deductions for the children) must be refunded to the first husband. The woman's family of birth could not be allowed to receive marriage consideration twice for the same woman. Both plaintiff's and defendant's fathers (the original parties to the problem) were dead at the time of the institution of the suit. According to the disputing parties, both plaintiff's and defendant's fathers told their respective sons of the existence of the debt. Plaintiff therefore brought this action in his capacity as the heir of his father before the Tundia People's Court claiming the refund of the above-mentioned marriage consideration in kind, or alternatively, the sum of LS117. In answering the claim, defendant admitted the debt for two head of cattle, but denied the debt of eight goats. Defendant further added that he was ready to pay the whole debt if the plaintiff took an oath on the fetish (spear of a kwüni) to corroborate his evidence (especially with regard to the eight goats). Plaintiff consequently took the oath as required, and the Local Court found for the plaintiff as against the defendant.

For unknown reasons, plaintiff initiated a case before the Resident Magistrate's Court asking for the execution of the Local Court's judgment.[1] The Resident Magistrate, Faisal M.A. Mussalam, ruled that the Tundia Local Court has no jurisdiction to entertain this type of case

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1. See S.21 of the People's Local Courts Order, 1977, which states that the Local Courts are responsible for the execution of their judgments within the ambit of their jurisdiction.

(matrimonial case). He asked for the papers of the case which he subsequently referred by a note to the Sharia Court, asking for its opinion on the matter. In replying to the Resident Magistrate's note, The Sharia Court stated that the wife alone has the right to claim the mahr. However, the rest of the note by the Sharia Court is ambiguous and need not worry us here. What is objectionable is the improper introduction or application of the mahr notion to the Nyimang customary marriages. As has been indicated above, application of Sharia principles to customary marriage are irrelevant unless the parties are established Muslims or have celebrated their marriage according to Sharia law or have submitted to the Sharia Court's jurisdiction. Thus, since under Nyimang customary law marriage considerations are different from Islamic mahr, the wife does not have any rights over property paid as marriage consideration on her behalf as prevails under Sharia law.[1] As is obvious, the main issue in the case should not be whether the wife is entitled to the marriage consideration or not (as the wife herself is not a party to the present case), but whether plaintiff (as the heir of the deceased father) has a right to claim property, paid by his father on a broken marriage, from the defendant who is the heir of a person who received such property.

Although the record does not show what happened after the note from the Sharia Court, one can see that the case is full of procedural irregularities, and it is not known why the Resident Magistrate intervened in a case that had finally been disposed of by the People's Local Court without any appeal from the parties concerned. The judge has certainly acted contrary to Section 14(3) of the People's Local Courts Act, 1977.

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1. Cf., Farran, op.cit., 284.

It is stated under that section that State Courts are not allowed to try cases, except on appeal, that have already been decided upon by the People's Local Courts. Thus, even if we accept that a Local Court has no power to try personal cases, which is not the point here, then it is a procedural irregularity which should be pleaded by the aggrieved party on appeal.

Moreover, one is not inclined to agree with the Resident Magistrate when he stated that the Tundia Local Court has no power to try personal cases. The reason for this disagreement is that Section 12 (1)(2)(3) of the People's Local Courts Act, 1977, in limiting the powers of the local courts, never mentioned that these courts should not try personal cases.[1] Had the legislature intended to exclude personal cases from the People's Courts' jurisdiction, they would have done so. It is thus almost axiomatic that if the law is badly framed, then it is for the legislature to change it.[2] Furthermore, both the Resident Magistrate and the Sharia judge totally misunderstood the nature of the dispute, and thus were unable to determine the proper law to be applied in this case. As no proper inquiries were made as to the religious identity of the parties, the reference of the case to the Sharia Court for opinion is also submitted to be wrong.

This approach on the part of the State Courts is due, in the present writer's view, either to the ignorance of the existing statutory laws which state clearly that customary rules in the Sudan are regarded as the main source of the substantive law, or to the overzealousness of some professional judges to apply Sharia law to parties who are either not

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1. Cf., ibid., 251, n.8.
2. Cf., the People's Local Court Order, 1977, S.20, which empowers a higher court to hear again any case tried by a Local Court if it is seen that injustice is being done.

Muslims in the first place, or have not celebrated their marriage according to the Sharia law. In both situations the results are catastrophic. It is, however, an established principle of law in the Sudan that in any case of personal matters of non-Muslims the appropriate law to be administered should be the customary law of the parties unless, of course, it is contrary to justice, morality and order. Thus, under Article 9 of the Permanent Constitution of the Sudan, 1973, it is provided that:

> The Islamic Law and custom shall be the main source of Legislation. Personal matters of non-Muslims shall be governed by their personal laws.

This general notion has been elaborated under Section 5 of the Civil Procedure Act, 1974 and Section 13 of the People's Local Courts Act, 1977. According to Section 5 of the Civil Procedures Act, 1974, questions concerning family relations and the general devolution of property shall be determined by:

> Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by the decision of a competent court.

One should, therefore, agree with Akolawin when he cautions the judges of State Courts against unheeding interference with rules of personal laws of the parties, unless not to do so would entail a graver harm.[1]

EFFECT OF MARRIAGE ON PROPERTY RIGHTS

In the majority of the world societies, the institution of marriage is based not only on lines of sexual satisfaction, but also along property

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1. See N.O. Akolawin, "Personal Law in the Sudan" (1973), 17 JAL, 165.

lines.[1] It is almost universally acknowledged that the legal systems of each society may vary considerably as regards the effect of marriage on the property rights of the incipient parties.[2] In those legal systems where the concept of community property is partly recognized, and notwithstanding any legal reforms, the social supremacy of the husband is also widely reflected.[3] Under the old English Common Law rule (now abolished), the maxim was that "husband and wife are one, and the husband is the one".[4] This obsolete notion of English Common Law principle gave little recognition to the rights of a married woman to acquire and dispose of any kind of property independently without her husband's consent.[5] Sharia law, however, is different in that it accords full recognition to the married woman's rights to her own property.

Under Nyimang traditional law the legal position of the married woman as regards her property rights is highly unsatisfactory. Generally speaking, a married woman among Nyimang has a legal capacity to acquire property even without her husband's knowledge. However, once she has acquired property and valuable durables (e.g., livestock and land) such property becomes her husband's own property. Informants are unanimous in indicating that, among Nyimang, a married woman lacks legal capacity to dispose (apart from her personal effects) of land, livestock, and fowls without her husband's consent as the property does not belong to her, but to him. It is perhaps this unhappy situation which has led Hawkesworth to think that:

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1. See P. Vinogradoff, Outlines of Historical Jurisprudence, Vol.2,. London 1922, 197.
2. Farran, op.cit., 274.
3. See W. Friedmann, Law in a Changing Society, London, 1972, 268-269.
4. See Bromley, Family Law, op.cit., 347-355ff.
5. See Blackstone's Commentaries on the Law of England, bk.2, Ch.29.

> In Nuba custom, a woman has no legal individuality. She is merely a res....[A]fter her marriage she becomes the property of her husband. In no circumstances has she any legal right either to property or to her children.[1]

It is submitted that this is not true of the majority of Nuba tribes. It seems that Hawkesworth is apparently confusing two different concepts, viz., legal capacity and legal personality.[2] Thus, while it is true that a married woman, in the majority of Nuba tribes, may lack capacity in disposing of certain types of property, she is endowed for all other legal purposes with full legal personality, and in no way is she regarded as a mere res or the property of her husband, as claimed by Hawkesworth. In many circumstances, widows and elderly women among the majority of Nuba tribes, amy be regarded as feme sole for all property purposes.

Thus, although woman are generally regarded as inferior to men in Nyimang society, this subordination has little effect on their legal personality or indeed upon their other legal rights. But as regards their rights in disposing of certain types of property, the position of woman cannot be calimed to be a happy one. Traditionally, a married woman must work for her husband on his farm, look after livestock (especially watering), cook for him and look after the children. Under the Nyimang traditional law, a husband has a right to chastise his wife should she refuse to work on his farm, prepare food for him or perform any kind of duty required of her by her husband. In the old days, crops collected from the wife's farm were considered as the property of the husband, and she could not dispose of them without his consent. When divorced, she was not allowed to take a single grain from her own farm produce.

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1. Hawkesworth, op.cit., 187-188.
2. For the different meanings of the two concepts, see A.N. Allott, "Legal personality in African law", in M. Gluckman (ed.), Ideas and Procedures in African Customary Law, 1969, 181-184.

According to Nadel:

> In the patrilineal societies [of the Nuba] the property rights of the women are essentially usufructory rights; they lapse with divorce - the divorced wife is not allowed to take "her" crops or share in the farm produce with her.[1]

The above statement is true of the old customary rule which existed in the Nyimang area. In the modern Nyimang, however, a married woman has acquired more freedom to dispose of her farm produce in the manner she sees fit. The new trend among the Nyimang people is that a divorced woman may be allowed to take part (though not all) of her farm produce. She must share the crops with her husband or leave part of them to her children. In any case, the right of the woman to dispose of her crops is limited to sesame, beans, ground nuts and bullrush millet, but does not include grain.[2] Even today a divorced woman among the Nyimang is not allowed to take with her a certain type of grain known as mondor tabar, which is mainly cultivated in the men's distant farms.

Generally, a married woman can use the proceeds of her farm to buy various things for herself and her children in which things she may gain absolute right. Nevertheless, should a woman purchase any kind of livestock or even a fowl, then she gains no rights over them. As a rule, all types of livestock and fowls are regarded as men's property. Thus, should a woman come into possession of livestock whether through sale, gift or by whatever means, she does so on her husband's behalf and the property in them rests by law in her husband. The husband, therefore, becomes free to dispose of such property in whatever way he sees fit, even without consulting his wife. He can use them to pay his own

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1. Nadel, op.cit., 52.
2. Ibid., 51.

personal debts, to pay as marriage consideration to obtain a wife for himself or for his sons. But after the death of the husband, only the woman's male issue are entitled to inherit this property to the exclusion of their step-brothers.

Under the old Nyimang law, women do not inherit any property rights in land or livestock. The maximum right a woman could obtain is limited to a life interest. The rigour of this rule applies whether a woman stays unmarried with her family of birth, or with her husband's family. In theory, as has been indicated, should a woman acquire property (especially livestock), she does so on behalf of her male guardians, i.e., a father, brother, husband or son. After marriage a woman may be provided by her father or guardian with a certain amount of property which she takes to her husband's home. Such property may consist of livestock, the traditional plank bed known as kubang, crops, cooking utensils and personal ornaments. In some cases her father would provide her with a farmland known as tusulu/terengu or tengu korong (as they are known in different parts of Nyimangland). It is thus a firm rule of law that all livestock, brought by the woman as ante-nuptial property into her marital home, must belong to her husband. On the other hand, she has the right to retain her other ante-nuptial acquisitions. In the case of the farmland provided for her by her father, the woman's right of interest-holding over such land is absolute. She can utilize this land in the way she wants. If she intends to dispose of such land, she may consult her husband only by way of courtesy, and in any case may dispose of it even without her husband's consent.

Any type of property acquired by a married woman during coverture must by law belong to her husband. This at least is the orthodox view

of the Nyimang customary law. In practice, and especially nowadays where in urban areas women have gained a certain amount of economic independence, the old customary rule cannot be held to be fully operative. Thus, because of the introduction of cash economy, girls' education and the general enlightenment in the area, coupled with the introduction of Islamic notions among some relatively sophisticated Nyimang,[1] women have become more aware of their legal rights. The presence of the Sharia Courts in Dilling town have added a favourable dimension towards the recognition of women's rights. In any matrimonial dispute women tend to go to the Sharia Courts to enforce rights over property acquired by their sole effort in defiance of their husband's customary claims.

However, as a wife is required to work on her husband's farm and carry out the domestic work, a husband is under legal duty to maintain his wife and provide her with a decent home. He must give her a cultivable farm and must ensure that such farm is properly fenced. He (the husband) must occasionally help his wife in farming and harvesting her crops. In addition, and as a strict rule of law, a husband is held answerable for his wife's debts and for any tortious liabilities. Furthermore, it must be noted that all gifts (other than livestock and land) made by the husband to his wife during coverture are irrecoverable in the event of divorce or the death of either party.

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1. Among certain Muslims of Kurmiti and Nitil women are allowed to inherit property according to Sharia law.

CHAPTER V

RIGHTS AND INTERESTS IN LAND AMONG THE NYIMANG

1. THE NYIMANG CONCEPTION OF LAND

Under Section (3) of the Land Settlement and Registration Ordinance, 1925, land is interpreted to include the following:

> "'Land' includes benefits to arise out of land and buildings in land and also any interest in land which requires or is capable of registration under this Act other than a charge but including the right to cultivate a determinate or determinable area of land although its situation may vary from year to year."[1]

The statutory definition of land, as it appears from the above section, is fundamentally different from the Nyimang conception and meaning of land. Under Nyimang customary law, keil (land) means the soil itself. It refers exclusively to the fixed hard surface of the earth upon which people live, build their settlements, cultivate farms and graze their animals. Land, for the Nyimang, does not include any benefits arising out of it nor does it include any natural fixtures that are permanently attached to it. There is a Nyimang myth which says that at the beginning of the universe land was created without rocks or mountains. The sky was so near the earth that it almost touched it. One day, an old widow was making her food and, being harassed by the nearness of the sky, scorched it with her hot cooking stick. Roaring in pain and panic the sky dropped rocks and mountains and fled to its present height. Rocks and mountains are, therefore, not part of the land.

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1. See also the Prescription and Limitation Ordinance, 1928, s. 2, where the same definition of the land is reiterated. Cf. the Law of Property Act, 1925, s. 205 (1) (ix).

According to Nyimang ideas, land does not include things produced through human acts such as houses, planted trees, and crops. Moreover, things that lie under the soil (water and minerals) are not considered as forming part of the land. Similarly the sky or the space above is not considered as land. Thus, principles such as "cujus est solum ejus est usque ad coelum et ad inferos", which form part of the definition of land under English law, do not hold good under Nyimang customary law of property. Under the English law, as is the case under the general Sudanese law, land is not regarded as comprising merely the surface; it includes, inter alia, fixtures, the air above it up into the sky, the sub-soil and whatever lies there underneath right down into the centre of the earth.[1]

However, since there is a total lack of any kind of minerals in the Nyimang land, importance is not accorded to whatever is embedded in the soil. Thus, the holder of the absolute or paramount title to the land would not be entitled to things or property found over or under his land. That is because title to the soil (keil) does not carry with it 'ownership' of those interests upon or under that soil. He who finds a property upon another's land has a better right of claim than the iran (master) of the land. His, the finder's, right is defeated only by the right of the original owner of the lost chattel, who has better title against the whole world (including the finder). A slight but important difference must be noted in the Nyimang concept of land, and that is: a distinction must be made between the land

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1. Cf. Cheshire's Modern Law of Real Property, 12th edition, London, 1976, 155, where he states that this maxim has been eroded by statute.

itself, as the hard surface of the earth (keil), and the enjoyment of interests upon it such as korong (farm). It is the latter which may be granted or borrowed and which conveys no rights over the land or the soil itself.

Under the Nyimang law, as indeed is the case under most traditional African Laws[1], trees which grow naturally on the land or are planted by human activities are not part of the land (keil). In many cases, title to these trees may be held by different persons. The iran (master) of the land is entitled only to those trees planted by his own efforts. There is, however, disparity of opinion concerning ownership of some trees. That is, a situation arises where a person is allowed onto another's land as a gratuitous tenant, and new trees grow while the land is under the tenant's utilization. Customarily, these trees belong to the tenant exclusively. Yet there are some informants[2] who state that the original land holder has a right to share the trees with the tenant. In any case, all authorities agree that ultimate title to these trees eventually falls into the ownership of the original land holder. But this is not contrary to the important fact that rights over trees and rights over the land (keil) may be exercised simultaneously by different persons. The law among the Nyimang is similar to that as generally stated by Saeed M.A. El Mahdi:

> "Trees growing on A's land may not belong to A. If D purchases A's land, he may be labouring under the wrong impression that he is buying both the land and the trees. The real owner of the trees may then interfere to protect his right."[3]

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1. See T.O. Elias, The Nature of African Customary Law, 1956, 166.
2. Personal information to the author.
3. Saeed M.A. El Mahdi, A Guide to Land Settlement and Registration, Khartoum, 1971, 36.

Accordingly, a person who controls the land does not necessarily control the thing either within or upon it. It thus follows that a holder of an interest over a certain piece of land may opt to exercise his rights over that land so long as he does not interfere or prejudice the rights of other interest holders, e.g. the owner of a well situated on another's land is allowed to take any amount of water for his sole utilization. If the land is being cultivated a path must be prepared for that purpose. But the owner of the well is prevented from acts detrimental to the holder of the soil, i.e. if there is cultivation he would not be allowed to drive animals into the farm for watering purposes.

The concept of land (keil) among the Nyimang should be understood to refer narrowly to the soil itself, irrespective of and without relation to interests in it. This narrow interpretation of land is behind the general misapprehension by some writers of the nature of Nuba land holdings.[1]

2. PROPERTY AND RELIGION

If one examines in depth the relation of religion to land, one may say that, in the Nyimang concept, land is not regarded as a fetish nor does it represent any form of deity. It has no shrines of its own, and, since land is not worshipped per se, there are no professional earth priests in Nyimangland. But certain hills (mede) in the Nyimang area are "understood in a mystical sacred sense".[2]

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1. D. Hawkesworth, "The Nuba proper of southern Kordofan", (1932/33) 15 S.N.R. 187.
2. S.F. Nadel, "A study of shamanism in the Nuba Mountains", (1945/46), 76, J.R.A.I. 33.

These hills are consecrated as being the first to be inhabited by the invading ancestors. For that reason, special priests known as medu iran (hill masters) are to be found in each of the Nyimang sub-tribes, and are regarded as the keepers of the hills. The function of these hill masters (medu iran) is to perform rites and sacrifices to propitiate the hill spirit and to placate misfortunes whenever a common catastrophe or a disease is imminent, thereby ensuring both the continuity and welfare of Nyimang society. Acts such as the organisation and blessing of the age-grades or the circumcision ceremonies fall exclusively within the domain of the hill priests. Apart from the general invocations to the hill spirits to bring about social well-being, hill priests do not officiate at any public or communal rites or sacrifices concerning land. Nadel is wrong to assume that the guardians of the hill (the priests), were concerned, inter alia, with rites connected with land.[1]

Despite the foregoing, many aspects of the people's practices and their attitude towards the land (keil) clearly indicate the existence of a kind of vague awe and veneration of the earth (keil). This suggests that the Nyimang concept of the land is not purely empirical. Of course, this could also be said of most African societies. Russell has stated that:

> "To many Africans, land is not a commodity but a 'nature, which is not produced by man ...' Any value it has is an intrinsic or psychic value, and this emotional value often surpasses the money value it would have as a factor of production. For Africans land has a mystical quality."[2]

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1. Ibid.; cf. Nadel, The Nuba, 1947, 445, where he stated that "other spirits are concerned with the fertility of the land or the fecundity of women".
2. K. Russell, Land Reform: A World Survey, London, 1977, 358.

The idea of the religious significance of land can be demonstrated by a multitude of cases from many parts of Africa. In most African societies ancestral 'ownership' of land is prevalent.[1] There exist everywhere sacred places that are guarded by taboos, disregard of which calls for an atonement in the form of gifts and sacrifices to the divinities. Obi[2] tells us that among the Ibo there are certain sacred bad groves connected with the divine spirits, and these would not be utilized unless permission was first obtained from the deities. In the Ewe of Ghana, Kludze[3], enumerates certain instances where the land spirit must be venerated, otherwise misfortune is inevitable. Allott reports that, according to the Ashanti view, land belongs to the ancestors, and that "the most important religious aspect of land tenure was in connection with the earth-spirit, Asas Ya ('Earth Thursday')."[4] In the Sudan, Deng reports that the Dinka cannot sell their land because the religious attributes it embodied are seen as forming the necessary link between the living members on the one hand and the "ancestral and clan divinities" on the other.[5]

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1. See C.K. Meek, Land Law and Custom in the Colonies, 1968, 6, where he says that "Religion often colours the attitude of peoples towards the land, and many cling to the exhausted soil because their ancestors lie buried there. Indeed, in Africa, the ancestors are commonly regarded as the real owners of the land."
2. S.N.C. Obi, The Ibo Law of Property, London, 1963, 35-6; P.C. Lloyd, Yoruba Land Law, 1962, 72.
3. A.K.B. Kludze, Ewe Law of Property, London, 1973, 105-07.
4. A.N. Allott, The Ashanti Law of Property, Stuttgart, 1966, 140; see also Audrey I. Richards, Hunger and Work in a Savage Tribe, London, 1932, 155, where the author said about the South-Eastern Bantu tribes that "tribal deities are also associated with a definite tract of land", and that "Ancestors remain associated with a given area for a very long time, even after the original occupiers of the land have moved elsewhere".
5. F.M. Deng, Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan, New Haven and London, 1971, 272.

Indeed, among the Nyimang people, land (keil), in its abstract concept, is believed to be endowed with hidden powers capable of destroying human life unless duly propitiated. There are some sacred places that should not be fouled in any way by human beings. In addition, certain rituals and observances must be obeyed so as to increase fertility, add to the general prosperity of society, and to avoid general catastrophes and personal misfortune. These observances are governed by ritual ceremonies and taboos (kworung).[1] The consequences of omission or violation of these taboos are believed to entail supernatural sanctions in the form of personal or general diseases, or the destruction of the crops. Such violation is also believed to be dangerous to the very existence of Nyimang society.

Nadel has observed that "the Nyima equally consider quarrels and fights over cultivated land an evil thing, though no sanctions are admitted".[2] However, despite the vagueness and over-generalization of this statement, it faithfully summarizes the people's general attitude towards their lands. As will be made clear, contrary to Nadel's contentions, there are various quarrels over land that are always followed by religious sanctions. It is unlikely that people should systematically obey any sort of rules, be they secular or religious, without producing plausible justification (at least to their own satisfaction) for doing so. Thus, in the traditional

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1. A sacred place or thing is said to be akuri. It is forbidden (kwir) or taboo to defile a place or a thing which is said to have kworung, or sanctity.
2. S.F. Nadel, The Nuba, op. cit., 459.

societies, as indeed in advanced societies, rules are followed for the most part out of fear that their contravention may be sanctioned by an overt or covert punishment. The following of a certain rule in the hope of reward has the same driving force.[1] The Nyimang do not quarrel over land to which they have a defective title, as they fear that they may die if they are proved wrong.

One of the most common oaths among the Nyimang is to pick up a handful of soil and touch it with one's tongue so as to demonstrate one's "truthfulness". It is believed that a person who falsely swears by the soil will die and be buried in the earth. Deng tells us that "a Dinka will swear on land to establish his truthfulness". This, he says, "symbolises his submission to the judgement of the ancestors".[2] It is submitted that the implications of the willingness to submit to the judgements of the ancestors through the oath by earth is also true of the Nyimang people.

There exist all over the Nyimang land some areas that are considered sacred places (akuri). These places are mostly associated with supernatural powers or ancestral spirits. For example, places where the shira used to sit, or places which the great consecrated shamans (kueer) used habitually as their sitting places (mostly under big trees) would be regarded as sacred. Also places where warriors, in the old days, used to assemble in preparation for an expedition, and which are known as kedangu tagil (the standing place of the warriors), and places where the elders of the village usually sit, known as gudi, also fall under the general

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1. Cf. Sumner and Keeler, op. cit., 348, where they say that religious sanctions are always included in the taboo.
2. Deng, Tradition and Modernization, op. cit., 272.

category of sacred places. Bad areas (li kusudo) are places believed to be haunted by evil spirits.[1] Such places are feared, and settlements are not usually built in such areas unless a person has a 'strong good luck' and continuously makes sacrifices to the spirits of such a place.

Theoretically, no acts of possession or ownership should be exercised over such places by cultivating the soil or cutting the trees, and human beings are not allowed to foul such places. Defilement of these places is considered a sin that should immediately be rectified by presentation of sacrifices of fowl and libations of beer (ashi) to the spirits of the place as a purification: this ritual is known as agelda (washing oneself from pollution), failing which, the culprit would suffer bad luck. Kronenberg says that a woman would not be allowed to enter the gudi[2] of the shira, especially at the time of rain ceremonies, otherwise rituals for her purification would have to be carried out for which the woman would be required to bring along ashi (beer) and a goat. Places that were believed to have been inhabited by the progenitors or the forefathers of a certain clan would be regarded as sacred (akuri) only to the members of that clan.

Graveyards have a special kind of sanctity, as they are believed to be haunted and inhabited by the spirits of the dead known as geshin. Children seldom approach such places. Kronenberg says that it is a kwir to sit on or point at a grave, and that the geshin would kill

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1. R. Critchfield,"The Changing Peasant: The Magician", 1979, 28, A.U.F.S., RC-3-79/6.
2. Kronenberg, op. cit., 208.

the offender unless such a person swallowed a grain of sand to convince the geshin that he (the culprit) is one of them.[1] Oaths are sometimes taken upon these grave sites. Land asked for for burial purposes must be readily given by the holder. If a grave has been prepared for a person who was believed dead, but subsequently recovers, then a fowl must be buried in his place as a salvation for his soul, and this is known as lu ilo tanyari[2] (the ritual of removing the shadow).

One of the most fearful practices of sorcery in Nyimangland is performed to seek the aid of the earth spirit to destroy thieves or enemies. This is known as gumo nida (killing or striking by a hole).[3] The soil is obtained from the culprit's footprints and buried in a hole together with the blood of a red cock. It is believed that the offender and all his family members will be struck by an obnoxious disease and will eventually die unless sacrifices of fowl and libations of ashi (beer) and other gifts are presented to a certain shaman to perform rituals to absolve the curse. This terrifying means of recovering property is seldom applied, as it is believed that this curse will fall squarely on both the respondent and the applicant.

A piece of land may be rendered sacred temporarily by human action through the direction of a supernatural power. For example, when a shaman is about to be consecrated, his shrine, known as kodi, will be removed from his compound and fixed in a conspicuous place on any man's

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1. Ibid., 199.
2. Ibid., 198.
3. See R.C. Stevenson, "The Nuba Peoples of Kordofan Province", op. cit., 206.

land regardless of the permission or objection of the land owner. Such land becomes akuri (sacred) and will remain under the control and utilization of the supernatural power for at least eight years.[1] Such a place becomes a temporary sanctuary where people may seek protection and take their oaths, and a repository where they can deposit their unguarded crops under the sole protection of the supernatural power. Whoever defiles or steals from this place commits sacrilege that would call down the wrath of the guardian powers, and the culprit would be visited by a disease calling for his death unless purification rites in the form of sacrifices of a fowl and beer libations, together with certain gifts named by the supernatural power, are performed.

As mentioned earlier,[2] the Nyimang say that land (keil) is the creation of abradi (God), and so is not a deity in itself. However, a person who clears land for cultivation or settlement purposes must make offerings and prayers, either to the spirit of the owner, or, if the land is virgin, then invocations and prayers must be made to the creator abradi - God of the universe. The address runs as follows: é wudang no, keilu iran, é kéilo biran shiyé ... 'you that person, master and creator of the earth', the prayer continues, 'I offer you this small thing so that you might be happy and protect us and this farm from the worms of the earth. Please make the grain not to stay too long in the soil and guard it till it ripens ...'. A sacrifice of a fowl and a libation of ashi (beer) would be made. This ceremony

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1. The limitation prescribed here is a provisional period during which the consecration is contemplated to be ended. As a general custom the shaman may remain upon the land as long as he wishes.
2. See Chapter II above.

is known as li shil wurda (cooling the place). Technically, it is a keil tayen ashida (appeasing the land). In cases where the land has a reputed holder (iran), then only the iran is eligible to perform such tanyari (ritual). That is because it is believed that only the iran (master) of the land has the capacity directly to contact and propitiate the earth spirit. The items for sacrifices, which include ashi (beer) and fowl, must be provided by the person intending to settle or utilize the land.

A piece of land may be designated as keil kabar (hot or bad land), if its holder and his family members should die childless.[1] It is believed the spirit that dwells in that land is of an evil nature. Such land is feared and no acts of permanent holding are exercised over it. Although this land may be enjoyed by the public, no person can assert his title over it, and no quarrels are allowed to break out over its trees or over the cultivation of the soil.[2] To do so provokes the spirit of that land which would curse an offender with bad luck. Sometimes this land may be known as miro keil (land of fire).[3] If the deceased had no male children, then such land could not be inherited by the deceased's relatives unless the heir submitted to marrying a

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1. Kronenberg in his article "Some Notes on the Nyimang Religion", op. cit., 199, rightly said that: "There is always a reason for the premature death of somebody". Actually, any death among the Nyimang must have some cause, even if it was for the bad spirit of the land on which one lives.
2. Cf. Nadel, The Nuba, op. cit., 459.
3. The life of a person is likened to a glowing fire, and to ensure continuity in this world, a person must have a male child to kindle his fire and keep the continuation of the line. However, as land among the Nyimang stands in a category of its own, it cannot be inherited unless the heir agrees to step into the shoes of the owner, and shoulders the onerous responsibility for keeping the fire for the deceased. In the case of male children, the responsibility falls automatically.

wife on the deceased's behalf (ghost marriage) and produce children for him to save the deceased's name and soul from oblivion.

Nadel has already observed that there exist in the Nyimang society certain shamanistic spirits who are held responsible for grain and the general fertility of land.[1] The Nyimang ideas of fertility have been expressed more lucidly by Stevenson in the following:

> "With the Nyamang the emphasis in religious beliefs is on fertility and growth ...; fertility springs from Thowor, a wonder-maker supreme over offspring and grain. Thowor induces conception in women, and is present to ensure the growth of grain."[2]

It is true that the traditional religion of the Nyimang admits the existence of only one God known as Abradi, the creator of the universe.[3] In the Nyimang concept, God has delegated his powers to many junior spirits and supernatural powers, each of which is responsible for a certain aspect of life and human activity. The spirit Thowor, or Thoot, is believed to dwell under the surface of the earth, and is held responsible for the growth of grain and fecundity of women. In effect, Nyimang agricultural festivities throughout the year express and re-inforce in one way or another this fertility cult. Basically, these festivities aim at the individual's well-being, and hence involve the need to placate bad spirits in the society. These festivities form a central part of the people's existence, and mark the continuation of their society. The earth,

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1. Nadel, The Nuba, op. cit., 45, 453; Cf. his article "A study of Shamanism in the Nuba Mountains", op. cit., 33.
2. Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 95.
3. See Nadel, "A Study of Shamanism ...", op. cit., 34 and passim; R. C. Stevenson, "The Doctrine of God in the Nuba Mountains", in E.W. Smith (ed.), African Ideas of God, London, 1950, 211-13; Kronenberg, op. cit., 208, says that "The Nyimang have a conception of an otiose god whom they call Abradi. He is in the sky; he created man, and gave to the rainmaker (shilla) the equipment and special powers necessary for his office".

as the residence of the powerful ancestral spirits, symbolises an omnipotent but hidden power and displays a unique force in the universe. For that reason annual ceremonies must be performed to propitiate the concealed power in the earth. These annual festivities, which mark every phase of the Nyimang agricultural year[1], may be regarded as a periodical revival of a constant allegiance and connexion of the people to mother earth.[2]

Each year at the beginning of the agricultural season or before the tasting of new crops, and indeed before harvesting, certain rituals and ceremonies are performed by the whole Nyimang tribe as a thanksgiving to the deities for the present plentifulness. Prayers and libations are made to the supernatural powers for general posterity and future prosperity.[3] The people would suffer misfortunes if these rituals were not obeyed.

One of the most important fertility cults among the Nyimang is the ritual of konyingar tal or konyingaru tanyari (the ritual of eating bean leaf).[4] This is a thanksgiving ritual held in the middle of the rainy season when the crops have reached a certain maturity. After the ceremony, people are allowed to eat maize and other quick maturing sweet sorghum, which are cultivated in the tiny (home farm). The ritual must be initiated by the clan of the rainmaker, followed by

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1. Stevenson, "The Nuba Peoples of Kordofan Province", op. cit., 158.
2. Cf. M. Gluckman, Politics, Law and Ritual in Tribal Society, Oxford, 1965, 104. There the author explained the ritual value of land in tribal societies by saying that: "The ritualization of land is partly in relation to the manner in which land produces sustenance".
3. Cf. Nadel, The Nuba, op. cit., 44, where he says that these festivities are of an abstract nature which tend to "ensure in a comprehensive fashion, the health and posterity of the community".
4. See Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 83; id., "The Nuba Peoples of Kordofan", op. cit., 158; Kronenberg, op. cit., 206.

the remaining Nyimang sub-tribes, one after another. The social significance of this sequential order is well understood by Nadel, who has said that:

> "The pragmatic significance of these agricultural rituals, moreover, goes beyond that of a mere single event for the benefit of the local farmer. In many tribes the different hill communities do not perform a particular agricultural rite all together on the same day, or at their own discretion, but one after the other, in accordance with a strict traditional order. By means of this 'roster' of ritual performances the religious organization accentuates tribal unity and ensures that each hill community is kept aware of its place within the wider social unit."[1]

The ceremony of the konyingaru tanyari is, therefore, an invocation to the ancestral spirits to go to the fields and guard the growing crops.[2] Libations of ashi (beer) and sacrifices of fowl are performed in the compound of each family, and the first shoots of the bean-leaves mixed with sour milk are offered to the ancestral spirits of the offering family to induce the blessing for protection of people and property.[3] The following prayer is illustrative: 'Please, father (or grandfather) now it is your turn to go to the field. I have done my part of cultivation, now it is you who should look after the farm, make it yield good and plentiful crops; let us enjoy the harvest without flower (quickly). Please father, keep your eye on the property, be merciful and protect the kiye (livestock) from an evil eye. Cover the compound with your strong wings, and remove all illnesses from the

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1. Nadel, The Nuba, op. cit., 45; cf. Gluckman, Ibid., 104.
2. Cf. H.A. MacMichael, "Seasonal Festivals at Gebel Midob", (1919), 2, S.N.R. 95, passim.
3. Cf. A.I. Richards, Hunger and Work in a Savage Tribe, op. cit., 154.

family members so that we may be alive next year to present you with sacrifices and konyingar; who else would keep your name from oblivion?'[1]

During the rainy season, while the crops are still growing, all group singing and dancing is completely banned as being detrimental to crop growth. Nadel says that singing is forbidden as the shouting would hinder the growth of the crops, "or that the spirits which are said to dwell in the growing grain would attack revellers".[2] In my opinion, this is equally true of the Nyimang, but with a slightly different sanction. Here, the supernatural powers, if disturbed by the shouting, would not attack the revellers; instead, they would either send a strong wind to destroy the whole cultivation or work to stop the rain.[3]

The sway of the agricultural tanyari (rites) continues to proceed, and by approximately October/November, the jal (ǧal) ceremony is performed. This is a general purification rite executed at night in the Nitil sub-tribe (portion of rainmaker's clan). People scream and shout loudly, throwing burning logs out of their homesteads.[4] The noise of shouting spreads quickly over Nyimangland. The rationale of the custom is that these shouts and the throwing of the burning timber would expel all evil spirits (geshin - the spirit

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1. See Kronenberg, op. cit., 206.
2. Nadel, The Nuba, op. cit., 44; see also Stevenson, "The Nuba Peoples of Kordofan Province", op. cit., 159.
3. While in the field, I noticed that the Salara sub-tribe was severely hit by a drought which rendered life difficult. People consulted the kuni on this misfortune. Among the reasons adduced by the kuni and the elder generation, was that the incident was an obvious outcome of the disregard for the singing taboo by the youth before the crops had reached their maturity.
4. See Kronenberg, op. cit., 212; see also Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 84.

of the deceased person, dusur - a person believed to have been resurrected after his death, li - general misfortune) from home and crops to the far end of the world, to a place known as kedenge - the abode of all bad spirits. A dish may be prepared from the new grain and offered to abidi (ancestral spirit) before the new grain is consumed.[1] After the rite has been performed people must abstain from working in their farms for not less than seven days, during which time the farms are believed to be under the care of ancestral spirits. It is said that disregard of this custom of seven days rest angers the supernatural powers who might sanction the destruction of the crops by a strong wind.

Shortly before the harvest season begins there is held an important tanyari (ritual) known as kurum (black ant). This rite is held under the auspices of a professional ancestral spirit called kuni Shishere in the Kalara sub-tribe.[2] The whole ceremony of the kurum, as its name indicates, is connected with wishibi (ant hill), where, in the Nyimang mythology, grain was believed to have been first found.[3] Libations of beer and food made from the new grain are offered to the kuni Shishere as a thanksgiving.[4] The ancestral spirit Shishere is asked to disperse any evil from the home and go to the fields to protect the crops from damage.[5] The head of the

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1. Only crops from the home farms would be consumed by that time; but crops from the distant farms would not be touched unless another rite is performed.
2. Cf. Kronenberg, op. cit., 206, who wrongly thought that the ceremony was held in Tundia sub-tribe.
3. See Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 84.
4. This is a general festivity held in one place and is attended by the whole Nyimang society. Porridge and food made from the new grain are prepared and carried to the place of the ceremony and consumed freely by the attendants.
5. For prayers for this particular occasion, see Kronenberg, op. cit. 206-07.

kwunidu koydi (vessel of the kwuni) will be shaved symbolically on behalf of the community as if removing the old evil and promising the community a new and prosperous year.[1] It is, however, kwir (taboo) to eat or make ashi (beer) from the new grain unless the kurum ceremony is performed. Otherwise the transgressor will die of a stomach disease.[2] After the main ceremony of kurum has been held in the Kalara sub-tribe, people are then allowed to perform the ceremony of monong kanyer (new grain). Here each individual family performs its own thanksgiving to personal ancestral spirits asking permission to go safely to the harvest. The whole community would then start another busy season of harvesting crops from the distant farms.

The distinguishing feature of the Nyimang customary law of property, as indeed is the case with most, if not all, African traditional laws, lies in its relation to religious practices and beliefs. Sir Henry Maine in his celebrated studies has already emphasized the interrelation of religion and law in primitive societies. Speaking about law in ancient societies, he said that:

> Quite enough too, remains of these collections, both in the East and in the West, to show that they mingled up religious, civil and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the later stages of mental progress. [3]

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1. Cf. MacMichael, op. cit., "Seasonal festivals at Gebel Midob", 95, and passim.
2. Cf. A.I. Richards, Hunger and Work in a Savage Tribe, op. cit., 158, where the author, commenting about the rites of the first fruits among the Zulu said that "The rites appear to have a double function - the public and ritual exercise of prerogative throughout the community, and the removal of danger believed to be inherent in the eating of the new crops".
3. Sir Henry Maine, Ancient Law, Everyman edition, London, 1972, 9.

He further stated in another work that:

> "There is no system of recorded law, literally from China to Peru, which, when it first emerges to notice, is not seen to be entangled with religious ritual and observances."[1]

Most of the above propositions are true of the traditional Nyimang society. The Nyimang society lacked centralised political institutions, and depended largely on the rule of self-help, and refuge had to be sought in religion and divine laws for property protection. It is therefore truely stated by Sumner and Keeler, that:

> "In the point of fact, property had a sanction which was long antecedent to law; before formal secular law existed, religion guaranteed property."[2]

The satisfaction which the individual Nyimang finds in this religious protection is of a universal character which forms "part of the cultural heritage of a society"[3] that lacked any system of formal machinery for application of secular laws (in its traditional form)[4] for the protection of the individual's interests. Fundamentally religion is concerned with the well-being of the society as well as with that of the individual. It is for such factors, mentioned above, as social continuity, protection of interest, general prosperity and fertility rites in connexion with property, that religion plays such a significant part in the Nyimang society.

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1. Id., Early Law and Custom, London, 1901, 5. For the criticism of Maine's tehory, cf. Diamond, Primitive Law, Past and Present, London, 1971, 47-50, and passim.
2. W.C. Sumner and A.G. Keeler, The Science of Society, 2 vols. New Haven, 1946, vol. I, 339.
3. Cf. K.S. Carlston, Social Theory and African Organisation, 1968, 9.
4. This does not mean the absence or total lack of secular laws in the traditional Nyimang society. Indeed, there existed a multitude of cases which were not sanctioned by the supernatural powers and which were left entirely to human discretion.

3. THE POLITICAL ASPECT OF LAND

Land control and land entitlement

Since the Nyimang people lacked any centralised political organisation responsible for land control, our discussion will be centred on the general question of how land has acted as a politically cohesive force amongst the most individualistic and warring communities of the Nyimang tribe. According to tradition, the present location of Nyimangland was originally inhabited by some Hill Nubians.[1] The Nyimang people were believed to have come from the westernmost area of the Nuba Mountains[2] in about the sixteenth or seventeenth century; they drove the indigenous Hill Nubians away and made their settlements on the tops of the hills they took. Each of the seven Nyimang sub-tribes was autonomous and remained virtually outside the influence of other sub-tribes. At first they were few in number and inhabited only the summits. Later on they came down in groups to cultivate the lands lying immediately at the base of the hills. This enabled brothers to live and farm in the same area and stick with each other for fear of attacks from enemies. Likewise family groups belonging to the same lineage or clan would build up their farms near each other for defence purposes. In the early stages the farms managed by the people were very small, being mere strips of land prepared in parallel lines hillwards, so that escape might be facilitated at the first sign of danger. The following diagram may be illustrative:

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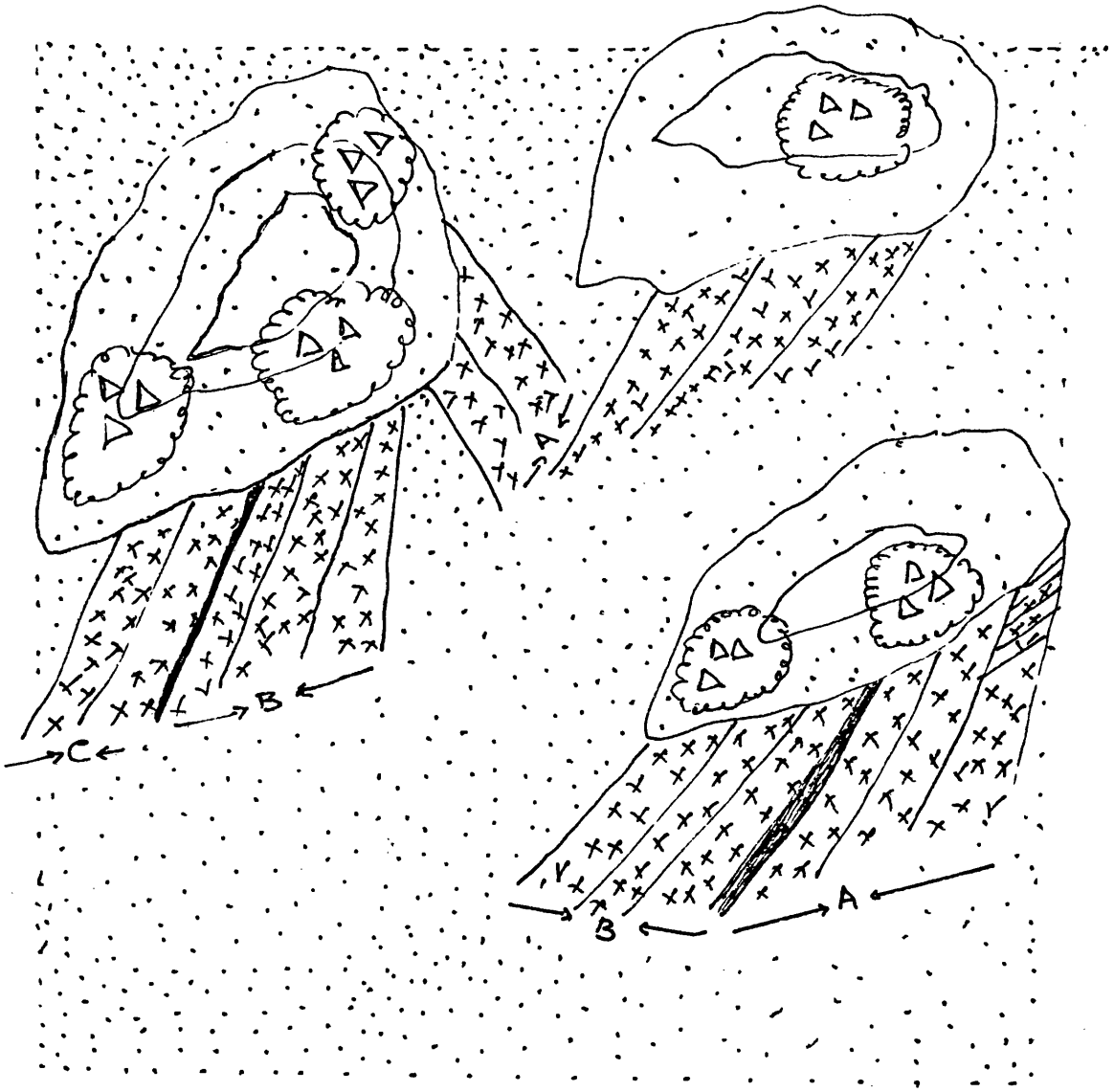
1. Cf. J.W. Sagar, "Notes on the history, religion, and customs of the Nuba", 1922, 5, S.N.R., 138-39; see also Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 77.
2. Ibid., 77; see also Nadel, The Nuba, op. cit., 5.

Figure VII : Early Nyimang Settlements



1. Settlements on the hill summit.
2. Hills.
3. Home farms - tiny.
4. Forest and grazing land.
5. A.B.C. group of farms prepared towards the hill. The individual plots of land belong to individuals of the same family. Sometimes the group of farms represented here by A.B.C. may be held by a lineage or clan group; but nevertheless, within this general lineage or clan holding individual plots would always be held by individuals or family that represent the actual or the basic landholding unit.
6. Boundaries between group farms.
7. Farm boundaries within the group.

It thus follows that at these early times members belonging to the same family, lineage or even wider clan must of necessity be found in the same area where they could co-operate for defence and other social activities. From this simple fact it is evident that the traditional system of landholding among the Nyimang was centred entirely around a kinship organisation; and this, it is generally agreed, has effectively fostered political solidarity and economic interdependence between the kindred. Vinogradoff made the general observation that:

> "Solidarity between the members of a clan or of a kindred required in the beginning a close proximity in the occupation of the land and constant economic co-operation. The natural basis for social relations ... must necessarily be found in the soil."[1]

If one considers the Nyimang traditional system of landholding, the clan or the lineage could maintain its existence as a group of social and political organisation by promoting alliances between all or a section of its members at least for the purpose of land administration. The formative principle upon which such alliances are based derives from the moral duty of a group and its individual members to defend property belonging to any of its members against strangers. When we say that a Nyimang traditional system of land-tenure was based on lineage or clan organisation, we do not mean to imply that the lineage or clan was regarded as a corporate body with separate legal persona independent of its members: a concept

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1. P. Vinogradoff, Outlines of Historical Jurisprudence, vol. I, London 1920, 321.

prevalent in many West African peoples.[1] All that is meant is that individuals and families, who form the basic strata of the landholding unit, would cultivate or build their settlements in an area dominated by their lineage or clan members.

Plots belonging to individuals or families of the same lineage would be identified and separated from each other by some conspicuous boundary (lulu) (usually a series of holes in which stones would be half-buried). Landless members of the kindred would be allowed to enjoy residential and cultivation rights over such lands if residing in the village or within a reasonable distance from the land. Control of such land was in the hands of the family heads. To recapitulate: the group of families belonging to the same lineage or clan would unite and make their farms and settlements in one area over which they exerted common control in the sense of defending it against aliens. There was no single allocating or controlling authority within the group, apart, of course, from the individual family heads (as being the heads of the ultimate landholding units) whose discretion was absolute. At that early period, the allocation or administration of the land within the family or lineage did not endow the land-owner with any special authority deriving from his position as a land-controlling body. Land was given free to the entitled members (i.e. those physically capable of exploiting the land) of the lineage. The acquisition and tenure of land was neither uncontrolled nor "collective" or "communistic" by the clan

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1. For the meaning of corporate or legal personality in an African context consult: A.N. Allott, "Legal Personality in African Law", in M. Gluckman (ed.), Ideas and Procedures in African Customary Law, 1969, 181-83 ff.

or the lineage members.[1] The absolute title to land would always be held by the first occupier or settler and the land thus acquired is known as that person's temel (axe). This is taken to indicate the acquirer's original effort to clear and appropriate the land, and his consequent sole power to control of such land was absolute. Other clan or lineage members exercised subordinate and dependent rights over such land and might also be said to have a residual power of control vis-à-vis strangers when the question of self-help arose; after all, there was a moral obligation upon the lineage or clan members to defend or help restore property belonging to one of their clan members if taken by force by enemies. Another example where the lineage or the larger clan were interested in land held by one of its own members can be seen in the following situation. A piece of land whose iran died without male issue or nearest male agnates would be available for appropriation by any of the surviving members of the lineage. But even within this lineage there must be found someone who would be reckoned as the next of kin to inherit the land.

Relation of Land to Political Cohesion

Despite the continuous enmity in the old days amongst the Nyimang sub-tribes, individual persons expelled or banished from their own communities for some serious crimes, e.g. murder, might seek refuge in other Nyimang sub-tribes. They are known as beshi bilé (persons from a different home). The term beshi bile is used in

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1. The only areas where the people had the right of common utilization were grazing and virgin land where the individual member had not established rights by first occupation.

contradistinction to such names as kishi and solu. The word kishi in the Nyimang language is used to designate all non-Nyimang who belong to other Nuba tribes. Solu is used to denote Arab elements. Both elements are allowed into the society on a limited scale. Even now, apart from government officials, only one solu at Sallara and one kishi at Tundia live permanently in the whole Nyimang traditional area. They are always treated as aliens. However, there were very few immigrants from outside the Nyimang tribes into the Nyimang land.[1] To acquire rights over land, a stranger must first find a host family to accommodate him. In former years, strangers who wished to settle permanently would not be accorded an independent status, but would be adopted by a pre-existing group, and final integration would be completed by forming the ritual of blood brotherhood. This was performed through tasting of milk from a heifer on the hearth (manda) in the centre of the compound. Thereafter the stranger would sever his previous ties and acquire a new status with full rights and duties within the new community. Land would be allotted to him by his new family head for cultivation or settlement purposes. In other African societies, for example the Yoruba, Lloyd tells us that:

> "When land was plentiful it was the advantage of a community to give out land to strangers; by the increase in its size it became more important and powerful; individual members of the communities lost nothing by their generosity and so nothing was demanded of the newcomer but his allegiance."[2]

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1. Cf. Nadel, The Nuba, op. cit., 29, where the author states that the "immigrants are received everywhere very friendlily and accorded the same rights with regard to land as are native members of the community".
2. P.C. Lloyd, op. cit., 89.

The above proposition is also true of Nyimang society. Nevertheless, although group migrations were rare in the Nyimang's recent history, people recall how members of certain families had migrated from one Nyimang community to another. Such migrant families would sometimes preserve their own identity, and hence be allowed to keep their old clan names. Of necessity, they had to find allies, i.e. a host family or a lineage with whom they would enter into blood brotherhood so that they might secure protection and have access to the lands of the new community. No marriage would be entered into between the two parties. Allocation of land to these immigrants would be the sole concern of the individual families, and no permission could be sought from any sovereign, as there was none.

The second phase of the evolution of the Nyimang land tenure came after the people had established themselves firmly in the security of their hilltops.

If one compares Nyimang with other African societies it is true to say that land among the Nyimang did not have the pivotal function, the centre around which the whole political system revolves, which is commonly a feature of other African communities.[1] Nevertheless, the importance of land as an element of cohesion should not be

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1. Cf. I. Hamnett, Chieftainship and Legitimacy, London and Boston, 1975, 63, and passim; see also Allott's The Ashanti Law of Property, op. cit., 140-41, where he states that, "The Ashanti system for the control and enjoyment of interests in land was fundamental to the whole structure of government so much so that, if one removed the land rights of the chiefs, the basis on which they held their office and exercised jurisdiction over their subjects would be destroyed"; also Cf. A.I. Richards, Land, Labour and Diet in Northern Rhodesia, London 1939, 262.

disregarded. It is almost universally evident, both in primitive and in advanced societies, that land has always been a factor of the unity in a given society. Writing about the political role of land in medieval England, Cheshire has stated that:

> "When the country settled down after the upheaval of the Norman Conquest, the social bond which, both on the public and on the private side of life, united men together in a political whole was the land. Broadly speaking, land constituted the sole form of wealth, and it was through its agency that the everyday needs of the governing and the governed classes were satisfied."[1]

With some advances in feudalism in medieval England, one could say that land was also the only link which united the Nyimang people, especially at that early time. Each of the Nyimang seven-and-a-half hills (mede kolad sui eid) remained autonomous from the rest. Nadel states that, in the Nyimang, "traditional political control was largely diffuse and rudimentary, and rose to conscious unitary leadership only in tasks (sic) of war".[2] This is acknowledged to be true about the traditional Nyimang political leadership. It was only when questions of common defence or raiding into other tribes arose that the role of land as a unifying element was manifested. The various Nyimang sub-tribes would unite when the supremacy over their territorial land was challenged by a distant common enemy.[3]

The question of defending land and other properties became of the utmost concern at both village and tribal levels. This provoked some regroupings of the villages for defence purposes. Members of

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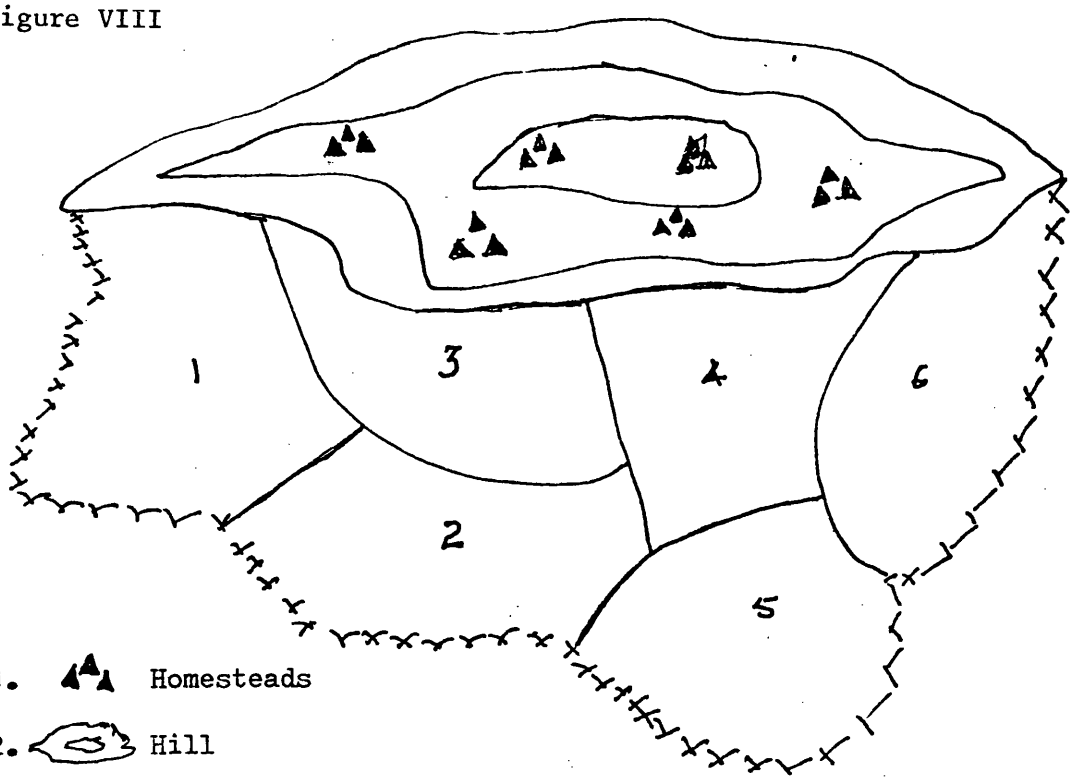
1. Cheshire's Modern Law of Real Property, op. cit., 5.
2. Nadel, The Nuba, op. cit., 447.
3. Cf. Carlston, op. cit., 40, where the author states that wars between the tribes "helped to hold the group together ... they served to maintain group identity and group boundaries".

each village, most of whom belonged to different lineage or clan membership, would construct a large thorny fence around their cultivable land, which would be neither far from the foot of the hill nor from where they lived. The fence would be constructed by the common village labour of all residents and sustenance would be provided by the village women. Scouts would be sent out at intervals to inspect and report any damage which had to be repaired immediately. As a guard against sudden attack, a person would be placed at the summit of a hill to watch for an approaching enemy and sound the alarm by shouting. Consider the following diagram.

Figure VIII



1. Homesteads
2. Hill
3. 1, 2, 3, etc. Farm plots
4. ××××× General fence
5. Internal farm boundaries

Note the internal boundaries between the various plots within the common fence. Also note and compare the shape and pattern of the plots with Figure above.

As time passed, the people had grown in number and the capacity of the villages became larger; members from different clans, lineages and other strange elements resident in the same village came closer to each other for the purpose of common defence of village lands. The idea of common residence or territoriality started to find acceptance with the people, and, although the kinship basis of landholding was not eroded as yet, individual members could also acquire rights in land by mere residence.

As a new development, the general scope of the individuals' basis of rights to land widened from the narrow family or lineage organisation to the larger village or territorial organisation which comprised members from different clans, lineages and included strangers from other Nyimang sub-tribes.[1] All these members were saddled, inter alia, with the same responsibility of defending not only their village lands but also the whole territorial area. Diamond rightly notices that in a similar situation:

> "It is ... usually at the level of the village or similar unit that the kinship relation combines with the territorial principle of division, and village is the lowest and basic political unit of the people".[2]

Village communities among the Nyimang emerged not as a necessary substitute for the traditional lineage or clan organisation, but as

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1. Informants say that it was necessary that different members from different clans and lineages should reside indiscriminately in one area, so that minority groups could find protection from their stronger neighbours if need for self-help should arise. Traditional social facilities, such as free access to consult the kuni (the ancestral spirit) or to enjoy the services of the rainmaker (the shira) were provided to all inhabitants of the village. Also modern social amenities, such as dispensaries, schools, etc., are provided on a territorial basis.
2. A. Diamond, op. cit., 236-37.

a result of a social and political expedience. As a part of, and indeed to ensure, the concept of territoriality, Nyimang villages are known through geographical landmarks, mostly bearing the name of some prominent hill or permanent watering place, and are not called after the kin-groups that often dominate an area, nor are the villages named after their founders. Although people are always ready to return to their traditional factionalism if any friction occurs between clan members[1], as time goes on the village community has started to gain prominence in general politics, at least at the level of the sub-tribe. Of this phenomenon Nadel says:

> "Territorial chieftainship, though in itself a new principle in this tribe, has emerged from the remarkably happy fusion of traditional structural features - local units and clan organisation. The favourable constellation of Nyima grouping, with its tendency towards a territorial concentration of clans has no doubt greatly helped towards a smooth development."[2]

A Nyimang village is called beshi - home (pl. beshi). The word mede (hill) may also be used (apart from its obvious meaning) to denote either the whole Nyimang tribal land, i.e. amadu mede (the hill of the people), or it could also be used to refer to the territorial area of a certain Nyimang sub-tribe. Thus, if a Nyimang says amadu beshi, amadu mede or amadu keil (home, hill or soil of the people, respectively) he should be understood to be referring to the territorial area of the Nyimang tribe over which the whole tribe enjoys a jurisdictional power. However, each of the Nyimang

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1. It should be noted that there always existed a situation where one group of a lineage or a clan would predominate in a certain locality. This was so especially in the old days, where in the Nyimang patrilineal society, married sons used to take residence next to their paternal homesteads for defence purposes.
2. Nadel, The Nuba, op. cit., 472.

'seven-and-a-half' sub-tribes has its own territorial area over which it has complete power of control, not only to the exclusion of the aliens from other non-Nyimang elements, but also to the exclusion of strangers from other Nyimang sub-tribes known as beshi bilé or persons from different homes.

However, within the different Nyimang sub-tribes the utilization of land is not so flexible as expressed by Nadel.[1] It is submitted that land utilization appeared to be flexible only because of the borrowing system which Nadel himself has acknowledged as being 'institutionalized'.[2] Thus, the overlapping or the mingling of the individuals with other neighbouring communities in the quest for new lands lying within the boundaries of another hill community, does not in itself refute the presence of the boundaries or the rigid and exclusive rights of one community over its lands. Among the Nyimang such boundaries exist; and the recent clashes between the Kurmiti and Kelara sub-tribes and the quarrels of Salara and Hajar Sultan (Shiro wa - people of the rainmaker) over territorial lands[3] is an obvious challenge to Nadel's claim.

As indicated above, in the traditional Nyimang society political power was exercised by the kinship groups. No formal elections existed. The function was taken voluntarily by wa di dia (big men) of the village, among whom would be found several kwunié (shamans)

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1. Ibid., 25, where the author says that "As in the case of village land, there are no artificial boundaries to distinguish the tracts of land belonging to different hill communities".
2. Ibid., 36.
3. Perhaps these bloody clashes over the boundaries may be due purely to the new developments of land and water shortages in the area. But nonetheless exact boundaries exist between the different Nyimang communities from time immemorial, since the first settlements were made.

and the warriors. The shira (rainmaker) was an informal leader only when there was an inter-tribal conflict. However, Nyimang society used to pay customary dues to the shira and to the kwuni so as to secure their services. The former to make the rain and the latter to guard the society from general evil.[1] Customary dues may be rendered either in kind (grain, animals and money ... etc.) or services, as, for example, in former years when the age-grades, etc., would collectively cultivate a farm, build a house, or fence a compound belonging to the shira or to the kwuni. These were tributes, and as such were not regarded as an equivalent to the modern taxes or rents levied upon the people by a ruler. It is true, however, that while these benefits helped the kwuni or the shira to balance his domestic economy, the dues also acted as a means to preserve the dignity of the office itself, and hence introduced another dimension in the relation of the public with the tribal dignitaries, thereby fostering the social ties of the community. Richards, writing about the political significance of the customary dues to the Bemba chiefs, said:

> "The political organization of the Bemba is based very directly upon this system of land tenure as is the case in most Bantu societies. The Umulasa system makes for tribal cohesion in a sparsely populated district, because it emphasises the unity of the village community and brings the people in direct personal contact with their chiefs, possibly their only opportunity of meeting him during the year".[2]

Traditionally, the shira or the kwuni were not considered as

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1. See Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 98; see also Nadel, "A Study of Shamanism", op. cit., 29-31, passim. Id., The Nuba, op. cit., 452, passim.
2. Richards, Land and Labour in Northern Rhodesia, op.cit., 262.

sovereigns, and therefore lacked any proprietary or jurisdictional powers over the Nyimang lands. In other words, these tribal dignitaries had no established legal rights in the dues or tribute produced by the members of the community. It is only when the community itself felt that it needed rain or general blessing that it would render the dues to induce the services in return. It is a self-imposed burden on the part of the community. Individual members are at liberty to pay the dues and contribute to the work, or they may choose to abstain. If they refuse to perform one or both duties then their lands, unlike in the Yoruba or Bemba tribes[1], would not be confiscated. But they will not be allowed by the community members to get away with it. The community, and not the shira or the kwuni, exert pressure on the individuals to secure their contribution for the common good.[2] In former years, the sanction would be enforced by the whole community against the defiant individual by forcibly taking an equivalent of the payments or the services rendered by the rest of the community members. Sometimes an additional fine, usually an ox, would be imposed upon the reluctant member. This fine would either be taken to the shira to appease his anger, or would, in most cases, be distributed amongst the people themselves. If the fine was an animal, it might be killed in a gudi (the sitting place of the village elders) and be consumed by the public.

It is evident, therefore, that among the Nyimang, there were no political authorities concerned with questions of land administration

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1. Ibid., 260; Lloyd, Yoruba Land Law, op. cit., 63.
2. It is said that the shira, if he learns that someone has refused to contribute to his services, would stop the rain. This is an indirect pressure to secure the continuation of the services.

as such. Nadel has rightly noted that:

> "In no Nuba tribe, whatever its political system, is there any special land authority in which the corporate land rights are vested or on whose sanction all such land transactions depend."[1]

He also further states in the same authority that:

> "In most Nuba tribes no central political authority existed in pre-British times that could have taken official cognizance of, or guaranteed land transactions."[2]

Thus, among the Nyimang, as could generally be seen throughout traditional Africa with similar social and political institutions, political office does not carry with it any specified rights over lands, nor does political office demand any allegiance from the people living within a certain jurisdiction. In such societies, it is submitted, territorial units are themselves regarded as a conglomeration of kinship groups professing no higher political authority other than their own family or lineage heads. In this connexion "lineage principle takes the place of political allegiance"[3], and the control of lands remains in the hands of the family heads. In such societies, land was never "usurped by the chiefs", nor was land exploited as a means for power accumulation necessary to give rise and establishment of chiefdoms.[4]

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1. Nadel, The Nuba, op. cit., 23.
2. Ibid., 39.
3. M. Fortes and E.E. Evans-Pritchard (eds.), African Political Systems, London, 1940, 11.
4. Cf. T. Hobhouse, G.C. Wheeler and M. Ginsberg, The Material Culture and Social Institutions of the Simpler People, London, reprint 1965, 253. The authors state that as the societies change from pastoral or hunting to agricultural stage, the authority of the 'nobility' or the chiefs increase as they tend to usurp the rights of individuals over the lands to themselves. Also Cf. Diamond, op. cit., 212.

The beginning of the present part of the evolutionary cycle of the Nyimang tenurial system started virtually and almost immediately after the so-called Nyima Patrol of 1917. After the Government had successfully completed its punitive operations in the Nyimang Hills, the Nyimang were forced to descend from their hill strongholds and build their settlements in the plains which lie within the vicinity of these hills. This dislodging of the people from their original homes, and the involvement of the government with the traditional organisations of the people had a devastating effect on the customary tenure.[1] Not only had the traditional system of landholding entered a new era, but also the whole political structure and, indeed, part of the traditional social institutions, had undergone formidable changes. The introduction of law and order enforced by the government-appointed chiefs also had its effect. This was a general policy based on the principles of Indirect Rule, where meks (chiefs) and sheikhs were appointed in each sub-tribe as government agents for general administration and for tax collection. In addition, native courts were established and were presided over by the newly-appointed chiefs who were endowed with judicial powers to deal, inter alia, with land cases.

One could venture to say that the "pacification" was the last straw; it came just at the time when conditions in the limited areas near the foothills had become congested with the expanding population, both human and animal. The land had become old and exhausted

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1. See D. Roden, "Changing Patterns of Land Tenure amongst the Nuba of Central Sudan", (1971) 10 J. Adm. O, 299.

through continuous utilization. Encouraged by the "pacification" under the Pax Britanica[1], the people started to move more freely, and hence were able to find and prepare new farms further from their settlements near the hills. Villages started to expand and a general "hiving" off started. The quest for new fertile lands in the virgin forests was started at first by individual pioneers who used to go and cultivate in virgin land known as wuro nyigil (birds' droppings).[2] If the new place proved prosperous, then other family members, friends, and others would follow suit and join the founder. As the number grew a village community would come into being. Thus, new villages were created as micropolitical units organized under the principles of residence and territoriality. The original 'finder' would be regarded as a sheikh for the new localised group, which comprised not only the family, lineage and clan members of the finder, but also strangers from other clans and beshi bilé or people from other Nyimang sub-tribes. In their entirety these villages would be regarded as temporary settlements, and the members would owe their political allegiance to the chiefs of the mother village. Likewise, important rituals would be performed in the original home known as beshi dia (big home).[3] As these villages expanded the jurisdictional areas of the meks (chiefs) increased. Since, as stated earlier, the intervention of the chiefs (as government agents) by way of control and the general administration of the land was of very recent origin, it could be stated that in the Nyimang area, as indeed

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1. Nadel, The Nuba, op. cit., 5, 16.
2. That is because virgin land is said to be fertilised naturally either through rotting vegetation or by bird droppings.
3. Now most villages founded through the "hiving" process and which lie in the periphery of the Nyimang territory, have grown big enough to claim some independence from the mother villages.

in the rest of the Nuba Mountains, changes in the system of landholding were parallel to the changes in the political institutions of the people. Nadel was right in pointing out this correlation by stating that:

> "The changes in Nuba land tenure must move parallel to changes in the whole concept of Nuba political existence. Today, land disputes are submitted quite naturally to the modern chief's courts. The political machinery has thus been provided, and has been readily adopted by the people. But it is as important to ensure that the working of the new machinery should be equal to its future task."[1]

It appears that the Native Administration did not last long enough to shoulder the onerous task of land administration, as envisaged by Nadel. After the liquidation of the Native Administration in 1972, Rural Councils became the direct agents of the Central Government in land questions. Now land control and administration have passed into the hands of the Salara People's Council as the agent of the Central Government. For that purpose, there exist in each Nyimang sub-tribe committees of elders, traditional sheikhs and other enlightened members, elected by the people themselves, under the Council's supervision to arbitrate and solve petty disputes relating to land. Difficult cases may be referred to the People's Local Courts or to the Resident Magistrate's Court situated at Dilling town.

As has already been mentioned, traditionally land did not play a major part in the general political structure of the Nyimang acephalous society. Individual rights in land were derived mainly from family membership. It has also been stated that, despite the lack of any centralised political organisation, land has acted as a

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1. Ibid., 39.

cohesive element which has helped in uniting the Nyimang sub-tribes (who used to quarrel among themselves) to fight a distant common enemy. However, by the turn of the twentieth century, a relatively more complex political organisation, initiated mainly by those administering under the Condominium, has evolved[1] from a simpler traditional structure where the lineage or the clan formed the pivot of the political organisation.

Under the new political structure territoriality has become more pronounced. Villages and hamlets are formed in which residence has become the basis of citizenship. Here the political unit is composed not only of lineage or clan members, but also of strangers from other Nyimang sub-tribes (beshi bilé). These strangers share and enjoy full political and social rights like any other original members. But, nevertheless, still traditional concepts and arrangements may be followed in which these strangers must be adopted by the families, and hence be absorbed into the lineage or clan membership of the pre-existing groups.[2] In short, territorial residence has become the bond of citizenship and not the traditional kinship affiliation.

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1. It is acknowledged that the word 'evolution' is not an impressive one, since the new political system was superimposed by the new government for an effective administration. The traditional system was not, therefore, left alone to evolve and change through lapse of time.
2. Nowadays the formal adoption of the strangers and their formal assimilation into clan membership is less significant than it was before.

CHAPTER VI

RIGHTS AND INTERESTS IN LAND (continued)

1. ACQUISITION OF RIGHTS AND INTERESTS IN LAND

i) Historical Process of Acquisition

The historical, social and political organization of the Nyimang society, which was based entirely on the kinship system, coupled with the practices of subsistence economy, may explain the methods by which land was acquired. These factors further explain why holding and control of land among the Nyimang remained primarily in the family groups or in individual members, rather than in an organized single political body. Nadel is of the opinion that the agricultural system in the Nuba Mountains, which is based on shifting cultivation, in addition to the kinship organization which requires that a newly-married son should be allotted new plots, account for a constant demand for new land. He also suggests four methods by which a person may acquire interests in land. These methods are, according to Nadel, by clearing virgin land, succession, or through alienation by sale or lease.[1] To this one would agree, except that, among the Nyimang, lease is not commonly used as a mode of acquiring interests in land. In addition to the above methods of acquisition, one may add gift as one of the methods by which an individual Nyimang acquires interest in land.

To understand the present basis of acquisition of rights by individuals, it is necessary to understand first the historical process by which the whole territory became available for settlement. Nadel

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1. Nadel, The Nuba, op. cit., 29.

has pointed out that:

> "We must picture local groups as having opened up a certain stretch of country which, promising and conveniently situated, they have come to regard as their own by the right of first occupation. And this right would extend not only, step by step, to the tracts of land actually occupied and worked, but also, in a more sweeping though vaguer fashion, to all land in the direction of a natural extension of present land holdings."[1]

This faithfully paints the picture of the Nyimang people. Traditional stories indicate that when the Nyimang first came into their present location they were few and weak. They, in effect, infiltrated surreptitiously and settled on the tops of the hills (whether by permission of the existing inhabitants or not is not clear). In time, they grew in numbers and strength and started to wage organized wars against original inhabitants, most of whom were probably from the Fanda, Kujuria, Wali and other tribes. After some devastating wars, the Nyimang were able to drive away the original inhabitants, and thus requisitioned their lands.

After the Nyimang people had settled down, each of the 'seven-and-a-half' sub-tribes apportioned and thereupon occupied a specific territory of the requisitioned lands. Nevertheless, wars continued with the neighbouring tribes which might occur either on a tribal level or because individual sub-tribes entered into separate wars with their neighbours so as to obtain cattle, or to acquire more land for grazing purposes. An example could be found in the Salara sub-tribe, who claim that they obtained their present land by defeating and driving away the people of Kura (Kujuria). It has already been noted above that the settlement at Salara was the last to be occupied

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1. Ibid., 23.

by the Nyimang. And that the people of Temein (whose tribal land is found to the south of the Nyimangland) claim that they once inhabited the now Salara sub-tribal area, and were driven by the Nyimang people further to the south.[1]

From the above account, it is evident that, in the past, some powerful Nyimang communities had settled on lands belonging to other tribes by hostile means. But it should also be noted that direct wars were not the only means by which land was acquired. On many occasions the Nyimang people used to send regular expeditions and organized raids into the neighbouring tribes for search of cattle or slave hunts. Through these raids they exerted immense pressure on other tribes who preferred to migrate and forfeit their lands, which were then taken by the expanding Nyimang communities. Thus the Tundia people, through continuous raids and hostilities, were able to drive away the people of Fanda (Fada), Kujuria (Kura) and Mandal, further north or north-west, so occupying their lands. Now the area in point is that which lies in the heart of Tundia territory. It is called Fado[2] Kodi (forest of Fada). As its name indicates, it once belonged to the Fanda (Fada) tribe and has been requisitioned by the Tundia people. Similar examples exist in the sub-tribes of Salara, Shiro-wa and Fassu, who through their continuous raids into Wali, Temien and Ghulfan were able to push out the latter tribes further south or south-east. In each case the molested tribes would migrate away from the Nyimang neighbourhood to avoid further hostilities, leaving their lands to be taken over permanently by the Nyimang people.

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1. See Chapter I above.
2. Fada (or Fanda) is one of the Hill Nubian tribes that used to inhabit the area before the Nyimang came.

However, not all lands were acquired by hostile means as described in the above paragraph. It is true that some of the Nyimang lands were ceded to them by tacit consent on the part of some neighbouring tribes. This occurred in places where the tribe was smaller in number, but held relatively extensive tracts of territorial lands most of which were not utilized by its members. A case in point is that of the Dilling tribal lands. Nadel commented on this situation:

> "A small group with a large previous territorial expansion which it can no longer utilize (partly because of the smallness of the group and partly because modern conditions have made expansion in other directions possible) will freely offer its abandoned fallow land to borrowers. This is the case in Dilling, where large tracts of Dilling land have been 'borrowed' by neighbouring Nyima sections."[1]

It is true that most of the areas that lie to the north or the north-west of the Nyimangland are concessions from the Dilling tribe. Also considerable areas were acquired permissively through peaceful means by the Nyimang from almost all neighbouring tribes, notably areas within Gulfan in the south-east and Fanda, Kujuria and Mandal in the north-west. In former years the boundaries within which the Nyimang people exercised territorial jurisdiction expanded each time that individual members dispersed in pursuit of fresh lands.

The expansion of the Nyimang continued, and hence inter-tribal problems over lands increased. The problem of tribal boundaries was temporarily solved when the Condominium government drew formal boundaries between the Nyimang and its neighbours in the thirties. The artificial boundaries drawn by the government did not stop the process of extension by the Nyimang in all directions, which carried

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1. Nadel, The Nuba, op. cit., 37.

on until, almost everywhere, other communities were encountered. In some cases, these boundary contacts resulted in armed clashes between the Nyimang and their neighbours, as in the areas situated in the north or north-west and the south or the south-east of the Nyimang tribe. In the areas that lie to the north-west, the Tundia and Kelara (Nyimang sub-tribes) were involved in constant friction with Kujuria, Fanda and Mandal. In the south or the south-east of the Nyimangland the Salara sub-tribe (Nyimang) entered into armed confrontations with Gulfan and Wali.[1]

The above paragraph is intended to describe how the whole Nyimang community came into effective control of their territorial lands. It has been mentioned also that acquisition of land by the Nyimang community was made mainly through conquest, in which direct wars were fought, or by peaceful means. However, the nucleus for the acquisition of all types of land was either a family group or an individual person. As soon as each territory became available to the Nyimang through conquest, new modes of acquisition could come into operation. Primary modes, in such as the direct occupation of virgin forest land, and secondary modes in the form of purchase, succession, gift, pledge or loan, became common. Direct occupation of virgin land was regarded as one of the most important modes by which most of the Nyimang lands used to be acquired.

ii) Occupation of unappropriated land

In the old days, if new lands were to be acquired, a group of brothers would take up arms and declare that they were going to

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1. See Chapter I above. It should be noted that there were no encroachments on the Nyimang territories from any of the neighbouring tribes.

penetrate the forest: this was known as worongu dwil (opening or penetrating the forest). In the past this was considered a very hard task which needed great endurance and courage. Land thus acquired would be regarded as family land and would be utilized by all family members as of right. Each individual member is considered as an interest holder whose right is inseparable from the rights of other members. That was so unless the land was parcelled or was alienated.

Primary acquisition of rights and interests by an individual member in land was therefore performed by occupation of unappropriated land, clearing it of its trees and bushes, and its conversion into agricultural land or land suitable for human habitation. Legendary stories are told about pioneering ancestors who fought enemies and wild animals in their quest for new land. To some extent, in recent years, clearance of virgin land is still an important method by which individual members of the Nyimang community may acquire absolute titles to land. It is a customary principle among the Nyimang that any person who is the first to clear forest land, known as worong or kodo worong (wilderness of the forest)[1], and thereafter cultivates it, thereby acquires a proprietary right over that piece of land. Such a person is regarded as holding an absolute interest in that land. In other words, a first settler on virgin land establishes a permanent relationship with that piece of land, and the total bundle of rights and interests in it would accrue to him. His superiority in holding such interest is unchallengeable by the family

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1. Such lands are also technically known as woru nyigil (land of bird droppings), as it is believed to be manured solely by the rotten leaves and droppings of the birds.

group or by any political body in the Nyimang. Such a person is said to have acquired a right in land by his temel (axe), and the land he acquired is customarily known as the temel of the acquirer.

There are instances in the Nyimang where an individual person may acquire interests, though limited, over virgin land. This occurs in situations where a person marks a farm by felling trees and bushes over a portion of virgin land. This process is customarily known as gumeir kire (cutting the farm). After the trees have been felled they should be left for three to four years or for a long enough period to allow for their drying out completely. After the trees and bushes have dried out, they should be heaped up and then burnt, leaving a fertile soil ready for cultivation. The process of marking the farms is but a reservation of virgin lands exercised by individual members over common lands.

Customarily, no-one should attempt to cultivate any such land that has been reserved or worked out as gumeir, at least until such time has elapsed as to permit the regeneration of growth of new trees. Informants indicate that the size of the new trees must be equivalent to the size of the wood on which a temeleng (man's axe) is fixed. This is an arbitrary measure which may depend on the special circumstances of each case. After the provisional period of the right of reservation has elapsed, then any other member of the community has the right to convert the land to his own use, and hence acquire by that action a valid primary interest over that particular land. It thus seems that the mere marking or felling and heaping up of the trees in the wilderness does not, ipso facto, confer an absolute and exclusive interest in the person. Permanent and sacred right by temel (axe) is established only when the land is

further put into positive and actual use. There must be something more, like the mingling of the labour of the person with the soil itself, i.e. by cultivating the soil, to invest the acquirer with an exclusive and perpetual right in that land. There is, however, a different opinion which asserts that the mere marking or felling of the trees in the "no man's land" is in itself enough, without more, to confer an absolute interest on the individual person.

A person may acquire some limited rights over land belonging to another individual member of the society. For that reason not every person who fells trees on a piece of land acquires full title under Nyimang customary law. Nadel is of the opinion that when the Nuba clear agricultural farms, the felling of the trees must be started shortly after the rainy season, so that the real holder would have enough opportunity to protest his rights.[1] This opinion is misleading and must be clarified. It is true that most of the people start to clear their new farms some time immediately after the harvest. But among the Nyimang, the clearance of new land, especially when trees are being felled (which is called gumeir kire or korong kire - cutting the farm) is a well known co-operative act which involves the labour of the whole village community. With this sort of public activity, the real holder of the land so cleared need not take that long to discover that his land has been cleared by somebody. In addition, it is unlikely that true virgin land on which trees have recently been felled would be ready for cultivation within only one or two seasons. If, however, Nadel meant the fallow land, jarie, in which marks of

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1. Nadel, The Nuba, op. cit., 29.

cultivation, according to him:

> "... are frequently so much obliterated that one might easily take for virgin, vacant land that is in reality fallow land, only temporarily abandoned",[1]

then the original holder of such land need not worry, because the customary law provides that the new occupier should continue to utilize the land on the borrowing principle. As is noticed by Nadel himself, land may be lent to the new occupant for as long as it can be worked, after which time it reverts to the owner.[2] Customarily, the original holder of the land has no right to expel a new occupier who has settled on his land - even without his permission - as it is taboo to do so.

Nadel has also not stated the Nyimang law correctly when he continues and suggests that, if the land has been cultivated by the new occupier, then the original holder has a right to evict the occupier after two years have passed. He states that:

> "If the mistake is discovered before the planting, the owner may offer a quantity of grain or occasionally money as compensation for the work of clearing the farm, or he may offer to do as many days labour for the occupant as the latter has put in his farm; if the mistake is discovered immediately after the planting, the additional refund of the seed-grain would entitle the owner to recover his land."[3]

With due respect, the present writer has never come across any place in the whole Nyimang area where the above rules exist or are complied with. It has already been pointed out that Nadel misunderstood the gist of the two years' rule. Contrary to what has been stated by Nadel, no time limit is provided by the customary law after which period the original holder of the land is entitled to evict the

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1. Ibid., 29.
2. Loc. cit.
3. Ibid., 30.

occupier from his land. Instead, customary rules emphasize that the original land holder could not reoccupy his land, abandoned by an occupier for any reason; that is because the occupier still retains exploitation rights over that land. It should also be pointed out that in cases of a wrongful clearance of a farm belonging to another citizen, no compensation of whatever nature is paid to the new occupier who has been denied the use of the land. Furthermore, the original land holder would not be required tc clear a farm of similar size, or perhaps work for the intruder in his farm; neither would seed-grain be refunded.

However, it is not claimed that the Nyimang never eject others who are using their fields. What is claimed is that if ever such instances existed, they are exceptions to the general and customary rule, rather than the rule itself. Among the Nyimang, it is a bad thing, and indeed, a taboo, to expel a person who has taken possession of one's land.[1] Thus, in the settlement areas, a person could not be ejected from another's land if the former had built his granaries (tilfu). Some informants go even further and say that a person acquires an immediate right of utilization over another person's land the moment he applies his digging hoe (shigir) to the soil, i.e. if he initiates any acts of possession. If the land lies fallow, as is suggested by Nadel, then no offence is committed in the Nyimang context. That is because, as mentioned, no permission is necessary

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1. This rule is strictly followed, for apart from its religious sanctions, it has also pragmatic significance. People say that the land holder would not expel others from his land, as he (the original holder) knows fairly well, that he would one day need to borrow another person's land. It is not prudent, therefore, to refuse to lend a commodity so permanent and plentiful as land.

to occupy such land. As the Nyimang customary law does not recognize trespass rules, a person who occupies another's land knows full well that his acquisition will be acquiesced to, and hence will be ratified by the original holder. In addition, Nadel himself has rightly pointed out that, "in the Nyima it forms part of the accepted method of borrowing land to occupy any fallow land ..., knowing ... that it has an owner".[1]

Thus, once a person has occupied another's land then it becomes most difficult to evict such a person. Even if one accepted the view that a new occupier could be expelled after two years, as claimed by Nadel, then one is met by another customary rule which lays down that a person who has recently abandoned a piece of land continues to retain the right to utilize the land for periods ranging between two to four years. This right is customarily known as the right of one's milé (spit) or the right to cultivate one's wodé (dung or manured land). It is a grave taboo, among the Nyimang, to re-enter and cultivate a land that has been recently abandoned, lest the transgressor would suffer bad luck. A person may choose out of his own accord to forfeit this right of cultivation. Even then a ritual ceremony must be performed. The person who intends to utilize the land must offer prestations and a token gift of fowl and beer (ashi) to the person who has newly abandoned the land. The latter would then be required to ritually "spit" on the hoe (kadang) of the would-be occupier, thus removing the taboo. Compliance with this rule is strict, especially in residential areas where people used to settle for long periods in

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1. Ibid., 30.

one place to establish a special relation between oneself and the land utilized. The rule is also being followed in distant farms in such areas where cattle camps (wir) are made for manuring purposes.

Nadel also put forward a somewhat dubious reason why the Nuba people generally tend to grab land initially cleared by left uncultivated the same year by other fellow-members. According to him, the reason for "this open theft" is the failure on the part of the grabber to appreciate the good quality of other farmland in the far plains. For that reason, according to Nadel, the grabber becomes envious, and being unable to choose as good land as that "ear marked" by his fellow-citizen, starts to cultivate land which has already been reserved.[1] Again, the present writer must challenge the explanation adduced by Nadel as superficial and non-applicable to the Nyimang people. Stevenson has already referred to the Nyimang people as good agriculturalists.[2] Nyimang farmers can tell what sort of soil is best for a good harvest.

However, among the Nyimang, a person who "earmarks" a piece of virgin land secures a reservation right until such time as it is reasonable to infer that he no longer intends to resume his rights. No person is permitted to cultivate land left fallow for only one season without the express permission of its previous holder. If, however, a person grabs land so cleared, but left uncultivated for a season, then such acts would be considered as a serious interference with one's rights which should be rectified immediately. In the old days, such a problem would have been regarded as an outrageous act

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1. Ibid., 30.
2. Stevenson, The Nuba Peoples of Kordofan, op. cit., 151.

which would be remedied by the force of arms. But nowadays, though people still have inclinations towards self-help to settle this kind of dispute, they generally resort either to the elders of the village or to the customary courts for settlement.

Primary acquisition of land through occupation no longer exists in the settlement areas. Nadel was right in pointing out that each parcel of land in the residential areas has its reputed iran (master or owner). He says that:

> "Vacant land is no longer found in old-established settlements; nor is inadvertent occupation likely to occur in the case of those farm plots which are never left fallow and whose ownership is never in doubt".[1]

Contrary to Nadel's claim, the jarie (fallow farms) and indeed vacant tracts of land exist in the Nyimang residential areas. It is true, as Nadel says, that every tract of land in the settlement areas has a reputed holder, but it is also true that temporary rights of utilization may be acquired through occupation. Perhaps the type of areas reported on by Nadel are those old settlements found on top of the hills. As will be made clear, these old settlements have been completely abandoned since the years of pacification that followed the Nyima Patrol of 1917.

Fluctuations in the village population are a remarkable feature in many African rural areas. The Nyimang villages are no exception. Among the Nyimang there is always a possible decrease and increase in the village population. People who used to live in the recesses and hidden valleys between the hills may decide to move to open areas or a little farther from the foothills to be nearer the main car road

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1. Nadel, The Nuba, op. cit., 30.

or a watering place. Others may move from older villages on account of the fact that most of their village lands have grown old and exhausted due to over-cultivation. They must move into new land, either into relatively newly-founded villages, in the periphery of the Nyimang territory, where there is still room for habitation, or to distant fields to unappropriated land, creating by that new 'colonies' or residential areas. It is worth mentioning that an individual member who moves from village 'A' and settles in village 'B' would not sever his ties with his former village immediately. But his land in the former village would remain open to utilization by other members of the community, especially the newcomers to the village. In addition, people die, migrate to other parts of the Sudan as migrant labourers, or go into active Government service. In many cases a person may shrink the area of his residential farmland for old age, allowing by that more room for the newcomer. All these factors make possible the occasional existence of vacant lands in the settlement areas which may be acquired temporarily by other citizens.

iii) By sale

Traditionally, sale transactions among the Nyimang, were a recognized mode by which a person could acquire rights and interests in land. However, it should be pointed out at the outset that that mode has grown out of fashion in recent years, and is rarely used as a means of acquisition of rights and interests in land.[1] The major turning point, as has been said, occurred after the Nyimang dislocation from their old settlements on the hill summits. People

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1. Individual cases of sale of land still exist among the Nyimang, but it is not as common as it used to be in the old days.

suddenly discovered that they had enough land to utilize with ample security to travel away from fortified settlement areas and grab more land in the wilderness. Even at the time when land was freely sold and bought, it was never regarded as an important commercial commodity. Thus once land became available, because of the relative security on the plains, the demand and the pressure on the settlement lands was relieved. The people then turned their eyes to the fertile fields in the plains, and there was no longer any need to buy land that had grown old through continuous utilization. As will be made clear, Nyimang customary law recognizes two modes of sale transactions in connexion with landed property. One of these modes is considered as a final and an outright alienation of the proprietary interest in land, and hence would pass a good and irredeemable title in the purchased land. The other mode is regarded only as a conditional sale. It leaves the vendor or his heirs an option to redeem the land no matter after how many years. The difference between the two modes is a question of degree depending mainly upon the nature of the item paid as a price for the land.

iv) By inheritance

Individual members among the Nyimang can also obtain rights in land through inheritance. As will appear later, land for the Nyimang is considered as a special type of property, and hence cannot be inherited except by a male issue or by a male next-of-kin. The latter is entitled to succeed only if he accepts to shoulder an onerous responsibility of keeping mir (fire), by marrying a wife and producing children in the name of the deceased holder. A person may succeed to all his father's land if he is a sole heir, or he may

be entitled to some rights if he is one among several brothers. In all cases, the successor acquires all the rights and interests enjoyed by the deceased holder. But the quantum of rights and interests acquired by the successor may differ depending upon whether his predecessor in title had an absolute right of enjoyment or only a temporary one. If, however, his predecessor was an absolute holder who enjoyed a paramount and proprietary interest in a piece of land, then the heir would step into his shoes and acquire the same amount of rights. If, on the other hand, the previous holder of an interest in land was himself a licensee (permissive holder), or if he was a purchaser or a donee whose title would be, according to customary rules, subject to revocation, then the new heir would not be entitled to acquire more than that which had been enjoyed by his predecessor in title.

v) Borrowing

Everywhere in Nyimangland, borrowing and lending of land is regarded as one of the most important and commonest ways by which individual persons may acquire rights and interests in land. According to Nadel the borrowing system among the Nyimang is "widespread and firmly institutionalized".[1] Thus a person may acquire rights and interests in land by the process of 'borrowing', either through an express permission from the original holder, or a person may occupy any piece of land knowing fairly well that such land belongs to another. Traditionally, the original holder has no right to object, especially if the land is not under cultivation,

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1. Nadel, The Nuba, op. cit., 36.

and is expected to ratify this unilateral borrowing of his land. Rights and interests established pursuant to the 'borrowing' process are not mere personal rights that terminate upon the death of either party. They are durable rights which tend to survive the immediate parties to the transaction, and hence pass as a matter of course down to bind the heirs of the parties.

The rite of the Li Koshil Worda (cooling the place) is that in which the borrower is expected to offer prestations of ashi (beer) and a fowl for a sacrifice by the iran (master) of the land. Apart from these things, which are considered as a prerequisite for the ceremony's performance, there are no other gifts or thanksgiving to the land iran to signify a rent intention.

Borrowing transactions are entered into not only between the relatives but also between the members of different clans within the same tribe. Also strangers beshi bile (persons from different homes) from other Nyimang communities may have land lent to them by their friends residing in another community. Customarily, the borrower of the land is entitled to exercise unfettered rights of utilization over the borrowed land.[1] Thus the borrower is entitled to build upon that land or plant it with whatever seasonal crops he chooses. The duration of possession is unlimited. However, during the last decade, as a sign of economic development in the area, people have started to plant economic trees (mangoes, guavas, etc.) and vegetables for marketing purposes. Such plantations are found in Salara, in

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1. In the residential areas the borrowers of the land are generally not allowed to cut certain trees. Thus in most cases the original land holders would tend to keep adig (acacia albida) and fir (ziziphus spina christi)in permanent ownership.

Kobigil and Suda (El-Kook), and in some minor places all over the Nyimang land. But the most important of such plantations exist in the fertile land of Abu Seibe village in the Nitil sub-tribe. There the original land holders have discovered the detrimental consequences of the old custom of unconditional lending of land; and though no active steps have been taken to abolish or supplement the rule by creating tenancies at rent, a condition may now be inserted whereby the borrower of land is restricted from planting any economic trees without express permission from the iran (master) of the land.

vi) Through gift

A common method of acquiring interests in land by individual members is done by way of gift. Nadel seems to regard gifts of land as an unimportant mode of transferring and acquiring rights and interests. Within a general discussion of voluntary gifts of land among the Nuba, Nadel refers to the Nyimang, saying that:

> " ... in the Nyima the wish to render friends or relations a favour of this kind is combined with an economic transaction proper".[1]

This appears to be an underestimation of the existence of land gifts among the Nyimang. One is obliged to disagree with this. Although it is true that gifts of land are not widely made among the Nyimang, this is not to say that gift is not practised. It is universally known all over the Nyimang land for people to make gifts of land to their relatives and friends by way of favour. Thus, a father may make a gift of land to one of his favourite sons as a reward for his services. However, the important form of gift of land is that which is made by a father to his married daughter at the time of her

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1. Nadel, The Nuba, op. cit., 36.

removal to her husband's home. Such land is known as terengu or tengu keil (land or farm of a gourd). It is similar to a 'dowry', and is regarded as an outright gift and is not subject to later revocation.

In each case the gift of land may be made either inter vivos or donatio mortis causa. The person to whom a gift of land is made need not be present at the time of the transaction. Witnesses may be required to determine the boundary of the land, but this is not a condition required to validate a gift transaction. Gifts made by fathers to children are considered as an outright transfer of the proprietary interest in land, and are therefore not subject to a later revocation. However, gifts to friends and other relatives, or even between brothers, are subject to revocation at any time.

From the above general discussion it is evident that the Nyimang customary law does not recognize the principles of prescription and limitation of actions. The grantee of a piece of land is not required to pay any rent or tribute to acknowledge the superior title of the grantor. Thus, the lack of any customary payment does not, ipso facto, act as a bar to the recovery of the reversionary interests by the original land holder.

2. LOCATION AND CLASSIFICATION OF INTERESTS IN LAND

Land utilization among the Nyimang, and the type of the interests enjoyed by the people over it, can better be understood if land is divided according to its geographical location in relation to the people's settlements. However, the general division of land by reference to its geographical site is, in itself, suggestive of the

different types of interests and benefits which may be held and enjoyed by the people over each of the different divisions. Often the enjoyment of the particular portions of land is not only for the primary purpose indicated by the broad designation of its category, but it may also be for different subsidiary purposes. Thus, although land is designated residential it may also be used for grazing purposes. This is particularly so when animals may be grazed and watered in settlement areas. This activity (grazing), in turn, depends largely upon the general seasonal rotation and on the seasonal distribution of labour among the people.

It has already been stated that the whole Nyimang territorial area is called mede (rock, hill) or beshi (home).[1] In this context, the words mede and beshi are used synonymously to refer to one and the same concept, viz., the territorial area occupied by the whole Nyimang tribe. Thus, one could hear a Nyimang say amadu mede or amadu beshi, meaning the hill or the home of the people, respectively. This tribal land is further divided into sub-divisions, i.e. into the seven-and-a-half Nyimang sub-tribes or hill communities as they are often known. Each of these sub-territories is also called mede or beshi of a certain sub-tribe. Thus, one may say Kwolo mede or Kwolo beshi, the hill or home of Kwol or Kwodongul (Kurmiti sub-tribe).

The following diagram illustrates the main categories into which land among the Nyimang may be divided according to its use:

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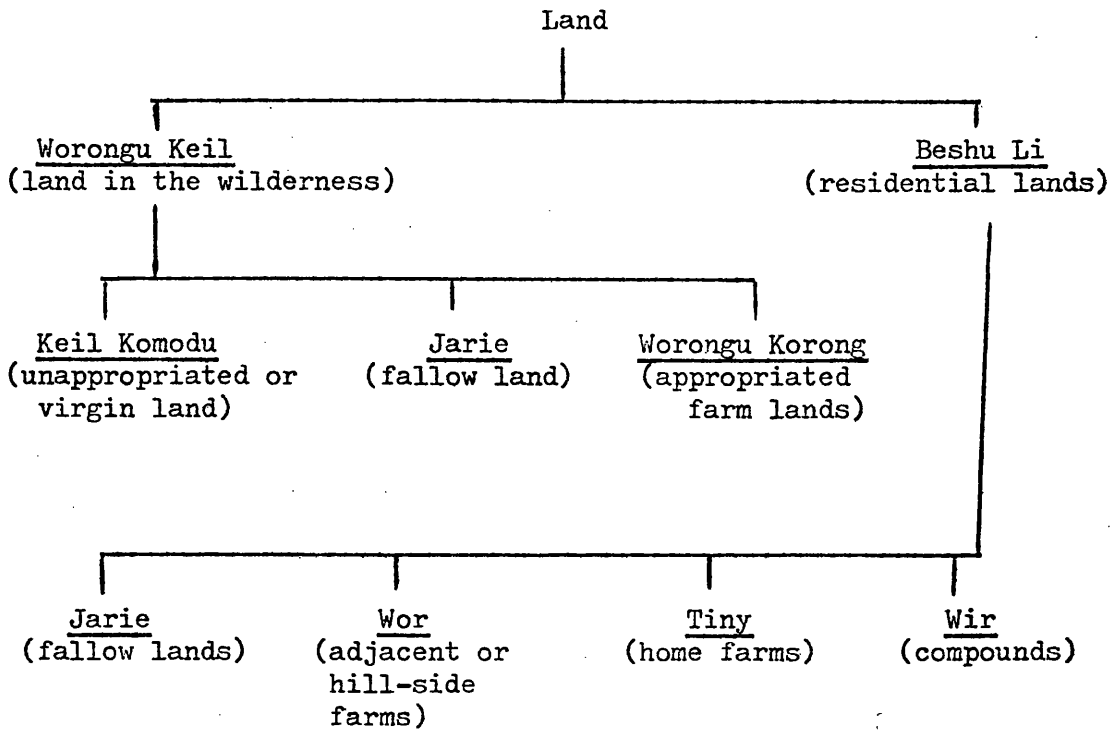
1. See above, Chapter I.

Figure XIX



As appears from the above diagram, Nyimang land may be classified as follows:

i) Worongu keil: "land in the wilderness". This is a vast area that lies far afield away from the settlement areas. It may be subdivided as follows:

a) Unappropriated land, or 'no man's land' - keil komodu (untouched or virgin land). This type is also called woru nyigil (bird's droppings): it is the land most desired for its fertile qualities. It is also regarded as the prime source of the future farming land. Before it is appropriated it is freely and generally available for individual use without restriction or control for grazing and hunting purposes.

b) Appropriated or fallow land. This land is known as jarie (resting land), and is distinguishable from type (a) only because acts of possession have once been exercised on it, and it thus has had a definite holder; it is left uncultivated for reasons of exhaustion. Such land may remain uncultivated for long periods in order to regenerate, and so as to become woru nyigil (virgin land). Sometimes such land may be left uncultivated until any traces of possession disappear. Nadel has noted this by saying that, "the traces of previous cultivation are frequently so much obliterated that one might easily take for virgin, vacant land that is in reality fallow land, only temporarily abandoned".[1]

c) Appropriated land under cultivation. These are the farms properly known as worongu korong (far farms) or farms in the wilderness. They were originally regarded as men's farms, but farm labour may be provided by the whole family. It must be noted that the first two categories (a) and (b) are invariably used for grazing purposes, and are enjoyed in common by the members of the community of a sub-tribe.

ii) Beshu keil (home place). This refers to residential or settlement areas and can be divided into the following:

a) Wir (the compound land or the homestead proper). This is the land on which the actual weil (huts) stand. It is generally enclosed by a strong fence with a curved entrance.

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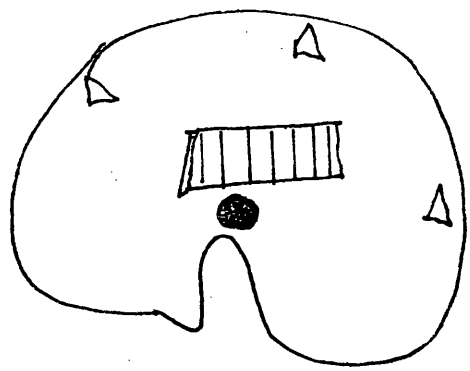
1. Nadel, The Nuba, op. cit.,

The space in the middle may be used as a sleeping place for the livestock. The following is illustrative of a typical Nyimang compound:

Figure X

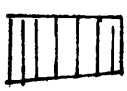


 huts

 entrance

 manda - hearth (fireplace)

 a thick fence made from the branches of trees

 Kwordu or Kwoil: a sun shelter or rack used basically for storing unthreshed grain and other crops to be dried before they are finally stored in the tilfu (granary).

b) Tiny (home farm) is the land that lies immediately around the homestead. It is cultivated by women and their children.

c) Wor (hillside farm). These are plots of land not far from the settlement areas. The vernacular term signifies that these farms are cultivated with ara (bullrush millet). As a general statement, wor farms are managed by women and by old people who, because of their age, are unable to travel long distances to the far farms.

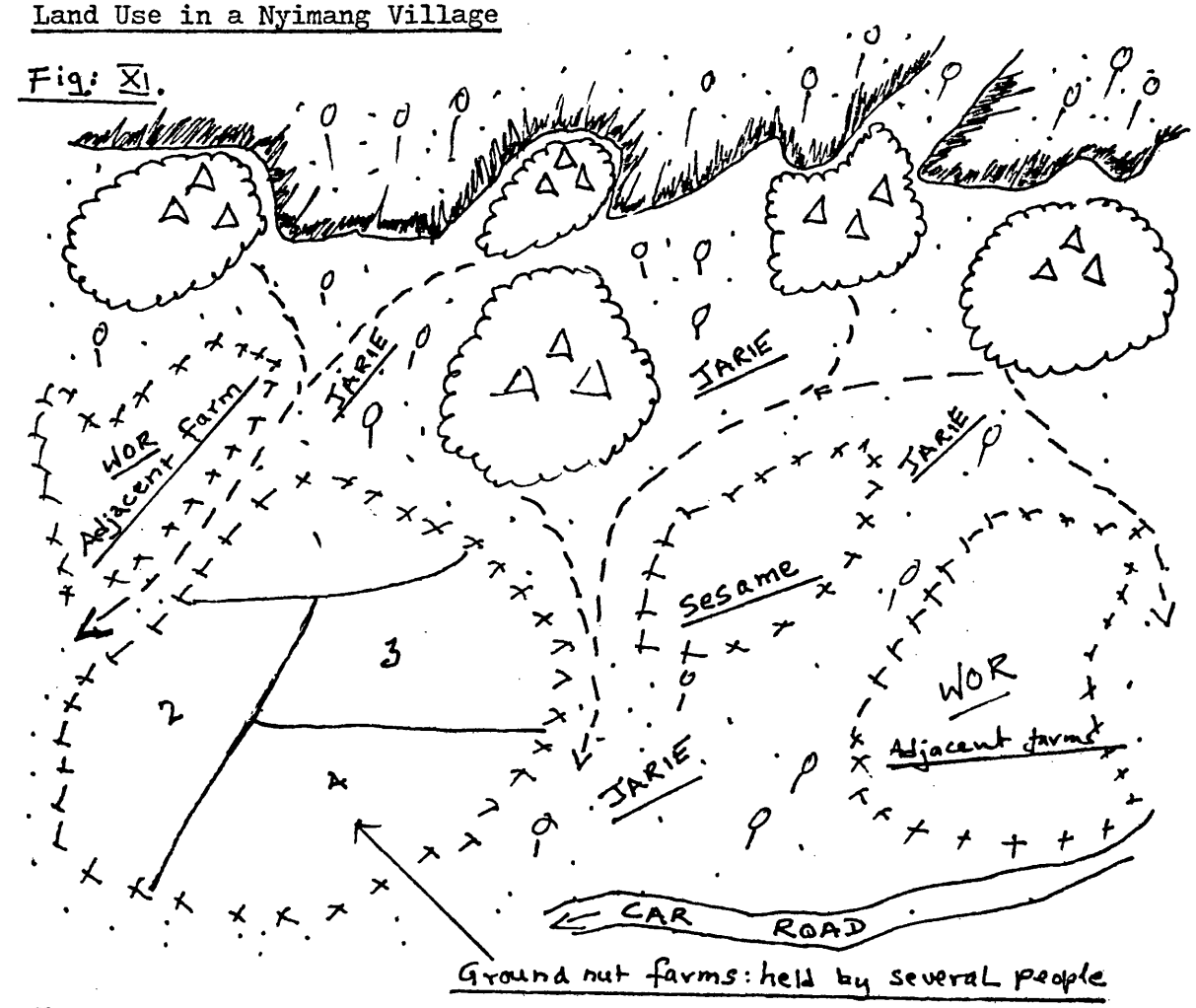
d) Jarie (fallow or resting land). These tracts of land are either tiny or wor which lie within the settlement vicinity.

They are areas of land which are left because of exhaustion through over-cultivation, and used as common grazing areas for the village animals.

The layout of the typical Nyimang village is illustrated by the following diagram which is based on an actual village.

Land Use in a Nyimang Village

Fig: XI.



Key

hills and trees

settlements with home-farms around

wor and other cultivations

car road

lanes used by the villagers

Jarie (fallow fields for grazing)

3) Land Use in the Early Nyimang Settlements

It should be stated at the outset that the situation which led the people to adopt hill settlements was not unique to the Nyimang tribe, or indeed the rest of the Nuba tribes. It is a fact that hill settlements were found throughout Africa where tribes living on the periphery of strong military states sought refuge, and hence built defensive settlements on top of hills to survive incessant wars and slave hunts, characteristic of pre-colonial Africa.[1] Indeed, so much has been said about how and why the Nuba peoples were driven from their rich plains by the Arab raiders - and later by the cruelty of the Turco-Egyptian slave hunters - to seek refuge in the strongholds of their mountains.[2] Also some weaker tribes had to protect themselves against militant and aggressive neighbouring tribes, who used themselves to trade in slaves.

However, Stevenson mentions that before the Arabs increased their activities in the plains of the Nuba Mountains, the Nyimang used to cultivate extensively in the valleys near their hills.[3] It was only after the Nyimang had become vulnerable to the raids and continuous slave hunts, first by the Arabs and later by the Turks, that the plain cultivations were abandoned.[4] Nevertheless, the formation of the Nyimang range is such as to allow the existence of extensive valleys between the spurs of these hills. For that reason, the

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1. M.B. Gleave, "Hill Settlements and their Abandonment in Tropical Africa", (1966), 11 Transactions of Institute of British Geographers, 39.
2. See H.A. MacMichael, The Tribes of Northern and Central Kordofan, London, 1967, 1.
3. R.C. Stevenson, The Nuba Peoples of Kordofan Province, op. cit., 150.
4. Cf. Stevenson who, in his article "The Nyamang of the Nuba Mountains", op. cit., 80, says that "The Nyamang are confirmed hill-dwellers".

Nyimang, were able to content themselves with their new abode, and hence cultivate and graze their animals upon the mixed vegetation of herbs and grasses accumulated in the pockets of these hills.[1] Thus the Nyimang continued to sustain themselves sufficiently, if need arose, within the confines of their hills. March has rightly noticed that "in times of danger, there was very little necessity for the Nuba to leave his mountain stronghold".[2] Although there was a very limited cultivable area on the hill summits, the Nyimang made use of every available patch of land, however infertile it might be.

Informants indicate how, in the old days, when they used to live on top of the hills, soil would be carried from the valley up to the hill summit, so that a suitable area could be prepared for a plantation. This followed platforming and levelling of the small areas within the settlements by removing the boulders and stones to increase the cultivable area.

As permanent cultivation is a usual practice on these home farms (tiny), soil fertility must be maintained through continuous manuring. This is achieved by using the droppings of goats, sheep and (formerly) pigs, which are collected from these animals' pens by the children, and scattered haphazardly around the farm. In addition, human refuse and cattle dung, together with the general waste collected from the huts, especially finan (ashes), are used to manure the farm plots. After the harvest, farms are indirectly manured by allowing animals to graze the remaining grain stalks. Furthermore, as the cultivation

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1. See K.M. Barbour, The Republic of the Sudan, London, 1961, 173.
2. G.F. March, "The Development of Agriculture in the Nuba Mountains area of Kordofan Province, Anglo-Egyptian Sudan", (1936), Emp. J. Exp. Agri., 77.

season approaches, farms are cleared and old grain stalks, together with weeds, wood, and dry grass, are collected and then piled up to be burned in places which are regarded as less fertile. This is believed by the people to add fertility to the soil. A similar situation existed in the other Nuba tribes, which made Bolton describe the situation as a "paradoxical state of affairs", where, in his view, a primitive people like the Nuba "who are in a stage when land would normally be expected to be held in common have individual ownership of land".[1] As seen, this expectation (such as Bolton's) is frequently shown to be false in regard to the African context.

As mentioned earlier, the years that followed the Nyima Patrol, 1917, were nonetheless regarded as a turning-point in the Nyimang tenurial system. People were uprooted from their hill recesses and were brought down into the plains for easier administration. However, while the colonial administration was planning the removal of the people from their hill fastnesses - mainly for political reasons - there were also other interacting and supplementary factors which helped the Condominium Regime to achieve its objectives. Most important of these factors was the increasing infertility of land on the summits, slopes and at the foot of the hills due to over-utilization. In addition, the congestion produced by the general growth of the population made the demand for new land an inevitable problem. It was in the light of these circumstances that sale of land among the Nyimang flourished. The problems were relieved as people gradually moved into the plains, which offered more land for acquisition.

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1. A.R.C. Bolton, "Land Tenure in Agricultural Land in the Sudan", J.D. Tothill, ed. Agriculture in the Sudan, London, 1952, 197.

The movement of the people from their hill settlements was more than a mere change of home. It involved delicate questions of freedom of movement, introduction of cash economy, the search and acquisition of land and the use of new agricultural techniques that followed. Further, and in order that the government should successfully remove the Nuba from their hill strongholds, it had to "provide inducement in addition to compulsion".[1] For that reason, the government started to encourage the Nuba to grow cotton. In 1924 American cotton seed was distributed free of charge to be planted by the Nuba. The rationale was that the Nuba would be less troublesome if their interests were turned to farming activities, especially if they finally came to appreciate the benefits of a cash economy. In other words, a means had to be found peacefully to "turn their swords into ploughshares".[2]

i) The Nyimang Farm Types

As has been stated by Nadel, three main types of farm exist in the Nuba Mountains, viz. home farms, hillside farms, and distant farms. The fourth type of farm - though it could hardly be termed a farm proper - mentioned by Nadel, consists of the small irrigated plots of land situated mainly near wells and permanent watering places, where chillies, tomatoes, tobacco and other vegetables are grown.[3] In addition to these, a new type of plantation was introduced into the Nyimang area not more than two decades ago. This was garden plantations of fruit orchards, which are to be found mainly in Abu Seibe

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1. J.H.G. Lebon, Land Use in Sudan, London, 1965, 89.
2. G.F. March, op. cit., 78.
3. Nadel, The Nuba, op. cit., 16-17.

village in the Nitil sub-tribe.

However, Nadel (writing in 1947) said that the three farm types which had previously been found in the Nuba Mountains have now been reduced to two only. According to him, the hillside farms have given way to the modern distant farm, or are merged into the home farms. This contention, however, is only partially true among the Nyimang, as contemporary observations by the present writer have demonstrated. The majority of the Nyimang cultivators still prepare hillside farms (wor) in addition to the other farms. The merger, if any, is not a universal phenomenon and may occur only in individual cases, when, for instance, all farms cannot be retained or worked at the same time because of old age or the diminishing number of the family group.

In the following pages we shall consider briefly the different types of farm held by the Nyimang together with the general mode of utilization.

a) Home Farms (Tiny)

A home farm, known as tiny, is found immediately around the individual homesteads. It will be smaller in size in comparison with wor (hillside farms) or worongu korong (far farms). The tiny is managed by women and their young children. This type of farm is used to grow secondary crops, which are regarded as supplementary to the main staple crop of sorghum. Crops grown in tiny are maize, bullrush millet (ara), cucumber, early maturing grain, and sweet sorghum (Andropogon Sorghum), melons, gourds, lady's fingers, groundnuts, beans, and sometimes tobacco may be planted by men. It has already been mentioned that the home farm (tiny) is cultivated almost continuously every year (some

people say they have been cultivating the same piece of (tiny) farm for some 60 to 70 years). In cases where homesteads are on the slopes of the hills, then ridges and terraces, together with stone walls, are necessary to prevent soil erosion and to catch rain water. These farms, as mentioned, are also subject to continuous manuring to ensure fertility.

b) Hillside Farms (wor)

Hillside farms (wor) are situated not far from the settlement areas, or within easy reach of the villages. The distance varies from a mile or less, to four miles' walk at most. Crops grown on this type of farm are much the same as on the home farms. As has been noticed by Stevenson[1], these farms are cultivated with bullrush millet to a greater extent. In addition, sorghum, groundnuts and sesame may be interplanted. On many occasions separate plots for sesame and groundnuts may also be cultivated by women and young girls. The hillside farms (wor), like the home farms (tiny), are worked primarily by women. Here also ridging is necessary. From time to time old grain stalks and dry wood may be laid across the slopes of the fields to decrease the rate of run-off of the water and to allow it to penetrate the soil.[2]

c) Distant Farms (worongu korong)

The distant farms or worongu korong (literally, farms in the wilderness) are situated, as their name indicates, at a great distance from the settlement areas. They are usually found on

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1. Stevenson, "The Nuba Peoples of Kordofan Province", op. cit., 151.
2. See Barbour, op. cit., 175.

the clay plains where the main heavy, late-maturing sorghum known as mondor tabar is cultivated. Other crops and vegetables, such as sesame, water melon, okra, cucumber, gourds, may also be interplanted. This type of farm is larger in size than the two previous ones, viz. wor and tiny. Although a farm of this type initially belongs to the father, its general cultivation may engage the labours of all family members. The holdings of one person are, as a rule, not situated in one area, but are scattered about in different places. The size of such farms vary according to the size of the family as a landholding unit. A farm plot held by a person of average means with a limited working capacity is far smaller than a farm plot held by a rich man with several wives and many children, who is able to provide beer parties (kaworé) and hence is able to clear large tracts of land for cultivation. Farms held by the kuni (shamans) are larger in size than the average farms as they are worked jointly by the age group as part of their duty to do community work.

ii) Choice of Farm Lands

According to Colvin,[1] soil types in the Nuba Mountains are divided into heavy clays, light clays, sandy loams, goz (sandy) soils, gardud (hard dry) soil, jebel and water-logged soil. To the Nyimang, the buda tebiu, which refers to the black clay soil, is thought to be the best of all soils for growing the heavy late-maturing sorghum. In earlier days cotton was also grown entirely on this type of soil. Land in the valleys between the seasonal streams is considered equally fertile and good for cultivation. Other types of soil, as mentioned

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1. See Colvin, Agricultural Survey of Nuba Mountains, Khartoum, 1936, 1-3.

by Colvin, are less important for cultivation purposes.

The gardud soil is explained by Colvin as hard, dry, bare soil which consists of "semi-decomposed rock, and it consists of a hard rocky or stony sand, with a mixture of clay".[1] This is known to the Nyimang as durang, and is quite unsuitable, so crops are rarely grown on it. The jebel soil, which is found on the hillsides, is not rich in quality, but the people are obliged to use it as being the only type of soil found near their settlement areas. Here the people cultivate their crops in tiny and wor farms. Light, quick-maturing sorghum, bullrush millet, groundnuts and maize with other vegetables are usually grown on this type of soil. But, as has been indicated by Colvin,[2] the output of the farm on this type of soil is not commensurate with the hard labour of terracing and continuous manuring.

However, a Nyimang farmer may generally measure the quality of different types of soils suitable for cultivation by their colour, texture, or the place where such soils are found. To choose a cultivable soil a Nyimang uses trees and grass as the best indicators of a good soil.[3] Thus a person who wants to clear a new farm must try to find a suitable soil, preferably a black clay soil, in the virgin land known as woru nyigil (birds' droppings). This type of soil is at a considerable distance from the settlements, and is believed by the people to be best as it is manured naturally by the birds and rotten leaves.

A person who wants to choose a new site for his farm must do so when two or three months have passed after the end of the rainy season.

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1. Ibid., 2.
2. Ibid., 3.
3. Cf. A.I. Richards, Land, Labour and Diet in Northern Rhodesia, op. cit., 280, where the author states that the same measures are employed by the Bemba to ascertain the quality of a soil.

This is when most grass is believed to have dried out. The idea is to detect places where trees grow tall and where grass does not dry quickly after the rains are over. But if part of the chosen soil is gürfo (light clay or a hard bare place), then cattle camps, together with terraces and canals, must be made to raise its fertility. In areas that are densely populated with trees, these trees must be felled or their branches cut and left for four or more years to dry out, and then be burnt as gumeir. Cultivation in such soils is believed by the people to be the most productive.

iii) Agricultural Methods

As the Nyimang have relatively less rich soil in their area compared with other Nuba tribes, hard and diligent work is required to render the small areas - especially in the residential areas - more productive. Colvin has noted this by saying:

> "In the vicinity of the Nyima, ... , the total available land is limited in extent; much of it is of the gardud, goz or jebel type of soil, and there are only small areas of the loamy or clay soils. The farmers cannot afford to leave much, if any, of their land fallow, and so have to do their best to produce their grain crops by a system of continuous cropping."[1]

Colvin's statement is more significant when considered in regard to settlement areas where there is little room for expansion.

The farming system adopted by the Nyimang, which has never been changed from time immemorial, is that of shifting cultivation. This system is based on exhausting a piece of land, by continuous farming for four to five years, and then leaving it to be rested for another

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1. Colvin, op. cit., 17; see also Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 80; see also Stevenson,"The Nuba Peoples of Kordofan Province", op. cit., 152.

considerable period for natural regeneration.[1] Meanwhile, the farmer moves his farm to another cleared plot of land for further cultivation. To obtain maximum returns from their farm plots, the Nyimang exercise a sort of continuous manuring of their farms. As has been mentioned already, the home farms (tiny) are manured systematically. In the case of the distant farms, soil fertility is maintained by making cattle camps. These camps may be shifted intentionally each year around the same place until a sufficient area (mostly a farm size) has been manured.

It is worth mentioning that any piece of land that has been put under cultivation must be closely fenced with thorny branches so as to prevent straying animals. In places where there are more than one farm belonging to different persons, a Y-shaped stile, known as kwojor or sulé ngal, may be built in the main entrance leading to different farms. Stiles are common in the home farms for personal use.

The most important agricultural methods practised by the people, in addition to the manuring system, is the terracing or ridging system. As has been mentioned, terracing is commonly practised in the settlement areas, especially on the hilly slopes of the homesteads. In many cases, stone walls are built to catch the run-off rain water and to stop the soil from being washed away. This was noticed four decades ago by Colvin, who said:

> "On jebel soil (terraced hill side) good crops of early dura can be produced continuously over a long period. The terraces hold the moisture and the rain water

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1. See March, op. cit., 79; Colvin, op. cit., 17; and Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 81.

> flowing from further up the hill side also brings with it a small proportion of silt, some of which must get held up on the terraces. Part of these soils are also manured annually with cattle, sheep and goat manure. This is a very arduous type of cultivation as the terrace walls require annual maintenance."[1]

These terraces sometimes take different shapes and names depending on the farm type or the area of the farm. Thus, if the farm is situated in flat land, then the farm will be marked off in square or rectangular sections. In upper slopes, long lines of stone walls and ridges are built gradually on cross-sections. These are known as bere. On hillside farms (wor) the same square sections, though not always, may also be made and are known as dowor. In the distant farms (worongu korong), these sections tend to be larger and longer. There the farm is marked off in rectangular sections, but longer and narrower than the sections see in the home farm. Different sections are separated by ridges made of earth, wood or dead stalks laid along the ground. This technique is used mainly to stop water from washing away the seeds and to allow water to penetrate the soil. However, in places where farms are cultivated on the seasonal running of rain water (da'a), crude dams from tree branches known as babaliji may be built to check the torrential flow of water so as not to damage the crops by undue flooding.

People are not unmindful of the fertilizing qualities of some of their crops. As indicated by Colvin, the mixing of leguminous crops, usually beans (kendi - Vigna unguiculata) with the grain helps in assisting the soil to retain its fertility.[2] Further, the mixing of

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1. Colvin, op. cit., 18; see also Barbour, op. cit., 174-5; R.A. Hodgkin, Sudan Geography, 1952, 40.
2. Colvin, op. cit., 18.

mosol sesame with the grain also has the same effect. Another technique employed by the people when sowing is to leave wide spacing to give enough room for the grain to grow. When it has grown to about a foot high, thinning and transplantation are carried out to give additional room.

It has been said by writers that cultural, climatic and other environmental conditions are among the leading factors which determine agricultural methods, and indeed, the whole tenurial system prevalent in a given area.[1] These factors may further determine the type of agricultural implements employed by the people in their farms. In their early times, the Nyimang were ignorant of the use of iron hoes (kadang). The introduction of iron hoes is mostly connected with the Arab presence in the area. In earlier days, the work on the farms was done with a wooden blade shaft (irfinj) made from ago (ebony). This older implement has been replaced by the modern iron-bladed hoe (kadang). The kadang may be fixed into a long wooden shaft (preferably of bamboo) called wardal, or into a shorter wooden handle like a spud, named aswidi or asodu .[2] When using a wardal the farmer must stand up holding both hands halfway up the shaft. This implement is used for sowing and early weeding when plants are still young. Usually this would allow an easy forward movement, and the application of the hoe from this standing posture will not impose any great danger of killing the shoots or the young plants. After the plants have grown taller, the shorter spud (aswidi or asodu) is

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1. See Nadel, The Nuba, op. cit., 16; Meek, op. cit., 4; W. Allen, The African Husbandman, London, 1965, 3-5, 10, 13-19.
2. Cf. Stevenson, "The Nuba Peoples of Kordofan Province", op. cit., 154, where the author has mixed up the names of these two implements.

used. Here closer and more careful work is necessary. The farmer will squat or kneel down while he moves to and fro or sideways holding the aswidi in one hand and clearing the dead grass with the other.

Other types of agricultural tools include the modwor, which is a wooden 'pusher' with a long handle to drive earth when ridges or terraces are being made. The gesher is a forked wooden brush to clear farms of stalks and dry grass.[1] Shigir (a hoe-shaped tool) is used for digging up the grain stalks, kwodinya is a curved iron blade with a short hand grip used for cutting grain and sesame, temeling (axe) is an important tool, and is a larger type than normal axes. It is carried mainly by men, but may also be carried by unmarried women or widows, but never by a married woman. It is believed by the people that should a married woman carry the temeling on her shoulder, her husband will die. This is because her action would signify that she is assuming a man's responsibility, and this would kill her husband if he was still alive. When threshing grain, two types of beaters are used. One of them is called ngodafu, and is a rather tall shaft into which a piece of curved wood is fixed. It is used to beat the grain from a standing position. When used by men it must be held with both hands. The other tool called kwusum (wooden flail) has a short handle with a flat end, and is used by women in a squatting or kneeling position when threshing millet.

iv) The Yearly Cycle and the Agricultural Activities among the Nyimang

Being agriculturalists, the Nyimang are always aware of the importance of the stars and their movements in the sky. They can tell

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1. Kronenberg, op. cit., 211, rightly says that "The gesher should be stored inside the house or outside the compound. Should somebody rake the court with the gesher, the whole family would die, because the teeth of the gesher would rake their lus ... which are in court."

with some accuracy, by reference to these stars, the time at which different yearly activities should be started. Stevenson has already mentioned that the Nyimang regard such stars as Pleiades (Kai), Orion (Kira kwai - a girl's suitor), Sirius (Twin dio dori) and the Plough (Jo), as important agricultural phenomena by which people may measure their seasonal activities.[1] Nadel has also referred to this, stating that, among the Nuba tribes, the Nyimang is the only tribe among which certain stars serve as a tribal calendar.[2] Four main seasons are recognized by the Nyimang, viz. Mara - dry season which starts approximately from February until the rainy season in May; Bwer - rainy season from May until September; Guel - October to December and Kin from December to February. Guel and Kin are predominantly cool, dry, windy seasons.

However, to begin with, the following seasonal activities are intended to show the people's agricultural cycle month by month, as is seen in the Nyimang area.

Tigidi (April):

> All crops have now been removed to storage, and people have been relatively rested, although they continue to repair their houses. However, towards the end of this month the general work of farm clearing starts. It has already been mentioned that the agricultural cycle among the Nyimang begins by making ashi (beer) for the rite of tilfu lida (granary drinking). This rite is also known as tilfu ki (a granary thing). It is a general performance where people make libations of beer to abradi (God)

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1. Stevenson, "The Nyamang of the Nuba Mountains", op. cit., 82.
2. See Nadel, The Nuba, op. cit., 45, n. 1.

and to the ancestral spirits to protect them from any evil while they work on their farms. The ritual also signifies the beginning of the agricultural season. After the ceremony of tilfu lida has been performed, farmers start to clear their plots. The first clearance activity is known as aburadi or aburan ashida. Old grain stalks are pulled out or are removed by using the shigir (digging hoe). The dead stalks may be heaped up and burnt, or used to make terraces (béré). Similarly, bushes are cut and may be burnt together with other grass and stalks, or may be used to repair the farm fences. However, while doing the general farm clearing, a diligent Nyimang farmer knows full well that there is never a better chance for sowing the first seeds near the terraces. These first-sown grain are believed by the people to provide the best crop.

Kwo Kur (cultivation month - May):

This month is also known as Kulju Kur (month of the storks). Their arrival in the area is a sign that bwer (the rainy season) has come. The first period of the rainy season is known as gornédé. Cattle are sent into camps and are looked after by the adolescents, and the hunting festival (afunj) takes place. The sowing of maize in the immediate vicinity of the huts, bullrush millet (ara) grain and other vegetables, takes place in the home farms (tiny). The majority of the people move out to finish clearing and fencing in the distant farms. However, towards the end of May, the rains become more persistent, and the people proceed with their sowing in virtually all the farm plots.

Aman (June):

This month is also known as bodi dia[1] (much hoeing). This is the month for sowing proper. Even the laziest farmer knows that he cannot delay any more, or he will reap nothing. All family members are completely occupied by the work on their farms. Rainfall increases and the sowing of sesame (mosol) and groundnuts takes place, together with hoeing and weeding. Places where grain has failed to grow are re-sown.

Toto (July):

The name indicates the completing of the first part of farming activity (sowing and the first weeding). This is the height of the season. Transplanting continues and much work must be done to complete the first weeding (korong kabar). Collective hoeing and beer parties (kawore) are seen everywhere. Rains become heavier, tobacco seeds are scattered, and grain plants are thinned and transplanted. This activity is known as kurum.

Bibila (August): (literally means 'going in different directions')

The work on the farms continues, although the heavier weeding is over. Grain has grown tall and the wardal (hoes in the long bamboo shafts) are not employed any more, instead shorter hoes (aswedé) are used in a squatting position. This is the most difficult time of the year for the Nyimang. Food becomes scarce and everyone looks for sustenance wherever he can. People say that, in the old days, families used to sell their children

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1. Bodi means irfinj, which is a traditional wooden hoe. Dia, literally means big, but is used here to refer to the majority or the bulk of the hoes that were used at that time. The name of the month indicates the time in which all the hoes are actively employed in farming activity. Anybody may be seen carrying hoes all day.

and other members of their kin for a handful of grain. Indeed, it was in this month that family ties, many years ago, were threatened with permanent severance.

Kworadu (September):

This is the first pleasant month of the new year. Cattle are brought from camps to the settlements in preparation for the first fruits ceremony, and the festival of konyingar (bean leaf) is performed. There is a short lull, after which work continues. People are relieved of their hunger, and the final hoeing and weeding is done.

Kwishi (lift up[1] - October):

People start becoming busy again as the harvest season is about to begin. Stacks (kwordo or kwoil and bwedi) are made, groundnuts are dug, sesame and bullrush millet (ara) are harvested and stacked, tobacco is cut, and the jal ceremony is performed. Cattle are once more taken to camps, and people will rest for a week or two before they resume work on their farms.

Fil Kweren (November):

The harvest of sesame and bullrush millet continues. Now the tanyari (rite) of monong kanyer (new grain), known as kurum (ant), is performed. People prepare themselves for the harvest in the main distant farms and another busy period begins.

Urufu (December):

Kwadinyo ashi (a beer offering for grain knife) is made to

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1. People are not unanimous as to the meaning of this month. Some say that what is lifted up is the hunger. Others, however, say that the month is so called because some of the crops are tied up and lifted on to stacks (bwedi) or on to rocks to dry. Both meanings are acceptable.

indicate the beginning of heavy harvesting in the distant farms. People build temporary homes in the distant farms in order to be near their work. Sesame is shelled.

Kwinyige (January):

Trees and grass are cut for roofing, and there is some scattered bush burning. Harvest continues and the cut grain is collected in the hedged enclosures known as dwer in the farm itself.

Kishu Kur (February):

A short lull. Tobacco leaves are picked, ground or left to dry. Threshing of light grain and bullrush millet starts. This is the favourite month for marriage ceremonies. Some people are still busy cutting grass for thatching or for sale.

Bwie (March):

Grain in the distant farms is threshed, winnowed and carried home to be stored in the granaries. This activity continues until Tigidi (April). Cattle are returned home from their camps, and women start making clay pots. The Mara or the dry season has started.

v) Division of Labour and the Individual's Rights in the Farm Produce of a Household

As a general rule, the working team of a Nyimang family consists of a man, his wife, or wives, and his unmarried children. A single household may possess more than one cultivable plot to manage. Apart from the distant farm of the father, each wife may have her own plot or plots on which to grow her own crops. However, while, as indicated, each of the co-wives might have her own farm for which she is absolutely responsible, she is also expected to help her husband and

contribute her labour in the general family holding.[1] As a rule, the father has absolute legal power of direction over the labour of his family members.

Children:

The part played by the children in the co-operative labour of the Nyimang family is considerable. Before reaching puberty, the male children are expected to look after the goats, sheep and calves. Traditionally, male adolescents are held responsible for cattle herding, and are thus not required to work regularly on the farms. They also have the onerous responsibility of defending the village. But this general rule is not always followed. In many cases unmarried, grown children, especially if they do not own livestock, must help their parents on their farms. At times separate farm plots may be assigned to be worked by the grown children. Unmarried daughters are a very important working force in the Nyimang domestic and farm activities. They must help their mothers in their domestic work and must assist their fathers in their distant farms. But as soon as they get married, their fathers lose all rights over their services in these farms. The daughter would continue to live with the family of her birth for some time after marriage, but is no longer required to work on the distant farms. Now all her services are turned to assisting her mother. She must help her on the home farm (tiny) and the hillside farm (wor). She may also have her

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1. Nadel, The Nuba, op.cit., 51, n. 1, mentioned that Nyimang women are not required to work on the distant farms. This contention is now part of history. In the modern Nyimang a refusal by a wife to work on her husband's farm is another ground for divorce.

own small farming plot on which to grow groundnuts or sesame. However, crops collected from this farm must go to the mother's granary for the benefit of the family as the daughter has no granary of her own. If she wishes to dispose of part of these crops, permission must be sought from her mother. Technically a daughter lacks legal capacity to own or dispose of property of any kind, other than personal effects, and has no proprietary right over these crops. In practice permission is given as a matter of course.

A male unmarried child may demand that his father, as of right, provide him with a cultivable plot. Customarily the father must comply with his son's request. However, the produce from such a farm must go to the father's tilfu (granary). But if the father so wishes, a separate granary may be built to store part of the crops collected from the son's farm. This crop (if left as surplus) would ultimately be used to buy livestock which would eventually be used to pay the marriage consideration for that son. It is also possible that an ailing father may divide his farm plot to be cultivated by his children. This allocation does not imply any final division of property. However, a father who parcels out his farm among his children whilst he is still alive, continues to hold proprietary interest over his farm, which is regarded as a single plot under his control. Crops collected from these plots must be stored in the father's granary. Should an unmarried child occupy and farm virgin land, then such land, together with its produce, are legally considered to be the property of the father. After the father's

death, land acquired through the individual effort of a child remains in that child's private holding as being his temel (axe), and will not fall into the common pool of the family property. The situation is different in the case of a married child. The changing status of a married man from that of dependency to that of independence, with the capacity to acquire property on his own behalf is significant under the Nyimang customary law of property. Thus, a married son who has built a separate home away from his father's compound is no longer counted (economically) as a member of his father's household. He becomes economically independent with a separate budget. As a family head he is now endowed with a limited controlling authority over his small household. Land that was cultivated by him, or apportioned to him by his father, becomes his private property. He may dispose of some of the property without resort to his father. Customarily, a married son is forbidden to sell or otherwise dispose of a ram, a cock or a bull without his father's permission. As these animals have ritual significance, the married son will never slaughter them in his compound while his father is alive. These animals must be reared and kept for the father to dispose of in whatever ways he sees fit.

If the married son lives within a reasonable distance from his father's compound, as he usually does, then he has the opportunity to benefit from the food and drink in his father's home. While the father is still alive the married son continues to be ritually connected with him. Thus a married son must provide his father with a yearly token gift of grain in return for the ritual

services of the father.

If a son continues to cultivate a plot of land allotted to him, by his father until he get married, then such land will be considered as an implied marriage gift from the father. Such land becomes private property and will never revert to the common family pool. However, it is not law that a father should provide cultivable land each time one of his children is married. It is, in practice, difficult to meet all the requirements, especially if a person has several children, with only one plot of land. In any case, there is no shortage of land as there is always enough land to occupy or acquire at least on the 'borrowing principle'. But if the father has given a piece of land to a stranger, or even to his own brother, then such land might be claimed back by the heirs, as it is always presumed that no land may be given as an outright gift to strangers. No such presumption is contemplated when a gift is made to a son. That is because children have inherent rights in the father's land by virtue of their birth. It seems, however, that the father's right to alienate the land outside his family circle is curbed only by the overriding interests (social rather than legal) of his children, and that according to custom, the father has a wide prerogative to dispose of the family land. His children have always had an implied customary right to redeem the land so alienated by their father to third parties.

Traditionally, daughters have no rights in their father's land. They are generally referred to as wa baar (strangers). They never hold permanent or proprietary interests in the family

property. That is so particularly in land and cattle. It is customary that women join their husband's families after they get married, and for that reason lose all property rights within their families of origin, while unmarried daughters enjoy only the right of maintenance. Even if a daughter has cleared virgin land and converted it into a cultivable farm, the land should, by law, belong to her father or his heir after the daughter is married. This is so no matter for how long she continues to possess the land. This rule applies to all livestock properties acquired by the female members of the family. This is generally in contradiction to the principle that a person is entitled to the fruits of his labour. Instances, however, exist where a father may provide his married daughter with a plot of land as a gift. This is not a mandatory rule, but should a father give land as a marriage gift to his daughter, as will be explained, then that would be held as an outright gift which would not be revoked. Here then, the daughter acquires a proprietary right in that land. Though the land will be administered by her husband, yet she is the only person who has an absolute right of disposal over it. Even her husband has no right to dispose of such land without her consent. However, if she intends to dispose of it, she must first consult her husband. She has absolute right to prevent her co-wives from joining in to utilize the land. Upon her death the land will be inherited by her children alone, to the exclusion of the children of her co-wives. It should be remembered that this is the only occasion (apart from an outright sale of land) where landholding permanently

shifts from one clan to another without chance of redemption.

Wives:

As has been mentioned above, home farms are wholly managed by women. The men help only with the heavier work of clearing, cutting the trees and constructing or repairing fences. A man may also help with occasional work or may provide one or two beer parties to clear his wife's farm, but the bulk of the work in these farms is done by the woman and her children. On many occasions, women are left to exercise complete control over the produce of these farms. They may, at their own discretion, decide when to start harvesting, or what portion should be consumed or stored. However, traditionally a woman enjoyed little freedom concerning the disposal of her farm produce.[1] But due to recent economic and social developments, women may sell groundnuts, sesame, bullrush millet and other vegetables, but are totally forbidden to sell grain.[2] Generally, a woman may sell only when there is a big surplus, or when there is an emergency. In any case, consent of the husband must be obtained if the wife intends to sell a large quantity. Indeed, consent is sometimes implied even if it is not expressly given, as it is always taken for granted that disposal of crops by sale is done properly and to the benefit of the household. Although the husband is legally entitled to the proceeds of the crop sold by his wife, he normally does not exercise his right. However, if

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1. Nadel, The Nuba, op. cit., 47.
2. Ibid., 51.

a woman uses the proceeds to buy durable properties, such as livestock, a gun or a plot of land, then all these properties will be considered the property of the husband, and the woman never gains any proprietary rights to them separate from those of her husband.

Among the Nyimang co-wives live in separate huts; each with separate granaries where they store crops collected from their farms. The husband has his own granary. If he has more than one wife, then he must have a separate granary in each of the several huts occupied by his wives. Crops collected by women from their farms are used to provide food for their children and husband.[1] However, the division of the farm produce into granaries, as described by Nadel, is misleading and does not apply to Nyimang people.[2] Only crops that are collected from the distant farms (men's farms) are stored in the husband's granary, while crops collected from tiny or wor (women's farms) are stored in the smaller granaries (women's granaries). They must always be stored separately because disposal of crops from these farms, as has been made clear, is separately controlled. This being the case, each wife has an absolute and exclusive right over crops collected from her farms vis-à-vis her co-wives. The husband has no right to compel any of his wives to surrender

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1. Nadel said in The Nuba, p. 47, that in most Nuba tribes the husband "will eat with each of his wives in turn, on different days". This contention is not true in Nyimang society, where it is incumbent on each wife to prepare her husband's good daily irrespective of what her other co-wives do. Thus it is common, when mealtimes come round, to see several dishes provided by different wives, in front of a husband, who will eat part, mostly with his young children, and then give the rest to the domestic animals, such as dogs and fowl.
2. Nadel, The Nuba, op. cit., 47.

part of her farm produce for the benefit of her co-wives. In the case of crops from the family farms (distant farms), the husband divides such crops proportionally into his granaries in the different huts. This is a provisional division of the family income which is not intended to be final. The husband will give out these crops to each household on a rationing basis, as for example when one of the households runs short of grain storage. He also has a right to take part of the grain stored in his granary in one of his wives' huts for the benefit of another household.

Before a wife is finally removed to join her husband's family, she may go and help her in-laws, as a matter of courtesy, in their farm labour. This is optional work, as she would still be regarded as a member of her birth family. She acquires no rights in the farm products within her husband's family as a result of her labour. Although her husband must provide her with clothing and other gifts, she is not regarded economically as a member of her husband's family as yet.

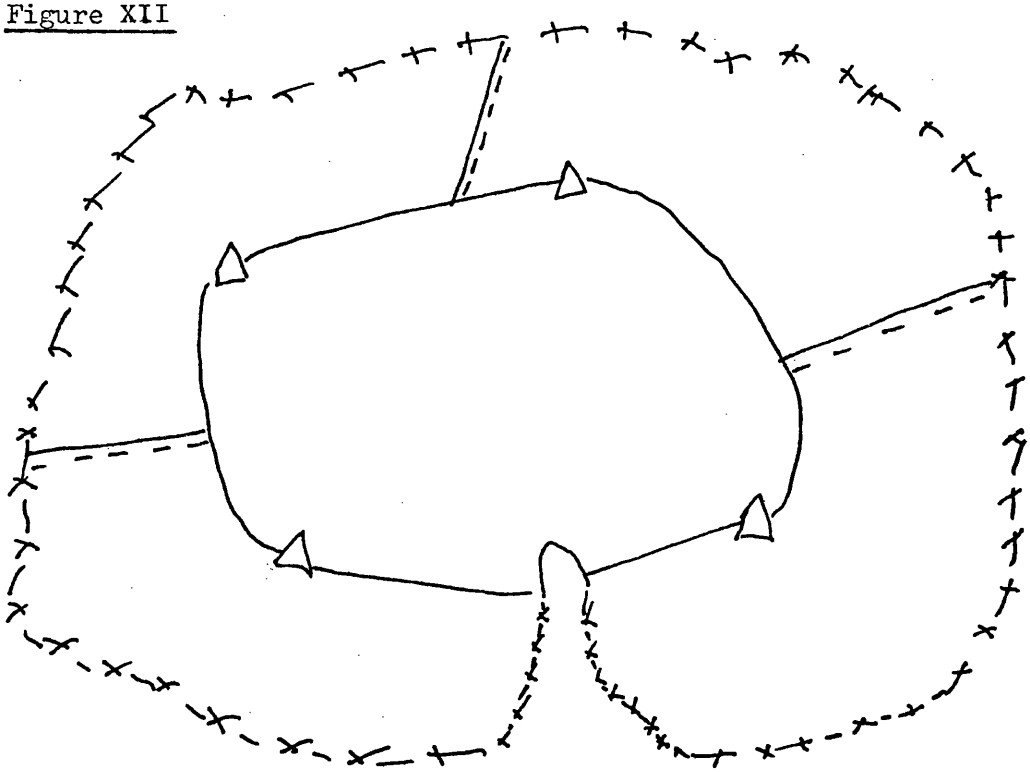
A wife who has just been removed to her husband's home has the right to be provided by her husband with a separate hut and a separate cultivable land near her hut as a home farm (tiny). It is a universal customary rule among Nyimang that no wife is ever left without land for a home farm. In addition, a hard-working wife may demand - and her husband must provide her with - another piece of land as a hillside farm (wor). If the wife wants to have an additional plot for growing groundnuts and sesame, then her husband is obliged to find her a suitable one. In each case the husband must clear the land of bushes and trees

and must make a proper fence to protect the farm from straying animals. However, it must be remembered that although all plots of land provided for the wife are controlled by her husband, and thus would never be regarded as her private property, nevertheless, no husband is entitled to usurp his wife's right to utilize his lands while she is still his wife.

Nyimang homesteads are constructed in circular form in which a wife must have a separate hut built within the circle. If a new wife is added, an extra hut must be built with the eventual enlargement of the compound space so as to accommodate the new member. A wife has the right to cultivate the land that falls immediately behind her hut and known as weilu bodu. As has already been stated, it is customary for a husband to provide his wife with - and the wife has a right to be given - cultivable land for her tiny (home farm). As the land is always considered the husband's property, the previous wife or wives have no objections and must submit part of their cultivable tiny to the new co-wife. It follows that each time a new wife is added, the same land which was utilized by the previous wives must be redistributed amongst all wives as the husband sees fit. In some cases, the choice is left to the wives themselves, with the most senior wife having first choice for the site of her hut and hence her tiny. If the wives cannot agree, then the husband will distribute the land according to his own discretion. There would, however, be a general thorn fence surrounding the whole plot of land held by a given wir (homestead). Within the general fence the holdings (tiny) of the different wives are

separated by boundaries - kilinga or lulu. These inter-boundaries are formed mostly by either a long terrace (beré), a strip of uncultivated land, or by trees. The following figure is illustrative.

Figure XII



Key

huts

compound with entrance

thorn fence

boundaries between different tiny farms

Each time a new wife is added, the same parcel of land would be redistributed to accommodate the new member. Land so given to be cultivated by a wife remains under the husband's control and will never pass into private ownership of the woman. Thus, a woman has a permanent right to enjoy cultivation interests over her husband's land while their marriage subsists. After dissolution of the marriage she loses all rights in respect of

all land given to her by her husband. Nevertheless, this land given to her by her husband is regarded as potential property for her children, and would be utilized by them upon her death. But if she dies childless, all her land must revert to her husband who is free to redistribute it amongst his wives. A plot of land assigned to a wife as tiny (home farm) or as wor (hillside farm) would be tilled by her throughout her life unless the husband chose to move the whole homestead to another place, whereupon new cultivable land would also be given to the wives for the same purpose. If a wife has grown old and is unable to cultivate her farmland, she may, as of right, allow one of her sons' wives[1] to cultivate her tiny or wor. She has an absolute right to refuse her farmland to any of her co-wives, and her husband cannot compel her to do so. As a general rule, the younger son would always remain in his father's wir (compound) and so keep the manda (hearth). He occupies his mother's hut to keep her doorway (orgol) and is therefore entitled to cultivate her tiny.

As is stated, a husband in the Nyimang has no right to deprive his wife of her cultivable land assigned to her by him while they are still married. On the other hand, this land is not regarded as the woman's private property. And although she has absolute right of utilization, she has no right of disposition as she lacks any proprietary rights in this land. However, a woman with children, whose husband has died, is entitled to

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1. This would probably be the wife of her youngest son.

retain all land allotted to her by her late husband. She will continue to enjoy the interests over such land for her own subsistence and to support her children. If she is still of marriageable age she may take a leviratic husband from her deceased husband's agnates (usually a younger brother) to bear more children in the name of the deceased husband. If she is childless and refuses to enter into a leviratic marriage, then she may be divorced, whereupon she would lose all rights over her late husband's land. A widow is barred from selling, pledging or otherwise disposing of her deceased husband's land left in her care, particularly if she has male children. She must keep all property intact until her children come of age and can take over the responsibility of looking after their mother and the property. She would be allowed by her children to continue and enjoy interests over their land until she died.

A question may arise as to whether the rights of a widow in her deceased husband's property are separate from her children's rights, or whether her rights are dependent and hence are subordinate to her children's rights. Considering all the circumstances, one may say that the two rights are different in nature. It is, however, pertinent to state that, among the Nyimang, the rights of children and wives in one's property have primarily different legal origin, albeit they are derived from the same source (the father/husband relationship). The difference is further emphasized in the different capacity and status through which a person passes his rights over property to his dependants. Thus, in his status as a husband, a man is able to confer limited rights and interests in property on his wife, which she holds and

enjoys only while she lives. In other words, a woman has only a life interest in her husband's property. Similarly, in his status as a father, a man passes absolute rights and interests in property to his children. The right of the children in their father's property is inherent and a necessary consequence of their birth. In this connexion, it could be said that although the wife's rights and interests in her husband's property are in essence, subordinate to those of her children, yet it could also be argued that her rights are not derivative from her children's rights. The justification for such conclusions may be drawn largely from the instances where a wife may continue to enjoy her deceased husband's property even if she bore him no children. In addition, a woman is not entitled, under the Nyimang customary law, to any part of her husband's property after the lawful dissolution of the marriage. This is the case even if she has children from her husband. In any case, wives are not entitled to inherit land from their husbands, nor do daughters have rights of inheritance in their father's land.[1] But in each case wives and daughters have a right of maintenance which may enable them to continue to utilize land held by their fathers or husbands.

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1. It is necessary to point out here that there is a gradual change, however slow, towards recognizing the right of daughters to share in the inheritance of their father's property. This is due to modern ideas and particularly to the spread of Islamic conceptions in this area of property law.

CHAPTER VII

RIGHTS AND INTERESTS IN LAND (continued)

1. THE NATURE OF THE INDIVIDUAL'S INTEREST IN LAND

It has been stated above that in former years, when the Nyimang people were fighting to acquire land for their settlement, no organized authority stood behind these wars. After the invasion was completed no political power was able to establish any claim over the new territory - as there was no political power. By tradition, an individual Nyimang never owed his political allegiance beyond the limit of his father's or grandfather's authority. Outside the family circle, lineage and clan elders were respected, not because of the political superiority, but because of a general conception of a cohesion fostered by the idea of common descent and solidarity within the kinship group necessary for purposes of self-help.

However, after the introduction of the system of Native Administration in the area, government chiefs and sheikhs were appointed to administer the existing law and order. Their offices were not backed by any traditional institutional force, so much so that the appointed chiefs remained only government agents, and although they exercised jurisdictional powers over the Nyimang territory, but they were never able to enjoy legislative powers in matters relating to land. This limitation explains why Nyimang chiefs were unable to contribute directly to the development of the customary land law in the Nyimang area. It further explains the fact that apart from the general state authority over all land in

the Sudan, no traditional political authority has any right of claim over Nyimang land.

i) The Individual's Rights in Land held by a Descent Group

The term "family land" in the Nyimang context should be strictly confined to land held by the descent group of a common father or grandfather. It is noteworthy that families among the Nyimang are not regarded as corporate bodies endowed with a legal identity separate from that of their members. Thus, on many occasions "family land" would simply mean land over which the father holds a superior title. The Nyimang-type of "family land" is created only when the original holder of the land has died intestate. The customary rule is that upon death intestate, the rights of the deceased person in land pass to all his male children. Traditionally, the inherited land would not be divided, i.e., it would be left intact in the care of the older son to be enjoyed by all children. In case there is a sole heir if, for example, there is only one male child, then such land would not be termed as "family land" since brothers of the deceased holder and other relatives have no rights of inheritance in the deceased person's property.

Similarly, new members of the extended family have no established rights in the so-called "family property" just by reason of birth into the landholding family. In order to understand this rule, two factors must be considered, viz., it is the law among the Nyimang that the grandchildren of a deceased person have no rights in his property. They are not counted among the heirs even if their grandfather has died

intestate. Grandchildren are considered only as potential heirs to their grandfather's property through their fathers. Another important factor is that most of the Nyimang do not legitimize male children born as a result of adulterous union by a married woman. Even if a child has been legitimized by the woman's husband, through acknowledgement, the child's rights would be subordinate to the rights of the other, legitimate, children. However, it is possible for a person who has no legitimate children to legitimize his own illegitimate son, but not his wife's illegitimate son, thus entitling him to inherit his property. This may occur when a person has no agnatic male relatives.

An unmarried son who has occupied virgin land or has bought a parcel of land as his own personal property, would not be regarded as an absolute holder of an interest in this land while his father is still alive. Theoretically, legal title to all property acquired by unmarried children is vested in the father. The highest interest a son can hold in a piece of land is the right of cultivation and the right to enjoy the products of his labour. It follows that among the Nyimang, no son would alienate by way of sale, pledge or otherwise dispose of any piece of land without an express consent of his father. It is possible that a junior member of the family may invite a stranger to occupy a vacant family plot pending the father's final approval. In many cases permission is readily given unless there is a blood feud between the two families.

Land held by the father is of two kinds: that which is acquired by him through his own personal effort (by sale, inheritance, etc.), and that which is acquired by his children on his behalf. Only land that has been acquired by the father through his personal effort can pass into the family pool. But no land that has been occupied or bought by one of his children would be added to the family pool. Such land would be inherited by the original acquirer. Similarly, land bought by the father by cattle, goats or other property brought as marriage consideration for one of his daughters, would not fall into the general family pool, that is because such land would be claimed by the full brothers of the daughter in preference to the other step-brothers. Nevertheless, land "held" by the deceased father would be held jointly by the children of the deceased person. However, if any of the legal heirs should step on to the land for cultivation or settlement purposes, then he acquires interests which, in any case, would not be terminated by any member of the descent group. He would not be dispossessed by the rest of the heirs until the time he chose to abandon the land. The rule among the Nyimang is that the first to occupy the "family land" gains temporary right of utilization against other members of the descent group. The rights and interests of the occupier are transmissible to his children after his death. A person who is a member of a descent group and who has occupied a joint family property has no capacity to alienate or dispose permanently of the property to a stranger unless with the tacit consent of the rest of the

family members. The consent required here is that of the senior members of the descent group or the family members. Junior members of the family are never consulted in matters relating to the general management of the family property.

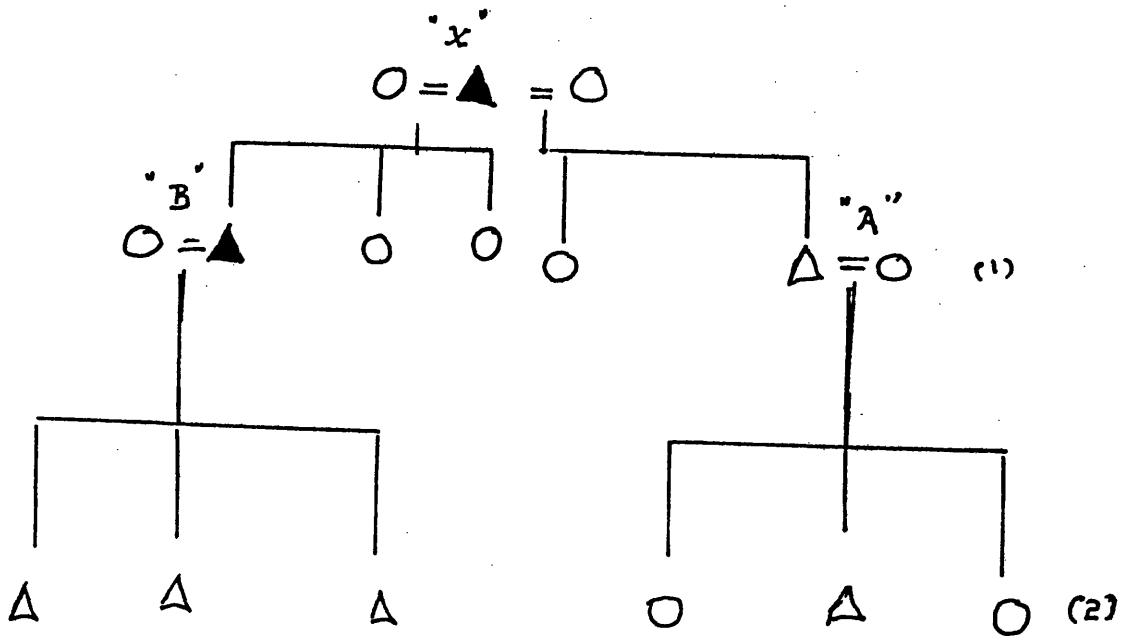
It has been mentioned above that during the lifetime of the father, the nature of the children's rights in the "family land" is that of dependency. The rights and interests of the children are subordinate, and are derived from the superior title of their father. Thus, while children are still under their father's guardianship they enjoy only limited rights over land held by their father. Children and other members of the family must seek the father's permission before they can be allowed to cultivate "family land". If, however, the father himself is a "co-owner" (if his brothers are still alive), then only technical permission would be asked from his brothers. In many cases permission would be given as a matter of course, especially if the land is not under active utilization by other members of the descent group.

If, on the other hand, a person has no living brothers, but does have brother's children, then he would automatically be considered as the head of the extended family, and his rights amount to a wilful disposition of the family property. Such a person would have a better title to property left by his intestate father than his brother's children. It is law among the Nyimang that rights of grandchildren are derived from their father's rights and hence are classed lower in scale than the son of the deceased person. The direct son of a person is

regarded as his mir (fire) and therefore represents the continuation and life of the deceased person, it is he alone who is entitled to inherit the deceased's property. However, while the rights of a direct son of a person are inherent rights which accrue by virtue of birth, as being mir (fire) of the deceased, the rights of the grandchildren are derivative and accrue only through succession pursuant to their father's death. However, the grandchildren would not be dispossessed if they occupied land belonging to their grandfather, or that which had been passed to them through their father.

The rules that govern the rights and interests of a descent group that holds common "family land" are diffuse and imprecise. The property itself might be disposed of, or it may end in one of the family lines. The following diagram is illustrative:

Figure XIII



X, a proprietor, died intestate leaving a plot of land to his children A and B, who would inherit the plot as family land. After the death of B, A becomes the owner of the land. B's children have only the right of utilization, and could not demand, for example, the partition of the land. A, as the surviving son of X, is regarded as the mir (fire) of the original landholder, and has therefore better title than his brother's children. A, now the head of the extended family, has the right to dispose of the land in whatever manner he sees fit.

ii) The Individual's Rights in His Personal Land

It is implicit in the nature of the individual's right in the family land, that the absolute title to land among the Nyimang is vested in individual members. It has been mentioned earlier that land may be termed as family property only when the original acquirer died intestate, and as mentioned, rules that govern the rights and enjoyment of family land are imprecise, with the result that the same land may ceased to exist as family land, at most, after two or three generations, This, however, depends on the circumstances: whether the immediate line of the original acquirer continued to survive, or whether at one generation of the descent group, the land was disposed of by one of the senior generation.

Subject to some limited rights of the community,[1] an individual member who has acquired land through purchase, gift

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1. Common rights over one's land amount to rights of way, grazing and wood cutting. Only right of way may be exercised while the land is still under actual utilization. Other rights subsist only after crops have been collected.

inheritance or occupation of unappropriated land, has an exclusive right over his property. Considering the general system of the Nuba landholding, Colvin wrote:

> The most firmly held land in the area is, naturally, the hill-side croft, that is, the terraced holding where a man and his family have built a house on the hill-side, and have, by very arduous labour, made a farm on the hill by terracing.
>
> The terraced land, where it is still cultivated, is handed on from one generation to another. It is entirely an individualistic system of land tenure, and each farm has very definite boundaries, which often consist of some stone walls or thorn hedges.[1]

This is also true about the Nyimang, but the expression "where it is still cultivated" is misleading. It sounds like a qualification on the right of the original holder to pass a good title in land, which is left uncultivated for some time, to his descendants. The qualification implicit in the above statement operates only against a person who holds temporary rights in land belonging to another person. It does not, however, affect the rights of the original holder, no matter whether the land is under cultivation or not, as it will always remain in permanent holding of the original acquirer unless, of course, his proprietary rights are alienated according to his wilful acts. Nadel has explained this situation by saying:

> [A] man may inherit his father's farm. but leave it unworked until his son put it again under cultivation; or the owner of farmland may die at an advanced age, when all his sons...are already married and have found land elsewhere; his own land will then go to their children.[2]

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1. R.C. Colvin, Agricultural Survey of Nuba Mountains, Khartoum, 1939, 12.
2. Nadel, The Nuba, op.cit., 33.

If the land, while lying fallow, has been grabbed by another fellow citizen, then, in principle, there would be no conflict of interests. This is because under the Nyimang law temporary rights of utilization and the original proprietary rights of "ownership" over the same piece of land may be inherited simultaneously by different persons or group of persons. The ultimate title to land is never lost, this is because rules of prescription and limitation of actions never form part of the Nyimang customary law.

In affirming the absolute rights of individual members over tracts of land acquired by them, Nadel also states that:

> Every tract of land in the Nuba Mountains that is (or has once been) under cultivation is individually owned. It represents land over which a certain individual holds complete and absolute property rights, including the right of alienating it or of bequeathing it to his heirs.[1]

According to Nadel, even the larger community has no preferential rights over land already under the individual's "ownership". He says that:

> It will be seen that corporate land rights are potential individual property rights....The corporate rights obtain only in so far as they do not conflict with previously established individual property rights. For the latter never lapse, and individual land holdings, even if they have been left unworked for several generations, never revert to the common store of group land.[2]

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1. Ibid., 22; see also Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 82, where he says that "Cultivation land is regarded as a family possession for all time, and the father is its trustee on behalf on (sic) his ancestors and descendants".
2. Ibid., 23.

Bolton also has acknowledged the absolute title of the individual member in the Nuba Mountains over his piece of land. He describes the situation as:

> [A] paradoxical state of affairs in which a primitive people who are in a stage when land would normally be expected to be held in common have individual ownership of land.[1]

In my view there is no paradox in this situation. In the Nyimang, as in all Nuba Mountains, land is obtained by personal effort. In former years the Nyimang made reservation and occupation of new land by marking trees of the intended farm with an axe. Land thus marked would be known as the occupier's axe (temel). It would become his personal property in which his soul would be mixed and would be inherited only by the children of the original acquirer as being his mir (fire) or continuation of his line and soul in this world. Even today, as it was in the past, hard labour for terracing and manuring are necessarily required to maintain permanent cultivation in the hilly areas of the Nyimang settlements. In addition, especially in the old days, a person who held a piece of land within the village vicinity would never depart with it. That was so because for security purposes (before the days that followed the Pax Britannica, people refrained from preparing farms farther afield for fear of abduction by the Arabs, or by other hostile tribes), or because of the nearness of a farm plot from the village, valuable working hours would be saved.[2]

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1. A.R.C. Bolton, "Land tenure in agricultural land in the Sudan", in J.D. Tothill (ed.), Agriculture in the Sudan, London, 2nd impression, 1952, 197.
2. Loc.cit., 197.

As the people themselves say, individualization of land-holding in the settlement areas is more pronounced. Bolton is right in stating that "in all these circumstances it is not surprising that a system of individual ownership developed".[1] It was in these circumstances that the sale of land once thrived in the Nyimang settlement areas.

An individual landholder, among the Nyimang, has an absolute right to alienate all or part of the interests held in a piece of land without resort to any superior, either political or social. Thus, an individual holder of land has the right to sell the piece of land individually held to whomever he wishes. Theoretically no limitation exists on the individual's power to alienate his property to any stranger outside his community. He has the right to lend it to a friend, a relative or a stranger for cultivation. This transaction is customarily known as lawa talau ("eating grass'). In the same fashion, land may be lent for residential purposes. An individual person also has an absolute right to dispose of all or part of his land inter vivos or post mortem by a will. In neither of the previous cases has the socio-political authority or other members of the family group have any right of pre-emptive claims over land alienated by a private holder.

iii) Extinction of the Individual's Rights in Land

An individual member who emigrates from one village to another does not necessarily forfeit his rights in land held by him in his previous village. It is a firm principle of

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1. Ibid., 197.

the Nyimang customary law that once a proprietary relation has been established by a person over a piece of land, then it becomes impossible to sever that relationship without the express consent or a wilful action of the real holder. It thus follows that a person who has left his old farm or his village residence does not, ipso facto, lose his rights in land previously held by him by the sole reason of non-residence or a mere emigration to another locality.[1] Customarily, a person who has abandoned his building or farmland continues to retain the right of use over such land for a period ranging from two to four years. During this period he has the right to cultivate the abandoned land as being his milē (spit), the rationale being, as mentioned earlier, that a person must utilize land developed or manured by him. After that period has passed, or even before that (provided the necessary rituals are performed), any member of the community is entitled to exploit the land so abandoned. But this also does not amount to a total loss of the proprietary right of the original holder who, in any case, would still exercise his rights over the trees.

Thus persons who emigrate in times of famine or because of continuous deaths and illnesses in the family, or those who work as Government officials, whose work demands their absence from home for some considerable time, do not necessarily lose their

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1. Cf., M. Gluckman, The Ideas in Barotse Jurisprudence, 1965, 118, where he states that in Barotse "The organization of people into villages also involves organization of its lands, which is so essential a part of it that if a man leave the village, he loses his rights in its land".

rights in the tribal land, or indeed, in land originally held by them. In many cases such land would be entrusted to their relatives to be held on their behalf. In one case of Abdalla Bishara v. Fikr Kilana,[1] the claimant inherited land from his father but did not utilize it. He was away on active Government service for 17 years. While he was away, his father's brother was appointed as caretaker of the land. Defendant was given permission to utilize the land on the customary principle of lawa talau ("eating grass"). It is noteworthy to mention that the defendant also inherited the right of utilization from his father who was allowed on to the land by the claimant's father in 1947. In delivering judgment for the claimant, the Resident Magistrate at Dilling said that, inter alia, the claimant's right continued to subsist through his father's brother's agency. This means that the relation of the claimant was never severed despite his absence from the village for more than 17 years. This important case, which will be discussed later, further establishes that, among the Nyimang, unless there is a proper alienation, any such abandonment of a piece of land by its iran (master) should be deemed as a temporary abandonment only.

However, an individual member may lose his right in the land because it is expropriated by the Government for public use. According to the provision of Section 4 of the Unregistered Land Act, 1970, all unregistered land in the Sudan

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1. Abdalla Bishara v. Fikr Kilana (C-S/94/75) Dilling Resident Magistrate's Court.

is deemed to be the property of the Government. On this legal basis the Government has the right to requisition, under Section 8(i) of the previous Act, any piece of land in the Nyimang area for the building of schools, dispensaries, places of worship and so on. After the formation of the Salara People's Council, the Council has the right to expropriate any piece of land and convert it into a market place, or to sink a borehole or a public well, or for any development purpose.

It appears that a person who has been deprived of his land for public use, has no right to be provided with another plot of land, or indeed, to be compensated. That is because, as is apparent from the wording of Section 8(4) of the above enactment, the Government has to act arbitrarily upon its sole discretion as to whether or not to compensate a person whose unregistered land has been thus expropriated.[1]

According to tradition, an individual member may voluntarily forfeit his rights in land when a murder is committed by him, in which case he banishes himself from the entire community. But although it is most unlikely that the culprit may return to his former village, which means that his loss of the right is permanent, yet his children and other close relatives have the right to occupy the land. Similarly, in the old days when

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1. S.8(4) of the Unregistered Land Act, 1970 (as amended by the Unregistered Land Act (Amendment), 1971), runs thus: "Without prejudice to the provisions of the preceding sub-sections, if the Government is satisfied that any person has made any beneficial use of any land which is the property of the Government by virtue of this Act, the Government may pay due regard to such use when formulating any development, co-operative or other scheme covering the land in question, and until such scheme is formulated, deal with the case in such manner as appears to it to be just and proper, including the payment of such compensation, if any, as it may think appropriate in the circumstance of each case".

people used to sell family members into slavery, a person so sold severs all ties and relationships with his previous family. He is not entitled to return to the same village, or indeed to his family, even if he has been emancipated. His loss of rights and interests in land was therefore permanent.

But a person who is held responsible for breaking farmily ties may not lose his rights in family land. If the land held by the descent group still remains intact, it may be used by the culprit as of right. His right is not determinable unless he is sold into slavery.

2. COMMON RIGHTS AND INTERESTS OVER LAND

i) Introduction

It has already been mentioned that land is regarded as fundamentally different from movable property, and as such is essential to the livelihood of every member of the community. Thus every individual Nyimang must have free access to the utilization of land that lies within the territorial area of the Nyimangland. However, in view of the absence of any unit of the society to enforce effectively the laws of access or enhance acts of enjoyment, the society found refuge in religious taboos and supernatural sanctions. As a general dogma it is taboo (kwir) to refuse a fellow-citizen access to land required either for settlement or for cultivation purposes.

As has also been pointed out, the absolute title in land among the Nyimang is vested in individual members of the community. However, each of the Nyimang seven-and-a-half sub-tribes has its pre-emptive claims over tracts of land that fall within its

territorial boundary. Such land is regarded as common storage for the potential individual holders. Power of control over this land, as against the aliens, is exercised by the whole community of a given polity. Nevertheless, the community per se does not have, other than this jurisdictional supremacy, any proprietary interests in land held by its individual members.[1] To enhance the peaceful enjoyment by the individual members of the benefits of their land collective power of control over the entire territorial area is exercised by individual members of the same community, as part of their social and moral duty, to defend and protect the land of their ancestors.

Before one can proceed further, it is important to say something about the phrase "communal withholding" which has commonly been used by some Sudanese writers. The term "communal land" may presumably suggest two possible meanings. First, it may mean that territorial area over which a certain community or polity as an entity holds proprietary or jurisdictional title. Second, it may suggest a certain area of land which falls within the boundaries of a certain community and is not, nevertheless, appropriated by any member of that community. In the former sense the title to all land is vested in a political authority, be it a Sheikh or a Rural Council, and the individual members are deprived of holding any proprietary or absolute title in plots of land held by them.

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1. Cf., Lord Hailey, An African Survey, Revised, 1956, 685.

These situations are found in the Western and Eastern Sudan amongst the nomadic cattle- and camel-owning tribes. The cattle-owners of the Southern Sudan (Dinka and Nuer) may also be said to exercise some kind of collective holding over grazing lands. However, the term "communal land", as employed in the second sense, has a narrower meaning. The community here lacks any proprietary interest over its land, but its individuals may enjoy a common interest in the sense that each individual has an inherent right to appropriate any portion of land to his private holding. Once that land has been appropriated, it ceases to be common land. It is indicative, therefore, to point out that the term "communal land", as used by some Sudanese scholars is misleading.[1] That is because it is never made clear by these writers in which sense the term "communal land" is used.

However, an individual member of the Nyimang community has vested rights over all vacant land falling withint the territorial boundary of a given sub-tribe. This general and unrestrained right, as has been seen, stems from the fact of the individual's membership of a given community. The individual member may not be tied to exercise his right to a specific piece of land, but he is entitled to the general right of collecting woods, grass for thatching, grazing his livestock on any piece of land he chooses, or may hunt over any area of land that falls within the territorial area of his community. These general rights

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1. Cf., M.H. Awad, "The Evolution of Land Ownership in the Sudan", (1971) MEJ, 228; Saeed M.A. El Mahdi, A Guide to Land Settlement and Registration, op.cit., 16.

may also be exercised on land privately held provided that these holdings are not under direct cultivation. The above are common rights open to all members of the community and the individuals exercising them are not required to ask permission from any political superior other than the direct holder of the land.

ii) Trespass Rules

Despite this repeated emphasis on the idea of individualization of landholding among the Nyimang the right of the individual holder over his land is seriously circumscribed by the general claim of the community at large. Thus apart from the compounds, which are normally enclosed by thick fences, there are no closed areas in Nyimangland from which the general public may be excluded. Presumably the traditional schema of the Nyimang customary law excludes the existence of trespass rules, such as obtain under the English Common Law, in relation to land. As has been made clear, land in the Nyimang ideas is the creation of Abradi (God), and should therefore be enjoyed by all men. This general conviction, as has been pointed out, does not exclude the existence of specific individual rights over certain plots of land. Further, it may be said that the absence of the trespass rules in the traditional Nyimang laws may also be attributable to the fact that what is regarded as crucial to the Nyimang landholder is not the land itself (in the form of soil), but the use or the interest upon it. It thus follows that since land is plentiful and the population is relatively sparse, there is no need vigorously to exclude other members of the community from enjoying interests over land

though individually held. Thus trespass as an actionable wrong per se is absent under the indigenous law, and hence mere entrance on to land held by another without more does not in itself constitute an actionable offence.[1] But a person in exercise of his common right over land held by another is not entitled to cause damage to property situated on that land, nor is he allowed to appropriate any part of the crops without the holder's consent. If, however, a person has entered on another's land, with or without permission, and caused damage to crops or other property, then such person must be held answerable for such damage. An action is founded not in trespass, but on a specific injury suffered in respect to specific property damaged by the wrongdoer.

Despite the absence of any trespass rules, instances exist where individuals tend to exclude other members of the community from exercising some common rights over land held by them, even if no damage is foreseeable. Thus an individual holder has an absolute right to prevent the public from entering his wir (compound). The wir is normally enclosed by a thick fence to exclude strangers or unwelcome members of the community. The wir of a person, among Nyimang, has an especial sanctity which would never be violated by an intruder without running the risk of being expelled by force of arms, or being sued in a court of law. Persons who are believed to have the evil eye (kworu) are usually not welcome in the cattle camps or in the compounds of

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1. Cf. W.W.Buckland and A.D. McNair, Roman Law and Common Law, London 1952, 102. where the authors state that the same notions also existed under the Roman law.

other persons for fear that they may bewitch the livestock, or even human beings.

In recent years, people have become increasingly aware of the offence of criminal trespass under Section 350 of the Sudan Penal Code. This is a direct result of the people's frequent visits to the larger towns and the growth of the relative economic value of land in some Nyimang areas. For instance, in the village of Abu Seibe of the Nitil sub-tribe, people have started planting economic trees such as mangoes, guarvas, etc., which are of a permanent nature, for economic purposes. The spread of these plantations in the area has raised the economic value of the land. So in order to regain possession of land some individuals started to base their actions in trespass. Even in those areas where land is still utilized for subsistence purposes, people have started to base their actions in trespass in order to enforce a claim to title. This is so even if the possession of the land in dispute was permissive. The claim to evict a person may be triggered by an old vendetta or a misunderstanding between the parties, as for example, when one of the parties refuses to allow his daughter to marry into the other party's family.

The remedy asked for, when actions are based in trespass, is eviction and not damages. Nevertheless, Customary Courts have consistently refused to recognize trespass as an actionable offence unless there has been an actual damage to property. Thus in Koser Kori v. Abdel Gadir El Asha,[1] claimant lent part

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1. Koser Kori v. Abdel Gadir El Asha (C-S/17/77 - Salara People's Court).

of his farmland to defendant's father some twenty years ago for cultivation on the customary principle of lawa talau (to eat grass from). The original borrower died and the cultivation rights passed to his son (the present defendant). Claimant alleged that defendant had started to encroach on the other part of the farm still held by claimant. Basing his action in trespass claimant asked for eviction. The Salara People's Court rejected the claimant's allegations of trespass and refused to eject the defendant. The court further ordered the defendant to return to his former boundary and continue to utilize the land accordingly until such time as he (the defendant) abandoned the land. On appeal the Resident Magistrate upheld the decision of the lower court but did not discuss the legal issue of trespass involved in the case. The rule thus expounded by the Customary Court in this case is that a person in possession of land belonging to another should not be evicted contrary to his wishes. This is so even if the possessor has acted in ways which may be regarded as violations of the original holder's rights. In addition, the situation seems not to differ whether the possession was initially permissive or not.

It seems that while the Customary Courts are reluctant to recognize actions founded in trespass, the court of the Resident Magistrate in applying the general territorial law, is ready to disregard the customary rules and sustain such actions. Thus in Khamis Jabri v. Ibrahim Sanafur,[1] claimant alleged that

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1. Khamis Jabri v. Ibrahim Sanafur, (C-S/63/74 - Dilling Civil Court).

defendant was allotted part of his (the claimant's) land for settlement purposes. After some time defendant started to enlarge his residential area. Claimant based his action in trespass and sued for eviction. The Resident Magistrate, as the trial judge, gave judgment for the claimant. This decision is inconsistent with the general customary rule where a person in possession of land, on the basis of borrowing principle, should not be evicted despite his subsequent acts which might amount to criminal trespass.

In another case, Abdalla Bishara v. Fikr Kilana,[1] claimant brought his case before the Resident Magistrate at Dilling. He alleged that defendant was allowed to cultivate land belonging to the claimant on the customary principle of "eating grass". Defendant sank a well intending to convert the land into a fruit-garden. When asked to surrender the land defendant refused and counter-claimed that the land belonged to his father. The trial judge in finding for the claimant said that defendant had trespassed on the claimant's rights. But the judge did not say, when sustaining an action in trespass, whether he was relying on the common law rules of trespass or whether he regarded the defendant's acts as amounting to criminal trespass, which comes under the purview of Section 380 of the Sudan Penal Code. In any case, the decision of this case is inconsistent with the customary principles as shown above. The proper award should have been an injunction and not eviction. That is because the rights of the borrower of land under the customary rule

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1. Abdalla Bishara v. Fikr Kilana (C-S/94/75 - Dilling Resident Magistrate's Court).

could not be terminated without his consent. The letter of this principle applies even if the borrower was originally a squatter. In addition, eviction is no appropriate remedy under the customary law where there is no material damage to the property.

iii) Grazing Rights

Each of the Nyimang sub-tribes has its conventional grazing areas that fall within its territorial boundary. In the old days other communities were not allowed to drive their animals into grazing areas that fell outside their area. Not that there were sharp divisions any more than there are now, but because all strangers were discouraged to drive their livestock away from their homes for fear of theft. Today different Nyimang communities may graze their animals on lands falling outside their territorial boundaries. Division of grazing land is less exclusive than it was in former years. This is due to the general security and the free movement of the individual members of each community.

Although there are no specific areas for grazing purposes, some places are preferred for their accessibility to water. Some minor disputes that occur between the various Nyimang communities are centred mostly around watering-places. The watering-places are held either by a certain community collectively, as in cases of natural reservoirs, or are wells sunk by personal effort and hence individually owned.

Normally, rich grazing areas are found at a considerable distance from the village settlements, and for this reason cattle camps (wir) may be established far out on the plains so

that animals may be near to the grazing places. However, as has rightly been pointed out by Stevenson,[1] cattle move between the camps and the villages according to the agricultural activities of the people. The cattle are taken away at a certain time of the year, usually during the cultivation period to keep them away from the village farms. They are looked after by youths who live in these camps for several months. On the other hand, the formation of these wir (camps) is permanently connected with the distant farms for manuring reasons.

Any land that is not under direct cultivation is open to all persons to graze their animals. However, and notwithstanding this general rule, the farmer is inclined to chase away herders who might wish to graze in the precincts of his farm. This is so, especially if crops are still on the farm, for fear that animals may stray through negligence and damage the crops. The farmers' objections are more pronounced in the settlement areas. For that reason the Salara People's Coundil issued a local order as a step towards regulating grazing periods in the residential areas.[2] The order prohibits herders from grazing their animals in the village settlements during the period from the beginning of June (which is also the beginning of the rainy season) until the end of December. If, in violation of this order, any animal has strayed and damaged any

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1. The Nuba Peoples of Kordofan, op.cit., 160.
2. This local order is still a proposed scheme which should come into effect only upon the final approval by the People's (Provincial) Executive Council in Kadugli.

planatations, the owner of the animal shall be liable to the following:

40 P.T. for a single head of camel

30 P.T. for a donkey

20 P.T. for a single head of cattle

10 P.T. for a calf

5 P.T. for a goat or sheep.

In addition, a fine of LS10 may be imposed, or a month's imprisonment in cases where the animal's owner refused to pay the above fines. The order does not mention whether, in order to hold the herder liable, negligence must be established, nor does the order state whether the farm owner is required to maintain proper fences around his farms.

The objective of this local order is to reduce the increasing mode of disputes between herders and farm owners. In the villages every suitable place is expected to be under cultivation. This, in effect, leaves little grazing space for the village animals. But the local order, as is evident, does not suggest any particular areas or any alternatives as grazing land within the villages. It simply says that people should not graze their animals in the village vicinity during a certain time of the year. However, a careful reading of the local order reveals that it does not pro tanto prevent persons from grazing animals in the villages provided they do not stray and damage other people's crops.

It has been mentioned that animal owners are entitled to pasture their stock faliny (free) in all directions over any piece of land without obtaining permission from anyone. There is, however, no common right to drive animals on to another's

farm to feed on the kawulè (grain stalks) after the harvest is over. It is an offence among the Nyimang to run animals on to another's land immediately after the collection of the crops without first obtaining the necessary permission from the farm holder. To do so is an act which entitles the farm holder to sue and demand compensation. As a general rule, the farm holder preserves the right of first feeding his animals on the grain stalks of his farm. Furthermore, the farmer may opt to collect the kawulè either to store it as fodder for his young animals in the dry season, or to use as a saleable commodity. In case he does not intend to benefit himself, then he has a right to invite a relative or a friend to drive his animals on to the farm before the public.

But as soon as it is made known that a certain farm has been grazed (even by the animals of the farm holder), then the public also have the right to run their animals on to the farm. This is because the farm holder can no longer pretend that his crops are not yet collected. The tiny (homefarms) are more closely guarded. It is common to see people repairing the fences of their "homefarms" immediately after harvest. People say that these farms are the best place for fowls and goat-grazing. They become available for public use only after a considerable period has elapsed after the harvest.

iv) Hunting Rights

Among the Nyimang hunting is practised by anyone at any time of the year and land for hunting is freely available to all members of the community. However, organized hunting

known as defi or afuny is regarded as a seasonal activity, and takes place every year towards the end of the dry season and the beginning of the rainy season. It may also take place virtually every time before the initiation ceremony of the age class (ashi twil - beer drinking). The activity of the organized hunting (afuny) has a significant connexion with the general fertility cult and other social institutions. For that reason it is the concern of the whole tribal community. Thus in each Nyimang sub-tribe there exists an ancestral spirit who is responsible for the hunting expeditions. This ancestral spirit is known as the afunyu or defu iran (master of the hunt). His role is to organize, predict and direct the group to places where game is abundant and also to protect the members of the expedition group from any misfortunes.

The choice of the time for the group hunt is left entirely to the discretion of the priest spirit. The expedition time is decided by blowing a special borshér (horn). The hunters assemble in a conspicuous place and lay all sorts of weapons (including rifles, spears, clubs, swords, etc.) on an ant-hill to await the blessing of the hunt master. The hunt master performs his blessing by killing a fowl and breaking an egg over the weapons. After this ritual, the priest is possessed by the spirit who will utter his blessings, and then announce the place to which the group should head for hunting.

As a rule the afunyu iran, or master of the hunt, is entitled to the first four animals killed during the expedition (most important are wild cats, rabbits and guinea-fowl). In

addition, prestation of the heads of all animals killed during the expedition must be given to the kuni as the master of the hunt for ritual purposes. The right of the hunt master emanates from his religious status and not from any unique relation to the land over which animals are killed.

It is a firm customary rule of hunting that the person who first hits an animal has the right of claim over it. A person who has hit an animal with his club, but not hard enough to kill it, has a right to the two hind legs if the same animal is subsequently killed by another person. Should a person kill an animal, but not be quick enough to collect it before the corpse is touched by a fellow-hunter, then the person who has touched the corpse acquires a right to one foreleg of the dead animal. Similarly, a person whose dog first catches an animal, though joined later by other dogs, gains absolute title over the meat of that animal.

The use of the land for hunting purposes is never refused by the landholders, but in most cases farmers are likely to quarrel with the hunters if the latter should beat the farm fence so as to scare off the game. The objection is not that the landholder has a specific claim or interest to protect the game found on his land, or that he does not want others to hunt over his property. He objects because he wants to protect his farm fence from destruction. Thus any person in hot pursuit of prey may be allowed to enter even land under cultivation, in order to kill. This is in order that the pursuer should not unnecessarily damage the cropes. What the hunter requires is the right to hunt game; he does not demand possession of the soil.

The interests of the hunter do not, therefore, conflict with the interests of the landholder.

In Nyimangland there are some places that are considered as favourable areas for trapping wild animals; but no concept of individual claims over such areas has ever been developed. Any person has a common right to set his traps in these areas without objection from the landholder. On some occasions farmers may invite professional trappers to rid their farm of those animals that damage the crops, but the farm-holder has no right to any portion of the animals so trapped on his land.

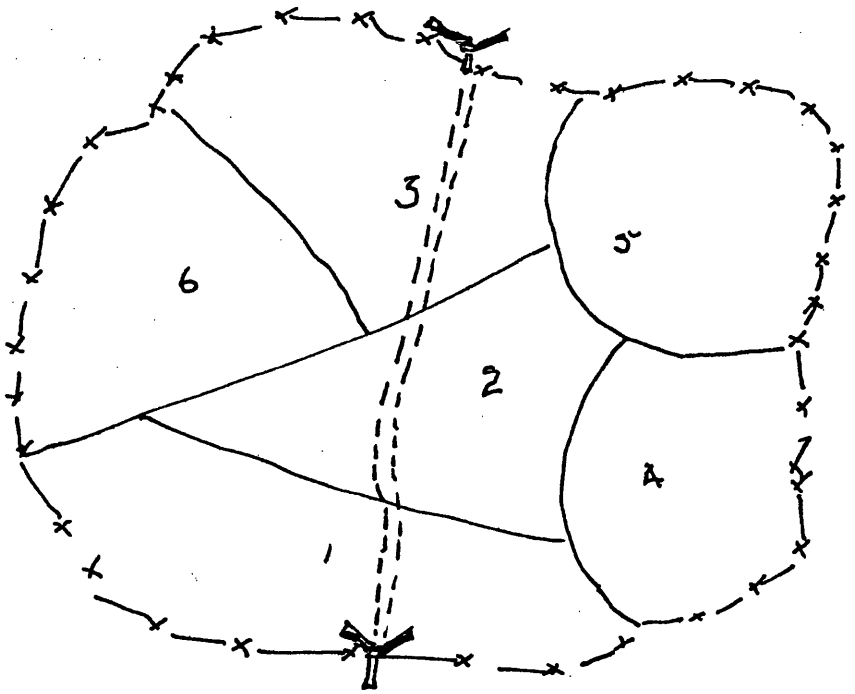
v) The Right of Way

Right of way is also a common right. It is generally permissible to enter on another person's land or walk through another's farm without permission, provided the passer-by does not cut trees or damage the crops therein. It has already been mentioned that in the absence of the law of trespass, mere entry on to another person's land is not an actionable wrong. Main roads (bwir dia - big or main roads) are commonly used and are not subject to closure. Even strangers have the right of passage over the roads. The bwir dia has a special sanctity which should not be infringed. Most of the important rituals, especially those connected with purification rites (agelda - washing oneself) are performed on these main roads. It is kwir (taboo) to foul common roads, to barricade them, dig holes in or throw any throny branches on any road used by the public. Informants say that the perpetrator of these acts is liable to have bad luck, as the users of the road (be they humans or supernatural powers) will curse him.

If a path is in the process of being made on land to which the holder of the property does not agree, then the holder has a right to close that path before its use matures into a common right through the passing of time. If such a path is not closed within a reasonable time (within a season or two), then the public seems to acquire an indeterminable right of passage over that piece of land. It is an accepted rule that a person who wants to stop the public passing through his land - after the latter has established right of way over his land - must clear an alternative new road and make it ready for use before he can take any steps towards closing the previous path. Similarly, no person is allowed to clear a farm upon a common road. But if a person opted to prepare his farm on a common road he must leave the actual footpath uncultivated. Usually a Y-shaped wooden stile, known as the kojwor or sulè ngal (an opening in a fence), is built into the entrance to the public use of the path. Some people have extreme opinions which say that no person is ever permitted to enclose a public path into his farm. In the Salara sub-tribe, the supporters of the last opinion cite a famous incident where 'A' cleared a farm on the public road without making an alternative path for humans or livestock. When 'B' heard of this incidents, he took his arms and drove his cattle through the farm of 'A' destroying his fences and plantation. 'B' was supported by public opinion as having justifiably exercised his common right. The case was settled by reconciliation, and 'A' was requested either to clear his farm elsewhere, or to prepare an alternative passage for the public.

In valleys where cultivable lands are fairly fertile, different people may make their farms in one area in the following way:

Figure XIV



Key:

fence

public path with a stile

internal boundaries

1,2,3, etc. farm plots

In the above diagram the public and rest of the farmers have a common right of passage over the holdings of 1, 2, and 3 without the respective holder's permission. However, Nyimang customary law imposes an obligation on the users of the path, especially where crops are still in farms, to close the entrance after passing through. If, as a result of the negligence of the users of the path, crops are damaged by animals, then such persons must be held answerable.

However, in considering the nature of the right of way enjoyed by the public over land held by individual persons, it is open to ask whether such right could ever amount to that of easements under the English law. Although it is true to say that these rights are recognized as basic rights under the customary law, yet it is difficult to say categorically whether they are actual easements. The Nyimang do not differentiate between rights in rem and rights in personam. In addition, they do not, in effect, lay any emphasis on the consent of the landholder to the creation of such rights over his private holding. Similarly, Nyimang customary law is silent, for example, as to whether the right of passage is attached to the land as a dominant tenement as against a servient tenement. In the absence of any conceptual basis to the creation of such rights, it is open for one to assume that rights obtained on other persons' holdings are mere public rights. The individual person, as a member of the public, obtains such rights only in that capacity. It has been mentioned that a person may even prevent the public from passing through his land. Sometimes a public path may be destroyed by natural causes, as for example, when a road is turned into a seasonal stream. In all these circumstances the right of passage may cease to exist.

vi) Right to collect Honey

Honey found on unappropriated land is a common property which may be picked by any person as of right without asking permission from anyone. But a person who finds a bee's nest on another person's holding must make sure that the landholder or any other person has not taken any positive steps towards its possession.

As, for example, by putting a thorn branch on the hole, fencing the tree on which the nest is found, or by putting a fetish on it (usually a spear, kordo (whip) or kodi (stone), etc.). These acts clearly indicate the intention of a person to appropriate honey to himself by keeping the public away from it. Should any member of the public disregard these fetishes and pick the honey, then the person who has first reserved it has a right to sue the intruder to recover the honey, or be compensated. This remedy is in addition to the supernatural sanctions which may be incurred by the offender as a result of his disregard of the fetishes.

If the landholder is not aware of the presence of honey on his farm, then the honey is considered as common property and may be appropriated by the first finder. An adverse opinion exists which claims that if honey is found on a farm of another person, or even near his homestead, then it becomes incumbent on the finder to inform the landholder to keep an eye on it.[1] The finder would still claim a superior title over it, but at the time of picking a token share must be given to the farmholder. Here the landholder acquires his right through his acts of caretaking and not through his peculiar relation to the land on which honey is found. Persons who join in to help pick the honey are also entitled to a small unspecified share as a reward for the risk of collection. A third opinion says that a person who finds honey on another's holding has a right to enjoy it for two years, after which, if the honey is still

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1. These opinions are derived from interviews with the informants during the field research.

made, the landholder joins in as a joint owner. The difference between these rules is only a matter of degree as the whole thing depends on the parties' relationship. On the other hand, the general rule is that he who first finds honey has a universal claim over it to the exclusion of all other members, including the landholder.

A person may attract bees to make honey in a place prepared by him. To achieve this a hole is made in a tree, or perhaps a trunk or a rock with a suitable hole may be chosen as a site for the purpose. A fowl is killed under the tree, and the entrance of the hole is anointed with tidifu (a fermented dough from which ashi (beer) is made) to lure bees. To signify further acts of ownership, a kodi (small stone) is put on part of the entrance of the hole. A fetish of a spear or a kordo (whip) obtained from a kwuni (ancestral spirit) is placed or tied on the tree. Honey made in that hole becomes private property. Picking of this honey by any member of the society without the owner's permission is regarded as theft.

vii) Water Rights

Water from perennial streams, natural reservoirs (tofa) and seasonal springs (guji), whether situate on another person's holding or not, are free of access to any member of the public. Obtaining water from these places is regarded as a general right, and may be enjoyed dumma (commonly by the public). Thus any person is absolutely free to sink a waterhole (tewa) in the bed of a seasonal stream to water his animals, or to use it for domestic consumption. It is a firm customary rule that natural water depressions (especially the large ones) belong to the

whole community, and hence no person is permitted to enclose these watering places within private farms.

In the old days the people, because of the insecurity of the plains, were unable to take their animals away from the settlement areas. A custom was developed where the group of youths who were about to be initiated into an age-grade had to dig an artificial reservoir called wordi. The custom of digging a wordi for public use is also practised to the present day. The custom makes it incumbent on the newly-formed age-grade to dig an artificial water depression (wordi) for public utility. No permission is required from the landholder when the wordi is dug. Further, the landholder on whose land the wordi is dug has no especial right or claim to the water of the wordi. The wordi, like the tofa, is regarded as common property and not, therefore, subject to private holding. Its waters must be used faliny (free) by animals and by all people, including strangers. The original holder of the land is prohibited from enclosing the wordi into his farm as it is kwir (taboo) to do so. Usually, the farm on which the wordi is dug must be abandoned by the holder for practical reasons. That is because it is feared that flocks of animals that come to drink from the wordi are likely to go astray and damage the crops. However, as soon as a wordi is dug, the public at large acquires right of user over that piece of land and may exercise watering rights until such time as the interest ceases to exist, as for example, when the depression is covered with mud or sand and becomes incapable of holding water

any longer. The original farm holder may, if he wishes, return to his farm as of right. Also boreholes sunk in some areas of the Nyimangland, together with artificial water depressions (haffirs) made by the Government, are considered as common tribal property.

A person has the right to sink a well (bidi) anywhere he wishes. He is free to do so either in the settlement areas or in the far fields. Permission is necessary if a person intends to sink a well on another person's land. Some informants say that land required for burial or for sinking a well is never refused; but experience shows that people quite often refuse to permit others to sink wells near their homesteads or tiny (homefarm) for fear that animals coming to drink may stray and damage the crops. In the old days, when water was plentiful, wells were regarded as common property. The older generation retain the opinion that wells should be left open and available to the public to be used by everyone, and that the present situation, where people lock their wells and deny water to the needy, is disastrous. This state of affairs, they allege, has angered the supernatural spirits, and the result is a continuous shortage of water each year.

Everywhere throughout the Nyimang area bidi (wells) are privately owned. When sinking a bidi the person who first breaks the soil, or is the first to apply his shigir (digging hoe) acquires the right of ownership over the well. Usually several individuals, or even a group of families and other neighbours, may contribute towards the costs and/or manual labour to sink a well. The contributors are not, in the

strict legal sense, regarded as co-owners of the well. They (the contributors) would have the right to water their animals and to draw water for domestic use. But the actual bidi itself is "owned" by the person who first applied his shigit (digging hoe).

As a rule, these wells are tightly controlled by the owners. The owner of a bidi is absolutely free to allow or disallow anyone to water his animals or take water for personal drink. People are quick to resort to arms if a person takes water from a guarded well without the owner's permission. This is so especially during the dry season when water becomes scarce in most parts of the Nyimang area; and as most people usually rely totally on these wells the owners keep them under padlocks to protect them from intruders. The locking-up of these wells is a clear symbol of destruction of the old sense of community. A person has a right to return to his old dried-up well at any time he wishes. A well that has been abandoned by its owner may be resunk by the co-operative efforts of the village members. Such a well becomes common property of those particular villagers who have the right to exclude other villagers. Even the original owner of the well has no special right over a well that has been resunk.

viii) Rights over Trees

Trees whose wood is used for fencing, building and for other purposes are, in effect, common property open to all members of the community. They can, as a rule, be cut freely by any citizen from any part of the territorial area of a given

Nyimang community. However, there are exceptions to this general rule. Certain large trees under which the older people of a village gather, or retire after a day's work, are regarded as akuri (taboo) and may not be cut. If such trees become old and fall down, their wood may not be collected (except by elderly women) for fear of death.

Further, trees on a farm are used exclusively by the farm holder. The general public is not permitted to cut trees on other people's farms without the express permission of the farm holders. But no such permission is necessary to cut trees from an old deserted farm whose holder does not intend to recultivate in the near future. Similarly, trees in the village vicinity, and particularly those that grow near homesteads, would not be cut without the permission of the homestead owner.

It has been mentioned that private property in trees is recognized among the Nyimang. Thus rights in trees may be held by persons other than the landholder. Similarly, rights in trees can be alienated distinctly from the land on which they grow. A person who settles on another person's land may be allowed to pick the fruits of these trees, but must not cut them down without the owner's permission. An owner of a tree on another person's holding has right of passage to enter the land and cut his trees or collect their fruits, provided that he uses reasonable care not to damage the crops. It is common among the Nyimang that a person may permit another to cultivate a privately-held piece of land, but that the landholder may reserve his right in trees on that land. In other words, the

borrower of the land for cultivation is not entitled to cut trees on it. In some cases an agreement may be entered into between the tree-owner and the occupier of the land, whereby the land-occupier is required to tend these trees by manuring and protecting them against cutting by strangers, in consideration of appropriating some of them to his personal benefit.

A distinction has to be made between trees which have economic value and those which are used as animal fodder (and thus saleable), and other common trees. Trees such as adig (Aacia albida), fo (baobab), kabidé (Cordia rothii) and fir (Ziziphus spina christi) have especial value. They are generally preserved and are known as jinan. The kabidé tree is regarded as a reserved tree by the local government for its timber usefulness, and may not be cut without a licence from the Forestry Department. But traditionally the Nyimang consider the adig tree as the most important, because its leaves and fruits are used as an important source of animal fodder and, when the adig tree becomes old and falls down, its wood may be used as sleeping planks, a traditional bed known as kubang.

As a general rule Nyimang law makes no serious distinction between self-grown and planted trees. Thus trees that are planted by the occupier and those that grow naturally, while the land is still under the occupier's possession, both belong to the person in possession of the land. But trees which were already on the land when the licensee comes into occupation, belong to their original owner, be he the original landholder or a previous occupier. The law is not clear whether the borrower/occupier of the land is to own the trees even if he has

abandoned the land for a considerable period. In my own field investigations a variety of opinions were expressed. One opinion is that the borrower/occupier of the land may continue to exercise his rights of ownership over these trees for some time after he has abandoned the land. No specific time is mentioned after which the right in these trees may cease to exist. The second opinion states categorically that the borrower/occupier of the land loses all rights to the trees the moment he abandons the land. In such cases the ownership of the trees reverts to the original landholder. There is a third opinion which says that the borrower/occupier of the land would, upon abandonment of the land, divide equally the ownership of the trees with the original landholder. However, in the absence of any specific rule that governs the situation, none of the former solutions seems satisfactory. That is because complications always arise if the same land is borrowed by more than one person, as is the case among the Nyimang.

ix) Soil for Building

Earth for building purposes is regarded as a common property which may be obtained by any person. Permission is necessary if earth is required from another's tiny (homefarm) for building purposes. Generally permission would not be withheld, except for special reasons (e.g., personal vendetta). Soil required by women for pottery may occasionally be dug from some common place or from another person's land without asking any special permission. This is legitimate under the current law, provided that the place from which soil is obtainable is not near to someone's homestead.

x) Rights over Dry Wood, Grass and Wild Fruits

Everywhere in Nyimangland dry wood for fuel may be collected freely by any person for domestic or marketing purposes. Thus every citizen is entitled to collect wood for cooking from unoccupied farms that are left fallow with no intention of immediate cultivation. Firewood may also be obtained from the fences of deserted old farms without asking permission of the previous. A person who intends to collect firewood from a farm under cultivation must first obtain permission from the farm-holder. Permission is not likely to be refused provided the wood collection does not become a habit. A person who collects firewood from the fence of someone else's farm without the holder's express consent, will be required to return the firewood or made to pay compensation. In residential areas, where home-farms are permanently cultivated, no person is permitted to collect firewood from the fences of these farms. Even the farm-owner rarely takes wood from the fence of his own homefarm. That is because it sometimes becomes difficult to find appropriate trees in the village vicinity to make a good fence.

Like any other common property, wild fruits may be collected freely by the public from any person's land without permission. But if the land is under cultivation, then permission must be obtained. Generally people say that it is not an offence for a person to enter on to land and pick some wild fruits; or even take some cultivated vegetables for personal consumption. This is so provided that the quantity of the vegetables collected

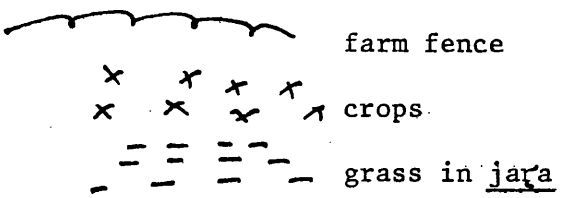
is not large enough to amount to theft or criminal misappropriation. It is also a rule that people are not permitted freely to collect the fruits of fo (baobab) trees on another's holding while the farm is still under cultivation, i.e., before crops are harvested.

Similarly, people have a common right to pick gum, mushrooms, together with various medicinal roots anywhere in Nyimangland without asking permission. Thus a person may enter any tract of land, whether cultivated or not, to collect these things without asking the consent of the farm-holder, provided the picker does not destroy the farm fence or any crops therein.

Grass is also common property which is enjoyed by all members of the community. As soon as it has been cut or any acts of appropriation have been performed, then the grass becomes the property of the person who has cut it or collected it. Grass can be collected by any member for personal use - such as thatching - or for sale without permission from anyone. As a common right people are entitled to collect grass, even from jarie (fallow land) belonging to someone else. Generally thatching grass is not reserved; but exceptions exist to this general rule. In the far fields grass that is found within the fence of a farm is regarded as personal property of the farm-holder. This happens in cases where only part of the farm is under hoe, while the rest of it lies fallow, but is still included in the general fence of the farm. The rested part of the farm is sometimes known are jara. The diagram below illustrates this.

Figure XV

Key:



Should a person cut grass from jara of another's farm without express permission of the farm-holder then such a person would be considered a thief and should be made to return the grass or pay its price. That is because it is presumed, by custom, that the farm-holder has a reservation right over grass grown on the jara to the exclusion of the public. The law is not certain as to whether the right of the farm-holder to reserve the grass continues even after crops have been collected and, if so, at what time the right of reservation

would end. Unless the farm-holder immediately cuts the grass or shows intention to continue his reservation for a reasonable time, as for example, by repairing the fence of his farm or putting fetishes on the grass, then it may (probably) be assumed that the farm-holder has no intention to appropriate the grass for himself. The public may then cut the grass, after the crops have been collected, without being answerable to the farm-holder.

Similarly, the right of reservation may exist in the residential areas. A certain type of tall hard grass known as golé suitable for thatching, may also be reserved. This type of grass is commonly grown on the hill slopes in settlement areas. Thus a person who lives next to a foothill has a right to prevent other members of the community from cutting golé grass that grows on the slopes near his homestead. The following map is illustrative:

Figure XVI

Key:

homesteads

a hill with golé grass

In the above diagram the owner of the 'A' homestead alone has the right to cut golé grass that grows next to his settlement. But if he moves his settlement to some other place, then he loses all right to that grass. The public then acquires a common right of enjoyment. This is so unless another person builds his huts near that area.

There is, however, no consensus as to the existence of the rule which encourages land reservation and other interests upon it to the exclusion of the general public. The general rule is that no person is permitted to reserve any land without effective utilization for a period of more than four consecutive years. This rule applies also to the iran (master/owner) of the land. In one case personally observed by myself in 1978 at Salara sub-tribe, Minyir claimed that a certain plot of land belonged to his ancestors. He then surrounded the plot with a fence and built a small hut on it as an indication of reservation. He then continued, for more than four years, to prevent anyone from attempting to cultivate the land or cut any trees from it. Some members of the community disapproved of this strange attitude and forcibly cut some of the trees on that land. A dispute arose between Minyir and his neighbours. There some elders and the members of the land committee (formed by the Salara People's Council) were called upon to settle the dispute. The elders and the members of the committee unanimously agreed that, in custom, Minyir was entitled to reserve any piece of land for private use, provided that the period during which the land lay unutilized, should

not exceed four years. The rule applies to the iran (master or the original holder) of the land. If the prescribed period has been exceeded, then the public may defy the right of the reserver and may utilize the land without asking the permission of the presumed landholder.

3. BOUNDARIES AND DISPUTES OVER LAND

i) Boundaries

It is futile to speak of individualization of landholding among the Nyimang without saying anything about the mode of boundary identification between the various holdings. However, in the absence of any registration system in the Nyimang area there is a total lack of the cadastral surveys necessary for precise boundary demarcation. Although this lack of survey might be taken to imply that boundaries, if they exist, would be marked in a somewhat crude fashion which in most cases must be imprecise; this conclusion is not wholly correct. Among the Nyimang, individual holdings are separated from one another by boundaries which are marked by definite markings on the ground. These markings as judged by Nyimang standards, precisely demarcate the extent of the various farms and thus could properly be said to form what Allott calls the "indicia of ownership".[1]

By way of contrast to the individual farm holding, there are no proper or exact demarcations separating village lands; nor indeed are there any between the territories belonging to the different Nyimang sub-tribes. In the case of the village

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1. Cf., A.N. Allott, The Ashanti Law of Property, op.cit., 176.

lands, it has already been mentioned that the Nyimang inhabit scattered settlements which spread loosely over valleys on the hillsides. Village communities do not have any special claims over tracts of land utilized exclusively by the village members. Thus it is customary for individuals from different villages to be allowed to establish farms within the precincts of another village without the least objection from the settlers of the latter village. For that reason boundaries between the villages are not precisely marked, and can be described only through some natural features, viz., a tree, a rock or a seasonal stream.

Boundaries between the different Nyimang sub-tribes are also blurred. Nadel has said that:

> As in the case of village land, there are no artificial boundaries to distinguish the tracts of land belonging to different hill communities. Nor are the land rights rigid and exclusive with regard to individuals from other, neighbouring, hill communities.[1]

It must be remembered at the outset that Nadel is speaking about the general situation in the Nuba Mountains. However, as regards the Nyimang, one finds it most difficult to agree with his contentions. It is true that the boundaries between the different Nyimang sub-tribes are imprecise and tend to conform, as in village boundaries, to natural features. But this is not the same as saying that there are no "boundaries to distinguish the tracts of land belonging to different hill communities". Nadel also concludes that, as the result of

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1. Nadel, The Nuba, op.cit., 25.

the absence of the boundaries between these communities, rights to land are not rigid and are not "exclusive with regard to individuals from other, neighbouring, hill communities". This again is quite untrue in the Nyimang case. However, Nadel may be held right if his contention is applied to the era preceding the so-called Nyima Patrol, 1917. In those far-off days, and despite the continuing enmity between the various Nyimang sub-tribes, the abundance of water resources and grazing land meant that there was no cause for the strict assertion of boundary claims over territorial land.

In recent years the picture has completely changed. Consciousness of the territorial limits of each Nyimang sub-tribe has grown considerably amongst its members.[1] This was inevitable as a consequence of such factors as population growth (human and animal), water shortages and general overgrazing of the land. There is also a move to assert vigorously the supremacy and the right of the members of a given Nyimang sub-tribe to enjoy land falling within their own territorial area to the exclusion of other Nyimang communities. Such a conception represents a fundamental change of attitude, and contrasts sharply with the general concept, previously unchallenged, of common enjoyment of property of all Nyimang people. Several instances of which records exist, may be cited from different periods in the recent past to illustrate this new trend. Thus:

1. Recurrent incidents have arisen in the last two decades, between the Salara sub-tribe and the Shiro wa (the people

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1. Cf., D. Roden, "Changing patterns of land tenure amongst the Nuba of Central Sudan" (1971) 10:4 J.Adm.O., 299.

of the Shira). The people of the Shira started to prevent members of the Salara sub-tribe from cutting grass and wood for thatching in an area which they claimed belonged to them. There were some minor casualties, but the case was not taken to court, as it was arbitrated by the elders of both sides. They (the Shiro wa) also prohibited the Salara people from watering their animals in a rich watering-place owned by them (the Shiro wa). Eventually a peaceful agreement was reached, the people of the Salara sub-tribe admitting the existence of an imaginary boundary, believed to have existed from time immemorial, and which separated the respective territories.

2. Another notorious example, which may clearly contradict Nadel's claim, may be taken from the strained relations that existed, over years, between the Kallara and Kurmitti sub-tribes which culminated into bloody clashes warranting police intervention in the sixties.

All these instances lead us to conclude that boundaries, albeit imprecisely marked, do exist between the various Nyimang sub-tribes, and that contrary to Nadel's implications, disputes over territorial boundaries are common between Nyimang sub-tribes. If need arises, any elderly Nyimang can usually demonstrate the boundary that exists between his sub-tribe and any other Nyimang sub-tribe.

It must be made clear that as it is not always possible to make land boundaries to coincide with the natural features, certain types of trees and shrubs may be planted either to

serve as boundary markers on their own, or as supplements to existing natural features. Generally, any large tree may serve as a boundary marker. But the most common and useful boundary trees are the fo tree (baobab), amar (Tamarindus indicum), and the poison tree kurumish (Adenium hongel). All these trees have conspicuously large trunks which make it difficult to cut them without attracting the attention of the other party. Other trees, such as kele (Borassus flabellifer) and abirde (Hyphaene thebaica), may also be used as boundary markers.

Unlike the boundaries that exist between the villages, or between the various Nyimang territories, boundaries (lulu or kilinga) between individual farms do not correspond exactly to natural features. The Nyimang know the inconvenience and the inadequacy of relying totally on trees and seasonal streams as the only markers for boundary identification: trees grow old and die and they may be cut down by a covetous party. Furthermore, it is possible that new trees belonging to the same species may grow in the area, and these may tend to confuse the boundary picture. Seasonal streams are likely to change course over time. For all these reasons, any boundary (lulu and kilinga) between individual farms and house plots is always marked with exactness on the ground. Colvin is right in saying that:

> Nuba farms near the hills, whether they be on gardud, goz, light loams, or on cotton soil plains which have long been cultivated,

> all have definite boundaries, often made of lines of stones. These boundaries invariably run in straight lines...and are very permanent.[1]

In view of this, stones (midir) are used in the Nyimang area as the most common traditional form of boundary marking. This is particularly so in residential areas where, because of the individualization of landholding, permanent boundaries are required (as other means would seem inappropriate). Stones, which are permanent (unless removed) and less subject to deterioration or disappearance, are preferred to natural features. A further reason for this preference is that farming plots and homesteads are comparatively compact and are so small that it becomes difficult to make their boundaries conveniently coincide with natural features.

It is accepted as a general rule that boundaries should be marked in more or less straight lines. Sometimes a long piece of wood or rope may be used to determine the line. However, although planting or fixing boundary marks does not require any special ceremony, the presence of impartial witnesses is regarded as essential requirement for future dispute settlement. In addition, respectable village elders and sheikhs may be called upon as witnesses to the boundary marking. When the parties (the two neighbours in question) agree to a common boundary, holes are dug in a straight line, in which stones must be buried. On some occasions a visible part of the stone is left out so that a boundary may be found quickly when a dispute arises.

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1. Colvin, op.cit., 12; see also Stevenson, "The Nuba Peoples of Kordofan Province: an Ethnographic Survey" MSc(Econ) thesis, University of Khartoum, 1965, 152; see also Hawkesworth, op.cit., 187, where he says that "the various cultivations and building sites are defined by stone boundary marks".

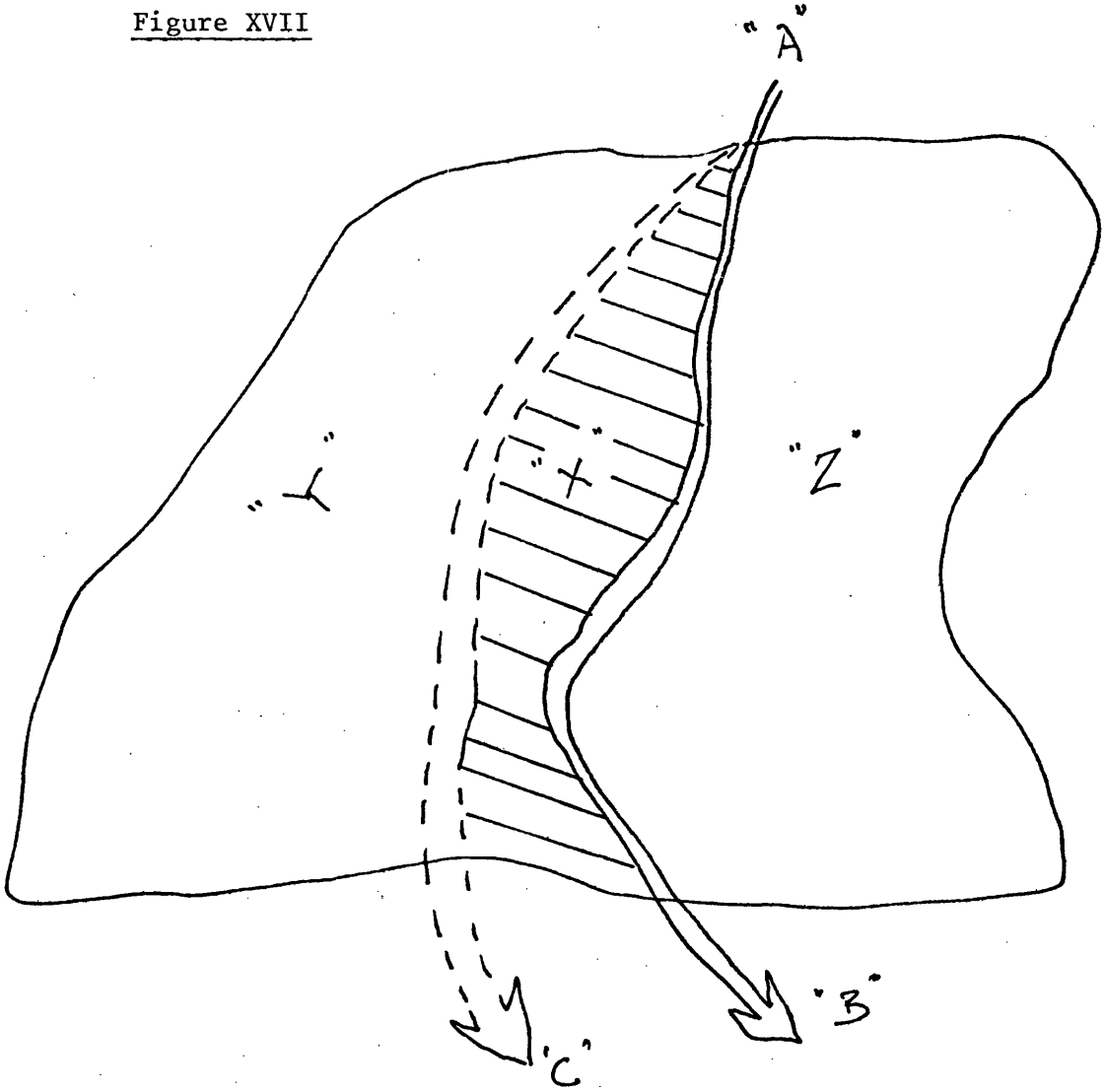
Stones used as boundaries have no distinguishing features, but the most common form is that which appears flat and oblong in shape, and which is used to close grave entrances (bɛbɛlɛny). These are also used as head stones (gusu) on the graves. The use of this particular form of stone as boundary indicators has ritual significance and support. People say that any person who disregards a boundary will suffer supernatural sanctions. They believe that removing a boundary stone implies burying oneself in a grave.

In areas where it is difficult to obtain stones as boundary markers, terraces (bɛrɛ́) may be made as boundary lines between the different holdings. However, in cases of internal boundaries, e.g., where plots of tiny (housefarms) are held by co-wives, then it may be enough to separate these holdings by leaving a small strip of uncultivated land as a boundary. This does not rule out other markings, i.e., stones, wooden wedges, terraces or even trees. Sometimes a special type of tree known as gurfu (Commiphora Africana) may be planted to mark an internal boundary. Wooden wedges (kwijing) may also be fixed in the ground to serve as boundary markings between individual farms. At times, in addition to the buried stones, some plants and trees (those which are used for ropes), viz., adala (family of sansibera) and abirde (dom palm - Hyphaene thebaica), are planted over the buried stones as visible markers. People think that the roots of these plants and trees sink deep into the ground, which makes it difficult for a person to eradicate them. These trees and plants also have a reputation for durability and do not die quickly. Should a person remove

these boundary plants, then it is believed that his roots and all his family members will be severed from life and die.

Generally, seasonal streams are not used as reliable markers for boundary identification. The reason, as stated by the Nyimang, is the unpredictable changing quality of these streams. This changing quality, according to the Nyimang, does not conform with the requirements of a sound boundary which must be precise and permanent. It must be noted in this respect that the bed of the seasonal stream itself is not subject to a private holding. It is regarded as public property over which all the members of the community share a common right. If a boundary stream changes its course imperceptibly over years, a change of the boundary line in favour of one of the parties would be inevitable. However, the law among the Nyimang is that if a boundary stream changes its course and bisects one of the neighbouring holdings, then the owner of the bisected plot loses (temporarily) the right of utilization over the part of the land sliced from his holding. This, however, does not mean that the holder of the bisected land would permanently lose his right over that portion added to his neighbour's holding. The rule is that as the parties have accepted the stream as a boundary, then the stream will always be regarded as such, even if it changes course to the detriment of the other party. It is because of this hazardous uncertainty that seasonal streams are seldom accepted as boundary markers among the Nyimang. The following diagram is illustrative:

Figure XVII



The above diagram represents two neighbouring holdings, Y and Z, of which the stream AB forms a common boundary. If, in the course of time, the stream AB changes its course to AC and by that action cuts a portion from Y, then AC must be accepted as the new boundary. According to the Nyimang, this is regarded as an unfortunate situation caused by vis major for which none of the parties should be held responsible. Thus, according to custom, plot X will be annexed to the holder of Z. The original holder of Y, though he will not lose title to the sliced portion, will not claim farming rights over plot X. However, trees and

other interests, e.g., wells, etc., situated on X will still be held and enjoyed by the original holder. It must further be made clear that the rule of temporary annexation operates only so long as the holders of plots Y and Z continue to remain neighbours. But if the holder of plot Z moves to any other place, then the right over plot X reverts to its original holder.

ii) Disputes to Title over Land

It has already been mentioned that, unlike many other contemporary societies in Africa, land disputes among the Nyimang are infrequent. The main reasons are (i) the abundance of land in the Nyimang couples with a relatively low population: (ii) there are no agricultural schemes, government or private, in the area. However, despite some limited planatations of economic trees in Abu Seibe village and in some scattered areas in Nyimangland, land is not regarded as a commercial commodity as yet. It is used basically for subsistence purposes. Thus as land has not acquired any commercial value, there are few disputes over it. Most of these disputes centre around traditional problems, such as boundary question, titles and crop damage by animals.
(iii) Another reason which limits land disputes among the Nyimang is the people's religious beliefs in relation to land. Land to the Nyimang has a special sanctity which should not be unduly abused. Thus every aspect of land-dealing is affected by various religious taboos. It is in relation to this religious aspect of land that Nadel said, "The Nyima equally consider quarrels and fights on cultivated land an evil thing,

though no sanctions are admitted".[1] This is a rather vague and wide generalization which must be clarified. Nadel is generally right in stating that disputes over land are to be considered an evil thing, but this does not mean that disputes over land are non-existent. On the other hand, Nadel is wrong in adding the qualification of the absence of sanctions whenever people quarrel over some pieces of land. As is shown below, there are sanctions. Nadel, it would appear, has not fully grasped the true nature of this customary rule which emphasizes, in its totality, the religious significance of land among the Nyimang. Nevertheless, not every quarrel over land is regarded as a sin or an evil. Certainly in actual life people do quarrel over land many times, but among the Nyimang certain fights over certain plots of land are not just forbidden, they are taboo. The word "taboo" (kwir or kwurung) must be understood as referring to "a social injunction that is sanctioned by supernatural action. It is not just anything forbidden".[2]

The traditional rule among the Nyimang is that no one should enter into a quarrel over a piece of land over which he has a defective title. Nevertheless, for the rule to become mandatory, the quarrel must be in regard to the title of the land (keil) itself. To claim absolute title or to enter unjustifiably into a conflict over land that does not belong to

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1. Nadel, op.cit., 459.
2. E.A.Hoebel, The Law of Primitive Man, 1967, 260; see also Sumner and Keeler, op.cit., 348, where the authors say that "religious sanctions are always included in the taboo".

oneself or to one's ancestors is a flagrant contravention of a serious taboo, the sanction of which is a quick death. No sacrifices or gifts of whatever kind to the supernatural powers can save the culprit from the consequences of his profane act. The seriousness of this rule is evidenced by the absence of any remedial performance to atone for the guilt or to appease the anger of the land spirit. The rigidity of the rule further renders it less possible for the people to tamper with the taboo and unjustifiably acquire land which does not belong to them. Thus, in one incident, J disputed the title of a certain plot of land which was sold by his ancestors to A's ancestors some fifty years ago. The balance of two goats still remained unpaid. J sought either the payment of the balance or the redemption of the land upon returning the part payment. The case was tried by the Native Court, and J succeeded in his claim to redeeming the land. After a year J suddenly died. people alleged that his sudden death was attributable to this dispute and to his unjustified regaining of title to land of which he was not iran (master/ owner), or a direct descendant of the original holder of the land (the first donor).

However, in recent years and due to education, Islamic influence and other economic forces, customary rules which rendered quarrels over cultivated land a bad thing are no longer considered as one of the determinant factors which in former years effectively curbed the assertion of the competing interests of the disputants over a piece of land. In the

important case of Abdalla Bishara v. Fikr Kilana,[1] both disputants are from the Nitil sub-tribe and had farms in Abu Seibe village. The claimant alleged that the land which was the subject of the dispute, was inheirted by him and his brother from their deceased father, and the defendant had borrowed the land on the customary principle of lawa talau ("eating grass"). The claimant further alleged that the defendant acted contrary to the agreement by sinking a well on the holding without his permission, with the intention of converting the land into a plantation of fruit trees (jinan). When asked to surrender possession, defendant contested claimant's title and counter-claimed, asserting his better title to the land as the heir of his deceased father. Claimant brought this case before the Resident Magistrate at Dilling and asked for eviction. It was further revealed in court that claiment's father died in 1954. Claimant had left the land in the care of his father's brother and had been absent on active service in the army for 17 years. During this period defendant's father was in possession of the land, and upon his death his son (the present defendant) resumed possession for five or six years.

Claimant witness (no.2) Madibbo Mohammad, stated on oath that the land which was the subject of the dispute belonged to his deceased brother (claimant's father). That defendant's father borrowed the land for cultivation purposes, and when he died his son (the present defendant) wished to continue

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1. Abdalla Bishara v. Fikr Kilana (C-S/94/75-Dilling Civil Court).

cultivation of the land. That he (the witness as the caretaker) agreed to allow the defendant into the land only on condition that defendant should surrender possession of the land as soon as claimant demanded it. Defendant continued the cultivation for five to six years. All the above allegations were systematically confirmed by plaintiff's witnesses (3) and (4).

Defendant stated his case by counterclaiming his right to the title of the land. He alleged that he heard his father had bought the land, the subject of dispute, from the claimant's father. Defence witnesses (2) and (3) both said that they heard defendant's father claim the purchase of the property for 30 P.T. from claimant's father, but did not witness the alleged sale. Defence witness (4), Mek Nawai Khalifa, stated on oath that the land subject of dispute belonged to the claimant's father. That about 1947 it came to his knowledge that claimant's father had pledged the land to the defendant's father for 30 P.T. to pay it as tax (dignia tax). That the land remained in the possession of the defendant's father until the time of his death. The witness further asserted that the nature of the transaction was that of a pledge (massāka)[1] and was never intended to be a sale transaction. However, in finding for the claimant, the judge, though he touched upon the delicate issue of the State ownership of the land, under section (4) of the Unregistered Land Act, 1970 (Amendment 1971),[2]

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1. Massāka is from an Arabic word meaning to hold or give a thing as a pledge.
2. See the Unregistered Land Act, 1970 (Amendment 1971), S.4.

failed significantly to discuss the implications of the provisions of this Act on the general rights of the individuals over pieces of land held by them for many generations, though unregistered.

Boundary quarrels and disputes over land titles and crop damage by animals, are (as they were in the old days) settled mainly through wa didia (old people) in the village. Each of the disputing parties is required to bring his witnesses to establish his case before selected members of the body of village elders. The disputing parties must agree to the impartiality of the arbitrators. All parties must move to the scene of the dispute. As such proceedings are not regarded as a formal settlement of the dispute, a party who does not agree with the judgment of the village elders has a right to take his case to the local People's Court for further adjudication. Further appeal to the Resident Magistrate is also possible. In the old days, settlement through wa didia (old/big people) was not regarded as effectively sufficient. That was because the dissatisfied party, depending on the power of his clansmen, was likely to defy the authority of the elders and seek a remedy through self-help. Traditionally, the most effective mode of dispute settlement, however, was by reference exclusively to the supernatural powers. The boundary dispute was settled through an ordeal of oath-taking in which the fates of the parties would be left to the mercy of the divine powers. In other words, if the disputing parties failed to reach an agreement, the aggrieved party might call his adversary to the performing of

the ordeal of miro ajéda (throwing fire). The party who wanted to propose the oath-taking would take an axe-handle (téméleng) without its iron head, and then go to the disputed area. On his arrival at the disputed area, the contestant would give a sharp, loud, hysterical cry. This cry indicated an invitation to the other party to join in the oath-taking. It was also a general announcement to the public to come and witness the ordeal. The party posing the ordeal oath would then fix the axe-handle in the ground on the disputed land and await the arrival of his opponent. A fire would be lit and all the people present on that land would move away from the place of danger leaving the disputants alone to undergo the ordeal. Each of the two contestants would pick a lighted piece of wood or a glowing ember and throw it over the head of the other party without attempting to hit him. Words would be uttered to the effect that may he (the party throwing the fire) die if he was not justified in his claim to the land. However, because of the fearful outcome of the judgment through ordeal, which meant the imminent death of the dishonest party, disputants would not apply this method of settling a dispute over land unless all peaceful means had failed. In any case, people say that a dishonest person was likely to refrain from taking the oath when he was called upon. It must be noted that in recent years people no longer resort to the traditional ordeal of "throwing fire" when settling a land dispute. Oaths, or fetishes such as the spears and cuffs (birad), ring and kodi which belong to kuni (shamans), are still widely used by non-Muslims to settle their disputes. But the majority of the people prefer taking their cases to modern courts of law.

iii) Damage to Crops by Straying Animals

It has already been mentioned that disputes over land titles, though not absent, are remarkably few in the Nyimang area. But the most vexing and commonest disputes in relation to land are caused by crop damage by straying animals. Thus, to discourage the herders from leaving their animals unattended, pounds are built in which straying animals (especially those apprehended in the farms) are placed. A person whose animals have been impounded will be made to pay the following fees before he is allowed to take them out.:

2½ P.T. for a single sheep or a goat

5 P.T. for a single head of cattle

10 P.T. for a donkey.

Before any further analysis is attempted, it should be pointed out that the rules that govern the recovery of compensation for crops damaged by animals must be viewed within the following general perspective:

1. The traditional customary rule is that there is no compensation for crops damaged by straying animals. Informants state that in the old days a person who recovered the equivalent of his damaged grain (whether in kind or in any other form) would die if he later ate or drank beer in the home of the animal-owner. This rule should not be taken literally. That is because it is a mere social rule that has no legal sanctions if violated by the crop-owner. Informants say that a person whose farm has been damaged is not under any legal disability to

accept compensation. This qualification which prevents him asserting his legal right to compensation is more significant in later development of the rule. However, it must be remembered that not all social rules are less obligatory than the legal rules. Indeed, in most traditional societies, some social rules are covertly sanctioned by supernatural powers, and hence are more feared than the man-made rules which could easily be evaded. Another practical reason impelling a person to condone damage done to his farm by other people's animals is that he in turn may be forgiven if his (the farmer's) animals should later damage other people's farms. It is a situation where rules of reciprocity are strictly observed. The maxim is "live and let live". But rules of reciprocity were effective only in the old days when the Nyimang were living in a close community in which social and family ties were highly appreciated.

2. Due to modern economic pressures a modification of the traditional rule has been introduced whereby the farm-owner may be compensated for damaged grops. The compensation award is settled through a committee or a council of elders who act as arbitrators. The committee must be chosen and agreed upon by both parties. As this procedure is regarded as an informal settlement of the dispute, it is not regarded as a final adjudication, and is therefore not binding on either party.

3. The formation of the modern customary courts capable of enforcing their rulings has added another important dimension to the traditional mode of dispute settlement in the Nyimang area. This is because most people are encouraged to insist on their rights by the new legal mechanism which makes it possible for them to enforce claims which had to be abandoned under the traditional pattern of behaviour.

As indicated, the law applied by the courts in cases of crop damage is not uniform. Some courts are ready to treat the whole matter as a criminal offence and thus are ready to impose extra punishment in the form of a fine, or even imprisonment, in addition to the usual compensation award. Other courts, or even the same court, may treat the same offence on other occasions as a purely civil case in which compensation alone is awarded.

It must be pointed out that, despite the availability of quick redress through court proceedings, people go to court only when all peaceful means for the settlement of their disputes have failed, or where there has been, for example, a systematic failure or negligence on the part of the animal-owner to restrain his animals from the farm. The majority of the people prefer to drive the straying animals to the pounds where, as has been mentioned, the owner will be made to pay detention fees before he is allowed to take them out. This step may be regarded as a warning to the animal-owner, and the case may end there. But if the animals of the same person are again apprehended by the same farmer on his farm, then the farmer is most likely to ask for compensation through court or by other informal means.

It has been mentioned that the traditional rule is that compensation is not paid for crops damaged by animals. However, a second look at this rule suggests that it is not the case that compensation was or is not paid as such, but that the situation was not regarded as such a serious conflict between the farmer and the animal-owner as to require a formal settlement. In the old days, the farmer whose crops had been damaged by another person's animals would be compensated, not by the animal-owner but by his (the farmer's) own clansmen and relatives or other village neighbours. Damage by animals was considered as equivalent to damage by locusts and crop pestilence. Sometimes the youths who look after the animals would be punished corporally by the farm-owners.

However, the law as now applicable has changed a great deal. Not only is the crop-owner compensated by the courts for crops destroyed by another's animals, but that animal-owner is likely to be tried under section 364 of the Sudan Penal Code. Thus in Somi Salfur v. Omer Akuya[1] accused neglected his cattle which damaged plaintiff's crops. Accused admitted the offence, but added that his cattle broke the fence of the camp at night while he was asleep. His defence was not accepted by the court, and constructive negligence was imputed. He was held liable under section 364 of the Sudan Penal Code. His appeal to the Resident Magistrate was unsuccessful. In this case the following important facts must be noted. As a new development,

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1. Somi Salfur v. Omer Akuya (3/78 - Tundia People's Local Court).

people here started systematically to depart from the traditional practice whereby the crop-owner would have willingly condoned the damage he has suffered. In recent times, as is apparent in the above case, not only is the crop owner compensated through the court proceedings, but the animal owner may be subject to criminal liability. In order to bring the animal-owner under section 364 of the Penal Code, actual damage to the crops must be proved. Hence, mere entrance by the animals into the farm without more does not constitute an indictable offence. But it is not necessary that negligence should be proved on the part of the animal owner. Constructive negligence is enough to substantiate the offence. That is because courts are generally inclined to protect the farmers against the animal-herders. It is this attitude which prompted Hawkesworth to say that:

> The Nuba are primarily an agricultural people, and agricultural rights are given first consideration. For example, the onus is on the cattle owner to see that his animals do not enter the cultivation and not on the cultivator to build a fence round his cultivation.[1]

However, Hawkesworth does not precisely state the law in the Nuba Mountains or, indeed among the Nyimang. The law among the Nyimang does not say categorically that farmers are not obliged to fence their farms. Certainly a negligent farmer who deliberately fails to fence his farm has only himself to blame. On the other hand, it is also true that herders are

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1. Hawkesworth, op.cit., 187.

required to exercise the utmost care in looking after their animals. A negligent herder could not be heard to offer a defence that a farm has a bad fence. Thus, in Fatima Ibra v. Birdol Mohammad,[1] a plea (on appeal) that a farm owner failed to provide a proper fence to his farm was not sustained.

At times persistent failure, on the part of the animal-owner, may be provocative and may result in an action in the court. In Armin Subiya v. Ghaboush Idris,[2] both parties were from Kurmiti sub-tribe. Plaintiff sued for compensation for crop damage. He alleged that defendant's bull entered his farm twelve times consuming considerable amounts of grain. That he had warned the owner on several occasions, but all in vain. He was awarded LS.10.45 m/m as compensation. Defendant's appeal to the Resident Magistrate was unsuccessful.

Farmers are not allowed under any circumstances to kill or injure animals found on their farms. In Khazna Katfaur v. Shawish Tumsah and another,[2] accused, a farm-owner, killed complainants' ox which, as accused alleged, persistently damaged his crops. The court found the accused guilty under sections 84/367 (as amended by the Resident Magistrate upon appeal). Issues of crop damage or whether animal-owner was negligent were not discussed.

There are, as is apparent, inconsistencies in the application of law by the customary courts in questions of crop damage. In the above case of Somi Salfour v. Omer Akuya, the Tundia court

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1. Fatima Ibra v. Birdol Mohammad (Criminal Appeal 354/78, Dilling Resident Magistrate's Court).
2. Armin Subiya v. Ghaboush Idris (C-S/ /78, Nitil People's Local Court).
3. Khazna Katfaur v. Shawish Tumsah and another (Nitil People's Local Court).

held that the animal-owner was criminally liable under section 364, and a fine of L.S.3 was imposed. This was in addition to L.S.15 as compensation for the damaged crops to the farm-owner. But compare the above case with Hamdan Halouf v. El Zubeir Jadmoun,[1] where under the same circumstances the Nitil People's Court treated the case as a purely civil suit and awarded compensation as assessed by the arbitrators. None of the approaches taken by the different customary courts accurately represent the law in the Nyimang area nor, indeed, do they reflect what actually happens amongst the majority of the citizens in the area.

If one tries to summarise the existing the state of the law which reflects both Nyimang customary law and the codified law of the Penal Code, one is faced with a dilemma. Which law is "the" law? Mr. Justice Holmes, in his realistis perception of law, described it as no more than a prophecy of what the courts will do. In such cases of cattle trespass, it is difficult to prophesy what and how the courts will decide. Furthermore, one cannot take the statements and opinions of elders as conclusive of the present rules of customary law. One has to investigate actual cases and discover what citizens are in fact doing in their daily lives. Such an investigation discloses that there is currently some confusion of opinion and practice. This is so as most potential cases of dispute do not come before the official courts or are even submitted to informal dispute-settlement before an arbitration by the elders.

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1. Hamdan Halouf v. El Zubeir Jadmoun (C-S/6/78, Nitil People's Local Court).

CHAPTER VIII

DISPOSITION AND TRANSFER OF RIGHTS AND INTERESTS IN PROPERTY

MODES OF TRANSFER

1. GIFTS

i) The Nature of Gift

It has already been indicated that property relations, of which exchange of gifts forms an integral part, is an important structure which helps in preserving the social equilibrium. Indeed, in some cases, these gifts may concern the welfare of the whole community. In the following pages an attempt will be made to discuss legal implications as well as some social rules which govern the exchange of gifts among the Nyimang.

There is no vernacular term in the Nyimang language which exactly corresponds to the word "gift".[1] But words such as twei or tweida may commonly be used generally to indicate the giving out of a thing to signify friendship or so as to keep good relationships or merely to show gratitude to someone. The phrase kafur teg (to give something gratis) may be used when objects are given without consideration. There is, however, a special type of gift that is made to an aggrieved person to appease his anger, when that person stands in a special category or relationship to the donor. These persons include angry parents, unhappy in-laws, malignant kwuni and the shira. These gifts

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1. For an elaborate meaning of gift in the anthropological sense, cf. M. Mauss, The Gift, trans. I. Cunnison, London, 1969.

are made out of fear that the aggrieved persons may retaliate in such a way as to bring bad luck to oneself or one's family. This type of gift is known as kujede.

All types of property known to the Nyimang can be alienated by gift. This includes land and other durable valuables such as livestock. The gift of foodstuffs, crops, money and chattels is also common. Where gifts are offered mortis causa, or to take effect post mortem, these are to be treated as wills proper to which the normal rules of testamentary disposition would apply. But as a general statement, this form of gift to take effect on or after death may not be honoured by the surviving members. This is so especially if a father chooses it as a means to deprive one of his children of his lawful share. Such a gift if effected, which is possible, might possibly lead to a serious disruption within the family members.

Gifts are offered either by individual persons or by a group of people. Group gifts are made usually by the whole community to the tribal functionaries such as the kwuni and the shira. In such cases, the transfer of property to the kwuni or the shira is a product of a mutual obligation between these functionaries and the community. In other words, this transaction forms part of an implicit social contract between these dignitaries and the community at large. Thus the community members provide gifts of property (with no legal sanctions in default) to the tribal functionaries in consideration for their services. Thus the shira is given gifts of property to make rain, while the kwuni is given gifts to protect the society from catastrophes and evil spirits.[1] Although the kwuni never inherits property, yet

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1. Although all types of property could be given as gift to the kwuni or the shira (including slaves to the shira in former years), land is never given as gifts to either the kwuni or the shira.

he has a separate legal capacity capable of holding property on his own. Like the shira, gifts to the kwuni must, of necessity, be offered inter vivos. In addition, gifts made to the shira, or to the kwuni, could not be reclaimed by the same person or his family. Although gifts are made to the kwuni in expectation of good reward, the donor has no claim as against the kwuni if his expectations are not realised. The gift is made to a supernatural power to invoke a blessing or to bring good luck. But, also, the adverse capabilities of the kwuni and his subsequent wrath should be taken into account and, indeed, be feared.

Gifts to the shira or the kwuni cannot be revoked; but the rule nemo dat quod non habet is generally applicable. A person cannot pass a valid title over something which he does not own. That is so even if a gift is made to the kwuni. Thus if property has been given to the kwuni but it is discovered that the donor has a defective title, then the third party has the right to reclaim his property from the kwuni. But if in the same circumstances a gift is given to the shira, then the right of the shira over that property holds good against the whole world, including the real owner. The third party, if he wishes, may pursue his rights against the donor and not against the shira. The reason is that relationships with the kwuni are at the person-to-person level, so that a dissatisfied kwuni can injure only the person who has angered him. The situation is, however, different with the shira, whose relationship is to the community as a whole, and when angered he will stop the rains, which will certainly affect the whole community.

Deceased members of a family constitute an important category of persons to whom gifts of property must be given. They must be propitiated continuously through gifts of property (in the form of libations and sacrifices). In some cases property may be dedicated

to them so that they may not harm the living members of the family.

A gift, like sale, is a form of transaction by which a person may acquire or alienate an interest in property, and bears many resemblances to it. When the appropriate requirements (discussed below at pages following) have been complied with, a gift may (like sale) have the effect of completely divesting the donor of his title to the benefit of the donee. On other occasions, a gift does not have this effect. Accordingly, gifts, among the Nyimang, fall into two kinds: those which are considered as an outright alienation of property, and those which are regarded merely as revocable transactions. Both types of gifts can be made in relation to land as well as to movables. But, as a general rule, gifts of land are made only to one's own children or to those persons who are entitled to inherit in the absence of the donor's children. This does not mean that the notion of outright alienation of the absolute title in land to strangers is not known to the Nyimang. But when a gift of land is made to persons other than the donor's children, then there is a legal presumption (which can be rebutted) that such a gift is revocable at the instance of the donor or his heirs, and that in this case the gift is no more than a gratuitous licence to the donee to utilize the land indefinitely.

It is traditional for a married daughter who is about to be taken to her husband's home to be given all sorts of gifts by her close relatives. Her mother usually provides her with cooking utensils, together with grains and other cereals and foodstuffs. Her father gives her a goat or, if he is rich, a milch-cow. These gifts are considered outright gifts and are not revocable. However, there is a strong opinion to the contrary which maintains that cattle given to one's daughter are not intended to be outright gifts, and that this

apparent gift is a mere loan which is properly termed as kol (a transaction whereby a person may entrust his livestock to another to look after on his behalf). When given to the daughter it is intended to help her bring up her children. The ownership of the beast will remain with the woman's birth-family. The issue of such a beast, especially if it is a bull, must be handed back to the woman's birth-family. Thus, upon any future disagreement, the father or his heirs have the right to revoke the gift and get the beast back together with all its issue. After the death of the woman, the beast will be inherited by her children, or her birth-family if she has no children.

In some cases a matrimonial gift of land may be given to a married daughter who is about to be "removed" to her husband's home. This type of gift is known by different names in different Nyimang areas. Thus in Salara it is known as terengu korong, in Tundia and Kellara it is called tengu korong, and the Nitil people call it tusulu korang.[1] However, this custom of giving land must not be confused with the practice of the father allowing his married daughter (or her husband) to cultivate part of the father's land for life. This latter transaction is a mere license which may be revoked at any time.

As a rule, a matrimonial gift of land to one's daughter (tusulu/terengu or tengu korong) is regarded as an outright gift which can never be revoked. It cannot be redeemed by the donor or his heirs. The husband of the daughter has no legal right over such land. This is, in effect, one of the few cases where women in the Nyimang can obtain

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1. Tereng means a small gourd used for keeping oil. Teng is a large gourd plate for holding food. Tusul means ochre. Oil mixed with ochre was traditionally used to anoint the bride. Even now when traditional marriages are performed, the loins, knees, and breasts of the bride must be anointed with oil and ochre to signify fertility.

and control land independently of their husbands. After the woman's death, title to this land passes to the descendants of the body of that woman. This is similar to the English law of entailed interests. It further resembles the tail male as only the male children of the woman are entitled to inherit such land. If she has no male children, then such land could not be inherited by her husband or his children by other wives, and the land must revert to the woman's birth family. However, for such gift of land to be regarded as an outright alienation, it must be made inter vivos and as a marriage gift. It must further coincide with the time the daughter is being "removed" to her new home. Thus, gifts of land made to daughters before their "removal" or after they have already been "removed" to their husband's homes are not classified as outright gifts and may be subject to redemption.

ii) The Validity of Gifts

The first and most important principle is that, under Nyimang law, no particular form is required to effect a valid gift. Requirements, such as publicity and acceptance of the gift, are important but contribute nothing to the validity of the transaction. In other words, publicity, for example, is an important factor in proving whether a gift transaction has taken place. It also helps to bring the alienation of the property to the general notice of the public. This, it is true, makes it possible for the persons who would otherwise have been entitled to the property immediately to contest the alienation of the property. But publicity alone is not an essential ingredient to a valid gift. A person who has kept silent at the time when a gift was made would not be estopped from reclaiming the property at a later date. There is, however, nothing like "estoppel by notice" under the Nyimang customary law.

Although, as mentioned, the Nyimang customary law of property is generally silent as to what constitutes a valid gift, yet a proper gift must conform with the following requirements. When making a gift the subject-matter must be identified. In addition, for a gift to be effective, it must be accepted by the donee. It is almost an invariable principle that without acceptance there can be no gift. Under the Nyimang law there is no formal ritual or thanksgiving to signify a gift transaction. In the case of movables, a gift is validly executed once the donor has expressed his intention and the donee is placed in the physical possession of the goods. In some cases mere exchange of the words of offer and acceptance is enough to transfer title to property through gift. Thus, as with sale transactions, the donee is said to have taken possession of an animal given as a gift if he has expressed his intention to that effect while the physical control still remains with the donor.

However, in cases of land, the actual transfer is made by taking the donee to the site of the land and showing him the boundaries. Witnesses are normally called for boundary identification. But, in effect, showing of the boundary is not a necessary ingredient in the valid transfer of title through gift. It is enough that the donor should express his intention to the effect that such and such farmland is donated to so-and-so. It is not even necessary that the donee be present at the time of the gift. As with chattels, no formalities or thanksgiving are needed to validate gifts of land.

iii) Revocability of Gifts

To recapitulate, gifts among the Nyimang are of two types: those which are irrevocable by nature, and those which are subject to

revocation. But it must be remembered that in some cases whether a gift is a revocable transaction or not also depends on two factors, viz., the intention of the donor and the identity of the donee. Thus for a gift to be regarded as an outright alienation of the proprietary interest in a thing, it must be followed by a supporting intention by the donor to that effect. This intention forms the subject of an express verbal statement by the donor that he does not intend to renege on his promise in the future. Such a promise is not binding upon the heirs unless it has been communicated to them by the donor during his lifetime. It will be recalled that gifts between parents and children are deemed to be irrevocable; likewise all gifts made to supernatural powers, i.e. the kwuni and the shira, are also irredeemable gifts.

However, a special gift of land to a deceased brother's widow is known to exist in the Nyimang. Such land is known as ker koeru korong (the farm of a widow). Thus, sometimes, at a leviratic marriage, the brother of the deceased husband who marries the widow may at his option give a gift of land to the widow to help her raise her children. The law among the Nyimang considers that such gift of land is outright and should never be reclaimed by the donor or his heirs. The widow becomes an absolute holder and hence enjoys full legal capacity to alienate any proprietary interest in that land. Upon her death only her male children have the right to inherit that piece of land. But, if she has no children, then such land must revert to the donor's family and will not be inherited by the woman's birth family.[1]

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1. Cf. instances where land given to a married daughter would be inherited by her birth family if she has no surviving male issue.

It is an accepted rule under Nyimang customary law that a gift made a long time ago is likely to be recalled at any time upon future disagreement. A significant, though interesting, incident was observed during fieldwork. Two elderly men were discussing a trifling subject; this became a violent debate in which acrimonious words were exchanged. A called B dwa (weak/poor) and reminded him of 25 P.T. paid to him by A as a gift two years ago. A insisted that if B was not poor, then he should refund the 25 P.T. B became so indignant that he immediately took out a 25 P.T. paper-note which A was only too ready to grab. This small story may sum up the entrenched rule of the revocability of gifts under the Nyimang law. Accepting or even consuming the subject-matter of the gift does not bar the reclaiming of the property or its equivalent. Thus if M has paid cattle as marriage consideration to his brother H, then M or his heirs have the right to revoke the gift and reclaim the cattle. If the specific head of cattle could not be traced, then an equivalent payment could be accepted. In such cases gifts are made under the general assumption that good relations will continue and that gratitude will be shown by the donee. Thus, if the donee chose under any circumstances to misbehave himself, then such a gift is liable to be revoked. For this reason the maintenance of good relations extends to the descendants of both parties.

In one Tundia case (though the parties are from Salara sub-tribe) John and Tirgé, children of Jalda Aseed, sued I (Jalda's step-brother), claiming recovery of animals paid as gift by their father as a marriage consideration for I's bride. I failed to satisfy the Tundia Peoples' Court that he actually received these animals in consideration for his

work as a herder for his brother and not as a gift. The court, in upholding the recovery claim, ordered I to repay all the animals given to him by the claimant's father. This clearly indicates that gifts among the Nyimang may be revoked by the descendants of the donor upon any future disagreement.

As has been mentioned, an exception exists to the general rule of revocability of gifts under the Nyimang law. Thus gifts between parents and children and gifts to the kwuni or to the shira are classified in a different category which is held to be irrevocable. That is because the special parent-child relationship or the uncompromising influence of the supernatural powers (the kwuni and the shira) on the lives of the Nyimang individuals make the basis for the rule that a gift made to these categories should not be revoked.

It seems that to this exception another exception exists. This is assumed as the Nyimang law does not state categorically that all gifts, of whatever nature, to one's children should not be revoked. This loophole, however, leaves room for one to assume that at least some gifts are revocable at the instance of an aggrieved parent. Indeed, some informants have indicated that gross disobedience or continuous ingratitude by one's child may give cause for a parent to revoke a gift made to a child. In such cases only the living parent has capacity to revoke a gift made to a child. It has already been mentioned that land given as a marriage gift to one's daughter is an irrevocable gift. Similarly, if a person pays a marriage consideration for his son's marriage and if for any reason such property has been recovered (upon divorce or death of the wife) then such property is considered exclusively the property of that son. Even if the recovered

property has later been kept in the father's compound, and even though that child remained unmarried, then it is that child alone who has absolute control over property recovered from his in-laws. This, it must be pointed out, is the only instance where a child could virtually control and dispose of property kept in his father's compound without infringing the father's rights.

Similarly a gift by a child to his/her parents is an irrevocable transaction under the Nyimang law. This is consistent with the general rule which states that all property of the unmarried children, of whatever nature, is regarded as the property of the father. This general rule is a legal fiction. That is because in the modern Nyimang the means and the types of property obtained by the children has so varied that it is futile to insist on the former customary rule. Gifts made by married children to their parents are also irrevocable.

A final word may be mentioned in connexion with gifts between spouses. The law governing modern property relations between the spouses is distorted and has become controversial. Although the husband is under a duty to maintain his wife, the traditional view is that all gifts to one's wife may be recovered by the husband on the dissolution of the marriage. However, some informants state that food and personal effects belonging to a wife are not held recoverable even under the traditional law. But all agree that, in the old days, all gifts, including food, clothing and personal effects supplied to one's fiancée or her family, were recoverable if the marriage failed to take place. With the advent of new ideas and the spread of Islamic notions, it has become doubtful whether clothing and other small items are recoverable even if the marriage has not been consummated. That is

because some customary courts have the tendency, however unreasonably inconsistent, of rejecting claims by husbands to recover foodstuffs and clothing supplied to their wives and their parents during betrothal. Some informants reason that, as a new development, a person is not entitled to recover gifts of clothes and other personal effect supplied to his fiancée even if the marriage has not taken place. Similarly, in the old days, the wife was not entitled to recover any gifts made to her husband. That was because it was a firm customary rule that all property of the woman is regarded as her husband's. This rule, although it is gradually becoming obsolete, is still applicable.

However, the modern trend is that wives are economically growing more independent of their husbands. This economic situation has its repercussions on the legal status of the woman vis-à-vis her husband. One of the results is that a wife can recover gifts made to her husband if the marriage has broken down. Some informants go even further and suggest that a wife, especially in the urban areas, can revoke gifts made to her husband while their marriage still subsists. This attitude, as mentioned, is also taken by the customary courts who are manned mainly by enlightened young people who have been semi-acculturised in the modern ways of living and thinking. These men are ready to defy traditional laws and apply the general territorial laws which they pretend to know. It is also appropriate to point out that this trend has been improperly encouraged in recent years by some Sharia judges in Dilling. The Sharia court has persistently, though wrongly, treated all matters concerning husband and wife (including property relations) as falling under the jurisdiction of the Sharia court. There has, therefore, occurred apparent conflicting judgment on issues of the same

nature between the Sharia courts and the customary courts which has added more confusion to the existing customary rules. The confusion is greater as people, being provided with more than one machinery, have the choice of pursuing their cases in whichever court they think will serve their ends best. Hence the conflict of opinions on the same issue.

2. PLEDGE

Once again, one is confronted with the problem of the absence of vernacular terms which describe some customary transactions that are commonly practised by the people. However, it is common for one among the Nyimang to deliver possession of property, land or movable, to another person from whom one receives a loan or borrows other articles. This is done on the understanding that the creditor should safely keep or otherwise use the property in his possession in such a way until such time as an obligation is discharged or the debt due is paid or the borrowed article is returned.

Unfortunately the Nyimang have not invented any appropriate legal term which describes such transaction. Instead some people (only the Arabicized) use the Arabic word massaka (to hold something as security for a debt) to describe the transaction. Terms such as pledge, pawn and bailments, as used under English law, have no counterparts in the Nyimang law. However, the word kol is used (as will be shown) to describe what may resemble one aspect of bailment transaction under English law, viz., a gratuitous bailment whereby a person may entrust goods to another for safe custody.

But to say that a certain practice has no specific legal term that describes it does not, ipso facto, mean that such practice has no

legal implications in its relative social context. However, as it is impossible to invent any new words to cover such instances, one may conveniently employ terms such as pledge and pawn to illustrate these practices. In effect, customary practices make no difference between pawning or pledging of property. But, as mentioned, the term kol is used when animals are bailed gratuitously. The word "mortgage" as used under the English law to relate only to real property is misleading, and should not be used here.

One may generally say that land is infrequently pledged among the Nyimang. In the old days, and before the introduction of the cash economy in the area, the common objects pledged were livestock, tobacco, guns and other personal property in return for grain. Nowadays pledging and pawning systems have become relatively widespread. Almost every type of property (including land) may be pledged or pawned in return for money. As a general customary rule the pledged object must be higher in value than the advanced credit. No special form or procedure is required when a pledge transaction is entered into. Witnesses may be required, although it is not always necessary to have witnesses when entering into a pledge transaction. However, in at least one case, the statement of a witness was vital in deciding whether a given transaction was a pledge or a sale transaction. In the case of Abdalla Bishara v. Fikir Kilana[1] a dispute arose over a piece of land where the plaintiff alleged that the disputed land was pledged to the defendant's father more than 30 years ago for 30 P.T. Defendant in possession contended that that transaction was a sale proper. The

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1. Abdalla Bishara v. Fikir Kilana (CS./94/75-Dilling Civil Court).

Resident Magistrate, in trying to decide, inter alia, whether the transaction was a sale or a pledge, had to rely upon the statement of the claimant's witness that the transaction was meant to be a pledge and not a sale. In support of his assertion, the witness went on to say that that transaction could not have been a sale transaction as the 30 P.T. was not a proper price for land in that time. The whole argument was fallacious, it is submitted. Neither the plaintiff nor his witnesses were able to say what was the actual price of the land at the time of the transaction. One may thus sympathise with the trial judge in not being able adequately to decide or discuss the issue whether a given transaction was meant to be a sale or merely a pledge transaction. That is because, under the Nyimang customary law, there is no distinguishing feature which may differentiate between rules of sale and pledges of land. The sole distinction lies in the intention of the parties.

A pledge under English law is that in which the possession of the chattel is transferred to another as security for a debt or performance of an obligation. On default the chattel may be sold by the pledgee. However, the legal incidents of the Nyimang pledge are slightly different. It is true that, under the Nyimang law, property may be transferred as security for debt. However, the orthodox view of the Nyimang customary law is that property thus pledged can never be sold in the case of default in repayment. The reason is that the property pledged is not given out to be sold as a substitute for the debt. Such property is usually a valuable item which the pledger would not like to lose. This type of customary pledge seems common in some contemporary African societies. Kludze, for example, tells us that

customary pledges of the same nature also exist in Ewe law. He says that the pledge is

> " ... a transaction in which the property is held by the creditor as a 'security' only in the sense that, because of the value of the pledged property, it reasonably ensures that the relevant obligation shall be discharged, because the pledgor would not like to leave property of that value permanently in the hands of the pledgee."[1]

The above proposition is also held to be true of the pledge transactions among the Nyimang.

One of the important features of the Nyimang customary pledges is that they are permanently redeemable. In this connexion, the plain meaning of the maxim, "once a mortgage, always a mortgage", which relates to equitable mortgages under English law, may be borrowed and employed to pledge transactions under Nyimang law. Thus the specification of the time limit for the repayment of the debt is of no legal significance. Traditionally, the pledgee could not convert the pledged property to his ownership nor had he a right to sell it in satisfaction of his debt. In short, pledged property cannot be realized for the repayment of the debt.

Nowadays, if the time for the repayment of the debt has lapsed, then the pledgee may ask the pledgor to repay the debt due. If the debt cannot be paid, then the pledgee may take his case to the court. The court, if satisfied that the pledgor is unable or unwilling to pay the debt, may authorise the pledgee to sell the property to satisfy his debt.

Sometimes if the pledgor is unable to pay the debt due then the parties may agree to make a set-off by entering into a marriage

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1. A.K.P. Kludze, The Ewe Law of Property, London, 1973, 237.

relationship. Thus, if the pledgee or one of his family members marries into the family of the pledgor (in consequence of the previous unsettled debt), then the original debt will be cancelled and the pledged property would be returned as if the debt had been duly paid. The new marriage relationship has absorbed the whole debt, because the parties have become one family. The following example illustrates this point: X pledges his rifle to Y for LS. 10. Later the pledgee Y (or one of his family members) marries a daughter or a sister of X the pledgor. The normal procedure in this situation is that the pledgee Y would deliver the pledged rifle to X and forfeit his original debt of LS. 10. The question of set-off does not arise. Here X the pledgor will regain possession of his pledged rifle and will appropriate the LS. 10. There will not be any mention of the LS. 10 when a marriage consideration is paid, or else the relationship would be strained. If, however, it was the pledgor (or one of his children) who married from the pledgee's family, then the LS. 10 debt will still stand as a separate transaction which must be paid in addition to the normal marriage consideration. The rifle will not be forfeited, but may be considered as part of the marriage consideration if the parties so agree.

As a rule the pledgee must be placed in possession of the goods. In addition, and in strong contrast to English law, the pledgee acquires the right of user and the pledgor has no right to restrict the use of the pledged property. The pledgee could therefore exploit the pledged property commercially without having to account for the profits he makes from it to the pledgor. If, however, the value of the goods have depreciated during their custody, then it is a usual

practice for the parties to agree that the pledgee should appropriate the goods without any further obligation on either party.

But, if the pledged property is of a perishable nature, then the rule is that the pledgee presumably agrees to the transaction at his peril. The rule is that if such goods perish accidentally while in the custody of the pledgee, then both parties are absolved from their duties and obligations. If, however, the pledged chattel has been damaged while it is being used by the pledgee, e.g. where a pawned gun has been broken while the pledgee is shooting with it, then more than one opinion exists as to the correct rule. Some informants say that the pledgee is under a duty to repair the damaged property, especially if damaged while it is used by him. Others claim that the pledgee was exercising his legitimate right of exploitation, thus could not be obliged to repair the damaged property. The damaged chattel should be kept until it is redeemed. However, if a pledged animal should die, then the pledgee must notify the pledgor of the death. The pledgee's story of the death should be corroborated through producing the horns and the tail of the dead animal. It has been mentioned that the destruction of the pledged property absolves the parties from their obligations. In other words, once the pledged property has perished, then the pledgee automatically forfeits his right to recover his debt. Similarly, the pledgor is not entitled to ask for his pledged property. This is so unless negligence is imputed to the pledgee. For example if the pledgee, or one of his family members, should deliberately destroy the pledged property. In such cases the pledgee is obliged to pay the full price of the damaged property after the deduction of the debt due.

There exists, among the Nyimang, a transaction which seems similar to bailments under the English law. Among the Nyimang a person may entrust his property (usually animals) to another for safe custody. This transaction, which is a form of "agistment", is customarily known as kol. It is a gratuitous bailment where the owner of the animals is not required to pay any wages to the keeper. But it is possible for the owner to send occasional gifts to the herders.

Another form of customary bailment is where a person borrows a dog from another for hunting purposes. This transaction may also be entered into gratuitously between relatives and friends. A reward may be asked if the transaction should involve strangers. Some informants insist that if the transaction is entered into between strangers, then the borrower of the hunting dog will either pay a token of anything (as if the dog is hired) or that the parties may agree that on each hunt the hind leg of the hunted game should be given to the owner of the dog. Kol transactions are related only to livestock. There must be a delivery of possession of the animals coupled with the obligation that such animals should be looked after with reasonable care and be returned safely when asked for by the owner.

3. SALE

Land purchase is commonly practised throughout the Nuba Mountains. However, the reasons which gave rise to land purchases in the Nuba Mountains have different causes in different Nuba societies. According to Nadel,[1] the matrilineal system of inheritance in societies such as

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1. Nadel, The Nuba, op. cit., 32-5.

the Tullishi, Kamdang and Korongo, has been proved detrimental to the economic interests of the deceased's sons. This problem, as Nadel reports, has been solved by the indigenous people through the introduction of the sale system. Thus, in Tullishi, sons are allowed to purchase their fathers' land to prevent it from passing into the hands of their fathers' sisters' sons. But in areas where sale of land has not proved an adequate solution to the problem, a change in the substantive rules of inheritance has been introduced to modify the rigour of the old law. Thus in Korongo and Kamdang traditional rules of inheritance are modified whereby the deceased's own children and his sisters' sons may inherit different categories of farmland. Nadel also mentions land scarcity as among the factors which led to the sale development in the Nuba Mountains. He further reports that:

> "Everywhere in the Nuba Mountains (with the exception of Dilling) house farms are bought and sold. The necessity for the purchase of house farmland arises, for example, when a young man, about to marry looks for a suitable site, preferably not too far from his paternal home, on which to build his new house; or when a married man takes another wife and has to expand his establishment. As land in and close to the village is all in firm hands, there may be no chance of obtaining these plots and sites otherwise - unless one has the luck of stepping into a timely inheritance, or of being presented with a suitable plot by friends and relatives."[1]

One is obliged, with due respect, to disagree with Nadel. That is because all the reasons mentioned by him are superficial and not universally applicable to all Nuba tribes. For example, among the Nyimang, any such problems which, according to Nadel, give rise to the sale of land, are solved generally through the "borrowing" system and not through sale. In addition, it is a firm customary rule that land,

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1. Ibid., 34.

among the Nyimang, is not bought or sold if required for settlement purposes. Another thing is that it is no longer necessary, in Nyimang society, for a married son to build his home near his parental holding.

Furthermore, it is interesting to note that land in the old days, according to Nyimang ideas, was more valuable than it is today. In the early years of the Nyimang settlement it was difficult to clear a new farm without subjecting oneself to enemies or to the wild animals. Indeed, stories are told and songs are still sung about how certain people were obliged, by animals or by hostile neighbouring tribes, to leave their farms and run for their lives. In addition to these elements, there were thick forests which made it difficult and laborious for anyone who wished to clear new farmland. For these reasons most of the Nyimang farms, in the old days, were prepared near their settlements not far from the foothills on which they live. Another practical reason was that farms were made near homes so that valuable time would not be wasted by travelling for considerable distances. The above-mentioned factors were among the reasons which led to the development of the sales of farmlands, particularly in the settlement areas. Nevertheless, it was only in times of famine or the lack of adequate property to pay as marriage consideration, that people were obliged to sell their pieces of land. Thus, having regard to the reasons which gave rise to the sale of land among the Nyimang, it is hardly tenable to attribute these sales solely to land scarcity. One may also think that it was probable that, under such circumstances, "borrowing" of land was not widespread as it is now, and was therefore exercised on a limited scale. This should appear more significant, as when the "borrowing" system evolved land sales became relatively few.

In a sense Nadel is right in saying that the security obtained under Pax Britannica made it possible for the people to prepare their farms farther afield without fear of being abducted; thus, relieving the pressure on land in the settlements areas. Furthermore, with the introduction of the cash economy, people are able to satisfy their needs by obtaining money through other means (e.g. by selling livestock, agricultural commodities or by working as wage labourers elsewhere), and are not obliged to sell their land. In any case, the proceeds from the sale of land are not enough to make it an attractive proposition to sell land.

Before analysing sale transactions, a question might arise about the nature and legal meaning of the word "sale" in the Nyimang context. Is selling land similar to selling a movable property? What is it that a person sells when alienating a piece of property? It is acknowledged that there is no exact word in the Nyimang language which refers or exactly corresponds to the contract of sale itself. In the Nyimang, the general sale transaction is known as sande. The words tara or tareg (sell) and tara or tarag (buy) are used, sometimes indiscriminately, to refer to the disposition or acquisition of objects (land or movable) through sale transactions, i.e. through payments of some valuable consideration. Thus, wherever a sale transaction is carried out, the intention to create legal relations between the purchasing parties may be evidenced by exchanging the word tara (to sell or to buy). In some cases a "mortgage" or pledge transaction may later be converted into a sale proper.

However, in the Nyimang and from time immemorial, absolute rights in property, especially movable property, have been subject to an

outright alienation either through sale or gift. All informants agree unanimously that there is no doubt that absolute rights and other proprietary interests in land were, and still are, also subject to an outright alienation. By an outright alienation of a right or a title in a thing is meant an irredeemable transfer of the proprietary interest in property by sale or gift as contrasted to transactions, such as pledges, loans and tenancies. Thus, when alienating a piece of land the vendee retains no reversionary interest in the property so alienated.

i) Sale of Chattels

Among the Nyimang, when a movable property is sold or bought, the law assumes that the parties to the transaction intend that the sale should be final. It must be regarded as a complete divesture of the proprietary interest of the vendor to the benefit of the vendee. However, before payment of the purchase price, each party has a right to protract from the transaction without incurring any legal liabilities. Sale, among the Nyimang, is never complete unless part of the purchase price has been paid. The agreement, promise or intention to create legal relations, is not binding on either party. On the other hand, if a purchase price has been paid (part-payment is enough), then the parties are not allowed to re-open the negotiations on account of the price being inadequate or that the goods did not comply with the specifications at the time of the sale. This is so unless the purchaser could prove that he has relied totally on the warranty given by the vendor that the goods are of a certain quality (at the time of the sale). In such cases the sale transaction may be held voidable at the instance of the purchaser if the warranty has turned out to be

a fraudulent misrepresentation. Similarly, the iran (master/owner) of the alienated property will not be allowed to revoke the contract of sale at a later stage unless the purchaser has failed to pay the full balance of the agreed price.

Generally the iran of the movable property has a full legal right to sell his personal property to any person (including strangers) he wishes. When selling livestock, children and women must obtain the necessary consent of their fathers and husbands before they can validly enter into a binding contract. Sales effected by children or women may be held voidable at the instance of their guardians if entered into without the guardian's express consent.

It has been mentioned that in sale transactions payment of the purchase price is the only determinant of a valid sale transaction for a movable property. However, when a movable property is sold the object must be delivered to the purchaser or to his agent. Generally speaking, payment of the price and not delivery is enough to transfer the proprietary title in the goods to the purchaser. A person may validly buy an animal without taking actual delivery. Thus it is possible to pay a price for an animal (or any other object), but entrust it or leave it in the vendor's custody. This transaction is known as kol. In the case of land sales, no active possession is required, mere showing of the boundaries is enough to constitute a constructive possession of the property.

ii) Sale of Land

In cases of land, two modes of sale transactions must be distinguished. The first type is that which is considered as an outright alienation of proprietary interests in the land and which is

not redeemable. The second type, though it is by no means an outright sale, is nevertheless, subject to redemption. The first of these types is an obsolete form which does not exist today. However, whether a sale transaction is such as to implicate an outright alienation of the land, or whether it is merely a revocable transaction, depends largely upon the item paid as a price for the purchased land. In other words, and as will be made clear, what determines the nature of the sale transaction does not depend so much upon the intention of the parties, or even less, upon the general procedures and other formalities of the sale.

In the old days, a sale of land would be regarded as an outright and irredeemable alienation of the absolute title in land if the following items were paid as price: ameleng (seeds of water-melon), boreng (seeds of kerkadi - the Roselle Hemp, Hibiscus Sabdariffa), forug (hide). The latter item was considered as the most important item for land exchange in the old days. Some informants mention that sales by dur (shield), a hunting dog, or temeleng (large axe used by men), were equally irredeemable sales. It was kwir (taboo) to revoke sales or redeem land for which the above-mentioned things were paid, or else the redeemer would die. In the old days, and besides sales proper, other instances also existed where titles to land would be totally alienated. For example, if a person had borrowed another's shield in times of war expeditions (kedang) and the shield was lost, then this lending of the shield was likely to be converted into a sale transaction in which the borrower could be made to part with his land instead. Thus land given as compensation for a lost shield would never be redeemed. Similarly, a person who in the old days had caused another person's slave to run away, or was responsible for his

death, might be made to give his land in exchange. Such land would not be redeemed. Any other forms of sale transactions for land in which livestock, guns, money, and other items are paid as a price may be subject for redemption.

The remarkable feature of this customary rule of redemption is that it works one way only. The rule entitles the vendor and his heirs to revoke the contract of sale and hence redeem the land. No such privilege of revocation is open to the purchaser of a piece of land. Though the people themselves do not present any plausible explanation for this unilateral rule, one may suggest that the rule is certainly affected by their religious attitude. That is because, as has been mentioned above, the iran (master) of the land (the vendor) has power to render the purchased land unproductive (by invoking supernatural powers) if the vendee refuses to agree to the redemption procedures.

It has been stated that debts among the Nyimang never die. The creditor or his heirs could claim the unpaid balance of the sale price however many generations have passed. There is no time limit after which the vendor or his heirs are estopped from claiming the redemption of their alienated piece of land. Any future disagreement between the purchasing parties or between their respective heirs is likely to lead to the revocation of a sale transaction entered into generations ago. However, the most common of these problems comes to the surface when a proposal for a marriage relationship is refused by one of the parties. In most cases the unpaid balance of the purchase price is one of the several instances which give rise to the revocation of contracts of sale.

iii) Sale Formalities

Unlike movable property, sale transaction of land is generally carried out between relatives, neighbours or between parties who would be well known to each other for a long time. In the majority, if not all the cases, the purchaser knows the iran and the piece of land he is purchasing, and thus there is little room for the question of uncertainty of title to arise. However, this does not rule out the possibility of unauthorised sales where a member of a descent group sells a piece of land belonging to the whole group without the group's express consent, or, in cases of movable property, when a stolen property is sold. The rule nemo dat quod non habet is also applicable under the Nyimang law of property. Thus, if the vendor's title has been proved defective, even after the sale has been concluded, then the whole transaction must be set aside. Thus investigation made to ascertain the proper title of the vendor was, and still is, the product of personal knowledge of the purchaser. In the old days it was rare for a beshi bilé (a stranger from other Nyimang sub-tribes) to dare to purchase land outside his home territory.

However, before entering into any contract of sale of land, negotiations and other preliminaries must be discussed. For example, before the parties could agree on the sale price, the subject of the sale must be identified. In cases of livestock sold in the market place at Salara, a certificate must be issued by the clerk of the Salara People's Council. In return for the certificate the vendee pays 5 P.T. No formal deed or written contract is required.

A person purchasing the land must be taken, together with some respectable villagers, to the site of the land to be shown the

boundaries. The showing of the site is important to ascertain the size of the farm. However, it must be pointed out that the Nyimang have not developed any system by which farm size may be measured. What is sold here is the farm, a fixed area with fixed boundaries, and a quick glance may be taken as a sufficient clue. The formality of the boundary-showing, in addition to whether the farm itself is of good cultivable soil, is an important factor in the final agreement for the purchase price.

Under Nyimang law, witnesses may be required to testify whether a sale transaction has in fact taken place. But the presence or the absence of witnesses are not regarded as vital to the validity of a sale transaction. In land sales, witnesses are necessary, inasmuch as they could help determine the land boundaries if a future dispute should arise. The rule that witnesses are not vital to the validity of a sale transaction (especially when a piece of land is alienated) is demonstrated by the following fact. In the old days, the purchaser might legitimately deceive the keilo iran (land master) and surreptitiously include some of the seeds (which render the transaction an outright sale)[1] amongst other items paid as a price. The same trick may be played to convert a genuine pledge or a pawn transaction into an outright sale. In all these cases no witnesses are required, nor is the intention of the vendor held material to the validity of the sale. However, though in the modern customary law courts witnesses are regarded as indispensable to any sale transaction, yet a sale transaction can always be proved by oath-taking without need

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1. See above.

to resort to the attestation of the witnesses.

Although it has been mentioned that under Nyimang law witnesses are not essential when a sale transaction is entered into; in some cases witnesses are an indispensable requirement for the publicity of the transaction. On the other hand it should be remembered her that publicity itself does not affect the validity of the sale. The publicity requirement is to make known to the public that a proprietary interest in a certain property has passed to a certain individual. It is to give third parties a chance to contest unauthorised sales. Publicity also gives interest-holders in adjoining farms (who would usually be called as witnesses) an opportunity to protest if an improper boundary is drawn which tends to affect their holdings. Thus lack of witnesses or the absence of publicity cannot in themselves be regarded as good ground for setting aside or vitiating a sale transaction. That is because, as has been mentioned, an oath on a fetish by either party is conclusive to prove or disprove a case. After the formalities of seeing the locality and identifying the boundaries of the purchased land are completed; the purchase price may then be agreed through negotiation. When concluding the contract of sale no religious ceremonies or libations are performed so as to render the contract binding on either party. Thus, unless the nature of the sale, as has already been mentioned, suggests an outright alienation of the proprietary interest in the land, either party is absolutely free to resile from his agreement without incurring any liabilities. In other words, even if part of the price has been paid, the parties are free to withdraw from their agreements without being liable for breach of contract or being called upon for specific

performance. In such cases the purchaser is entitled only to the original price paid by him. The Nyimang law of property does not offer any remedy by way of damages in any similar cases.

Absolute title in land, as mentioned, is vested in the individual members. Thus any holder of the absolute title in land has a full right and legal capacity to alienate that title without resort to any superior (be it social or political). Among the Nyimang, only the father has capacity to exercise the right of sale of family land. Thus a junior member of the Nyimang family has no capacity to sell land held jointly by the family without the consent of the rest of the family group. However, it is common that after the father has grown old and is unable to manage the family property competently, his elder son will normally aid him in the general administration of the property. In most cases the father may, out of courtesy, consult his elder son before a property is sold. Sometimes the decision may be taken by the elder son, but upon the express authorisation of the father. If, however, before the sale transaction is finalized one of the sons steps in and prevents the sale of the land or any movable property, by fulfilling the needs of the father or the rest of the family, then the redeemed property does not become that child's property. The property so redeemed will still remain as a family property over which the father still exercises full control. But after the death of the father, a conflict is likely to arise, as that son has the right to demand the property (if it still exists) redeemed by him during his father's lifetime.

A sale of an interest in land less than the absolute title is also recognized under the Nyimang law. Thus a person may validly sell

trees, wells, etc., but keep the soil itself in his possession; or he may sell his separate rights in trees and the soil to different persons. But generally, unless an intention is expressed otherwise, a person who sells his land to another is deemed to alienate it together with the trees upon it.

To recapitulate: in the opinion of Nadel the need for the regulation of inheritance rules and the scarcity of land were the two determinant factors which led to the development of land sales in the Nuba Mountains. And that in those Nuba tribes with matrilineal inheritance the driving force for land sales, according to Nadel, are purely social which in others (those which experience land scarcity) the need is purely economic. In the latter group the rules of supply and demand determine the transaction. In these circumstances, he says, "The price varies considerably and tends to reflect the commodity value of land". Nadel takes the Nyimang example to demonstrate the correctness of his theory, and says that:

> "A Nyima practice of somewhat similar nature convincingly supports this interpretation. There the people distinguish land purchase between relatives from land purchase between strangers. In the former case the transfer of land is regarded essentially as a mutual obligation between kinship members, and in consequence the price is standardized and nominal; in the case of land deals between strangers, the purely economic nature of this transaction is reflected in an elastic (and much higher) price."

Despite this repeated emphasis on the occurrence of land sales in the Nyimang area, it must be noted that sale of land was and still is not widely exercised. The reasons that gave rise to the sale of land, as has been made clear, also made the land holders reluctant to part with their pieces of land. It was only in extreme cases, e.g. in famines, or where a person wanted property to pay a marriage

consideration, that a person was obliged to sell his land. Thus Nadel's contention of land scarcity, which implicitly suggests that land is regarded as a commercial commodity, is untenable.

It is true, however, that kinship rules require that relatives should not be treated like strangers, and that purchase prices between them may always tend to be low. But, certainly land transfer through sale between kinship members is not regarded as a mutual obligation. Nadel seems to speak about land pledging or lending, and not of land sales among the Nyimang. There is no legal distinction in land prices as between relatives and strangers. Mutual obligation between relatives, in similar situations are rendered through lending and not through sale of land. Nadel is also obviously at fault when he speaks about standard prices between kin among the Nyimang.

One may suggest that land sales in the Nyimang area occur less frequently in recent years than they did in the old days. As mentioned, the traditional system of the Nyimang land tenure allows individual members of the community to enjoy benefits over land belonging to others, for whatever periods, without paying any consideration. This system, as is apparent, has given no impetus to the people to develop any prosperous land sales in the area. However, despite the existence of the "borrowing" system, there is, nowadays, a growing tendency towards selling land. The emergence of this tendency is connected with the spread of the new economic institutions in the area. For example, the cultivation of the economic trees and the erection of the permanent buildings such as modern brick houses and shops, are, presumably, regarded as a permanent deprivation of land from its original holders. The

original holders (iran) of land upon which permanent shops are built know that there is no way that the shop owners could move elsewhere. Some of the original holders have, therefore, expressed concern and willingness to sell their pieces of land to those shop owners. It is interesting to note that the shop owners have refused the offer to buy plots of land upon which their shops are built. In their argument, the shop owners rely on the traditional customary rules of "borrowing".

Another reason is that the idea of governmental ownership of the land has become common among the Nyimang people.[1] Thus most of them are unwilling to purchase land from persons whom they think (according to the development of the concept of government ownership) have no better title.

Thus, shop owners and the owners of economic trees will remain in possession of land as long as they wish. Both traditional laws of unconditional borrowing and the new concept of government ownership of land have worked to the benefit of those groups of people who are able to exploit the land economically. But the shop owners or the owners of economic trees are not allowed to mortgage, pledge, sell or rent these plots to other people without the express consent of the original holders.

This being the case, one may argue that this is the area where the traditional schema of land tenure (unconditional borrowing) has hampered the economic development of land in the Nyimang area, and that, despite the existence of the concept of individualization of landholding, the introduction of the cash economy in the area has not helped to

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1. See The Unregistered Land Act, 1970 (Amendment 1971), S.4.

increase the commercial value of land.

4. TENANCY

Before the introduction of economic trees in Abu Seibe village in the late 1950s, no commercial tenancies existed in the Nyimang area. Now tenancy for payment or, to be more precise, wage labour exists in Abu Seibe in relation to fruit orchards or plantations. In the old days the Nyimang knew only one form of tenancy, viz. where a person was allowed free use of land without payment of rent either in cash or in kind. This mode of transfer of interests in land, which Nadel calls the "borrowing" system, may properly be known as a gratuitous tenancy.

Generally, gratuitous tenancies are granted to in-laws, relatives and friends. Strangers may also be granted free use of land provided they continue to stay in the locality. However, when land is given gratis, without consideration, then it is said that such land is given for a person "to eat grass on" or lawa talou. In principle gratuitous tenancies are not limited by time and thus are apt to be confused with gift transactions.

i) Gratuitous Tenancy (land borrowing)

The mechanism by which interests in land are granted through gratuitous tenancies or by "borrowing", as it may sometimes be called, is simple. It has been described by Nadel as follows:

> "In Nyima ... borrowing of land is widespread and firmly institutionalized. According to the traditional practice in Nyima, the prospective borrower would first inquire whether a certain attractive fallow plot was available for borrowing. The owner would rather withhold permission; the borrower would work the plot for as many years as it bore crops, and then return it to the owner. Nowadays people dispense with this preliminary inquiry and

> application, and simply start cultivating any likely-looking fallow plot. An owner who would refuse his permission could not evict the borrower until after the second harvest."[1]

It is submitted that Nadel has correctly outlined the general rules that govern gratuitous tenancies among the Nyimang. In theory any person who wishes to occupy another person's land, either for cultivation or for residential purposes, must first seek the permission of the original landholder (the actual iran - master - of the land). In many cases permission must be obtained from a person who is in ostensible control of the land (i.e. another tenant). Generally such permission is given as a matter of course. As a rule, permission for land required for residence may usually be given more readily than if land is required only for cultivation.

ii) Rights of the Tenant

As a general rule, in the residential areas, a person may acquire rights of occupation over a piece of land the moment he starts clearing the grain stalks by a special digging hoe known as shigir. Thus the intention of a person to reside on land may be shown either expressly or implicitly by clearing the grain stalks or the bushes from the land. However, some informants say that mere expression of an intention (expressed or implied) is not enough so as to render the land-holder to submit his land gratuitously. This gives room for one to argue that the general rule whereby land-holders are required to submit their lands gratuitously whenever they are asked to do so, should be interpreted as expressing people's religious attitude rather than being intended as a binding legal rule. Thus while it is kwir (taboo)

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1. Nadel, The Nuba, op.cit., 36.

to withhold one's permission if a piece of land is required of one, nevertheless, there are no legal sanctions against a person who withholds his permission. That is because, despite this religious rule, people can always refuse to allow others to utilize their plots of land for any reason, however trifling. The original land-holder or even the ostensible holder of a plot of land has a right to object or refuse to permit persons to reside in his neighbourhood if such persons are proved to be notorious trouble-makers, habitual thieves, or are kworo (sorcerers).

However, instances exist where the land-holder may be regarded as under obligation to accommodate the tenant. Such instances are where the tenant has undergone some physical or economic loss in consequence of a misrepresentation on the part of the land-holder that such permission is forthcoming. This is so especially if the tenant has already built his tilfu (granaries) on the site. The reason is that Nyimang granaries are regarded as permanent buildings which cannot be removed.[1] This, in addition, involves economic expenditure if built by collective labour (kaworé) where free food and drink are offered. In some cases experts may be called and be paid handsomely to construct granaries. Thus a land-holder who allows a tenant to clear a residential site, and hence build his tilfu (granaries) may not later be heard to say that no permission was given. This, however, is similar to what is known as an equitable estoppel. The land-holder, who has allowed another to persevere and continue to construct buildings, labouring under such misapprehension that he has a right to do so, may be estopped from denying this false misrepresentation.

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1. A Nyimang would perceive the act of the building of a granary on a piece of land as a de facto establishment of a religious link with that land.

The rule stated by Nadel that "an owner who refuses his permission could not evict the borrower until after the second harvest",[1] is not correct and has already been criticized as not being universally applicable to the Nyimang.

A question might arise whether a person who has acquired interests in land as a gratuitous tenant could legally transfer such rights to third parties without the consent of the iran or the original land-holder. Under Nyimang law tenants have no capacity to transfer their occupational rights to persons other than their own children and wives. Thus, as regards the immediate family members of the tenant, the right of occupation is not a mere personal right that terminates on the death of the original parties to the borrowing transaction. The right of the tenancy is a heritable right which passes automatically and as a matter of course, to the heirs of the deceased tenant. It seems, therefore, that though the iran or the original land-holder may enjoy a perpetual reversionary title in the land; the tenant enjoys a permanent occupational right as long as the land can be worked.

A tenant can forfeit his right of occupation the moment he abandons the land. Once land has been abandoned, then no right of reoccupation exists to the tenant even if the land is still unworked. Generally speaking, there is nothing that may prevent a tenant reoccupying his old farm, although this could not be done as of right. Thus A, a gratuitous tenant, abandoned a piece of land which he had worked for some time. The land remained unworked for 10 years after which B started cultivating it. A, if he also wanted to cultivate the same

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1. See Nadel, The Nuba, op. cit., 30, 36.

farm, has no right to contest B's occupation, and will not be given priority over the claims by other members of the society.

Generally speaking, no restriction is imposed on the ways in which a gratuitous tenant may use the land. But nowadays tenants in the Abu Seibe area are forbidden to plant any economic trees. Another general customary restriction on the tenant's rights is that he may not cut certain trees on the land. Most important of these trees are the adig tree (acacia albida) and fir (ziziphus spina christi).

As a de facto controller of the land, a gratuitous tenant in exercise of his occupational rights may prevent third parties from maliciously interfering with his right of enjoyment. Thus, tenants may sue persons who cut trees, collect grass and wood from hedges or on land held by them without resort to the original land-holder. The original land-holder may join in the suit when there is a dispute over title, or when trees belonging to him are being cut by a third party.

iii) Termination of the Right of Tenancy

As has already been mentioned, there is no provision for a time limit after which the tenant may be required to give up his tenure. Ironically, and inconsistently, the extent of the security of tenure enjoyed by the gratuitous tenant is more considerable than that enjoyed by the keilo iran (master/owner of the land). Thus, once a person has been permitted to occupy a piece of land gratuitously, then it becomes difficult to evict him. In addition, the keilo iran cannot exercise acts which may be regarded as a direct intervention to the possessary rights of the tenant. Thus the keilo iran cannot pledge his land while it is still occupied by the tenant. This means that despite

the original permission being gratuitous and there being no rent, the keilo iran has no right unilaterally to terminate the tenancy. This rule holds good even if there has been a gross disagreement between the parties. But nevertheless, there is no consensus as to the universality of this rule. There is thus a disparity of opinion as regards the validity of the above rule. An adverse opinion states that the tenant can always be evicted if he started to contest the title of the original land-holder or the keilo iran.

One has to admit that both of the above rules, however contradictory, form part of the Nyimang customary law. Such apparent contradictions, although they are always reconcilable, are also likely to bewilder those who are not familiar with the peculiarities of the operations and the general structure of the customary rules. One does not expect that customary laws will exhibit the same systematic and self-consistent character as is possessed by legal institutions at a more advanced stage of development. However, it is possible to reconcile the two rules by pointing out that in tradition the keilo iran can always enforce his claim to evict by relying on religious rather than strict legal sanctions; that is because people believe that upon any disagreement between the tenant and the keilo iran, the keilo iran has spiritual power, derived from his unique relation with his piece of land, to render the occupied land unproductive. This being the belief, the tenant is always ready to abandon the land whenever there are problems between him and the keilo iran.

In recent years the immunities of the tenants have greatly increased through the decisions of the local courts. The customary courts, preoccupied with the notion of Government ownership of the land, are always ready to sustain the tenant's right to exploit the

land as against claims of eviction by the land-holders. It has already been pointed out how the customary courts and the State courts have taken different approaches when a gratuitous tenant is sought to be evicted on grounds of trespass. In Koser Kori v. Abdel Gadir El Asha,[1] the Salara People's Court refused to sustain an eviction claim by the keilo iran against a gratuitous tenant. The court expressed its opinion, obiter dictum, that "the tenant (defendant) should continue to exploit the land as is customary among the people".[2] This decision was upheld later by the Resident Magistrate.

It is odd that the court of the Resident Magistrate took a different attitude when similar cases came before it. In Abdalla Bishara v. Fikir Kilana,[3] a gratuitous tenant was evicted as being a trespasser. The same decision was arrived at by the same court in the case of Khamis Jabri v. Ibrahim Sanafur.[4] In this case, a gratuitous tenant was considered a trespasser and was ordered to give up the possession of the land to its original holder. It is submitted that the court erred in both cases. The court did not bother itself to look beyond the individual cases into the larger batch of customary practices that govern such cases. The Nyimang customary law has always, and consistently, protected the interests of tenants as against capricious claims of the original land-holders.

iv) Wage Labour

With the exception of Abu Seibe village, labour for hire at wage is not found throughout the traditional Nyimang area. But,

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1. Koser Kori v. Abdel Gadir El Asha (CS /17/77, Salara People's Court).
2. Translation mine.
3. Abdalla Bishara v. Fikir Kilana (CS/94/75 - Dilling Civil Court).
4. Khamis Jabri v. Ibrahim Sanafur (CS/63/74 - Dilling Civil Court).

traditionally, a person may call upon his relatives, neighbours and friends to help him in performing any kind of work in consideration for free food and drink. This type of collective work is known as kaworé. It is a transaction in which the rules of reciprocity are strictly followed.

The youths who lived in the cattle camps (wir) would start early in the morning to work in any randomly chosen farm, without the knowledge or invitation of its holder, in order to obtain grain and food. This voluntary and unilateral work is known as idin ashida. The youths choose to work in the farm whose holder they believe will be able to accommodate their expectation, and hence provide them with food in the form of grain or an animal to slaughter. It must be remembered that since the youths were not invited to work on the farm, so the farm holder is under no legal obligation to provide them with any remuneration. The whole transaction depends largely on the good-will of the farmer and his social status. As the youths have no enforceable claim, then the farm holder may choose not to pay them anything in return.

In Abu Seibe village two types of transactions which, though they may not properly be called commercial tenancies, may in themselves be regarded as an innovation in the whole Nyimang area. The first of such transactions may be regarded as wage labour proper. There garden owners may employ labourers to work in their gardens for monthly wages. The work is required in relation to irrigating the fruit trees, fencing the garden, planting and irrigating the vegetables and protecting the garden from theft and straying animals. The rates that are paid may vary each time. They are negotiable and depend largely on the parties' agreement. The other form of transaction is

where a person may place his farm under the management of another to plant and look after until it is harvested and marketed. After the deduction of the expenses of the farm, the profits will be divided into equal shares between the farm owner and the so-called manager.

CONCLUSION

The general emphasis of the Nyimang law of property on the norm of easy access to the enjoyment of land, asserts that certain rights over the same piece of land may overlap and may thus be held diffusely. This should not be misunderstood as implying the absence of individual rights over specific areas. The suggestion, however, is that the durability and the stability of the landed property present an important variable in terms of rights and interests enjoyed by different members of the community. Thus, despite the individualistic attitude of the Nyimang people, possessory rights of the occupants over land held by other persons may also be protected under the customary law rules.

The traditional scheme of the Nyimang customary law, under which gratuitous tenancy operates, has proved inadequate through systematic failures significantly to solve some of the modern problems which govern the relations between the tenant and the original land-holder. This failure has, as shown, led some customary courts as well as the Resident Magistrates' courts to resort to the application of the general territorial laws to determine some of the vexing problems in relation to questions of land titles. Thus, the traditional system, which allows the gratuitous tenant to continue in occupation of the land for indefinite periods, is liable to mislead those who live near, who may mistakenly consider the tenant (the ostensible holder of the

interest) as the original holder of the land. This, when the question of proof of title arises, becomes difficult for the courts to determine who is the real holder, that is so especially if the original witnesses to the transaction have died.

Furthermore, it has been noted how under the traditional Nyimang law, the keilo iran enjoyed only a limited security of title, vis-à-vis the gratuitous tenant, mainly through the aid of supernatural powers. But nowadays, the majority of the people (especially the young men) do not fear any of the old religious sanctions. This, however, is due mainly to the influence of modern ideas fostered by education, and to the adoption of the general principles of the Islamic faith. In addition, the introduction of the notion of the government ownership of land under the Unregistered Land Act, 1970 (Amendment 1971) has had an important impact on the people's ideas over landed property. In fact, one of the popular reasons produced by those tenants who contest the title of the keilo iran is their reliance on the notion of government ownership of the land. Now the younger generation seldom acknowledges anyone, other than the government, as the sole "owner" of the land. This attitude is in constant conflict with the views of the older generation who, due to psychological and religious reasons, feel more acquisitive and are loath to give up title over pieces of land inherited for generations from their fathers.

LOST AND FOUND PROPERTY

In any human society where there is an operative legal system, whether advanced or primitive, one expects to find the concept of possession of some significance. However, the possession of property

or mere physical control of it does not necessarily demonstrate that the possessor has any legal claim to the property. Some legal systems, e.g. English common law, take possession as establishing a right however limited to the thing in possession. Yet this right is defeasible by anyone who can show that he has a superior right to possession.

The question of possession has always proved problematic in English common law when discussed in connexion with the topic of loss and finding of property.[1] Most legal systems contemplate the possibility that a person who finds a chattel and who has physical control over it may intend to exclude others from the enjoyment of it. But what factors may amount to possession? It is not surprising to find that the Nyimang customary law has not developed any conscious approach to problems arising from possession of chattels, as for example, by laying down presumptions or legal postulates to determine factors entitling someone to claim possession as against someone else. Among the Nyimang any degree of physical control over found property may be enough to invest a finder with a right in that property.

Indeed, even English law has shared the failure to find an adequate definition of the word "possession". Earl Jowitt has said that "The English law has never worked out a completely logical and exhaustive definition of 'possession'".[2] Harris, however, suggests

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1. See D.R. Harris, "The concept of possession in English law", in A.G. Guest, ed., Oxford Essays in Jurisprudence, Oxford, 1961, 80. See also D.L. Perrott, "Some notes on possession and title in the Sudanese law of property", (1962) S.L.J.R., 332 ff.
2. See United States of America and Republic of France v. Dolfus Miege et Cie, S.A. and Bank of England, (1952) A.C. 605, H.L.

that English judges have constantly relied on certain factors when they come to determine such questions as who of the claimants have a better right to benefit from a claim based on possession.[1] Among the factors mentioned by Harris, which are also important in Nyimang context, are:

(i) the degree of physical control of a person over goods, and

(ii) his intention towards the goods he has found. However, questions such as whether a person in possession or in prior occupation of the premises on which the lost goods are found has a better title vis-à-vis the finder do not arise under the Nyimang law of property, as the finder's right over goods found on another's land is always absolute as against the occupier of the land. In this connexion two important questions also arise under Nyimang law in determining the rights of the possessor of good which he has found, viz. (a) whether the previous holder has intended to abandon his possession of them, or (b) whether the finder generally believes that the goods are lost in fact.

Among the Nyimang it is not unknown for a person to abandon his control over certain types of property intentionally with the view to their being taken and enjoyed by the first person who finds them. This typically happens with property which is dedicated to certain ancestral spirits or anonymous supernatural or divine powers. Such property may include goats, sheep, fowl and spears. But not every piece of dedicated property may be so disclaimed by its owner. The only dedicated property that may be taken freely by a finder is that which has been abandoned or is believed to have been abandoned or thrown away after the

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1. See Harris, op. cit., 70-1 and passim.

performance of certain rituals or ceremonies. Thus a ritual of agelda (purification) may be performed on bwir dia (main road) and chattels employed in the ceremony may later be abandoned to be taken by strangers. The things most commonly abandoned in this context are fowls. On occasion some of the personal paraphernalia of the kwuni (ancestral spirit) whose koydi (the human vessel) has died may be thrown away to be collected by strangers, as it is taboo for such property to be used by the family of the deceased koydi. In the above cases, the abandonment of the possession corpore et animos may destroy the title of the original owner and render the chattel bona vacantia. Thus the occupatio res nullius by the finder may create title by the mere fact of taking possession of the abandoned goods.

Under Nyimang law, unless there is an intervention by a supernatural power, such as when a kwuni asks that the found property be delivered to him, the finder's title is good against the whole world except the owner (i.e. the original holder). The owner of lost property has a right to recover his goods from anyone at any time, no matter after how many years, as long as he can identify his goods. The term "original holder" may suggest that such a person may perhaps be no more than a person with better title than the claimant (e.g. as when the original holder was himself a finder).[1]

Generally, the finder cannot pass a better title to a third party than he himself has. Thus, a third party who purchases something which has been found from another for a valuable consideration may act at his peril. This is so even if the third party has bought his

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1. Cf. Armory v. Delamirie (1722) 1 Stra. 505.

property in an open market (there is no concept similar to that of market overt in Nyimang law), as he will never be protected against the owner. However, it is possible that more than one person may be involved in a finding case. In such situations all of them may be regarded as joint finders, and may all benefit from the found property on equal terms. D. Riesman reports a similar American situation where some boys found an old stocking which eventually burst in the course of their playing with it. It contained money. The money was divided amongst the boys equally. It was held that all the boys had an equal intent to control the contents when the stocking burst.[1]

A finder of lost property, among the Nyimang, has a right of remuneration. This is contrary to the English common law,[2] but similar to the General Territorial Law of the Sudan.[3] Under section 4 of the Lost and Unclaimed Property Act 1905, a finder is entitled by way of remuneration, to one-tenth of the value of the found goods, or of the proceeds of their sale. As has been indicated, similar principles exist under Nyimang law. The difference is that under Nyimang law the remuneration is not specified. It is a token, and is commonly known as angeu ki (a thing for the eye). The reason is that if it were not for the eyes of the finder, the property might have been collected by a person from outside the tribal area, or indeed by a dishonest person, which would have made it impossible for the owner to recover it.

Under Nyimang law a finder has a better title as against the occupier or the iran (master/owner) of the land over which the property

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1. See D. Riesman, "Possession and the Law of Finders", (1939), 52, Harvard L.R., 1110.
2. See D.L. Perrott, "Some Notes on Possession and Title in Sudanese Law of Personal Property" (1962), S.L.J.R., 328-30.
3. See The Lost and Unclaimed Property Ordinance, 1905, S.4.

is found. This may seem to be the same as the principle laid down in Bridges v. Hawkesworth,[1] where a traveller found a parcel on the floor in the defendant's shop containing bank notes. It was held that the traveller was entitled to the notes against the shopkeeper. But this principle was not followed in South Staffordshire Water Co. v. Sharman.[2] The defendant was employed to clear a pool on land owned by the plaintiffs. The defendant found two gold rings in the mud and claimed them against the plaintiffs. It was held that:

> "Where a person has possession of a house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo."[3]

It is submitted that no such presumption exists under Nyimang law. The mere occupation or holding of the premises on which a property is found will not invest the occupier with a better title as against the finder, unless the occupier or the holder of the land himself is the iran of the found chattel.

Of course the rights and duties of the finder of lost property have a criminal aspect. In the general territorial law of the Sudan, if there is reason for the finder to believe that the real owner could be discovered, and the finder takes no reasonable steps to discover him, then the finder may be held guilty of theft or criminal misappropriation.[4] The important question here is whether the finder could have discovered

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1. Bridges v. Hawkesworth (1851), 21 L.J.Q.B., 75.
2. South Staffordshire Water Co. v. Sharman (1896), 2 Q.B., 44.
3. Per Lord Russell of Killowan C.J., 47. The principle was followed in Re. Cohen (1953), Ch. 88.
4. See Sudan Penal Code, Ss. 320 and 344, respectively.

the real owner of the found chattel if he has taken reasonable steps and not whether the finder knows the owner of the chattels. The orthodox view of Nyimang law is quite opposite. Under Nyimang law the finder of a chattel is not required to discover the real owner. He is required to do so only if he actually knows the real owner. In most cases found property, among the Nyimang, may immediately be appropriated to the personal use of the finder. It is claimed by the people that a person who finds things has a strong abidi (god or ancestral spirit) who cares for him. Thus, and quite often, rather than trying to discover the real owner or appropriating the found chattel to himself, the finder will dedicate it to an ancestral spirit (kwuni) who is believed to have assisted him in finding it.

A kwuni may, on his own initiative, require that the finder should deliver the found property to him. In such cases the real owner may recover his property from the kwuni, or he may recover its value from the finder. However, there exist certain kwuni(s) who claim to have general rights over all property found in certain areas of Nyimangland. Thus any property found on the main road that connects Tundia sub-tribe and Fanda known as Fado bwir, must be given to the kwuni Nyiil of Tundia. Any finder who appropriates any property found in that area to his personal use would be sanctioned to suffer an obnoxious disease and may die.

LOST AND FOUND ANIMALS

The law as regards the lost and found animals among the Nyimang, is remarkably different from that governing the found chattels. Lost and found animals can never be appropriated by the finder. When

found the animals must either be reported to the sheikh or be taken to the pound. In many cases the finder is considered a thief unless he takes the necessary steps to discover the animal's owner. The reason is that animals can reasonably manage to return to their master's place unless restrained by acts of a malicious person. As a general law the finder of the animals among the Nyimang has no right of remuneration.

CHAPTER IX

SUCCESSION TO PROPERTY

GENERAL PRINCIPLES

The subject-matter of succession among the Nyimang is not confined only to rights and duties in relation to property, but also extends to rights and duties in relation to persons (e.g., guardianship of women and minor children). Succession rights may also include the right of the heir to succeed to the holding of a political office (such as the rain-making office) or a social office such as that of the kwuni).

However, it must be noted that whilst succession to property invests the heir with rights and interests in property, it also imposes certain duties upon such heir. That is to say, Nyimang customary law recognizes onerous succession whereunder the estate of the deceased person includes debts as well as assets. The heir may therefore be saddled with debts and duties on behalf of the deceased person. This is so no matter whether these debts and duties are in excess of the actual disposable assets left by the deceased person. Despite this onerous succession, it is highly unlikely that a child would refuse to inherit his deceased father's obligations, bearing in mind that only the male children of a deceased are entitled to succeed to property. In any case a son must be prepared to shoulder his deceased father's responsibilities; if only because he fears the vengeance of the father's geshin (dead man's spirit).

One of the most important principles as regards the rules of succession is that the heir will not take possession of the property

immediately after the death of the proprietor. This rule is applicable whether the heir or heirs are already known or not. One of the reasons is to assure debtors that they will be able to receive their shares of the estate before it is finally distributed. A general meeting of the family and villagers is held in which a public inquest is made into the causes of the death. In this meeting the nuncupative will of the deceased will be discussed and the rights and obligations of the respective heirs will be made known publicly.

Succession among the Nyimang is patrilineal. This means that persons related by blood other than solely on the male line as well as affines have no right to succeed to rights and interest in the intestate property of the deceased person. A person succeeds to property by virtue of his blood relationship to the deceased; which relationship must be traceable through the father's line. Furthermore, only male children are entitled to inherit such property to the exclusion of other relatives. Thus wives and daughters are generally not entitled to inherit property in Nyimang society (other than rights to maintenance). It will be noted that these customary principles of succession are in total conflict with the rules of the Islamic law of succession. However, practice is changing gradually in certain urban areas and in some Nyimang subtribes which are predominantly Muslims, such as Nitil and Kurmitti. There it has been recorded,[1] Islamic rules of inheritance are sometimes applied (to individual cases) to allocate certain rights and interests to the daughters and wives of the deceased person.

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1. Personal investigation.

Generally speaking, upon the death of the father, the eldest son of the senior wife succeeds to his father as head of the family. As such he becomes responsible for the performance of all rituals connected with the ancestral spirits. In that capacity the elder son will manage the family property which, if it has not already been distributed by the deceased father during his lifetime, will be jointly held by all male children of the deceased person. A distinction must, however, be made between the religious role of the elder son within the Nyimang family and his heritable rights vis à vis the rest of his younger brothers. According to the Nyimang the eldest son is considered as the orgol (compound gate) of the father and the youngest son is regarded as the worgol (hut doorway) of the mother. Thus, whilst the youngest son keeps his mother's "hut", the eldest son is endowed with the responsibility for keeping his father's compound. This is achieved through performing the necessary ceremonies, rituals and prayers to his deceased father and to other ancestral spirits. In this capacity alone the eldest son inherits symbolic items that bear ritual connotations.

However, both Nadel[1] and Stevenson[2] think that upon the father's decease, the eldest son becomes the "exclusive heir" and that the younger sons receive "nothing". This, as will be shown below, is an exaggeration of facts, and may therefore be misleading. Both writers must thus be at fault, since the existence of a rule similar to that of primogeniture which bears strict feudal connocations may be inferred from their statements. The fundamental principle of the institution

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1. See Nadel, The Nuba, op.cit., 405. Also cf. D. Roden, "Down-migration in the Moro Hills of Southern Kordofan", (1971) 52 SNR 95.
2. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 184.

of the primogeniture or "the succession of the eldest son" which used to prevail in the medieval ages was founded so as to preserve the family assets intact. This was intended to consolidate economic powers in the hands of the eldest son so that he might be able efficiently to manage and hence to develop the production of more wealth within the family.[1] There is, however, a basic and fundamental difference between the Nyimang ideas of succession to property and the notion of primogeniture. Among the Nyimang, the eldest son is only a caretaker and a guardian of his younger brothers. Thus, as all children have no restricted rights of claim in their deceased father's estate, each son has a legitimate right to lay specific claims to individual shares of the basic estate of their deceased father's intestate property. The holding of the property by the elder son is by no means exclusive. As such, his property rights are not superior to those of his younger brothers, and he does not receive more material objects (except certain symbolic items) than the rest of his brothers. However, the subordination of the younger brother in the Nyimang family to his elder brother must be seen in the light of the religious duties rather than in relation to any preferential or proprietary treatment.

Although the Nyimang pattern of succession echoes many of the customary rules that are found in some African societies, it differs substantially from that as found, for example, in Kikuyu, Ibo and Haya tribes. Thus, while under Kikuyu law intestate property may be distributed equally among the deceased's male children, the elder son seems to get the lion's share.[2] This is different from Nyimang law,

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1. See G.D. Cole, "Inheritance", in Encyclopaedia of the Social Sciences, vol.VIII, New York, 1932, 36.
2. See E. Gotran, Kenya Law of Succession, London, , 8.

under which it is the unmarried younger son who is entitled to receive more shares than the rest of his married elder brothers. Similarly, the principle whereby the eldest son may inherit all the property of the deceased father to the exclusion of his younger brothers, and which has been reported to exist in societies such as those of the Ibo[1] and the Haya,[2] has no parallel in the Nyimang law.

If the deceased person has been survived by several sons, they all become co-heirs and hence are entitled to inheirt equal shares in the intestate property. They all become jointly and severally liable for any debts incurred by their father during his lifetime. If, on the other hand, the deceased has only one son, then that child becomes for all legal purposes a universal successor to the universitas juris of his deceased father. That is to say, that the single son steps into the shoes of the deceased person and takes "all the rights and all the duties".[3] In this case the obligation to pay the debts owed by the estate is not limited, as has been indicated, to the solvency of the estate of the deceased person; but extends to the personal property of the son.

Nyimang customary law recognizes the existence of what may be called a "chief mourner". Such a person is known as diyde(u). The diyde(u) is a next-of-kin who is entitled to succeed to the property should the proprietor die intestate. In this connexion it must be stated that, among the Nyimang, property devolves upon one's issue and their descendants and not upon one's ancestors (i.e., father or grandfather. Among the Nyimang rights to property in succession always

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1. See Obi, The Ibo Law of Property, op.cit., 153-4 and exceptions.
2. See H. Cory and M.M. Hartnell, Customary Law of Haya Tribe, London, 1945, 1-2.
3. Cf., Maine, The Ancient Law, op.cit., 105-6.

descends, and never ascends. The system of property inheritance may also operate horizontally whereby, in the absence of the deceased's issue or their descendants, the brother or a next-of-kin (who falls into the category of the same generation as the deceased) may be allowed to inherit the property. For this reason the father cannot properly be called as his child's diydé (mourner). It is further indicated that fathers are not allowed to inherit their children's property as that may induce bad fathers to invoke ancestral spirits and maliciously to cause the death of their sons so as to inherit from them.[1] Nevertheless, if a person dies childless his father may take care of the property and may choose or nominate one of his (the father's) own children, or failing that one of his brothers' sons to take hold of the property and marry a wife for the deceased child. This property will eventually descend to the male issue of the marriage, as they will be regarded as the legitimate children of the deceased person. Here it must be pointed out that where there are no sons or brothers an heir must be a next-of-kin from the father's side. In such cases it is not necessary that an eldest male member should be entitled to inherit: on the contrary, the younger member is always to be preferred to the elder member.

THE ESTATE OF THE DECEASED

It has already been mentioned that when a man dies his estate may include rights as well as obligations. Such estate consists of all

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1. Cf., R.G. Armstrong, "Intestate succession among the Idoma", in J.D.M. Derrett (ed.), Studies in the Law of Succession in Nigeria, 1966, 213-5. This general principle may also be found in Idoma where fathers are not generally entitled to inherit from their children.

personally acquired property as well as any inherited property. This may also include interests personal to the deceased person, such as gratuitous tenancies. The estate of the deceased may be said to consist of the following:

1. Interests in land, including tenancy rights. It must be noted that devolution of rights in trees (tuma) may effected separately from an interest and rights in relation to keil (land/soil).
2. Interests in movable property. Most important are:
   a) Kie (livestock), including cattle, goats, sheep and other domestic animals
   b) Crops
   c) General household property
   d) Weapons, such as guns, swords, spears, clubs and so forth
   e) Personal effects (ornaments and clothes)
   f) Persons (minors and widows)
   g) Claims and debts against third parties. This may also include the obligations of the deceased person toward third parties
   h) Office insignia.

ADMINISTRATION OF THE ESTATE*

Death, Funeral Rites and Burial Expenses

i) Death

Death among the Nyimang, as in any human society, is universally regarded as a sad phenomenon. Nevertheless, the death of a young person is more lamentable than the death of an aged person.[1] There is therefore no undue sadness should old people die.[2] It is thus true that in many cases death of the elderly is the occasion for "rejoicing that a man has lived his life to the full and has earned rest".[3] In any case, the Nyimang would say that death is like a tanyari (ritual ceremony) or a samurdu, i.e., a festivity where all close relatives and friends would be identified through their gatherings and contributions to the general expenses of the occasion.

ii) Funeral Rites and Burial Expenses

The nature of funeral rites and the general burial expenses is determined by the identity and the status of the deceased person in the Nyimang society.[4] Thus, the rites that follow and the expenses that are incurred in the case of the death of a shira (rainmaker), the kwueer (consecrated Shaman),[5] or a wealthy tribal dignitary, may differ considerably from the rites performed when an ordinary person dies. In the old days, big kwueers, unlike ordinary people, used to be buried in their wir (compound courtyard).

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* The account which follows is based on detailed personal observations of the writer of the procedure actually followed.

1. See A. Kronenberg, "Some Notes on the Religion of the Nyimang", op.cit., 199.
2. See Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 93.
3. Ibid.
4. Cf., R.E. Bradbury, "Father and senior son in Edo mortuary rituals", in African Systems of Thought (reprint, 1966), 77.
5. Cf., Nadel, "The Study of Shamanism", op.cit., 31.

The death of the shira (rainmaker) is considered by all Nyimang as an important event. Kronenberg reports that:

> In the event of the death of a Shila, the people of the Nyimang Hills gather in Shilowa and its inhabitants have to provide the people of each Nyimang Hill and also those from Ghulfan, Wali, Katla and Fanda with a bull. On the grave of the Shila itself a cow and a bull are sacrificed and further bulls are sacrificed in his compound. During the burial ceremony nobody from Shilowa is allowed to kill anything. When visitors have left Shilowa a bull, a ram and hens are sacrificed in the gudi.[1]

It is true that the death of the shira or a consecrated kwueer is regarded as a great event in which the whole Nyimang people and other friendly neighbouring tribes are expected to share in the mourning. After the death of the shira or the kwueer has been confirmed, people will immediately proceed to prepare a grave for burial. Before the digging of the grave is completed, a bull is slaughtered and a new bed is made from its hide. The bed will be used to lay the deceased shira or kwueer on when he is buried.

It is a strict customary rule that the shira or the kwueer is never buried during the daytime. The corpse must be removed secretly to the burial place in the middle of the night after it has been made sure that all are asleep and that no one is to be met on the way to the grave. Before the shira or the kwueer is buried, traditional shoes made from cattle hide and ornamented by koryang (cowries) will be put on his feet with other ceremonial burial robes. When the burial time comes, the corpse will not be carried, but will be supported and walked across the courtyard to the outer gate of

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1. Kronenberg, op.cit., 209.

the compound where it will then be laid on the leather bed to be carried to the final abode. Those who carry the corpse of the shira or the kwueer are not allowed to speak in a loud voice. However, after the corpse has been put into the grave, farang (drums) will be beaten and rifles will be fired as a signal that the body has been rested in the grave.

Customarily the grave will not be closed for at least four days.[1] During this period the people who took part in diffing the grave must remain near the graveyard and will be provided with necessary food and drink by the family of the deceased until the grave is closed. Meanwhile, drums will continue to beat both in the courtyard of the deceased's compound and at the burial place. At the intended date of the grave closure, messengers are sent to the neighbouring villages and tribes so that people may come to make their last goodbyes. As soon as the actual burial has taken place, guns will be fired as a farewell salute. By firing guns it will be known that the deceased (shira, kwueer, or a tribal dignitary) has finally been buried.

As has been indicated, a bull will be slaughtered at the grave when the burial of a the shira or a kwueer is over as part of the burial ceremony. This is known as bojur. The family of the deceased person and all his clan members must not eat from this bojur. The meat will be consumed entirely by the public, and particularly by the strangers from non-Nyimang tribes who came specially for the

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1. Informants vary as to the length of the period during which the grave remains open. But it seems that this may depend upon whether all important family members (i.e., elder sons) are present. Another reason is that the grave may be left open so that people from distant parts may come and make their last farewells.

occasion to offer condolences. The avoidance of eating the meat of the bojur is significant as it is believed by the Nyimang that those who eat this meat will inherit the sins of the deceased person. The inheritance of the deceased person's sins by the strangers other than family members is not harmful.

The burial ceremony of an old, wealthy tribal dignitary is similar to that performed for a kwueer or the shira. The only difference is that in the case of a wealthy old man, his corpse would not be walked across the compound courtyard, nor would ornamented shoes be placed upon his feet when he was buried. A bojur (bull) may be slaughtered at the grave of the old tribal dignitary, and the dignitary too may be buried lying on a newly-made bed.

Persons with obnoxious diseases (e.g., lepers) and murderers (wulie) form a separate category of persons when their burial time comes. Traditionally, any person who kills a human being must wear a red bead called koldu. The wearing of the red bead signifies the carrying of the sin and the "blood" of the victim. When these persons die they must be buried by strangers. The red bead (koldu) must be removed at the burial so that the spirit of the deceased may rest in peace without being haunted by worldly sins. It is strongly believed by the Nyimang people that a person who removed the koldu from the deceased inherits the sin and the "blood" burden of the culprit. The same idea of succeeding to the curse of the disease exists when persons with obnoxious diseases are buried. Anyone who buried this category of persons must remain under strict taboo for four years. During this period such a person must

abstain from eating or drinking in any home other than his own until the period of four years has elapsed. Should this restrictive rule be disregarded, then the person would suffer the automatic sanction of dying. After the four years have elapsed, the curse is deemed to be removed and everything will return to normal. However, it must be remembered that although the children of the deceased person (whether he suffered from an obnoxious disease or was a killer) can always bury him and thus shoulder their father's sins, yet people actually prefer to call strangers (normally kishi) from non-Nyimang tribes to remove the koldu and perform the burying. A goat or a cow will be paid to the stranger who buries such a perdon.

There are series of rites and burial expenses before the final property of the deceased is distributed. Stevenson reports that:

> After the burial a goat is sacrificed in the dead person's compound and water is poured on the ground. This is food and drink for the geshin, the person's spirit.[1]

It is customary that after the burial of the deceased person is over, a goat known as bongu kwodo[2] (lit., "goat of water") will be slaughtered immediately after the people have returned home from the burial ground. According to Nyimang ideas, the geshin (the spirit) of the deceased person will remain wandering and will not be allowed to join the other ancestors in the other world. The spirit will remain thirsty and will not be allowed to drink water by the other geshin unless he (the new geshin) offers something in exchange.

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1. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 94. See also Kronenberg, op.cit., 201.
2. This is sometimes known as bongu ki (lit., "a thing for water".

The sacrifice of the bongu kwodo, as is indicated by it name, is regarded as a gift by the living members to the geshin of the deceased person so that he may use it to pay for water in the other world.

As a general rule, the bongu kwodo and the bojur must be taken from the deceased's estate. It is almost a rule of thumb that any Nyimang, however poor, must try and secure at least a goat to be sacrificed for his geshin as bongu ki after he dies.[1] Should the deceased person leave any sort of property, then no problem arises; otherwise all funeral expenses (especially the bongu kwodo or ki) must be provided by the diydé,(the chief mourner), or by any next-of-kin.

However, it must be pointed out that the fact of providing a sacrifice or slaughtering a bongu ki by a relative or a next-of-kin, does not in itself create a legal right in such a person to share in the property of the deceased person. Conversely, a person who has a vested right in the deceased's property (e.g., a son) will be entitled to receive his lawful share even if such a son has deliberately abstained from contributing to the burial expenses. This rule is different from that which prevails in some African societies where, as in Edo, failure by a son to contribute or perform funeral rites for his deceased father may invalidate his claim to succeed to property.[2] The bongu ki must be sacrificed before the heirs enter into possession of the property. If the deceased is a woman, the bongu ki must be provided by her husband;

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1. Cf., J. Goody, Death, Property and the Ancestors, Stanford, 1962, 157, where the author mentions that among the Lo Dagaa of West Africa, a pot of cowries will be set aside as funeral expenses before a person dies.
2. See R.E. Bradbury, "Father and senior son in Edo mortuary ritual", op.cit., 98.

but will be sacrificed by the woman's brother or her son as the husband cannot make sacrifices or libations to his wife's geshin.

All burial contributions provided by the friends and relatives of the deceased's family must be given to the diydé (the eldest son or any next-of-kin). This property must be used in the first place to meet the funeral expenses and the residue will be added to the general estate of the deceased to be distributed amongst the respective heirs. It seems that the contributions of the kin-groups and other affinal relatives is a common practice in many African societies. Thus, Goody tells us that in Lo Dagaa in West Africa, friends, in-laws and other relatives are bound by the rules of reciprocity to contribute to the funeral expenses by giving gifts to the family of the deceased person.[1] The affinal relatives, among the Nyimang, especially the husbands of one's daughters, take an important part in contributing to the funeral expenses of the deceased person. As a general statement, each son-in-law, including husbands of granddaughters of the deceased, must bring a goat and a piece of cloth as a burial contribution to the father or mother-in-law. Sometimes a person before he or she dies may indicate his or her wish that a certain son-in-law must "bury him or her by providing a bull or a cow", viz., the son-in-law must contribute by giving a bull or a cow as a mourning expense for the deceased. In the majority of cases this informal request will be respected by the son-in-law for fear that misfortune might befall his children. The following diagram

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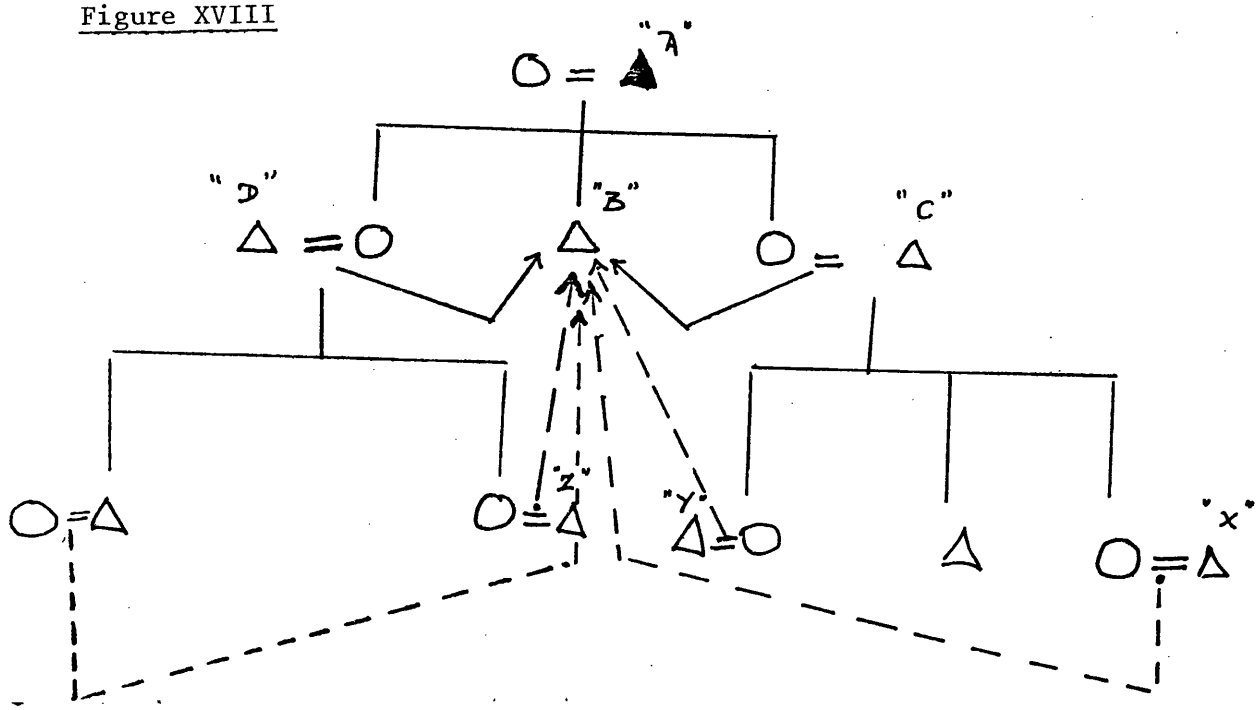
1. See Goody, op.cit., 157-8 passim.

is illustrative of the persons who must contribute:

Figure XVIII



In the above diagram, when A dies it is incumbent upon each of C and D (husbands of the deceased's daughters) and X, Y and Z (husbands of the granddaughters of the deceased) to provide a goat or a piece of cloth as a burial contribution to A's funeral. As a modern development, money is frequently given as a substitute for goats. Friends and close relatives are also expected to give token gifts for burial. The obligation of providing the gifts to the bereaved must be mutually observed by the parties involved. Thus, in the above case, should the in-laws and the close relatives fail to give burial gifts to B for his father's or mother's burial, then B would not later give gifts to any party who did not contribute when B's parents died. Should B condone

and offer any gift to a party who failed to assist him, then the geshin of B's deceased parent becomes B's sudo (full of vengeance) and may tend to do mischief to B and his family.

After a month or two (time may vary according to circumstances) another important ceremony known as wulau nyonda (lit., "the taking or removing into the hut") will be performed. According to Nyimang ideas the geshin of the deceased person will remain wandering about without any proper abode to rest unless the rite of wulau nyonda is performed to bring him home again. The ceremony of wulau nyonda, especially if the deceased is a kwueer or an old tribal dignitary, is regarded as a great festivity which will be attended by many people. Plenty of ashi (beer) will be prepared to which friends and relatives will contribute. A cow is slaughtered for the public. Those people who did not provide their burial goats or whatever gifts during the first mourning or at the rite of "hair shaving", will take this opportunity to bring their gifts. All people who take part in this festivity will be grouped according to their clan membership or hamlets, whereupon food and drink will be presented to them. The occasion will be considered as a drinking and eating festivity. In the evening the young people will rejoice by dancing to the loud rhythm of the beating farang (drum).

iii) Interim Administration of Property

Immediately after the death of a person a temporary administrator must be found to collect and control the deceased's property until such time as another family comes forward, or until the actual distribution of property takes place. In certain cases, a person before he dies may appoint someone to look after the

property until his children arrive. The appointed person will be regarded as a caretaker. If the caretaker is a relative or a clan member, then he may act as chief mourner as well, and may perform any necessary tanyari (rites) concerning the burial of the deceased. On certain occasions, the caretaker at this stage would not necessarily be appointed by the deceased or even by the village elders. Thus, should a person die while his children are away, then any neighbour, friend, younger brother, father or next-of-kin may voluntarily take care of the deceased's property without being asked to do so. Sometimes a wife may be appointed as an interim administrator of her deceased husband's estate in the absence of grown-up children or any next-of-kin.

The person who shoulders the responsibility of looking after the deceased's estate will do so until the ceremony of jeyu irdida (rite of hair shaving) has been performed. This ceremony, as will be shown, is a public meeting at which all matters concerning the cause of death and the administration of the property will be discussed at length by the public. However, it must be pointed out that the interim administrator is but a caretaker of the estate and has no right to sue for the benefit of the estate, nor has he any power to collect debts on behalf of the heirs. Similarly, he has no authority to repay debts from the deceased's estate, and is not expected to receive any remuneration in consideration for his work. If he himself is an interested party, i.e., an heir, then he must keep the property intact until his final appointment (as a formal administrator) has been confirmed in the public meeting that follows.

iv) Jeyu Irdida ("hair shaving")

The rite of jeyu irdida is by far the most important moment in the series of after-death ceremonies. It concerns the general administration of the estate and the formal definition of the roles to be assigned to other family members. There is no certain time limit during which the tanyari ("rite") of jeyu irdida is performed. The performance of this ceremony depends on the circumstances, such as the economic situation and the deceased's family (wealthy or poor), whether all family members are present, or whether the deceased person is an old man or an infant. Where the deceased was an adult with a large family and who had become a member of an age-grade by performing the ceremony of ashio lida (drinking the beer), then more preparations are needed. In this case it is uncumbent on the family members to prepare plenty of beer (ashi), for many guests will be expected to attend the ceremony. As this will involve expenditure, the rite may not be performed immediately. But if the deceased person is an infant or a young person who has not performed the age-grade ceremony of ashio twil, then no elaborate preparations are necessary and the ceremony of jeyu irdida would be carried out possibly on the day next to the burial or within a few days.

Thus, soon after the burial is over, the family of the deceased will start to prepare for the ceremony of jeyu irdida. As a general rule the elder son must be present before the actual "hair shaving" takes place. At the time of the ceremony a he-goat is slaughtered as wuru nyimudo kwodo. This goat will be taken from the deceased's estate, or from the goats given by relatives as

mourning gifts. Otherwise the diydé (the chief mourner) will be responsible for providing the sacrificial goat.

The ceremony of jeyu irdida takes place at a formal public meeting, which all family members, including the affinal relatives, close friends, unrelated neighbours, all those who have any blood connexions with the deceased and, most important, all persons who have interests, viz., creditors and anyone (other than family members) to whom inter vivos gifts were made by the deceased person must attend.

In this meeting the reasons for the deceased's death will be discussed at length, and the public will determine the appropriate kind of remedy to be taken in order to stop any future misfortunes. Thus any pending or unperformed tanyari (rite) or any dedications which were not offered to the ancestors must be carried out by the remaining family members. It must be noted that the night before the tanyari or jeyu irdida and the night following the burial will be known as ab du (mourning night). Before the public meeting is held all family members and their close relatives, who take part in the mourning, will discuss beforehand and decide and agree among themselves upon a common pattern or line to be taken by the family members during the public discussion. In most cases a person, usually the elder son or a guardian, will be chosen as the family spokesman. In addition a discussion as to how the property should be administered or distributed will take place. This meeting is not always calm or peaceful, as would normally be expected in such a situation. Thus, on certain occasions, some

bitter and acrimonious words may be exchanged and rivalry between brothers (especially step-brothers) may come to the surface. Another reason for such a meeting is to compromise and if possible to suppress any potential rivalries which would undermine the family unity before such differences become known to the public.

On the day of the "shaving" all the participants sit in a big circle with men and women sitting apart facing each other. It is also customary that the elder son or the diydé is the one who makes the opening speech. After the first speech a chance to speak is given to the other members of the family and to the rest of the public. Even children and women will be allowed to speak freely, and will be required to attest as witnesses to any nuncupative will made by the deceased person. One of the main purposes of this gathering is to resolve any pending differences within the deceased person's family. For this reason any dissatisfied member will be entitled to voice his grievances. After that the elders will try to patch up the quarrel, reconcile the antagonists, and forestall any possible future disagreements.

When the deceased's oral nuncupative will is discussed, any person who had heard anything said by the dead person regarding the way in which the property should be distributed will be asked to testify in front of the public. It is thus remarkable that the discussion of the family affairs and the devolution of the rights is not confined to the family members alone, but everyone present at the meeting will be allowed to speak. It is similar to an open court in front of which all disputing parties will take part in the adjudication. Anyone who has a claim on the deceased

person's estate must speak up and try to establish his claim. Such persons may include affinal relatives who will try to reassert their rights to the remaining su and koru (the incomplete portion of the marriage consideration). All the claims against the estate of the deceased will be directed to the diydé (chief mourner) who, in most cases, will be the eldest son. The eldest son, or anyone acting in his place, will either concede to the existence of such debts or contest items, in which case the claimants will be required to bring witnesses to establish such claims. In certain cases, such witnesses may be required to take an oath on fetishes belongin to the kwuni. The shindi (public) will act as jurors for assessing and acting as future witnesses if such a claim is later denied by the heirs of the deceased. Even family members who want to establish specific rights over the property of the deceased as, for example, where a son claims that the deceased father had made an inter vivos bequest to him, must do so before the shindi (public) in this general meeting.

Thus a creditor, an affinal relative or a family member who fails to establish his claim in front of the shindi at the time of jeyu irdida (while he was present) would not have his claim heard in the future. Conversely, once a right has been acknowledged by the heirs of the deceased person in public, it becomes difficult to deny that such a right has existed.

v) The Appointment of the Caretaker (guardian)

It has already been noted that, immediately after a person's death, anyone near him can volunteer and take care of the property

until such time as the actual heirs appear. Even if the caretaker has an interest in the property (e.g., is an heir), he is not expected to dispose of any part of the property until all other family members have gathered, or until such time that a formal public meeting has been heard, whereupon a proper caretaker will be appointed to administer the estate.

The permanent caretaker of the deceased person's estate will be appointed by two methods:

a) by the deceased's oral nuncupative will. This mode of appointment is most common among the Nyimang. Thus, before a person dies he will be encouraged by the attendants to make his wishes and utter his last "speech". This last "speech" will involve the ways in which the invalid person would desire his property to be distributed after his death. He will further point out the person he wishes to take care of his "compound" and the property, and

b) should a person die intestate (without expressing his wishes), then the caretaker or the guardian will be appointed by the family members and the shindi (public) in the public meeting at the ceremony of jeyu irdida (hair shaving). In this case, the appointment of the caretaker must be discussed publicly and the shindi including the lineage and the clan elders must take part in such an appointment. However, although the lineage elders and the public at large have no legal right or power to appoint, or indeed to disqualify a caretaker, yet the moral sanction behind any public approval of any person nominated as a caretaker is so great that the bereaved family

members themselves would find it difficult to disagree with any such appointment.

The most prominent candidates for the office of caretaker are the eldest son of the deceased and the brother of the deceased. The appointment procedure is simple. At the time of jeyu irdida (hair shaving) after all the speeches are made and all problems have been solved, an elderly person from the public will speak up and nominate or confirm the appointment of a guardian to the property and the family of the deceased person. As a rule, the eldest son (if old enough to shoulder the responsibility) will be appointed as a guardian. He will be told that from now on he will be regarded in the eyes of the shindi (public) as the guardian and caretaker of the father's property and family. The eldest son would then be told to "carry" his father's borang (large spear, signifying secular power), and a tou (a short ebony stick kept as a fetish in the archway of the compound entrance). The inheritance of the tou signifies religious and ritual power of the eldest son vis-à-vis the rest of his younger brothers. Furthermore, the eldest son will be told by the elders to step into the shoes of the deceased father and thus become a spiritual father to guard his father's home and his ancestors' hearth, to look after his younger brothers, feed them and pay their marriage considerations from the common property left by the father. The eldest son will also be asked to help provide food and shel er for his step-mothers so that they may be able to bring up the little orphans.

If the deceased father has already divided his property in his lifetime, then the eldest son will be held responsible before

the shindi to keep an eye on and generally supervise the actions of his younger brothers. On the other hand, if the property is left undivided then (unless the rest of the family members insist upon division), the eldest son will be asked by the shindi (public) to take care of such property for the benefit of the whole family. In the same meeting the eldest son will be reminded that such property does not belong to him privately, and that he must not try to serve his own selfish interests, which may possibly lead to a schism within the family.

In the absence of the eldest son (if dead or disqualified by reason of insanity), then the second son will take over the guardianship of the deceased's estate and family. However, if the deceased father has left no male children, or if all children are minors, then one of the deceased's brothers (preferably a younger one) or a next-of-kin will be appointed by the lineage members to marry the widow and become a spiritual father to the children.

vi) Rights and Duties of the Guardian

As a general rule, when a married person (who has a separate homestead) dies, a next-of-kin must be appointed as a spiritual father for the deceased person's family. Such a person will be responsible for the performance of all rituals concerning the ancestral spirits. The spiritual father may or may not be responsible for the administration of the property. Thus, in certain cases two persons may be appointed to look after the affairs of the deceased man. Traditionally the father's brother may be regarded as a spiritual father to his deceased brother's

family. His role would be largely ceremonial and is confined to the performance of all important tanyari (religious rites) in his capacity as the oldest surviving male relative in the family group who is most versed in divine matters. If there is a grown-up male son, then such a son may be regarded as the sole person responsible for his father's property. The appointment of the spiritual father depends on such factors as whether the deceased has only minor children, or whether the inter-relationships were good between the deceased person and his surviving brother. However, when appointed the spiritual father (if father's brother or any next-of-kin) must look after the widow and if necessary, marry her and hence take over the guardianship of her children. He would then take charge of the deceased's property and manage it on behalf of the minor children until they came of age.

If the deceased's eldest son is appointed as the guardian, then he becomes absolutely responsible for his father's wir (compound), and will be eligible to perform any religious rites on the manda (hearth). He must do his best to keep his father's property intact. However, the functional difference between the eldest son as a guardian and as a spiritual father and his father's brother who is appointed either as a guardian or as a mere spiritual father of the deceased's family, is enormous. Thus, while the son acquires right of control as well as proprietary interests in his father's property in his capacity as the mir (fire) of his deceased father, the deceased's brother (in principle) has no beneficial right over any interest in the property of his

deceased brother. Even if the deceased person has left no children, the person who succeeds to the property does not do so in his own right, but on the understanding that such property will be used to marry a wife on behalf of the deceased so as to keep his line of continuity. The issue of his union will bear the name of the deceased person, and legally speaking, they are the only persons eligible to inherit their father's property when they grown up.

One of the major duties of the guardian is to assume and exercise full control over the property of the deceased person, and keep it intact until such property is distributed. However, it is not unusual for a deceased person without mature male children to appoint one of his wives, or even a married daughter to take control of the property for the benefit of the minor children. This situation arises where the deceased person does not wish his brother or other male relative to take charge of his property for fear of misuse. In such cases, the woman will take control of the property and will have the same powers as a male guardian to sue debtors and collect debts on behalf of the estate.

The guardian who is also the administrator will be held responsible for the repayment of all debts out of the deceased's estate. As already mentioned, such debts must have been established by the creditors during the period of the tanyari of jeyu irdida (rite of hair shaving), otherwise the guardian will not be under a legal obligation to repay these debts. The repayment of the debts is obligatory and the successor is legally answerable to repay such debts out of his own pocket. This is so

even if the deceaaed has left no property to cover the debts. Moreover, the guardian has the power to sue on behalf of the estate and thus recover any debts owed to the deceased person for the benefit of the heirs.

If the guardian is the brother of the deceased person and has married the deceased's widow, then he must treat her as if she is his own lawful wife. He must maintain her and her children, cohabit with her, repair her farm fences and help her in cultivating her farm. However, if the property is under the control of the elder son of the deceased person, then the brother of the deceased father (in his capacity as spiritual father of the family group) must see that the elder son does not exceed his power and exploit his position in order to rob his younger brothers of their lawful shares.

Among the duties of the guardian is the duty to perform all necessary tanyari (religious rites) when the situation arises. Here it will be remembered that in certain cases the religious duties will have no connexion with other duties, such as the administering of property. It is noticeable that even if the eldest son is old enough to take control of the property, his father's brother (in his capacity as the spiritual head of the family) will become responsible for religious activities. But should the children disagree with their father's brother, then the children may opt to act independently and thus have the right to prevent their father's brother from taking any part in any tanyari (rite) held in the compound of the deceased person.

vii) Accountability of the Guardian

The holding of the property by the brother of the deceased, as has already been pointed out, is not because he has a rightful share in that property. Such property must be used for the sole benefit of the family (wife and children) of the deceased person. When the deceased's children grow up and become of marriageable age, the caretaker (the father's brother or the eldest son) must pay their marriage consideration from the deceased's estate. If anything is left over from such property, then it must be handed over to the children. However, it must be remembered that things are not always so smoother as it might appear. In many cases fathers' brothers (or even elder brothers) tend to usurp the rights of the minor children of the deceased proprietor in the lawful property, and to use it for their own (father's brother or the eldest son's benefit). Informants indicate that in the old days disputes were unlikely to arise if the father's brother or the eldest son paid marriage consideration for the children, as that might lead to the breaking-up of family ties. This was so even if the father's brother had used the bulk of the property for his own personal use.

Even today Nyimang society does not generally approve of the idea of family members behaving like strangers and being called ameshi (creditor/debtor). Nevertheless, cases exist where the children of the deceased have demanded that their father's brother hand over their father's property to them. Should the case be taken to court, then the claim of the children will normally be upheld. That is so especially if the caretaker has used the

property exclusively for his own benefit. The children have the same right to hold their eldest brother answerable for the property left under his control.

INTESTATE SUCCESSION

i) Persons Eligible to Succeed

The distribution of the deceased person's property among the Nyimang is determined according to fixed rules of priority as regards the heirs. Thus, the right to succeed to property accrues entirely to the male children of the deceased person or to the next-of-kin in the pedigree traceable patrilineally. For the prupose of property devolution the next-of-kin of a deceased woman, without male children, is her husband or her husband's nearest male agnate and not any member of the woman's own family of birth.

The orthodox view of Nyimang law does not recognize the right of women to inherit property[1] either within their family of birth or within their husband's family. The only exception to this general rule is where a daughter or a sister of the deceased woman is allowed to inherit personal ornaments and certain items normally used by females alone. Thus, if a deceased person has been survived by a wife or a daughter, then neither of these survivors will be eligible to succeed him. Conversely, as has been indicated, should a woman die without children, then her husband is entitled to inherit. Nevertheless, wives and daughters have the right to enjoy the benefits and interests in the property of the deceased

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1. Cf., Hawkesworth, op.cit., 187.

person so long as they remain unmarried and continue to stay in the late husband's or father's homestead (wir).

A wife who accepts a leviratic husband is regarded as remaining in her husband's homestead and is entitled to enjoy the benefits of her late husband's property. Although, as has been indicated, daughters have no lawful rights of inheritance in their father's property, yet the deceased father has the right to alienate inter vivos any part of his property to the benefit of his daughter and her children. In the same way the deceased husband can bequeath mortis causa any part of his property to the benefit of his childless widow. The enjoyment of the benefits by the widow of any property left to her by her late husband does not extend beyond her lifetime.

There is, however, a controvery as to whether a widow, under Nyimang law, who has been given property by her late husband has the right to dispose of such property. The orthodox view is that the widow has no right of alientation either inter vivos or by will upon death. However, the recent view (which seems to be the law) stresses that a widow can dispose of any portion of property (of whatever nature) bequeathed to her by her late husband either inter vivos or by will. This latter view has been affected by the notions of Sharia law, which recognizes women's rights to hold and dispose of property as of right. Thus, as the result of this new development certain individual Muslims in Kurmitti and Nitil subtribes have started applying Sharia law, by which they allow their wives and daughters to receive shares in the deceased's property The rules of Sharia law are most likely to be applied, especially in the Nitil local people's court when the session is presided over

by a Muslim. In any case, Sharia law is always applied should deceased and his family live in an urban area.

To recapitulate: succession among the Nyimang is patrilineal. This means that other affinal relatives have no right to succeed to the deceased person's property. As a general rule, if a person dies intestate, his property devolves on his male children. Thus, according to Nyimang law, fathers, mothers, brothers, sisters and other relatives have no rightful shares of inheritance in one's property. This is so unless, of course, the deceased has left no male children. As a rule (unless the deceased son is unmarried) the father has no right to inherit his married sons' property. If the married son has no children then one of his surviving brothers must become his diydé (mourner)[1] and inherit the property not as of right; but to use it to obtain a wife on behalf of the deceased brother.

If there are no living male children but children's children, then such descendants who are next-of-kin known as dofang tié are entitled to succeed to the property of the deceased. If there are not any descendants, then the nearest male agnate known as konang will succeed. The order of priority as regards the dofang tié (descendants) or the group of konang (relatives) is determined in the descending order of the pedigree: the nearest male in line to the deceased person becomes the sole heir. To illustrate this point, let us consider the following diagram:

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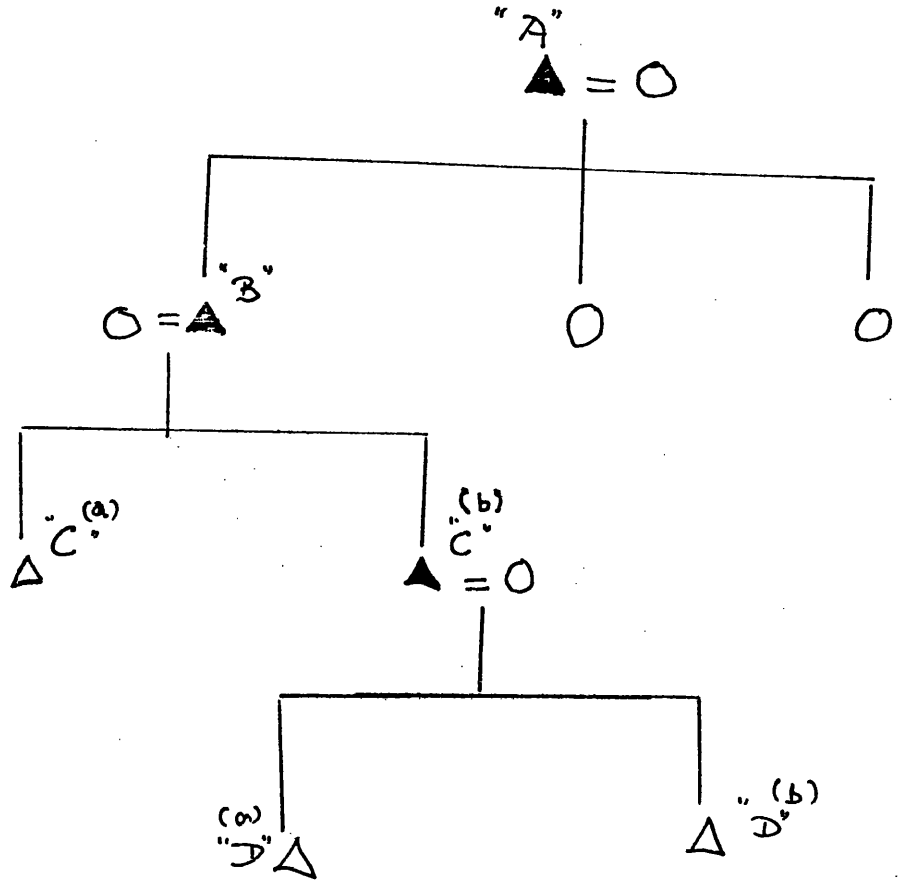
1. Among the Nyimang the bereaved father will never be called upon to act as his deceased child's diydé (mourner)

Figure XIX



In the above diagram upon the death of A his property will devolve on B, his son, and neither of his two daughters will receive any shares. But as both A and B are dead, their property will be inherited by C^a, since C^b the second son of B, is also dead. The children of C^b have no right to inherit either from A or B since their position in grading is lower than C^a. But as regards the inheritance of the property of C^b, the rights of his children (here D^a and D^b) are inviolable.

If the deceased person has left no male children or children's children, then his full brothers are entitled to succeed to the interests in the intestate property. As a rule, the descendants of the full brothers have priority over the deceased's half-brothers and their children. However, the half-brothers and their descendants come first before the father's brothers' children and their descendants and so forth. Each konang (nearest male agnate) precedes the other according to his nearness in the blood connexion to the deceased person. The descent line, as has been indicated, is treaceable through the father's line.

ii) Table of Succession

In the event of the man's death, the order of priority is as follows:

a) Male children of the deceased (daughters are excluded unless, of course, an inter vivos gift has been bequeathed to them by the deceased father)

b) Male descendants of the male children without limit of degree of descent

c) Full brothers of the deceased (who must marry a wife on behalf of the deceased in order to keep his line)

d) Male descendants of the full brothers down to unlimited degree of descent must marry a wife in the name of the deceased person

e) Half-brothers

d) Male children of the half-brothers.

The above six groups are considered as the diydé. All except the deceased's own children and their descendants, who are considered

as the deceased's mir (the continuation of the person's line) proper, must marry a wife in the name of the deceased.

g) Male children of the deceased's father's full brothers

h) Male descendants of the children of the deceased's father's full brothers

i) Male children of the deceased's father's half-brothers, and

j) Male descendants of the children of the deceased's father's half-brothers.

The above four groups of heirs are properly known as dofang tié.[1]

k) Any nearest male agnate either from the lineage members or from a larger body of the clan members as a maximal lineage. This group is known as konang (lit., a joint: a person who is remotely connected through blood).

CHILDREN AS SUCCESSORS

We have already pointed out that the children's right to succeed to their parents' property is absolute. Thus, no male child can ever be denied his lawful share in property belonging to his father for any reason whatsoever. Under Nyimang law no right of succession is denied to a child unless that child is known to be illegitimate. Nevertheless, cases exist in which some illegitimate children have been enabled to receive shares in the estates of their deceased natural fathers. In such cases, as alleged by the informants, the illegitimate must have been acknowledged by the natural father before his death. Thus, informants

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1. Dofang means a wooden plank used for various domestic purposes. People use it to sit on, to put meat on when roasted on the manda, and it may be used to support the wicket door used to close the compound and the hut entrances. Tié = carrier or holder, ∴ the term means the collector of such planks.

indicate, an illegitimate son whose natural father has died intestate leaving no legitimate sons, is entitled to inherit his deceased natural father's property in order to keep his (the natural father's) mir (fire) and thus assure the continuity of his line. This is so whether the deceased father has brothers or not.

However, an illegitimate child who has not been duly acknowledged by the natural father before death can inherit only:

a) If the deceased has left no legitimate male children. In these circumstances the succession is by no means automatic. The child must express willingness to be affiliated to the family group of his natural father. Such a child will not be rejected by the family members of the deceased father, especially if it was known that the child is a true son of the deceased person. In this case the newly-adopted child becomes his natural father's mir and ranks high (in priority to succeed to property) over his father's brothers.

b) Informants insist that if the deceased has left legitimate male children, then any of his illegitimate children cannot inherit unless they were acknowledged by him before his death. However, some of the informants were ready to state that even if the illegitimate children were not duly acknowledge, but were known to have been begotten by the deceased, then the legitimate children have the option either to recognize such children as their brothers and allow them a share in the property, or the illegitimate children may choose to deny, as of right, any right of inheritance to the illegitimate ones.

Even posthumous children have inalienable rights in the estate of their deceased father. For that reason, should a person die leaving a

woman pregnant, then (at least in theory) such person's property should not be distributed until the child is born. This is to make sure whether the child is male or female, whereupon it will be decided whether a share will be left in its name or not. The rule of the inalienability of the children's rights to succeed to interests in property of the deceased father, is further sustained by the rule that even the father himself has no power effectively to disinherit his own child. Informants indicate that even if a father has left an oral nuncupative will in which he expresses a wish to disinherit a disobedient son, the elders can always vary the will and secure a share for the son. This is true especially if not to do so will lead to fission within the family. Thus, it is axiomatic that a male child, in his capacity as the mir (fire) of his father cannot be disinherited under any circumstances.

A father has a right to oust his eldest son from holding the position of family headmanship, but not from inheriting property. Informants recall cases where a son whose disinheritance has been declared by his father has used force to take his lawful share, even during his father's lifetime. However, it is not unknown among the Nyimang to come across cases where the children of the deceased may follow their deceased father's wishes to the letter, and hence try to oust a disinherited brother from his share. This is always a situation for lengthy dispute in which the breaking of family ties in inevitable. On the other hand, rather than adhering to the wishes to the deceased father and in order to avoid the breakdown of the family, the children will include the disinherited brother in their share and then will try to appease their deceased father's spirit by offering sacrifices and performing prayers asking for forgiveness.

SUCCESSION TO OFFICE

By succession to office, among the Nyimang, is understood the inheritance of a living person to the position or office that used to be held by a deceased person. This includes inter-personal positions, such as family headmanship, and public or political office, such as that of the shira (the rainmaker) and the kwuni (the Shaman).

i) Succession to family headmanship.

The most common of these successions is where a person assumes the position of the deceased father and becomes the head of the deceased's family. If the successor is the eldest son then he will automatically be considered as the head of the family. Failing the eldest son, the next elder son will take the job, otherwise any next-of-kin (e.g., the deceased's brother) will be appointed by the shindi (public) in the general meeting at the time of jeyu irdida (hair shaving). In certain situations two persons may be appointed to take care of the family of the deceased. This happens where the eldest son takes on the management of the economic affairs of the family; the father's brother may play the role of a spiritual father in which capacity he will be expected to attend to religious affairs.

The succession of the elder son to the family headmanship carries with it the right to succeed to certain chattels and family fetishes in the homestead. These chattels include the sword, the father's spear, and the tou (a short ebony stick kept as a fetish in the archway of the compound entrance). These things symbolize both the secular and religious powers of the eldest son in the family.

ii) The Office of the Shira (the rainmaker)

The office of the rainmaker (shira) is the most important public office among the Nyimang. Nadel has rightly stated that the office of the shira is the only tribal office "secular or sacred, which embraces the tribe as a whole".[1] The tenure of the office is strictly hereditary, and it devolves automatically upon the eldest son of the senior wife of the shira. Automatically, in the sense that there are no candidates (other than the eldest son) from whom a shira may be elected. Both rules of patrilineal succession and the principles of primogeniture are strictly observed. Neither the shira himself nor the public have the right to deprive the eldest son of his right to hold the office. But, while no one in Nyimangland has any right to deprive the eldest son from succeeding to the office of the shira, the eldest son can always waive his right and allow one of his junior brothers to succeed instead. However, informants allege that the supernatural power known here as the muslum of the shira (which is closely associated with the craft of rainmaking) can choose randomly anyone from the children of the shira to succeed him.

One important principle is that the new shira must be ordained during the lifetime of the previous one. This is done at a formal ceremony of what may seem to be an enforced abdication. Thus, when the shira reaches extreme old age, he will be made to sit or "mount" on what is known as the kodi, which is a kind of sacred seat. According to the Nyimang ideas, the shira will not be made to sit or "mount" the kodi unless he becomes impotent through old age. The sitting or "mounting" on the sacred kodi indicates

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1. Nadel, "A Study of Shamanism in the Nuba Mountains", op.cit., 33.

ironically that the shira has become useless and is about to die and should therefore be succeeded by a young person capable of carrying out the functions of the office more efficiently.

However, as Kronenberg says:

> Like all the other Nyimang the youngest son of the rainmaker is the heir to his father's compound, and for this reason the rain-house (tum-wel), the ceremonial spear (sal), and the ceremonial rakuba (gudi) are not in the compound of the shila, but in that of his youngest brother.[1]

Thus, while the eldest son of the senior wife has indefeasible right to succeed to the shiragidi (the office of the rainmaker), other forms of property must be distributed according to the normal rules of inheritance.

iii) The Office of Kwuni (Shaman)

As regards the office of the kwuni (shaman) among the Nyimang, Nadel reports that after the death of the Shaman:

> ...the spirit is free to return to the limbo in which it previously existed or, perhaps, to seek another incarnation. This may or may not be in the family or clan of its previous vessel, and if it is, not necessarily in the next generation; for there is no rigid rule, the decision lying with the spirit alone.[2]

Thus, unlike the office of the shira, the office of the kwuni is not strictly hereditary. If the spirit reappears in the same family of the previous vessel, then his choice will be at random and his reincarnation will not necessarily be the eldest son, as that will be unpredictable.

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1. Kronenberg, "Some Notes on the Religion of the Nyimang", op.cit., 208.
2. Nadel, "A Study of Shamanism", op.cit., 27.

It has been correctly indicated by Nadel that the kwuni, among the Nyimang, is "conceived of as anthropomorphous beings. Sex and offspring are ascribed to them, and their kinship realtionships are often traceable".[1] According to the Nyimang ideas, all kwuni are males.[2] However, as has been indicated, the kwuni spirit has a legal entity separate from his koyidi (the human vessel). For that reason the kwuni has both legal capacity and legal personality to hold rights and interests in property in his own right.

The types of property held by the kwuni may be adequately divided into two categories:

a) That property which is also capable of being held by any normal, non-shaman human being, such as livestock, land, money and so forth

b) That property which is held exclusively by the kwuni. This includes the office paraphernalia and all property that represents the insignia of the office, such as rings, spiral cuffs, decorated axes, clubs, spears, and so on.

The group (a) of property will be inherited according to the normal rules of succession; but as to group (b), they must not be taken by the family members of the deceased kwunidu koyidi (the vessel). Such property must be distributed freely amongst other more remotely related clan or even non-clan members. If no one is interested in this property, then it will be thrown away to be collected by the public. However, it is important to note that should the kwuni spirit reappear in the same family as the previous

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1. Ibid., 27.
2. Although the kwuni's male sex is always stressed, yet he can choose female human beings as his vessel or medium.

deceased kwunidu koyidi, then it is incumbent upon anyone who has taken any item of the property (relating to the office) to replace it with a new one, and restore it to the new holder of the office.

SUCCESSION TO THE PROPERTY OF UNMARRIED DECEASED

The property of an unmarried person (male or female) will normally be inherited by his or her father as of right. Nevertheless, informants indicate that in cases where a deceased son has left any property, then rather than appropriating such property into his own private use, the father will choose one of his male children or any person from the closely related kin (of the same generation as the deceased peron) to use the property and marry a wife in the name of the deceased son to keep his mir (fire/line). If the father has predeceased the son, then the property of the deceased, unmarried son will be inherited by his brothers or any of his close relatives, according to the normal rules of priority. These too must (in theory) use the property to obtain a wife for the deceased brother.

SUCCESSION TO WOMEN'S PROPERTY

It has been pointed out that the woman's family of birth has no right to succeed to property of a deceased married woman. The one exception to this general rule is where the sister of the deceased woman is allowed to inherit certain items which are regarded as exclusively women's property. These chattels include kiding (a traditional wooden pillow), tari (a gourd in which oil is preserved), abari (earthenware jar for keeping grain dough for making porridge), and wurenging (the smaller piece of the grinding stone). If there is no sister, then these

items must be inherited by the daughter of the deceased woman. In effect, the sister of the deceased woman does not inherit these things unless she attends the funeral and performs a mourning rite for her deceased sister. Thus, in order to establish her right to the property, the surviving sister must participate in the mourning ceremony. According to custom, it is the eldest sister of the deceased woman who would be entitled to inherit the above-mentioned items. However, informants indicate that in practice the first of the sisters to attend the funeral and thus perform the mourning rite, will be entitled to succeed to the property exclusively. As a rule, the brother of the deceased woman will be entitled to the shroud or the burial cloth, and to the meat of the forelegs of the goat slaughtered at the ceremony of wulau nyunda (taking or removing into the hut).

The law among the Nyimang is that rights and interests held by a deceased woman in land or livestock will be inherited by her male children. The woman's daughters may enjoy the fruits and the benefits of such property until they get married. As a rule, the daughters of the deceased woman have the right to inherit the personal ornaments of their mother, and some (but not all) of the cooking utensils. The rest of the household utensils (pots and gourds, etc.) must be inherited by the woman's youngest son. The youngest son, as will be shown below, will also inherit his mother's hut and her tiny (homefarm).

If the deceased woman has no male children, then her husband will inherit her property. However, the property of the childless widow (whose husband has predeceased her) will be succeeded to by the nearest male relative of her late husband.

The rule that a wife's property is always to be inherited by her husband must be treated with great care. It is true, however, that the husband's right over his deceased wife's property is absolute. Thus, after the women's death the husband has a legal capacity to take control of her property as of right and dispose of it in whatever manner he sees fit. Nevertheless, informants are unable to reconcile the competing interests of the husband and the children of the deceased woman. But it seems that, except for property (such as the homefarm (tiny) and the woman's hut) which must by law be inherited by the youngest son, and certain paraphernalia inherited by the daughters, the husband's right prevails over that of the woman's children. It must further be noted that husbands too, even among the Nyimang, fear the vengeance of their deceased wives' (geshin) spirit. For that reason the husband must make sure that the deceased wife's name and the continuation of her line is preserved.

Thus, upon the death of a childless woman, it is customary that her husband, rather than converting the whole property of the deceased woman into his own private use, should nominate one of his sons (of another wife) to be attached to the "house" of the deceased woman. This nomination or attachment of a child to a "house" different from that of his natural mother is a kind of adoption. When attached the son loses all rights within his original mother's sub-family and acquires new rights within the new "house". Such a person will be known as the worgol (the doorway of the hut) of the deceased woman. Inter-house succession is the dominant rule among the Nyimang. The son who has been adopted or has been attached to a different house becomes sole heir to the property of that house and all property that has previously been allocated to that house, together with the personal

earnings of the deceased woman and any property brought through marriage consideration of the deceased woman's daughters must be inherited by this adopted person to the exclusion of his other full brothers, who are by now become mere half-brothers.

However, it must be remembered that such an adopted son will not take possession of the property immediately after the decease of the woman. In effect, all property will remain under the full control of the father who may use it freely during his lifetime. The right of the adopted son to the property of his adopting mother accrures only after his father's death.

If the deceased woman is survived by more than one male child, then all of them are entitled to equal shares in their mother's estate. However, as in the case of the deceased father, when the property of the deceased woman is divided amongst her children the youngest, yet unmarried, son receives a larger share than the rest of his married older brothers. Furthermore, as the youngest is required to remain in the compound to take care of his deceased parent's geshin (spirit), he will then be entitled to inherit his mother's tiny (homefarm) and her hut. The right of the youngest son to inherit his mother's hut together with the tiny is absolutely exclusive.

The rule whereby the youngest son is allowed to inherit his father's compound, his mother's hut with its household utensils and the mother's tiny is, in a sense, similar to the concept of ultimogeniture. The difference is that under Nyimang law the youngest son does not inherit all property exclusively. As has been noted, his right accrues in respect of interests in things closely attached to the parents and the family homestead. This, however, is not far from the notion of

ultimogeniture of medieval Europe[1] or indeed, what existed under Roman law where "the home-staying, unemancipated son, still retained under Patria Potestas, is preferred to the other".[2] In the Nyimang case a partial explanation may be found in the fact that the Nyimang family is not always regarded as a going concern nor, indeed, is it regarded as a corporate body. Fission within the family members is due to occur even during the father's lifetime. As a general rule, the number of the household will start to decrease, particularly when children grow up and get married, establishing their own separate homesteads away from their father's compound. Thus by the time parents grow old, only young unmarried children are still to be found in the father's compound.

THE LEVIRATE "Widow Inheritance"

The levirate marriage or widow inheritance some call it, is a firmly established institution among the Nyimang. After a man dies, his widow, known as ker kore, will not marry or be inherited at the same time as the rest of the property. She will remain in a state of celibacy for at least a term of two or four years. During this period she will be regarded as impure and will be avoided by her husband's colleagues. Meanwhile, her potential leviratic husband[3] or the spiritual father of the deceased person's family, will act as her guardian. The widow may be allowed to get married after the purification rite of removing the kubang (wooden plank used as a traditional bed) has

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1. See H. Maine, Lectures on the Early History of Institutions, London, 1875, 223; quoted by J. Goody in Death, Property and the Ancestors, op.cit., 323.
2. P. Vinogradoff, Outlines of Historical Jurisprudence, Vol.1, op.cit., 286.
3. See Stevenson, The Nuba Peoples of Kordofan, op.cit., 183; and Nadel, The Nuba, op.cit., 404.

been performed. As a rule, the younger brother of the deceased is preferred to the elder. But if there is only one brother, then she may marry him. The priority list is much the same as above, except that persons classified as children will be excluded. Furthermore, as fathers are not allowed to inherit their married children, all persons who fall into the father's generation will not be entitled to inherit the widow. The right to marry the deceased man's widow accrues exclusively to the husband's generation alone. This is so no matter whether the chosen levirate husband is so young as long as he can properly be classified as the deceased husband's brother.

Informants indicate that, in the old days, informal pressures were exercised (by the husbands' families) over widows of marriageable age to marry their husband's brothers. This pressure was also applied by the widow's family of birth, who might otherwise be obliged to refund the marriage consideration to the late husband's family, should their daughter refuse to continue her marriage within the deceased's family. Nowadays, and even in the old days, no great force was used to persuade a widow to accept a levirate husband she does not fancy. As Nadel puts it:

> The levirate marriage of widows who are still of marriageable age is considered desirable, but no pressure is exercised. The widow is just as free to marry some other man.[1]

It is the law among the Nyimang that should a widow refuse to accept a leviratic husband from her late husband's family, then her family of birth are compelled to refund the marriage consideration.

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1. Ibid., 404.

This refunding is subject to deductions for any children borne by the widow. If, however, the widow accepts to marry the deceased's brother or any lineage or clan member of the deceased husband, then no fresh marriage consideration is payable as she will still be regarded as the wife of the deceased person.[1]

It is important to remember that the person who marries the widow is not legally the heir of the deceased person. The children alone are the legal heirs and the children are not allowed to marry their mothers or step-mothers in the Nyimang society. This legal position should not be confused with the practice whereby, in the absence of children, the deceased's brother or any next-of-kin of the deceased's generation, may both inherit the property and marry the widow. But where there are children, as has been indicated above, they will inherit the property and the most senior son will be appointed as guardian and the head of his father's family and the person who marries the widow will play an advisory role to assist in religious matters. In such cases the right of the levirate husband is limited to the widow's co-habitation and the production of children on behalf of the deceased person. In this situation the widow would not be removed to the levirate husband's home, but would remain in her late husband's compound. The issue of this union are the legal children of the deceased person, and the responsibility of bringing them up falls on their senior brothers and not on the genitor.

However, if the deceased has left no grown-up children, then the levirate husband has a legal duty to maintain the widow and her children.

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1. Cf., P. Howell, A Manual of Nuer Law, op.cit., 79.

As a rule, the levirate husband must build her a separate homestead near but outside his own compound. He must assist her in farming her land, feed her, provide her with clothing, cohabit with her and, in short, must treat her in all respects as if she is his lawful wife. On the other hand, the widow is under legal obligation to obey her levirate husband. She must cook for him and work for him on his farm.

Informants indicate that, especially in the old days, the right of the widow to the enjoyment of interests in her late husband's property was seriously curtailed by the interventions of her in-laws, especially the brothers of the deceased. Thus, the brother of the deceased who married the widow used to exercise wider power over his deceased brother's widow. This included the power to divorce the widow and to have the marriage consideration returned to him, and the taking of the deceased's property to the exclusion of the widow. Nevertheless, informants indicate that, even in the old days, the interventions of the deceased's brother occurred only if the deceased person had left a childless widow. Even in this case, the husband's brother was justified in mistreating the widow should she refuse to marry him or disobey his orders by refusing to work on his farm. In any case, the widows of the deceased kwueer (consecrated shaman) and those of the shira would not be divorced even if they refused to accept levirate husbands.

A widow who has daughters but no male children would, nevertheless, be allowed to remain in her late husband's compound and would continue to enjoy the benefits of the property left by her husband even if she did not marry any of the family members. In such cases, and especially if the widow is not of marriageable age, a person will be nominated from among her husband's relatives as a guardian who will take care of all

property brought on marriage consideration on behalf of the daughters. He will furhter use this property and obtain a wife in the name of the deceased person. As the property used here to obtain a wife in the name of the deceased has come in the first place through the "house" or the line of the surviving widow, viz., her daughters' marriage consideration, the new woman will be regarded as the widow's worgol (the doorway of the hut). She (the new wife) will live in the same hut as the previous widow and her children will be regarded as the worgol of the senior widow.

This custom, in a sense, is similar to the practice that exists among the Nuer. According to Howell, an old widow among the Nuer may use either her privately-owned property or her deceased husband's property to marry a wife to the name of her deceased husband. And that while a living person will act as a genitor, the issue will be considered as the legal children of the deceased husband.[1]

However, among the Nyimang a woman who has been married to the deceased person by a surviving widow must live in the hut of the previous widow and the two will enjoy the benefits of the property left by the deceased husband. The person asked to cohabit with the new wife has no right to property. The children of this second marriage will inherit the property as they will be regarded as the mir (fire) or the line of the deceased person.

One must point out in conclusion that, notwithstanding the general encroachments on the rights of the widow of the deceased's brothers, modern Nyimang law holds that the right of the widow to enjoy interests

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1. See Howell, op.cit., 75. Also c.f., Farran, op.cit., 79-80.

in property left by her late husband is inviolable. This is so especially if she stays in the wir (compound) of her husband. Thus, as a modern trend and although women still have no rights under traditional law to succeed to property, they have the right to enjoy life interests, especially if they have minor children. As widows are becoming more independent, it is not surprising to find widows who although they continue to reside with their husband's family, may refuse to accept levirate husbands and who become solely responsible for their husband's property until their minor children come of age and take over the management of the property.

DISTRIBUTION OF PROPERTY

Before any detailed account of the rules governing the distribution of intestate property is given, a lengthy quotation from The Nuba is necessary as a starting point. Speaking about the inheritance rules among the Nyimang, Nadel says that:

> The rules of inheritance make the eldest son the exclusive heir. If the deceased left very young sons only, their father-brother acts as their guardian and trustee until they marry. Otherwise this role of guardian and trustee falls to the eldest son. He will take care of the widows until they remarry, and often also, as we have heard, of his younger brothers. Land, house, and the stocks of grain in the granaries are his. If the land property is very large, he may allot part of it to his younger brothers if and when they need it. Livestock, guns, money, equally belong to the eldest son. Out of this patrimoney, he will later contribute to his younger brothers' bride-price just as their father would have done; but at the time of the death the younger

> brothers inherit nothing. Only personal property, like knives, spears, tools, ornaments, clothes, is divided equally among all sons.[1]

It is submitted that the rules of inheritance as outlined by Nadel in the above quotation are widely generalized and are therefore misleading and cannot be true of the Nyimang people. The point of difference with Nadel, with respect, are numerous and the following are noted:

1. It is not true, as will be explained below, that the eldest son is the exclusive heir to all his father's property
2. Moreover, the generalization that the eldest son is the "exclusive heir" may raise many difficult queries especially where the deceased father had more than one wife. One such query is whether it is meant by "eldest son", the eldest son of the senior wife, or the eldest son of each wife as a representative of the mother's wel (house) or the sub-family. The confusion can be removed if we understand that the rights of the eldest son of the senior wife are exclusively religious. In that capacity, it is true, he acts like a father and no one else, except him, has capacity to perform any religious ceremonies. But when he has been appointed as a guardian or a caretaker he will not have any preferential or legal rights over his other younger brothers (in his capacity as the eldest brother) as regards the inherited property. Presumably, when property is divided between the "houses" per stirpes as is always the case, then the eldest brother

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1. Nadel, The Nuba, op.cit., 405.

of each house becomes responsible, but only as a caretaker on behalf of his other brothers and not as an exclusive heir. Thus, if a deceased man has been survived by sons belonging to several wives (each of whom represents a sub-family) then the whole property must be divided first per stirpes between the various houses, and then, afterwards, may be divided per capita amongst full brothers of a given sub-family whenever they wish to.

3. Contrary to Nadel's statement, the younger son is always in a much more privileged position than the elder married son. It is thus not true, as will be shown, that the younger son receives "nothing" as concluded by Nadel.

4. Whilst the eldest brother (or the father's brother) may act as a guardian to the minor children of the deceased person, the analogy of trusteeship cannot, in the strict legal sense, hold good under the Nyimang customary law of property. In other words, the concept of trusteeship as it exists under English law cannot sufficiently be employed to describe the nature of the relationship that exists between the father's brother and the minor children of the deceased person. Thus, unlike the case of the English trust law, the legal title to the property does not reside and is never vested in the father's brother. For that reason the father's brother has no legal right to alienate effectively any part of the property under his control without (at least in theory) obtaining the express consent of his brother's children. Informants indicate that if the father's brother had alienated property left in his care to a third party, then the children (when they come of age) have a legal right either to ratify the transaction or revoke the

same and claim their property back from any third party if traceable. If the property is untraceable they can lawfully claim its equivalent from their father's brother. However, it should be pointed out that the above rule which calls the father's brother to account is not always, especially in the old days, strictly observed. Thus, paradoxically enough, the father's brother or the eldest brother who misuses the family funds for his own ends is not strictly accountable as is the case under the English law of trusts. This is so as the Nyimang would consider it a bad thing to regard family members as strangers and call them ameshi (debtor or creditor).

5. Furthermore, Nadel's quotation creates, with respect, a false impression that devolution of property among the Nyimang, is strictly tied up with the incident of death. This, in many cases, is not true. As is noted, the actual division of property takes place during the lifetime of the father. This will happen gradually as circumstances arise during the course of the family life (such as the payment of marriage consideration for his children), with the result that at the time of the father's death the bulk of the property would already have been distributed or have been allocated to various houses with a little left to be inherited.

When a man dies there will possibly be found four main groups of property:

a) That property which is privately owned by the father and which is brought into the family pool through the father's individual effort. This may include all property that had been inherited by him from his own father. It comprises any deferred payments such as the su and koru

(the incomplete part of the marriage consideration) required and collected from the marriage of his sisters' daughters. Such property may also include anything that has been purchased by the father by spending his own private money (but not any money given to him by any of his wives or by any of his children). This is so unless it has been made known that a particular piece of property has been bought by employing a specific sum of money supplied by a certain family member. In the latter case, as will be made clear, the person who supplied the money will be entield to inherit that piece of property as of right

b) Any property brought by any of the children

c) Property brought by the wives

d) Property paid as marriage consideration for the daughters.

It is important to remember that although all the above-mentioned sets of property will legally be considered as belonging to the father while he is alive, each set will be inherited differently when the father dies. As a rule, the father's private or individually acquired property, unless it has already been allocated to the various houses or has been divided amongst the children during his lifetime, will be divided into equal shares between his male children. Even posthumous children have the same prospect to share in inheriting their deceased father's property. Thus, if the deceased person has left a pregnant wife then the property may not be divided until the woman gives birth to her child. If the child is male, then his share will be left in the care of the guardian. However, if the eldest son is

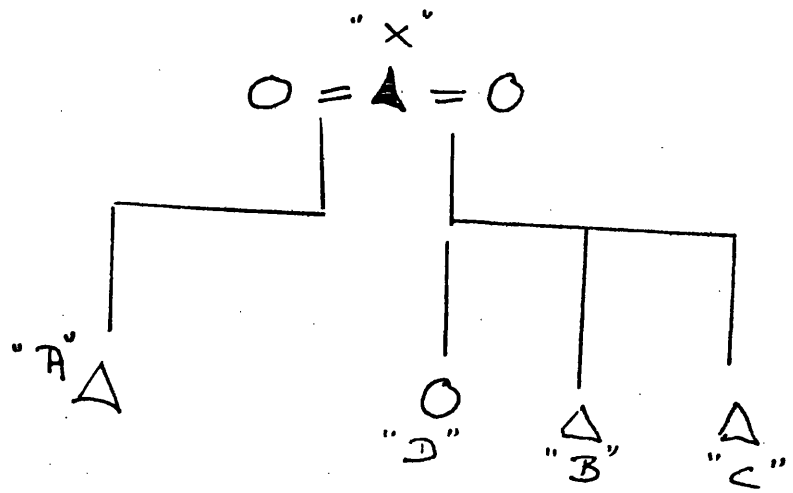
still unmarried, then he will be entitled to receive a larger share than the rest of his junior brothers. But if it is the younger son who remains unmarried, then he is the one who is entitled to receive a larger share than the eldest married brother. The criterion for receiving more property is whether a son is unmarried and not whether he is a senior child. But if all are unmarried, then the normal priority rule whereby seni[illegible] brothers marry before the junior ones, will apply. However, if all children are married (a divorcé or a widower are classified as married persons for the purposes of this rule as they have obviously used the family funds to obtain their wives) then each son is entitled to an equal share in the father's estate. In this case the division is carried out per capita. It is, however, important to note that division of property per stirpes or according to the number of the "houses" is likely to happen where there are minor or unmarried children, otherwise the division can be effected per capita.

It is a binding rule that in the Nyimang law of succession each son is entitled to exactly the kind of property brought by him into the family pool during the father's lifetime. This is so particularly if such property is still remaining and thus has not been disposed of by the father while alive. As also already mentioned, any property brought by any wife including those allocated to them by the husband during his lifetime will be inherited by the children of that woman alone to the exclusion of the children of other co-wives. Similarly, all property

paid as marriage consideration to a wife's daughter will be inherited strictly by the full brothers of the married sister and the other step-brothers have no legal claim over such property. The father, of course, if alive can use such property to benefit the whole of his family indiscriminately. But as soon as he dies, the remaining property will be inherited by the house of the girl's mother. In this case each brother is entitled to an equal share. But the amount of the shares is determined by such facts as whether all the brothers are married, or only some are married. If the former, as already indicated, they all received equal shares, but in the latter situation the unmarried brothers receive more shares. If all are unmarried, then the seniority principle applies and it is the eldest son who receives more, or at least is entitled to use even the whole property to get married.

The above rules may further be illustrated by the following diagram:

Figure XX



In the above diagram, deceased X has two wives. A is the eldest son of the senior wife and B and C are junior brothers of another wife with a sister D. When D, who is a full sister of B and C, get married her marriage consideration will be inherited by B and C alone to the exclusion of their senior half-brother A. It is thus a firm rule of law that any property that has been obtained privately by a wife or that which has been paid as marriage consideration to her daughter will by law be attached to the wel (house) or worgol (the doorway of the hut) of that woman and must be inherited exclusively through the line of that woman alone.

One cannot, therefore, successfully claim that in all cases the eldest son of the deceased person is an exclusive heir, particularly if the deceased had left more than one wife each with male children.

As already indicated, the property of the deceased, apart from his personal effects and ornaments, may not be distributed immediately after his death.[1] There is not, however, a definite time for the distribution of such property. But property such as livestock and land will be kept intact under the general supervision of the eldest son (or the father's brother as the case may be). However, say that the property is kept undivided under the control of the eldest son is not, as indicated, tantamount to saying that the eldest son has a legal title over the whole of such property in preference to the rest of his younger brothers. According to the Nyimang ideas a son is not entitled to have his marriage consideration paid twice out of the family pool. It is because of this strict rule of law that a married eldest son must

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1. This is not a rule of law and may not always be observed.

always receive less than the rest of his unmarried brothers rather than the other way round. This rule clearly contradicts Nadel's suggestion that the eldest son inherits exclusively and that his younger brothers inherit nothing.[1] Although Stevenson seems to agree with Nadel,[2] one notices that in his earlier article on the Nyimang Stevenson maintained, in a sense, different views as to whether the eldest son will always receive the lion's share upon the father's death intestate.[3] In his earlier writing (1940) he stated the position as follows: "...sometimes the eldest son received more than the others. If one son is unmarried he may be given a larger share".[4] It is submitted that the latter part of Stevenson's statement is the correct exposition of the Nyimang law. As indicated, the eldest son receives more only if he is still unmarried. This latter rule is in accordance with priority rules, whereby elder brothers must marry before the younger ones and must therefore have their marriage consideration paid first. If, however, at the time of the death the eldest son was already married, then the law is undoubtedly clear: that the younger unmarried son is entitled to receive more shares than the married eldest brother.

If the eldest son has been entrusted to take care of the deceased father's property, he will do so on the basis that such property will be used to bring up his younger brothers and pay their marriage consideration when they marry. It is because of the inherently absolute rights of all the children in their deceased father's property

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1. Nadel, The Nuba, op.cit., 405.
2. Cf., Stevenson, The Nuba Peoples of Kordofan, op.cit., 184.
3. Stevenson, "The Nyamang of the Nuba Mountains", op.cit., 93.
4. Ibid., 93.

that should the eldest son (or the father's brother) abuse his powers by misappropriating the property to his own benefit, that the rest of the junior brothers have a legal right to sue the elder brother in court (or bring him before the elders of the village) and successfully claim their lawful share. The younger brother, if he wants to, has the right to demand the distribution of the property even immediately after the father's death, unless, of course, he wishes to follow the leadership of his eldest brother.

SUCCESSION TO LAND

The Nyimang regard keil (land/soil) as the most important form of property. For that reason, they consider the absolute holding of rights and interests in land as being closely associated with the spirit of its iran (master/owner). According to the Nyimang ideas, only the male children of the deceased iran in their capacity as the mir (fire or line) of the original holder, are entitled to succeed to the interests in land. Any other person (who is not close enough to be classified as an outright mir)[1] will not succeed unless he accepts the onerous responsibility of becoming the mir of the dead person.[2] This, in effect, occurs only in cases where a person dies without male issue. In any case, the next male agnate will not be entitled to inherit interests in land should he refuse to act as the mir of the deceased person. As a matter of fact, no one would dare to succeed to a piece of land whose iran has died childless. This, however, has

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1. See above the list concerning the table of successors.
2. It is noted that among the Nyimang it is not an easy matter for a person to become another's mir. For a person to become a mir of another means that he (the former) must become a universal heir who would therefore succeed to the universitas juris of the deceased person. This involves not only rights and duties in relation to property, but also to all the sins and bad luck of the deceased person.

a deep religious connotation. According to the Nyimang ideas, a land whose iran has died without issue would be designated as bad land on which an evil spirit is believed to dwell. For that reason people are loath to succeed to any of such plots of land lest they die or perish childless. Such land becomes virtually bona vacantia and is known as miro keil (lit., land of fire). No disputes arise over such plots of land and any member of the community may utilize it for a limited period of four years or less. As the occupier will always be keen to avoid any permanent association and thus try not to develop any personal connexion with this piece of land, the term of years will not be exceeded beyond the prescribed period.

There are no predetermined rules of law which may be applied (apart from those which govern the succession to the homefarms) for distributing the deceased person's farmlands amongst his children. As a general statement, if a person holds more than one plot of cultivable land (as is sometimes the case), these plots will usually be divided by the father between his children before he dies. If the father has more than one wife and his children are too small to work on the land, then he will allocate these plots to each woman to be shared by the children of each "house" when they grow up.

Informants indicate that, in certain cases, where the father has only one plot of land, then he is entirely free to give it to any of his favourite sons. Such a son becomes exclusive heir to that land and thus acquires absolute rights and interests over that piece of land as against the rest of his brothers. If, however, a father dies without indicating who shall inherit his farmland, then all sons acquire undivided shares in that plot of land. However, it is worth noting that although the oral will of the father as regards property

distribution may be varied, any will concerning the disposition of the land mortis causa must normally be respected.

As a general rule, and unless the land is large enough, the farm will not be partitioned as that would render it grossly uneconomical. This is due, of course, to the usual smallness of the farm sizes in the Nyimang area. Thus, as each of the sons has the same right of enjoyment, any one of them who first occupies that plot of land gains temporary rights of possession over the rest of the brothers. He will continue to occupy such land until such time as he chooses to abandon it, whereupon any one of his brothers may step in and utilize it for himself.

It is a common rule among the Nyimang that an old man, who has become unable to work his land, may slice off part of his farm, or even give it as a whole to one of his children for cultivation. According to the informants, if the son continues to hold the possession of the land at the time of the father's death, then he would be entitled to inherit that plot of land exclusively. The younger son, as already stated, will be entield to his father's compound and to his mother's tiny (homefarm). His right is absolute, i.e., the rules of law governing the rights of the younger son to succeed to the above property are fixed and cannot be varied either by the parents or by the public or by any of the family members. This is so no matter whether there are any available plots or not to satisfy the needs of the rest of the children.

SUCCESSION TO CHATTELS AND SOME PERSONAL EFFECTS

The rule of succession to the rights and interests in chattels differ greatly from those governing the inheritance to land. As to the inheritance of chattels, certain items must be inherited exclusively by the eldest son. Thus, as already indicated, the eldest son is entitled to inherit his father's borang (spear), sword (if any), and tou (a short ebony stick kept in the archway of the compound as a fetish to ward off the evil eye). These items are regarded for the most part as symbols which are largely associated with both secular and religious powers of the eldest son in the family. If there is one gun, then that too will be inherited by the eldest son. But if there is more than one gun, then these will be divided between the brothers according to their seniority.

The knife[1] of the deceased will be inherited by his brother, who is also entitled to inherit the bedding of his deceased brother. Daughters too, as mentioned, have rights to inherit women's property, such as their mother's clothes and ornaments, especially the girdle of blue beads known as bardugeli. Clothes, tobacco, fowls brought by the mourners will be divided by the closest lineage members. In this case the divison will be effected per stirpes, according to the family grouping of the relatives. Chattels such as chairs and beds will usually be kept by the widow if she continues to reside in the compound, and will eventually be inherited by the youngest son. If there is no remaining widow, then these items will be divided equally amongst the children.

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1. Some informants indicate that the eldest son will inherit his fahter's knife too.

TESTAMENTARY AND DISPOSITIVE SUCCESSION

i) Disposition of property during lifetime

Devolution of property among the Nyimang does not necessarily depend upon one single factor or incident, such as the death of the proprietor. One aspect of the dissipation of the man's wealth begins as soon as his sons begin to get married. Thus the payment of the marriage consideration of the children and the subsequent allocation of property (livestock and land for cultivation) to the married sons undoubtedly indicates a gradual and permanent transfer of the interests in property from father to son.

Moreover, the father has the legal power to bequeath inter vivos any portion of his privately-acquired property to any individual member of his family (a wife or a child). He may well choose to distribute such property either per stirpes according to the number of houses, or per capita between his individual sons. If the property is divided per stirpes, then each "house", a group of children and their mother representing a sub-family, will be regarded as a single unit.

When property is distributed inter vivos it must be witnessed at least by someone who would be ready to testify should any future conflict arise between the children. However, despite inter vivos distribution of property will be considered final in terms of determining the respective rights and interests of the heirs, it will not necessarily take effect during the father's lifetime. This, however, means that the ultimate power of control will still

be retained by the father. Moreover, the father can exercise his legal power to alter the rights of the heirs. This power of alteration is implicit in the legal capacity of the father to dispose of such property in any way he sees fit while he lives. Thus, notwithstanding any previous allocation, the father can use the property for sacrificial purposes, sell it to meet the needs of the family group, or he may take any property previously allocated to one son and pay it as marriage consideration for another son. In doing so, the father will not be obliged to ask the permission of the potential interest-holder.

However, it must be noted that a permanent gift whether inter vivos or mortis causa of interests to property can only be made to one's children or wives. Any gift made to a stranger (even to a close relative who is not a son) can be revoked at the instance of the deceased's children, unless it was made absolutely clear by the father that such property should not be reclaimed after his death.

ii) Testate Succession

Despite the fact that the making of the oral will is well known among the Nyimang, there is no technical word describing such practice. A dying person who makes any form of declaration in the nature of an oral nuncupative will is said to be making a "talking". This dying declaration will generally concern the wishes of the deceased person as regards the ways by which he desires his property should be distributed, or who should be appointed as head of his family and, sometimes, the nomination of the person the deceased wishes to marry his widow.

1) Who will make a will?

Both men and women have legal capacity to make wills. A person whose death is approaching will usually send for his eldest son or one of his favourite sons, a brother, a favourite wife, or even a friend to whom he will state his last wishes. If the dying person has not already distributed his property, he will be urged by his close relatives and friends to make his death declarations by uttering his "last talk".

2) Formality of the will

No legal form is required for the effectiveness or the validity of the oral nuncupative will. But, as a general rule, witnesses are required (though this is not absolutely obligatory) to attest the truthfulness of the will when there is a subsequent doubt. If necessary, such witnesses may be required to take an oath before they can be allowed to testify; no specific number of witnesses is required, and there are no limitations as to who may serve as witnesses. Any person, including relatives, village elders, women and even minor children, may act as witnesses. The testimony of a single person is admissible, even if such a witness is not regarded as impartial, being himself an interested party.

It is important to note that a customary oral nuncupative will is not necessarily made at one particular time as a single coherent statement. It is, therefore, not surprising to find a person making several statements (sometimes conflicting) concerning the ways in which he wishes his property to be distributed after his death. This is so

especially if the will is made in bits during the course of his life before witnesses, some of whom may pre-decease the testator. This system of making customary oral wills is confusing, and will sometimes lead to conflicting views at the time of discussing the will during the jeyu irdida (hair shaving) ceremony. This situation, in effect, is among the reasons which may eventually lead to the cancellation or variation of the will itself. It is presumably because of this uncertainty that the customary law prescribes for the public discussion of the will whereby the attesting witnesses may be required to take an oath to establish their truthfulness.

Although, as already indicated, the wishes of the dying person will usually be respected, such wishes are by no means final. This is so especially if such wishes relate to the distribution of property, in which case these wishes may be varied by the living family members or even by the intervention of the impartial village elders.

3) Disinheritance of the heir

The chances of the will being altered by the elders are greater should a father declare that he is disinheriting one of his own male children. According to Nyimang ideas, all male children have rights in posse in their father's property as each son is considered the mir (fire) of his father. It is not rare, however, to find an aggrieved father expressing a strong wish to disinherit one of his disobedient sons. In such cases dispute among brothers is inevitable, especially between those who wish to stick to their father's will and the disinherited son.

> In the old days, the disinherited brother would either be expelled by force by the rest of the brothers from his share or, if strong enough, the disinherited son might apply force to obtain his lawful share. To avoid family fission, the will of the deceased father will be varied to allow the disinherited son to receive his share. In this case the children of the deceased will say prayers, offer sacrifices and make libations to the spirit of their deceased father to appease his anger.

CONCLUSION

It is evident throughout this chapter that the rules of testamentary succession among the Nyimang are relatively undeveloped. This is due partly to the fact that the devolution of property is gradual and does not necessarily depend upon the single incident of death. Property devolution, among the Nyimang, could occur either through *inter vivos* bequests, or as *mortis causa* gifts. Most important of these two ways is that of *inter vivos* bequests, which occur as a matter of course during the lifetime of the father.

No one, other than the deceased's male children, is allowed to succeed to property. Thus, as each son is regarded as the *mir* (fire) of the father in his own right, all sons are, in theory, entitled to receive equal shares in their deceased father's estate. However, for practical reasons, this rule must be read in conjunction with the "priority" principle. The "priority" rule whereby the senior

brother is allowed to get married before the junior brother, is conducive to the early dissipation of the father's wealth and can further present another variable to the indirect and informal distribution of the estate amongst one's children before death. Nevertheless, the payment of the marriage consideration for a son indicates that the son has exhausted his portion or share in the father's property and will not, therefore, be entitled to a further share in the common family property. This is so unless all the rest of the brothers have got married. On this principle informants indicate that the larger share of the remainder of the property (in the father's compound) must be inherited by the younger unmarried sons. The father himself will make this clear before he dies.

However, the above rule is likely to be varied if there is more property than necessary for the needs of the younger brothers or, indeed, if the younger brothers themselves are all married. In this case, all property must be divided equally between the senior and junior brothers.

CHAPTER X

CUSTOMARY MODES OF THE PROTECTION OF RIGHTS IN PROPERTY

Offences against property leading to disputes between the parties among the Nyimang are numerous. The most common of such offences are those which relate, as mentioned earlier, to crop damage by animals and theft (of both crops and livestock) by human beings. However, the processes whereby interests in property are protected or by which claims and rights are sustained, include:

i) Self-help

ii) Arbitration before the village elders

iii) Adjudication before the People's Local Courts

iv) Invocation of the supernatural powers.

i) Self-help

In the old days self-help or resort to force was regarded as the only legitimate means by which individuals and groups used to enforce their rights of claim. Thus as has been rightly stated by Nadel:

> Traditional Law in Nyima was entirely one of 'self-help' of individuals or groups. 'Procedure' was reduced to the informal consultations of old men, to whom it would fall to compose feuds and achieve final reconciliation.[1]

Self-help, it is true, is almost inevitable in societies that lack any form of centralized political authority endowed with sufficient power to provide sanctions or to regulate relations between the individual members of the community.[2]

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1. Nadel, The Nuba, op.cit., 459.
2. See J. Middleton and D. Tait, op.cit., 19.

For example: It was then a custom that should a person claim anything from another in any way, then he (the creditor, if strong enough) would seize by force any property belonging to the debtor in satisfaction of his debt. One aspect which gave rise to self-help in relation to property (especially in the old days) was the theft of crops and animals. Theft of crops from farms and animals (especially goats) by the youths is still a common phenomenon, and may be regarded as one of the major contraventions against the proprietary rights in the Nyimang area. The thieving activities culminate during such periods of the year when the youths and the herders take livestock to camps (wir) away on the plains near the distant farms.[1] This, however, does not mean that thefts never occur in residential areas in relation to other forms of property; but that when the youths are away in the cattle camps, away from the direct supervision of the elders, they tend to steal other people's animals. The stolen animals (mostly goats) are slaughtered immediately and eaten by the youths. Stealing from farms (ground nuts and grains) is common, and is actively practised after the cultivation season and before harvesting is over.

In the old days, as already indicated, the owners of the stolen property were likely to use force in support of their claims. Nowadays, with the introduction of the customary courts, the owners of the stolen animals would normally be compensated and the culprit would either be sent to prison or fined. However, when crops are stolen by the youths, then the owners are (as they were in the old days) always willing to condone the offence as being merely ~~an~~ a

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1. The movement of livestock between the residential areas and the wir (camps) on the plains relate, as indicated above, to the variations of the agricultural season in the area.

delinquent frailty caused by hunger. This is so especially if the amount stolen is small or has been consumed on the farm itself. But when crops have been harvested and piled on a dweer waiting to be threshed, then stealing from such places becomes unforgiveable and may lead to serious conflicts between the parties. Until recently the owner of the camp (where the youths who committed the thefts reside) was held vicariously liable and not the individual youths or their respective parents. In addition to any customary redresses available to the property owner, thieves were and still are subjected to social ostracism and may be publicly ridiculed by sarcastic songs.

ii) Arbitration before the village elders

In the old days there were no regular courts or any centralized law-enforcing body in Nyimangland, disputes between the parties were settled by the process of mediation through the village elders and other influential and prominent warriors. This was done by arbitration and negotiation. Even today, the process of mediation by the village elders is invariably used. Thus, before the customary courts were introduced in the twentieth century, any person who wanted to enforce a right against another would approach the elders sitting in the gŭdi (sun shelter for village elders) and ask them to arbitrate in the case. Each person in the gŭdi might express his opinion as to the best way of solving the dispute. If the parties agreed, then that would end the problem.

However, as there were no means by which such judgments were to be enforced, there was always a possibility that a dissatisfied stronger party might resort to the use of force. The weaker party, too, was not left entirely without further redress. He would

normally, if unable to enforce his claim or was dissatisfied by the settlement made by the elders, run to the shira (a form of traditional appeal) and plead the intervention of the shira. Any person who sought the aid of the shira must pay him a token gift (normally a goat) as a thanksgiving. However, it must be noted that the shira himself was not endowed with legislative or judicial powers as such, and thus did not have institutionalized or proper means for enforcing his judgments. Nevertheless, if the shira was convinced by the just cause of the aggrieved party, then he (the shira) would order the other party to rectify the injury. The shira might make his orders, even in the absence of the defendant. The formal hearing of the dispute where both contesting parties were required to defend their case was not always complied with.

It must be remembered that the judgments of the shira were by and large arbitrary. Nevertheless, the orders or the injunctions awarded by the shira were, for the most part, considered final and no one dared disobey them lest the shira exercise his prerogative and stop the rain. Thus, should the defendant defy the orders of the shira, then the whole community (for fear the rain would b stopped) would exert irresistible pressure upon the recalcitrants to comply with the orders of the shira. Furthermore, the public would force the defiant to pay a bull to be taken to the shira to appease his anger.

iii) Adjudication before the People's Local Courts

It has already been mentioned that until recently the retaliation by use of force was inevitable for enforcing rights and claims over property. Today, persons about to enforce rights and claims over property will take their cases to the local courts.

Thieves are usually punished by fine or imprisonment, and will further be ordered to restore the goods in kind to the owner, or may be made to pay the equivalent price.

iv) Invocation of supernatural power for the protection of rights in property

The protection of the various sorts of property by means of supernatural powers is widely practised among the Nyimang. Certain kwuni (shaman) and even some non-shamanistic individuals are reputed to possess the control and the use of certain supernatural powers which, according to the people, are capable to causing harm to property and human beings if invoked through performing certain rituals. These supernatural powers and the diseases or misfortunes they cause (such as diarrhoea, epilepsy, insanity and striking by lightning, etc.) are represented by fetishes such as decorated sticks, whips and clubs and so forth. According to the people, each of these fetishes bears its distinguishing marks, which like trademarks will be easily identified by the general public. These fetishes may be used in court or otherwise for taking oaths.

Furthermore, the supernatural powers evidenced by the fetishes are used as spiritual injunctions to restrain thieves or malicious strangers who tend to challenge the holder's rights in property. Thus, any person who wants to protect his property against theft or trespass may obtain a fetish from its iran (master/owner) and place it on the property intended to be protected. When obtaining the fetish from its iran the acquirer must pay a token gift to the person in possession of the fetish. The markings on the fetish which are regarded as emblems of the supernatural power must be made by the iran personally.

If the protected property is crops, then those planted nearest the fetish must be the last to be harvested. Before the protected crops are eaten - even by the owner - part of such crops (especially the portion near the fetish) must be given to the fetish 'owner' as a thanksgiving. The owner of the fetish will then perform the necessary rites to absolve or free the entire crop from the effect of the fetish so that no harm will be done when the crops is eaten by the owner.

The rights in the fetishes serving as emblems to supernatural powers are similar in a sense, if the analogy is allowed, to the proprietary rights in patents, copyright or trademarks in the modern world. The rights in these fetishes are heritable rights and are strictly protected by the supernatural powers. Thus, no one is allowed to make use of any of the fetishes without obtaining the necessary permission from the original holder. If the fetish has been used without the consent of its owner, then the person wrongfully using it would be struck by the disease represented by the fetish. This is so unless a purification tanyari (ritual ceremony) is performed. In this ceremony beer, fowls and goats are given as gifts to the owner of the fetish to enable him to perform the tanyari so as to appease the anger of the supernatural powers for the unlawful infringment of their rights in the fetish.

Stolen property can sometimes be recovered by invoking supernatural powers. Thus, when property is stolen by an unknown thief, the owner of the stolen property may give a spear, grain or even livestock as a gift to a kwuni (shaman) so that the latter may call upon the aid of the supernatural powers to discover or destroy the culprit. In the majority of the cases the mere act of seeking the

help of the supernatural power would be made public. The effect of this publicity, according to Nyimang ideas, is to cast fear into the heart of the thief so that he (the thief) may restore the stolen object as quickly as possible. The restoration of the stolen property may be done secretly and will usually be taken to the kwuni whose supernatural power has been invoked. To absolve himself from the vengeance or the curse of the supernatural power, the thief must offer a token gift to the kwuni as an appeasement.

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