

**CHILD LEGITIMACY AND SEXUAL MORALITY IN A TRADITIONAL  
SUDANESE SOCIETY: THE POSITION OF ILLEGITIMATE CHILDREN AMONG  
THE NUBA PEOPLE WITH SPECIAL REFERENCE TO THE NYIMANG\* COMMUNITY**

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*Abstract*

*This paper is an attempt to discuss customary notions of child legitimacy among the Nuba. It is not meant to discuss the place of customary law in the Sudanese legal system<sup>1</sup>. Despite the diversity of the Nuba cultures and their customs, nevertheless, there is always a possibility of a successful intermarriage between indigenous customary laws with the statutory laws in the country. It is also conceded that little difference (normatively) exist between certain tribal customary practices and the Islamic Sharia' since the bulk of these customary practices do not contravene any tenets of Islamic faith.*

*The Nyimang society is taken as an example on the basis that: a) it has shown, in the recent years, vibrant changes toward Arabicization and Islamization b) it apparently reveals a different pattern in the notion of child legitimacy compared to most Nuba communities and some other African societies as well.*

**INTRODUCTION**

Writing about any aspect of social life relating to the Nuba people of the Sudan has always been a challenging experience in as much as it is fascinating. Although the Nuba people of Southern Kordofan were referred to by Nadel as “a human enclave of aboriginal Negro stock”<sup>2</sup> or as put by Seligman as a ‘sub-racial unit’, they are, nevertheless, far from being homogeneous and thus could not be said to belong to one single race. The Nuba people are divided strictly on tribal lines. And for that matter one finds that each tribal group tends to exhibit ‘consciousness of its separateness’ and distinct ‘ethnic individuality’.<sup>3</sup> This ‘separateness’ or sense of ‘individuality’ has been expressed in the diversity of customary practices pertaining to all walks of life.

The differences in the notion of child legitimacy and sexual morality among the Nuba, is but a single example of the diverse Nuba philosophy of life as exemplified in these apparent structural differences of their social institutions. Paradoxical though, as has been

observed by many writers on the Nuba, and despite of this obvious heterogeneity of the Nuba, there is a general feeling pervading through almost all the Nuba communities about their 'Nuba-ness' as being racially distinct from their neighbouring non-Nuba elements. This sense of 'Nuba-ness' was never once a dividing factor prompting any isolationist movements hampering the Nuba from intermingling with the rest of the Sudanese communities.

It should further be noted that professing African traditional religions or Christianity were never in themselves inhibiting factors to the growing processes of Arabicization and Islamization among the Nuba. As a point of fact a sizable majority of the Nuba have actually adopted not only the Islamic faith but also the Arab way of life. As a result Nuba material cultures, their traditional religious practices and customs relating to marriage institutions and succession have greatly been affected.<sup>4</sup> Whether these changes were the product of a deliberate and a systematic proselytization of Islamic faith and the inevitable inculcation of Arab culture or not is not the concern of this paper.

However, the fact still remains that the new changes in the area have undoubtedly generated much debate and action by the Nuba intellectuals, since it carried with it general overtones of deliberate imposition of Arabicization, by the government, leading on the other hand to the destruction of indigenous cultures together with its traditional institutions.<sup>5</sup> However, it should be noted on the other hand, that the apparent admixture of the Nuba traditional cultures with that of Christian and Islamic cultures in addition to their Arabicization have tempted one to depict the Nuba area "as an epitome of cultural transfusion of different ethnic groups in Sudan."<sup>6</sup>

## ILLEGITIMACY OF CHILDREN IN A COMPARATIVE PERSPECTIVE

### A) Under common Law

At present, the trend in the West is the total assimilation of the legal position of the illegitimate and the legitimate children in almost all aspects of life.<sup>7</sup> Apparently, the ‘status’ of “illegitimacy” if confirmed ascribes to the person a socio-legal position within a particular society. (Cretney, S. M., 1984: 577; see generally, Lambert, L., 1980).<sup>8</sup> It carries with it certain rights and duties as well as disabilities.

Wilkinson and McK Norrie, point that:

“In common with most other European legal systems, a person’s status in law, and the nature of his relationship with his parent, was for long dependent upon whether that person was legitimate or illegitimate”. (Wilkinson and McK Norrie, 1993: 5)

Thus, while a legitimate child may enjoy all legal and social benefits a person who is declared illegitimate may suffer certain incapacities in her/his social as well as legal position. There, therefore, seldom exist a society in which people are not conscious about their legal or social status. Lord Wilberforce, in the *Amphill Peerage case*, states:

“There can hardly be anything of greater concern to a person than his status as the legitimate child of his parents: denial of it, or doubts as to it, may affect his reputation, his standing in the world, his admission into a vocation, or a profession or into social organizations, his succession to property, his succession to a title.”<sup>9</sup>

This statement, *mutatis mutandis*, may also be true of some African societies particularly that of the Nyimang. Indeed, among the Nyimang, succession to certain types of property (land and cattle) or to some tribal offices or family insignia depends largely upon whether the candidate is a legitimate child of its parents or not.

### B) Under African Customary Law

My own field data shows that the concept of child legitimacy among the Nyimang presents different example from theories proffered by some Africanists who claim that the notion of illegitimacy is virtually non-existent in African tribes (Cotran, E., and Ruben, N. N., Eds. 1970: 44; cf., also Nadel, 1947: 188).<sup>10</sup>

Illegitimate persons among the Nyimang are called *tudu*. Such persons are not allowed to attend certain rites with the rest of the family members. Male illegitimate children are barred from sitting on the family hearth (*manda*), in the centre of the compound, lest the legitimate ones might die. A male child for a Nyimang is considered as a torch (*mir*) signifying extension and continuation of life after the death of the father. Male legitimate children, among the Nyimang, create a 'desired link in the succession of generations'. For that matter they establish a religious link between the living and the deceased members of the family. However, the importance of a male legitimate child in the Nyimang society goes beyond these mystic and religious ideas to the realm of practical life relating to property devolution.

An Illegitimate child is not allowed to succeed to property neither within its mother's husband's family nor within its maternal grandparental family. As regards his natural father he might be considered for inheritance if duly acknowledged. An illegitimate child's right to property is limited to those property donated to him as an act of grace by grandparental family.

The above rules are not applicable to all Nuba tribes especially those who appear to experience greater liberty in sexual morality. Contrary examples are found in Moro and Tira tribes where Nadel mentions, "there is no discrimination against illegitimate children". (Nadel, 1947: 226). Nadel also points out that 'the position of illegitimate children is no

problem' in matrilineal societies such as that of Korongo and Masakin (Nadel, 1947: 287).

The reason, admittedly, is because, "...sexual intercourse...is quite free" (Nadel, 1947:

286). Nadel further observes:

"The number of children of unmarried mothers is very large, much larger than in the other tribes, possibly because the girls marry somewhat later, when they have already been sexually mature for some time. The girls do not practise abortion, although they know that, for example, the Moro do it. But in these matrilineal societies the position of illegitimate children is no problem. They belong, in any case, to the mother's family." at 287.

The above rules are not applicable to the Nyimang patrilineal society. Nyimang girls in the old days, used to undergo a *rite de passage* of ear piercing comparable to circumcision for men. Only girls who had attained full maturity were allowed to undergo the rite of ear piercing. It was only after the performance of the rite that girls were given away to marriage. The society made it difficult for girls marrying at any later age to enter into illicit intercourse resulting in illegitimate children.

### **C) Under Islamic Shari'a**

As regards the Islamic Shari'a the status of 'legitimacy' or 'illegitimacy' of a person determines his/her proprietary rights and interests within a family group. Both Islamic Shari'a and the Nyimang customary law agree that only paternity should confer status of legitimacy on a child. Under both systems child-parent relationship involves mutual rights and obligations in law and fact. For that reason both systems (to a varying degree) reject the idea of adopting illegitimate children into one's own family membership. Further differences are noticed between the two systems regarding questions of legitimization or acknowledgement of children born out of wedlock. Under Islamic Shari'a only the biological father and the child's mother with a strong presumption of a legal marriage can establish parentage.<sup>11</sup> Under Islamic law even a biological father cannot

confer paternity to a child who is proved to be an issue of an illicit cohabitation (*zina*). According to Shari'a law, a person who is known to be a product of unlawful relationship can never be legitimated. Acknowledgement under Islamic Shari'a simply means declaration of legitimacy, which in effect is a latent discovery of an already existing legal phenomenon to certain known facts (Fayzee, A., A., 1984:189). It is a mere clarification of an uncertain situation, which is based not only on the assumption that the child so acknowledged, relates by blood to its father but also that the union between the parents must be a lawful one. (Fayzee, 1984: 193) Later marriage by the parties will not change the legal status of such a child who was a product of fornication. Under Islamic Shari'a, there is no such a thing as *legitimization per subsequens matrimonium* known to English (Hindu or Roman) law. (Cf., Cretney, S., 1984: 581).<sup>12</sup>

#### **PATERNITY AND CHILD LEGITIMACY AMONG THE NYIMANG PEOPLE**

Generalization on the point that African traditional societies do not show concern whether a child is legitimate or not may appear rather superficial. Evidence shows that illegitimacy of children in most African tribal communities is a source of apprehension since it is a product of digression from societal norms. Reasons for concern include economic burdens, religious inefficacy and the adverse effects on both family institution and the society at large. Even in modern western societies where illegitimacy of children is not so much stigmatized it would still be considered as an undesired social phenomenon if only because it exerts huge financial burdens on the taxpayers (Smith, L., 1994: 82; George RG Clark and Robert P Strauss, 1998: 827-856).<sup>13</sup> Conceivably, the root causes of the problem of child illegitimacy, the degree of social disapproval or sanctions against

it, whether moral, social or legal may vary extensively from one African society to another.

The notion of child legitimacy revolves around the concept of paternity, which is considered pivotal to the general structure of the Nyimang family. For that matter guardianship rights has always been taken as paternal rather than maternal prerogative. Determining legal relationship between an illegitimate child and its parents has always been a prime concern of the Nyimang society. Among the Nyimang, similar to other societies, child-parent relationship is that of dependence on one hand, and duty coupled with power and legal responsibility on the other. Having looked at a wide range of data concerning child legitimacy in other Nuba societies- in addition to those from Western welfare societies, one finds that the discharge of the duty and the exercise of the powers and the extent of the legal responsibility are matters of degree depending primarily on the socio-economic as well as cultural factors of each society. Generally speaking, the necessity of the parental role in bringing up children, in almost all human societies, is always a focal point of concern. As a matter of assumption, parental care both in terms of wielding power and authority on one hand coupled with intimacy and love on the other hand, is unavoidable combination for educating and socializing the child. The above-mentioned sequence of interrelationships would be disturbed if the child does not belong to either of the parents within a given household.

However, in the modern Western welfare societies, where marriage and family institutions are on the verge of bankruptcy, a child may live with unmarried couple or, in most cases, may spend the entire childhood either with a single parent or in a government institution (Bogert C. 1997). For that reason the notion of child illegitimacy is either

starting to wither away or is at least becoming less stigmatized within these societies (Bogert C. 1977).<sup>14</sup> Progressive Social change of attitude toward extra-marital sexual behavior in the modern era, both in the West and in Africa, has resulted in the rise of the number of illegitimate children. Accompanying that is the corresponding change in the notions of child legitimacy to the extent that some welfare societies “proclaim that all children, whether born in or out of wedlock, have the same rights”. (Goode 1987: 33, 42 ff.; see also Wilkinson and McK Norrie 1993: 6; Meeusen 1995: 143-144; Smith 1994: 81 ff.; George R G Clarke & Robert P Strauss 1998: 827 ff.). This is also true about some African societies albeit for different reasons.

Child legitimacy, among the Nyimang, has always been thought of as a disruptive social phenomenon. Any cohabitation resulting in the birth of an illegitimate child, particularly in the old days, was one of the causes leading to affrays between different clan members. Adultery committed within the clan members might lead to the severing of relations. But if the relationship were classified incestuous then that would be even worse as the wrath of the supernatural powers would be expected to befall the culprits and their issue. In the old days unmarried girls, who gave birth to illegitimate children took the risk of being married to the elderly or sold into slavery.

Although it would not be true to disclaim the importance of the parental role in the Western welfare societies, nevertheless, new social and legal trends require that responsibility for a child is not necessarily and entirely tied up with the notion of biological parenthood nor does the status of parenthood and the legal responsibility toward the child need be based on any blood ties (Meeusen, J., 1995: 121-123, 143-144). In these societies child-parent relationship is a purely legal construct that, on the most part, may

rest entirely on general policy considerations. On the other hand the bulkiness of legal material and the number of social institutions set out to protect illegitimate children in the modern welfare societies seem to strike a phenomenal record. The result is unparalleled improvement in legal, economic, and social position of illegitimate children in these societies compared not only to that of African counterparts but also to that of the entire Third World countries. But despite all that the bitter reality still remains viz., a general disillusionment that the position of illegitimate child could be rendered exactly the same as the legitimate one by the miracle of some liberal social welfare laws. The very fact that these liberal laws are initially founded and aimed at protecting illegitimate children is in itself indicative of an inherently shocking situation that needed to be remedied.<sup>15</sup>

It thus sounds rather presumptuous to claim that complete removal of social and legal discrimination against illegitimate child, even in the very modern Western societies through legal institutions, is possible. This would raise doubts about some well-known social postulates regarding illegitimacy particularly those relating to equality and the diminishing role of a father in bringing up the child. Recent findings show that the contrary, now supportive of the traditional view, is true. Undoubtedly, illegitimacy must have its own adverse economic effects even in those welfare societies where enormous costs are borne through welfare payments. Certainly the indirect cost of illegitimacy could be more costly than it actually shows. The societal attitude as to the importance of a father in a family is changing since evidence indicates that “life without father can be perilous – to kids and to their communities”. (Smith, L., 1994: 83).<sup>16</sup>

In Africa and Muslim communities, traditional marriages resulting in nuclear families, in which the father plays central role, are still cherished. Determining the position

of a biological father of a child in African and Muslim communities, unlike what exists under modern welfare societies, is extremely important because of social and religious concerns. In most African tribal societies, similar to those of the Muslim's, where patrilineal *decent* would be emphasized; the society tends to be much more concerned with the place of the child in the kinship network.<sup>17</sup> In these societies, the notion of child legitimacy is more pronounced than in societies where 'descent is less important socially'. Under Islamic Shari'a, for example, it is necessary to determine not only the legal parenthood but also that the child must be the issue of a legally constituted marriage.<sup>18</sup>

#### **ESTABLISHING PATERNITY AMONG THE NYIMANG**

Among the incidents signifying assertion of paternity, among some Nyimang clans, over a newly born child is the naming ceremony known as *dussau-ki* (necklace or lit. a thing around the neck). The performance of this rite varies, in terms of procedures and the time chosen for the ritual, from one clan to another. These choices may depend largely on the clan identity of the father. Referring generally to the rationale behind the rite of *dussau ki*. Nadel (1947) writes:

“... 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*, 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.” (Nadel, 1947: 384)

The “naming ceremony”, among the Nyimang, is not without significance as indicated by Nadel. It raises a strong presumption of paternity<sup>19</sup> and whether or not such a child would be adopted into one's family membership (cf. Hunud A. Kadouf, 1981)

In addition to the naming ceremony, another rite known as *ko'oj(g)ada* would be performed two months after the birth of a male child. According to Nadel *ko'oj(g)ada* has

no other meaning apart from its general fertility significance. He mentions: “The symbolic meaning of the various features of this rite [*koʻoŋ(g)ada*] is not always obvious.” (Nadel, 1947: 388). Nadel was unable to perceive the underlying concept of *koʻoŋ(g)ada* rite. My own field data reveals that the rite signifies assertion of paternity and incorporation of the newly born child into one’s own family membership. It is an indirect ceremony for legitimization. It is thus logical to observe that the group of clans who normally perform *korongada* rite, (*Maryama, Toji, Mudu, Kinya, Fuy, Shiro wa, Anamu wa, Fandé, Kudèr* and *Kwolngala*) are also the same group of clans who neither adopt nor incorporate illegitimate male children into their family membership. According to Nyimang ideas should a *korongada* rite be performed for an illegitimate male child then that child is believed not to live for long. Informants indicate that a husband who suspects that a newly born male child might not be his own will perform *korongada* rite hastily before the prescribed period so the child would perish if illegitimate. The symbolic nature of this rite is, therefore, to determine paternity and legitimacy of male children within these clans.

#### **SEXUAL MORALITY AND CHILD LEGITIMACY**

Review of the bulk of data on the subject of child legitimacy indicate that most human societies ‘whether ancient, tribal, or contemporary’ are invariably moralistic with regard to transgressions of individual sexual behaviour (Goode, 1987:33). Contemporary Western societies show no less concern about sexual morality and its relation to the notion of child legitimacy. As put by Justice Powell in *Weber V. Aetna Casualty & Surety Co.*<sup>20</sup> (*Louisiana*):

“The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaison beyond the bonds of marriage”.<sup>21</sup>

The above classical model connecting illegitimacy to the prevailing notions of sexual morality is clearly exhibited by the Nyimang society. Inherent in the above notion is the prime concern of the society to protect the family institution and to enhance group solidarity. But in contemporary societies also, though to a lesser degree, sexual permissiveness does not completely overshadow the importance of family institution.

Viewed in certain Nuba concepts the relation between sexual permissiveness and the rise in the number of illegitimate children is unavoidable. A caveat is necessary particularly in view of divergences existing at the structural level prevalent in the social formations of some Nuba matrilineal societies. For example, Nadel reports that in Tullishi matrilineal society there is no differentiation between legitimate and illegitimate children (Nadel 1947: 340). A noticeable fact is that, unlike the Masakin matrilineal society, the Tullishi do not experience freedom of sex.

According to some writers (Hawkesworth 1932/1933: 182; Nadel 1947: 358; Stevenson 1965: 90) the Nyimang society, compared with other Nuba groups,<sup>22</sup> apparently possesses a high standard of sexual morality. Individual sexual behaviour, particularly in the old days, was strictly controlled so much so that the society did not have to bother about mixing between opposite sexes. It did not matter who sees who and where and at what time of the day or night. It was the individual's responsibility to make sure that no transgressions or unauthorized sex take place. These rules were enforceable through supernatural powers in addition to certain social norms in the form of ridiculing, popular songs and social ostracization. Apparently this social disapproval of sexual promiscuity must have led to the development of the notions of child illegitimacy and hence its placement in the society.

Writing about the Nyimang Nadel observed:

Certain observances which sharply differentiate clan from clan are of too momentous influence on individual and social life.... They are magnified to fundamental divergences in moral conceptions and in the religious and magic fears behind them, determining the attitude towards marriage, sex morality, and pregnancy. ... In one group of clans, then, sex morality fastens upon a *rite de passage* of the man as the prerequisite of consummation of marriage; ... in another, a certain ceremony called *kordi* or *kordik*, ... forms part of the final marriage ceremony [of the girl].... In the first case the clan membership of the young man counts; in the second, [it is] the clan membership of the girl (Nadel, 1947: 384-385).

Personal responsibility of the individual member of the traditional Nyimang society was so enormous to the extent that the society developed a customary institution in which a puritan type of friendship among the opposite sexes was recognized<sup>23</sup>. Strict social rules and other moral codes used to govern this institution. Nadel was, therefore, right in pointing out that all forms of unauthorized sexual behaviour were reprehensible to the traditional Nyimang society. This could be explained in the social concern to foster ties that transcend immediate family membership to that of a larger kin-group. However, a closer look at the people's attitude toward sexual intimacy reveal their concern not only to strengthen group affiliations but also to guard against indiscriminate births of fatherless children into the society.

The Nyimang say that illegitimate children have always been ill received by the society. Of especial position is the child born of incestuous relation. This is so since not only that 'the problem of socio-religious placement of such child cannot be "solved" by marriage' but also its status as regards to its parents cannot be determined. The Nyimang people display intense social disapproval against incestuous illegitimacy. The category of incestuous relation, in the old days, transcended those immediate relationships such as father-daughter, mother-son, brother-sister, nieces and nephews, to the larger family group comprising not only cross cousins but also cuts deep into wider groupings

comprising lineages and clan members. The Nyimang society managed to maintain not only family cohesiveness, especially in the old days, but also group solidarity up to the tribal level by strictly following exogamous rules of marriages. Similar custom relating to avoidance of elicits sexual intercourse within clan members for the purposes of enhancing clan solidarity were also found in Heiban tribe where Nadel reports that relatives of the culprit, who commits illicit sexual intercourse within the clan, would be rendered liable to the curse of leprosy (Nadel, 1947: 94).

It should be remarked that despite the existence of numerous rules against unauthorized sexual intimacy in the Nyimang, especially in the old days, it did not in fact completely prohibit the occurrence of sexual cohabitation of endogamous nature. However, if it ever occurred it would be considered:

...repulsive-if discovered; but they become a severe crime, followed by supernatural sanctions, only if they lead to pregnancy and childbirth. In this event, one believes, 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 its father, but will be brought up by its maternal grandfather. (Nadel, 1947: 389)

A lot of this rule has changed now where cross-cousin marriages are practiced as a matter of course by most of Nyimang clans. Individuals throughout the Nyimang area have persistently challenged this rule. In the last few decades the sub-tribes of *Kurmuti*, *Kalara* and *Nitil* have pioneered in cross-cousin marriages followed by the rest of the Nyimang communities. It is true that in the old days, children born in adultery by parties belonging to the same lineage, clan or even co-clans could not be claimed or legitimated by the natural father. Nowadays, this general statement must be qualified as referring only to strictly incestuous relationships, e.g. brother/sister and father/daughter. In the latter case

the rule is still that a child of incest will accompany its mother upon marriage to be adopted by the mother's husband.

However, it should be remarked that rigidity of observing sexual morality amongst the Nyimang clans is a question of degree depending on the clan identity of the observer. It has been indicated above that such observance depend largely on, for example, with whom should sexual promiscuity be avoided,<sup>24</sup> at which time of the year and where<sup>25</sup>. Reference is necessary to the existence of a pronounced dichotomy of male and female principle throughout the Nyimang society, which pervades observances of sexual morality and other related rituals (Nadel 1947:384,385, 479).

To further illustrate the above point, also mentioned by Nadel, Nyimang clans may conveniently be divided into two major groupings in terms of their observance of sexual morality. On one hand we find those group of clans who sanctify male sexuality and on the other hand there are those who purify female sexual morality. Rules of exogamy, with some modifications at the present time, were observed on clan and co-clan level. That meant members from clans sanctifying female sexual morality might marry only from clans who purify male sexuality and vice versa. In clans such as *Baya*, *Kilang*, *Jiyu*, together with their co-clans, it is the boy who observes rules of chastity and thus should not marry or impregnate any woman before he performs circumcision rite.<sup>26</sup> If a young man impregnates a girl –even if she were his own bride- then he must undergo a very rigorous and economically expensive rite known as *sobudu filda (tiflé)*<sup>27</sup>. In a yet another clan such as *Maryama*, both girls and boys are burdened by sexual taboo. Nadel rightly observes that:

In the Maryama clan, which forbids consummation of marriage to its as yet uncircumcised adolescents, expiation is impossible; a young man who had sexual

relations with a girl before he was circumcised must under no conditions marry her, whether she was his bride or not, else both will die. (Nadel, 1947: 386)

In the old days, a circumcised young man would be secluded from the rest of the family until he heals up. During his period of seclusion the person is known as *fwir tèglé* (lit. a copper bracelet worn by the newly circumcised person from wrist up to mid-arm just below the elbow). For the whole year following the period of this rite the person is utterly forbidden from entering into any sexual intercourse. Should the rule be disregarded and he cohabits with a woman who bears a child then the child would be known as *fwir tègléng*.<sup>28</sup> The putative father, even if he marries the woman, will not be allowed to eat, drink or otherwise appropriate any kind of property acquired by such a child lest he or the child would be met with grave misfortune.

On the other hand, the emphasis on the duty of the boys to maintain sexual integrity in the above-mentioned clans is balanced by the reverse emphasis in clans such as *Fandé*, *Modu* and *Shiro-wa* (the latter is the clan of the rainmaker) together with their co-clans. Girls belonging to this group of clans are referred to as *akwiri* (lit. associated with or being tabooed). They are required to observe strict rules governing sexual morality and thus must not allow themselves to be defiled or impregnated otherwise some rigorous ritualistic ceremony of purification must be performed to atone for the guilt. Girls belonging to the clan of the *Shiro-wa* (the people of the rainmaker) were of special concern. When impregnated she would be banished immediately from her parental home, to stay during the whole period of gestation, with a distant relative- mostly with her mother's relatives. That was for the fear that her brothers would die, as they would be tainted by her impurity if she shares food with them. She would not get married unless purification is performed for her. In such cases it is the one who had sinned the girl who

would be compelled to bear the onerous economic expenses regarding purification ritual<sup>29</sup>.

As a general rule infringement of sexual code would always entail expiation of some sort for the sin thus committed.<sup>30</sup>

Nadel had observed that among the Nyimang:

[P]remature sexual intercourse of adolescents – more especially, premature consummation of marriage- is forbidden, the criterion being a certain universal ritual event through which man or woman must first pass. (Nadel, 1947: 385)

It is true that virginity and pre-marital chastity is still highly valued; yet Nadel's statement should not be taken on its face value since it is no longer representative of the present day relatively liberal Nyimang society. As observed by Stevenson, sexual promiscuity would readily be forgiven by the society "if no illegitimate child is born" (Stevenson 1940: 90). The more so in the present day Nyimang society, where due to education or the general enlightenment, parties are no longer afraid of supernatural sanctions. Furthermore, ready access to hospitals and services of trained midwives have released the pressure on the girls formerly exerted by the society through traditional midwives.

A further important point relating to sexual morality, among the Nyimang, was the custom of hand shaking. Traditionally, a young adolescent (male or female) was strictly prohibited to shake hands with other sexes until he/she has been initiated or until the father has performed the rite or (*tanyari*) of *ashio twil* (beer drinking). Thus, and until these two rites were performed shaking hands was considered as bad manners or a disgrace if done with an elder person and would further be considered as part of a mild sexual flirtation, to which the society would never approve of, if performed with an opposite sex.

Two possible conclusions may be drawn from the above. First, and although no statistical data exist, the chances to procure an illegitimate child by a woman have become

greater than before. Second, increase in illegal abortions has become inevitable. Infringement of sexual moral codes, sexual flirtations by the youth and other illicit pre-marital sexual relations are becoming common. Nyimang society still continues to respond with derision and mockery to culprits through public songs. Notwithstanding, cases of adultery, seduction and intercourse with betrothed girls are classified as crimes punishable with imprisonment and fine when brought to courts.

#### **SOME SPECIFIC RULES OF ILLEGITIMACY AMONG THE NYIMANG**

##### **i) Illegitimate children of unmarried women**

As a general rule each individual in the Nyimang society must have an acknowledged father. Even illegitimate children must have known biological fathers. There is a general belief in the Nyimang (especially in the old days) that any woman who bears child in adultery would not be able to give birth unless she named the culprit. The belief was so strong that should a woman fail to name her paramour then she would die in the delivery process<sup>31</sup>. This last rule was followed more strictly in the old days when sexual promiscuity and illicit cohabitation were highly reprehensible. The effect of this supernatural sanction was threefold: 1) Adultery was reduced to the minimum in the fear that culprits might easily be known. 2) There were virtually very few – if ever – fatherless children in the Nyimang society. 3) In as much as this rule determines the social placement of the child it further emphasizes the strict definition of social, economic and religious duties and obligations of the adults involved. Such as who should be responsible for the infant: the mother and her family or the father, whether biological or legal. Furthermore,

the Nyimang were fearful of allowing foreign blood into their family membership since they would not be able to confer with the spirits of the deceased family members. The latter seemed to wield considerable power on the fates of the living.

Customarily illegitimate child by unmarried woman would either accompany the mother upon marriage or may be adopted by grandparental family from the mother's side. A person in whose name a child was born becomes socially, though not necessarily legally, the father of the child. If for any reason the father was unknown, then the mother's family will claim guardianship of the child. In any case guardianship rights, whether it be by the mother's birth family or by mother's husband, is not tantamount to the child's entitlement to property rights or to any traditional religious purification for his general well being in case of sickness or any other misfortunes that might befall her/him. Legally speaking, an illegitimate child that has been adopted by the maternal parental family cannot become a full member of such family. The child may enjoy certain economic rights within the adopting family as a member of the household. Although such child would not normally be entitled to inherit property nevertheless, she/he may be given gifts by the grandfather or by its *dir* (mother's brother). If a male *tudu* (illegitimate child) opts to continue living permanently with his mother's parental family then he may be given land for cultivation and may also be assisted to get married.

However, late discovery by the person born *tudu* (illegitimate) of his/her status of illegitimacy may involve grave psychological and other emotional problems. In most cases the emotions and loyalties of such a person may invariably be divided between the family that brought him/her up and the newly discovered natural father. Numerous examples are cited by the informants of persons who, in order to run away from this social stigma, may

choose to desert the whole tribal area. However, legal problems are inevitable should an illegitimate child, who was brought up by its maternal family or mother's husband, later runs away or physically moves to its natural father's place. In such a situation, if the child were old enough to have acquired any sort of property, then he would be allowed to take such movable property acquired by him including livestock. His rights over land would necessarily be relinquished.

#### ii) Illegitimate children of married women

Subject to the rules governing legitimization of male children, the general customary practice among the Nyimang is that any child born out of wedlock by a married woman belongs to her husband as his legal child. This is a presumption of law that could easily be rebutted. Consummation of marriage is not necessary since partial payment of marriage consideration, or the handing over a spear- *borang*- to the girl's kin (traditionally signifying betrothal) is enough to enforce the above customary rule. If the girl's *fiancé* is also the father of her child then no paternity problem arises provided he marries the girl. But if he refuses to do so then he will be entitled to partial payment only. If the girl/woman were impregnated *per alios* then the husband/ *fiancé* has the option either to marry the girl and adopt the child or reject marrying her whereupon he would be entitled to the full repayment of all property given as marriage consideration<sup>32</sup>.

It appears that any partial marriage payment would entitle the husband to claim paternity rights over children born by his wife. This supports Nadel's claim that "children go with the bride-price" (Nadel, 1947: 401). But this general rule must be read in conjunction with another rule asserting that Nyimang people loath the idea of affiliating

illegitimate male children into their family membership. Male illegitimate children would be regarded as *shél bāring* (child from different penis) and could not be entrusted, as indicated, with keeping the family line. This will lead us to another important area of how paternity is established by some Nyimang clans.

The general customary rule stating that illegitimate children of married women belong to their husbands is strictly followed only in cases where a person impregnates either his brother's wife or (in the old days) the wife of a clan or a co-clan member. The issue of such a union would be regarded as the legal child of the mother's husband and the natural father can never be heard to claim paternity rights over it. This customary rule is applicable to all Nyimang clans, including those who normally do not incorporate illegitimate children into their family membership. The rationale is not derived solely from the fact of the payment of marriage consideration, but rather from the special nature governing kinship relations that exist between the natural father and the woman's husband. Impregnating the wife of a brother, a member of one's own lineage or even a clan or that of a co-clan member, was considered detestable and a sinful act. In the old days, that could lead to the severance of kinship relations. However, the Nyimang argue that since the natural father and the woman's husband are from 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 would legally be regarded as the member of the woman's husband's family. This explanation is in line with the notions and the practice of leviratic marriages among the Nyimang.

### iii) **Children by divorced women**

An Illegitimate child of a divorced woman is treated, in law, similar to that of an illegitimate child of unmarried woman. Writing about the status of such children, Nadel states:

“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.”  
(Nadel, 1947: 403)

The above quotation is misleading as it confuses certain issues of child legitimacy among the Nyimang. It is not clear what the statement “[G]irls ... belong to their legal father” means. Under the Nyimang law a person who has divorced his wife can no longer be considered as her ‘legal husband’. He has no legal right over her children after the divorce. That is so even if the claim for the refund of the marriage consideration is still pending.<sup>33</sup> This custom is different from those existing in other Nuba tribes such as that of Otoro. There, and “Until the bride-price has been handed over, all children borne by the woman belong to the man who is still her legal husband.” (Nadel, 1947: 125). This may explain why in Otoro tribe “there is no discrimination against illegitimate children.” (Nadel, 1947: 125). Nadel, rightly states that, upon divorce, no full marriage payment would be refunded if a woman gives birth to legitimate children during coverture since part of it must be deducted depending on the number of the children and whether they are male or female. Nadel actually tries to state rules of legitimating children discussed later.

#### iv) **Children by widows**

Widowhood for a woman, in the traditional Nyimang society, was considered a profoundly woeful situation both socially and legally. A woman for the first two years of her husband's death would be considered almost ‘untouchable’ as she would be regarded

highly impure. She would be treated a little less than a contagious animal. Her eating and drinking utensils would be separated from the rest of the people. She would never dare pass by a male gathering particularly those of the same age group of her deceased husband lest they would also die. She would be called *durangu kèr* (lit. *kèr* means woman and *durang* is a very thick rough rope tied around the woman's waist signifying her impurity). Her impurity would be absolved only after performing a purification rite known as 'removal of *kubang* (Lit. *kubang* is a traditional conjugal bed made from wooden planks). It is during this period that the widow must observe strict behaviour of celibacy. "Illicit sexual intercourse during this period is a most grave crime, and her lover would never dare marry her afterwards (Nadel, 1947: 404)." As a rule of custom children born out of any adultery, during this period of seclusion, would belong by law to the deceased husband. Posthumous return of any part of the marriage payments would not change the rule.

The above rules indicate that, in common with other Nuba and most African tribes, marriage ties among the Nyimang, will not be terminated merely by the death of the husband<sup>34</sup>. The widow would normally take a leviratic husband from one of the family members of the deceased husband preferably a brother and thus continue as the lawful wife of the deceased unless she were divorced. All children from the levirate husband or those procured *per alios* must in law be regarded, with certain exceptions, as the legitimate children of the deceased husband.

In recent years a good number of Nyimang widows have started to challenge the stringency of the above custom. That is so since widows have already gained a great deal of freedom of choice to lead their own independent lives separate from their husband's

family. Thus, and although customarily a widow would normally be expected to be married to one of her deceased's family member, preferably to a younger brother, she is not legally obligated to do so. If, for any reason, she refuses to take a leviratic husband, then at least part of the marriage consideration (after certain deductions have been made depending on the number of children) will be refunded and the marital ties will thereupon come to an end. But should a widow object to a leviratic relation but continues to bear children before formal dissolution of marriage then the following rules may apply.

A: If the natural father is the member of the deceased's family (brother/cousin) or belongs to the same clan then the child will be considered as the lawful child of the deceased husband. That is on the assumption that the natural father would become a levirate husband.

B: If the natural father belongs to a clan other than that of the woman's husband, then it depends on whether the deceased husband's clan is in the habit of incorporating illegitimate children into their family membership. If the clan normally adopt illegitimate children, then they will have the option both to divorce the woman and claim recovery of the marriage consideration- with whatever deductions should a woman have legitimate children- or keep the woman and claim guardianship rights over the child.

#### **MARRIAGE PAYMENTS, ADOPTION, LEGITIMATION AND ACKNOWLEDGEMENT**

##### **a) Marriage payments and Legitimacy of children:**

About the nature of marriage payments and the rules governing illegitimate children by a woman during coverture, among the Nyimang, Nadel writes:

The aspect of the bride-price as a 'price' paid for the fertility of woman is manifest in the common rules of levirate marriage, *in the familiar rule that 'children go with the*

*bride-price*', and, above all, in the regulations concerning the refund of the bride-price (Nadel, 1947: 405). (Emphasis added).

Nadel is stating a general customary law principle, often discussed by some students of African traditional legal systems. Writers on African traditional laws believe that 'marriage payments'- sometimes inappropriately referred to as "bride-price"- is meant to buy woman's fecundity to bear children on behalf of the husband.<sup>35</sup> Accordingly payment of marriage consideration creates in the husband legal right over the woman's children even those who were born in adultery by the woman.<sup>36</sup>

Referring to other African societies with similar institutions, Poulter tells us that in Lesotho all children born by the woman whether fathered by the husband or born of adultery will be considered as legitimate children of the husband while a valid marriage subsists. (Poulter S., 1977: 75,78)<sup>37</sup> In Yorubaland of Nigeria a child of an illegitimate union will be considered legitimate, for purposes of property devolution, provided that its natural father has acknowledged it. (Coker, 1958; Nwogugu, E. I., 1964: 95) In line with the above Nigerian custom Ademola C.J.F. states that:

"Unlike England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimated by subsequent marriage of the parents. ... Children ... [who] are issues born without marriage can also be regarded as legitimate for certain purposes, if paternity has been acknowledged by the putative father."<sup>38</sup>

Obi also refers to the existence of a similar custom among the Ibo of Nigeria where an illegitimate child of a woman or a widow would be considered as a legitimate child of the woman's husband. That is so, whether the husband was dead or alive, provided that marriage payment was not refunded to the husband or his family. (Obi S.N.C., 1963: 190)

The legal position is not different from that prevalent at the early common law system under which a child conceived or born during coverture was presumed as the

legitimate child of the spouses<sup>39</sup>. Likewise, under Islamic law, which adopts a more rigorous attitude toward illegitimacy, the presumption is also that a child born during marriage is regarded as the legitimate child of the woman's husband<sup>40</sup>. Non-access to one's wife during the possible time of conception does not necessarily refute the presumption of legitimacy. The accepted *Hadith* (traditions of the Prophet) is that 'the child is for the bed [*firash*] and stoning for the fornicator'; unless of course the husband adopts the procedure of *lian* (malediction or imprecation)<sup>41</sup>.

However, a caveat is necessary against the above sweeping generalization especially when Nyimang conception of child legitimacy comes under scrutiny. It is true that some informants indicate that all children by a married woman would be regarded as the lawful children of her husband. However, my own field investigations, as has been indicated above, reveal an important point of divergence where it is found that, for certain Nyimang clans, an illegitimate male child (*tudu*) can never be incorporated into the membership of its mother's husband's family. The group of clans who observe female sexual morality, particularly *Shiro-wa*, *Maryama*, *Modu* etc. absolutely reject or rather abhor 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*, *Sabyang*, *Jiyu* and *Kilang* readily accept them as their own though with certain limitations. Nevertheless, acceptance or rejection of an illegitimate child by some clans does not in itself affect its welfare rights and other social benefits within its mother's husband's family equal to other legitimate children.

Furthermore, exceptions exist to the above general rule as regards other Nuba tribes. In tribes of Heiban, Otoro, Tira and Moro 'payments made to procure a wife' do

not necessarily determine social and legal position of children born by the woman. That is so since these societies do not exhibit any marked 'discrimination against illegitimate children' (Nadel, 1947: 125, 226). In almost all Nuba tribes, including the Nyimang, 'marriage payments' are essentially a 'focus of kinship relations' (Nadel, at 124). Thus, the formula commonly stated about African societies that 'children go with the bride-price' should not simply be understood as referring only to the buying of woman's fecundity as the term 'bride-price' itself would indicate. The above general principle should be understood as alluding to a number of social duties and legal obligations regarding the position of the child, whether legitimate or illegitimate, born by the wife. These include "the whole set of rights and obligations implied by – physical care, education, moral and economic responsibility" (Nadel, at 124). These norms are 'expressed most forcibly' through the medium of marriage payments (Nadel, at 124).

**b) Adoption:**

A marked difference exists between the concepts of adoption of children in African societies with that of their counterpart of Western welfare societies. In the Western welfare societies an adopted illegitimate child may become a full member of a totally stranger adopting family with full property rights. This arrangement while it is virtually unthinkable in some African societies seldom exists in others.<sup>42</sup> A caveat is, however, necessary when terms such as 'adoption', 'legitimization' and 'acknowledgement' are used in the Nyimang context.<sup>43</sup> Adoption of illegitimate children by certain Nyimang clans is carried out on a very superficial level. Nyimang law does not envisage that a child born out of wedlock would gain full legitimacy in point of law comparable with the rest of the children born during coverture. Thus, and since male illegitimate children could not be

entrusted to keep one's line-*mir*- they cannot, therefore, be adopted. Female children are not burdened with keeping one's line and may thus readily be adopted by all Nyimang clans. Furthermore, the Nyimang believe that females are incapable to communicate with ancestral spirits since they are not endowed with the necessary religious knowledge to do so. In addition female members of the family do not normally dissipate family property through inheritance or by payments of marriage considerations but are rather regarded as a source of family wealth. Adopting them would, therefore, increase the chances of generating more wealth within the family rather than taking the risk of dissipating it.

**c. LEGITIMIZATION and ACKNOWLEDGEMENT**

The Nyimang are able to distinguish between fatherhood in fact and that in law. A person can acquire legal paternity over a child even if he is not the natural father through the process of 'legitimation'. 'Legitimation' may, therefore, be exercised by a person other than the natural father upon payment of a certain amount of customary fees. That would be done for purposes of affiliating an illegitimate child into the woman's husband's family membership. The payment signifies legal acquisition of paternity rights over the child in which case the person will be considered as a putative father. This legal paternity, though will not confer a full status of legitimacy would, nevertheless, render the child to be entitled to some limited rights in property enjoyment as a member of the household. Such rights, however, will not extend, even within those clans who accept illegitimate children as their own, to the sharing of certain religious rites or succession to durable valuables, viz., cattle and land.

**i) Legitimization by payment of customary fees**

Two instances exist where a person may claim paternity rights over an illegitimate child: the first is where the child is of an incestuous issue (male or female) and the second is where the natural father of the child cannot be identified or where the natural father declines to acknowledge his paternity. In situations classified as incestuous the child can never remain with its maternal family and thus cannot be claimed by its natural father but must of necessity accompany its mother upon marriage. In cases where the biological father of an illegitimate child could not be identified or if he declines acknowledgement then the maternal family has a choice either to keep the child or give it away with its mother upon marriage. Customarily, the amount payable as a legitimization fee is one cow. As a rule legitimization fee must be paid separately in addition to the normal marriage consideration. Children so adopted are mockingly called *baring* (lit. a calf). Even if a person does not want to adopt his wife's illegitimate child, the child will still accompany its mother (especially when so young) to her new home and would thus become part of the mother's husband's household. In such cases the child may be brought up by the mother's husband either by way of charity or else may be paid a token by whoever claims the child afterwards.

Generally, a person marrying a woman with an illegitimate child, whose natural father is unwilling to acknowledge, would be most reluctant to pay legitimization fee unless the situation is such that the child will not run to its natural father in the future, e.g., being of incestuous issue. Experience had it that, in the majority of cases, an illegitimate child (whether male or female) will run away to join its natural father when the bitter truth is discovered. For that reason, a person paying the legitimization fee may require that the natural father take some rigorous oaths, to ensure that he will not assert or accept future

paternity claims. Customarily the natural father, upon giving up the claim, may be paid a goat known as (*g*)*kenyu kwodu* (lit. a goat for the semen).

## ii) Legitimization by acknowledgement

Acknowledgement is normally done either by the natural father admitting his paternity of the child or his family members might do it on his behalf in case he is already dead. It should, however, be remarked that mere acknowledgement of the child's paternity would not in itself change the social or legal status of a person born *tudu* (illegitimate). Thus, and in order to change the legal position there must be some formal acceptance through performance of certain customary rituals by the natural father or his family. But performing acceptance rite would not actually affect the social status of the child though its legal status may be changed fundamentally in terms of property rights and other ritual connections within the new family.

Instances leading to acknowledging illegitimate children may arise in the following circumstances:

First, a person, who is unable to procure children, may acknowledge his only illegitimate child from another woman for purposes of property devolution or for purposes of keeping one's line or *mir* (lit. fire). Likewise, a person may die childless without acknowledging an illegitimate child of his (as he might not know that he had one). In fear to be named as heir, the closest kin of the deceased person would attempt to acknowledge the illegitimate child born to the deceased. When acknowledged, the child is accepted into the family membership and would be obligated to inherit his deceased natural father. It should be remarked, in this connection, that inheritance among the Nyimang is conceived

not only as succession to the deceased's material wealth but also to his personal sins and religious obligations as well (Kadouf, 1981). The heir would therefore be required to atone to all religious obligations that are left unfinished by the deceased. The heir is undoubtedly under both legal and religious duty to discharge all other material obligations incurred by the deceased during his lifetime. It is because of this onerous obligation that, among the Nyimang, only male children are obligated to succeed. In the absence of a male child the next of kin would normally succeed. However, the kin member may choose not to become an heir. Such an option is not open for a son who is destined to carry out his deceased father's obligations, whether social, legal or religious.

Second, another way by which a person may acknowledge his illegitimate child is rather subtle in nature. It may arise when a person performs the ceremony of 'beer-drinking' (*ashio twil* or *ashio lida*). This is another form of *rite de passage* the last of the age-class cycles in the life of a Nyimang man. A custom of metonymy or agnomination exist where a person performing such a rite will give up his earlier names<sup>44</sup> and be called after the name of his first born child (be it male or female), e.g., *ningé ma* – father of so-and-so. Thus if a person performing the rite of *ashio lida*, fails to bear the name of his first born child then that would indicate rejection of his fatherhood of the child.

Furthermore, as mentioned above, an illegitimate child in the Nyimang society is always under permanent social ostracization. For that reason it is a common practice that the child (male or female) may decide to run away or move physically to join the family of his natural father. This may naturally involve some complicated legal problems especially if an adult or a married illegitimate person opts to move physically to his/her natural father's family.

The newly found father would rarely refuse to accept or indeed acknowledge paternity. When acknowledging paternity, a person will perform a rite known as *wurau ilig* (lit. to make to enter into the compound).<sup>45</sup> This ceremony, which indicates practical acknowledgement of paternity and welcoming of the new comer, also signifies incorporation of the child into the family membership. However, informants indicate that in order to claim paternity rights over an illegitimate who joined the family membership at a later time, the natural father must have contributed to the upbringing of the child or pay a token gift to those who brought up the child.

#### **CONCLUDING SUMMARY**

This article has tried to explore, among other things, the relationship between the notions of illegitimacy of children and sexual morality among the Nuba with special reference to the Nyimang people. The rejection by some Nyimang clans to incorporate male illegitimate children into their family membership is a clear divergence from the stereotyped model traditionally advocated by some Africanists who claim that ‘inquiry into [the child’s] biological paternity was unlikely’ to arise in African context. It has been pointed out that in Africa, unlike in the modern welfare societies, child-parent relationship is not a purely legal construct, in which the legislature may base his choices on policy considerations. When a Nyimang is faced with the problem of illegitimacy, questions such as injured pride of the husband, the chances of recovering marriage payment, property entitlement upon the father’s decease, the eligibility of the child (particularly in the old days) to confer with ancestral spirits would normally take precedence over other considerations regarding child’s welfare.

Developments in the Nyimang customary institutions have brought about changes in their notions of child legitimacy. It has further been observed that the process of urbanization and cross-cultural mixes of the Nyimang people with other Sudanese communities seem to have produced the following easy- to- note trends:

- a) Considerable loss of family control over the activities of the youth.
- b) Some of the most cherished traditional family values and other social norms have started to wither away.
- c) Relaxation of sexual morality and greater permissiveness of unauthorized sex has alarmingly been noticed particularly among the youth. Furthermore, instances leading to greater sexual promiscuity are the availability and hence greater access to medical care with newly discovered economic opportunities that increased financial capability to obtain abortion. Worse still, the society has become less concerned about the position of illegitimate children. That may be due perhaps to the change of attitude toward illegitimacy, which does not seem at present, relatively speaking, to pose any real threat to the survival or the well being of the Nyimang society.

•0 The Nyimang(η) tribe lives in the area of the Nuba Mountains in the centre-west of the Sudan also known as Southern Kordofan State. They call themselves *Āma Medé kwa lad suei ëd*. Referring to the seven-and-a-half hill communities of Twana (*Tundia*), *Kodongol (Kurmuti)*, *Ngidil (Nihil)*, *Kari (Kakara)*, *Fojini (Fasso or al-Foss)*, *Kallara*, *Salara* and the half being the *Shiro-wa (Hajar Sultan)*. The names in brackets are now popularly used to refer to these sub-tribal communities as they were by the neighbouring Arabs.

•7 The material for this paper was collected at different intervals. It started in the summer 1978 and continued to be updated periodically in the years: 1986, 1992, 1996, 1998, 2000 and June 2004 respectively.

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<sup>1</sup> See Judgements (Basic Rules) Act 1983, which places custom at the 6<sup>th</sup> place when enumerating sources of law to refer to by presiding judges when there is no legislation governing certain matter before the court. Tribal customs were normally not referred to since most of the judges and practicing lawyers are ignorant of their existence and since little of such customs are recorded any way.

<sup>2</sup> Nadel, S. F., *The Nuba: An Anthropological Study of the Hill Tribes in Kordofan*, Oxford University Press, (London, New York, Toronto), 1947, 1

<sup>3</sup> Ibid, 2

<sup>4</sup> Cf. Nadel, Ibid. Pp 484-6

<sup>5</sup> During the colonial era, the British policy was dogmatically and flagrantly against spread of Islam and Arabic culture in the area of the Nuba Mountains. However, after independence the National governments were no less fervent except this time it was in favour of proselytising Islam and Arabic culture in the area. That was done in complete disregard of local customary practices even if such customs were not in any way contradictory to the Islamic faith.

<sup>6</sup> Hunud A. Kadouf, "Marginalization and Resistance: The Plight of the Nuba People", *New Political Science*, Volume 23, Number 1, 2001, p 46

<sup>7</sup> Wilkinson and McK Norrie state that: "The trend of modern statute has, however, been to assimilate the legal position of legitimate and illegitimate children in very nearly all respects" at 6. Also cf. the position of Islamic Shari'a, which does not recognise illegitimate children under any circumstances.

<sup>8</sup> Cf., The English Family Law Reform Act 1987, where the Act seems to have intentionally left out words such as "legitimate" or "illegitimate" when describing the child.

<sup>9</sup> Per Lord Wilberforce, in *the Amptill Peerage* [1977] AC 547 at 568.

<sup>10</sup> According to Nadel some Nuba tribes, particularly those professing matrilineal systems, illegitimacy does not pose any social problem. At 188

<sup>11</sup> Surat Al-Ahzab, 33:4,5.

<sup>12</sup> Cf., in particular: The English Legitimacy Act, 1976, where under s. 2 it mentions that an illegitimate child can be legitimated by a subsequent marriage of the parents.

<sup>13</sup> See generally George R G Clarke and Robert P Strauss, "Children as income-producing assets: The case of teen illegitimacy and government transfers", *Southern Economic Journal*; Chapel Hill; Apr 1998; Vol. 64: Issue 4 p. 827-856.

<sup>14</sup> See Smith, Lee; "The New Wave of Illegitimacy", *Fortune*; Chicago; April 18, 1994, Vol.: 129, Issue: 8 where he reports that: "In Brockton and across the nation, the stigma of illegitimacy is fading fast. The illegitimacy rate, at the same time, is soaring. Shawn is one of at least 1.2 million American children--30% of all babies—expected to be born out of wedlock this year. In 1965, Daniel Patrick Moynihan warned that the black family was headed for serious trouble because the black illegitimacy rate was 24%. Today it is 67% overall and, by some estimates, 80% in urban ghettos." At 82

<sup>15</sup> See generally Goode, op. cit.

<sup>16</sup> According to Smith: “Data on thousands of children collected for the Department of Health and Human Services show that: \* Kids from single-parent families, whether through divorce or illegitimacy, are two to three times as likely to have emotional or behavioral problems, and half again as likely to have learning disabilities, as those who live with both parents.” P. 83

<sup>17</sup> See Goode, *op. cit.*

<sup>18</sup> This is different from certain African traditional societies, similar to modern Western societies, in which parenthood would not necessarily be established through genetic ties to the child.

<sup>19</sup> Couvade practice in Moro correlates to the kinship structure. According to Nadel, “couvade expresses the emphasis on *paternal* importance in a patrilineal kinship group in which matrilineal element almost hold the balance.” At 265. Emphasis added.

<sup>20</sup> 406 U.S. 164 (1972).

<sup>21</sup> *Ibid.*, at 175.

<sup>22</sup> Cf., Nadel who mentions that in tribes of Heiban and Otoro, “Sex morality-marital and pre-marital-is completely lax. Virginity of the bride is appreciated-vaguely and in a platonic fashion. It is rarely, if ever, a reality. The girls in Otoro and Heiban are familiar with methods of preventing childbirth or procuring an abortion.” At 119. He also mentions the same situation of sexual morality exist in tribes of Tira, Moro and Korongo and Masakin. As regards the latter group of tribes he mentions that the general moral conception in these tribes “...is one of complete equality of the sexes with regard to premarital, and even marital, sexual liberty.” At 289

<sup>23</sup> This customary practice is different from what resembles ‘courtship’ in the neighbouring Baggara tribes of Sudan in Kordofan.

<sup>24</sup> In the old days, *kwuni* (shaman) when initiated into *kwueer* (head shaman for want of a better translation), all his viziers and clan members of both sexes must not get married or engage themselves in any sexual intercourse of any nature unless the consecration period was over.

<sup>25</sup> For example: it was an offence if the youth, of both sexes, should get into sexual contacts while staying at the cattle camp. All sexual games were banned until the time the youth moved from the cattle camps. This custom is withering away and nowadays is seldom observed by the youth. A girl’s chastity may be marred by a mere caress of her breasts by a male partner. Purification rites must be performed otherwise the issues of the girl will not survive.

<sup>26</sup> This does not mean that girls in these clans are not bound by the code of sexual morality; but rather that the emphasis of such observance is on the male side. This is also true with the other group of clans who sanctify girl’s morality.

<sup>27</sup> For some detailed rules and performance of this rite, see Nadel, *ibid.*, 385

<sup>28</sup> It is customary that members belonging to clans sanctifying male sexuality must necessarily perform circumcision rite before they get married. A taboo is attached to a child who was born to an uncircumcised person even if the parents subsequently get married. Such a child is known as *sobuding*. A *fwir tègléng* in a sense is synonymous to *sobuding* because the period of seclusion was not completed.

<sup>29</sup> The performance of this purification ceremony, particularly in the old days, had far-reaching financial implications. Nine goats a ram and in certain cases an ox would be slaughtered *en mass* and a big feast would be held in which *ashi* (local beer) would be served in abundance to the public.

<sup>30</sup> There is no unanimity in the exercise of expiation rites between different clans whenever there is and infringement of sexual code warranting such atonement.

<sup>31</sup> Some informants indicate that the sanction was social rather than religious. The society would always be keen to know the father.

<sup>32</sup> This traditional custom is withering away due to the Islamic influence

<sup>33</sup> Customarily the divorcing husband will wait until the woman gets married. The claim for the refund would normally be suspended until marriage consideration was paid to the woman’s family by the new husband.

<sup>34</sup> The custom of leviratic marriage whereupon the children of the widow in law belong to the deceased husband is widely practised in most African societies. See for example: Phillips A., and Morris H.F., Marriage Laws in Africa, London, 1971, 52 ff.; Cotran E., Casebook on Kenya Customary Law, 1987, 185; Poulter S., “Marriage, Divorce and Legitimacy in Lesotho”, [1977] 21 JAL 66 at 75; Hunud A. Kadouf, An Outline of Dinka Customary Law, Customary law mono.

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- Series No. 2, Faculty of Law, University of Khartoum, 1976; Elias T.O., The Nigerian Legal System, London, 1962, 298; Roberts S., Botswana: Tswana Family Law, London, 1972.
- <sup>35</sup> Exceptions to this rule exist in matrilineal societies of Korongo and Masakin where the marriage payment does not imply the 'purchase' of woman's fertility. See Nadel, 289
- <sup>36</sup> See Nadel, *The Nuba*, who mentions that this customary practice invariably exists in tribes of Heiban, Otoro, Tira and Moro. As for Tira and Moro Nadel says: "Children born of an illicit union 'belong to the bride-price', i.e. the legal husband can claim all children born or even conceived by his (if her pregnancy is sufficiently advanced to be visible) until he has received the refund of the bride-price." At 226
- <sup>37</sup> According to Poulter, maxims such as "a married woman has no bastard", "cattle beget children" and "the child belongs to the beast", are commonly heard in Sesotho. Ibid. This is also true in the Nyimang in regard to female children. Cf. Islamic concept of *awlad firash* (a child belongs to the matrimonial bed) and the Common law position where the presumption was always in favour of a child born during coverture to be regarded as the legitimate child of such marriage-see Banbury Peerage case (1811) 1 SIMM and St. 153, cited in Cretney S., Principles of Family Law, London, 1984.
- <sup>38</sup> *Lawal v. Younan* (1961) All. N.L.R. Part II, 245.
- <sup>39</sup> Banbury Peerage Case (1811) 1 Sim. and St. 153
- <sup>40</sup> This presumption holds only when the child is born within the limits of what is considered as the minimum or maximum period of gestation. See generally the Holy Qurān: *Surah* 46 Verse 15 and *Surah* 31 Verse 14.
- <sup>41</sup> *Surah* 24: Verses 6-9.
- <sup>42</sup> See Nadel, *The Nuba*, where he mentions that in Heiban there are no "adoptions in the full sense of the word, for they do not affect the clan membership of the adopted children". At 121
- <sup>43</sup> These terms should not be understood as being synonymous to that under English law. Under English law an adopted child becomes by law the legitimate child of the adopting family with the same rights of a legitimate child. See Cretney, supra, n. 4 at 468. In Italy, for example, the Constitution though gives priority to legitimate children; yet it also provides for protection of illegitimate children. This protection, however, must be compatible with the rights of legitimate family members. See generally on this point: Hamilton C., and Standley, K., Ed. Family Law in Europe, 1995, Butterworths, at 291-292.
- <sup>44</sup> There are three cycles in the life of a Nyimang individual. Each time a new cycle starts a person would acquire different set of names from his peers, friends and family members. The first cycle begins at birth where a number of childhood names are given. The second starts upon circumcision. This phase of one's life signifies manhood. At this stage childhood names would be discarded and a new batch of names would be given. It is considered impolite to call a person with his childhood name after a person has performed the circumcision rite. The last of these important phases of a Nyimang life cycle is the performance of the rite of *ashio twil/ ashio lida* (Lit. the rite of beer drinking).
- <sup>45</sup> When performing the rite of *wurau ilig* a goat may be slaughtered followed with libations of *ashi* (local beer) and prayers to the ancestral spirits to bring blessing, protection and posterity to the coming child.. This signifies physical as well as religious and spiritual adoption of the new comer into the family membership.

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