

THE FWE OF THE EASTERN CAPRIVI ZIPFEL

A STUDY OF THEIR HISTORICAL AND GEOGRAPHICAL
BACKGROUND, TRIBAL STRUCTURE AND LEGAL SYSTEM,
WITH SPECIAL REFERENCE TO FWE FAMILY LAW AND
SUCCESSION

by

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INTRODUCTION

This study is a descriptive study of the historical and geographical background, the tribal structure and the legal system of the Fwe of the Eastern Caprivi Zipfel, with special reference to Fwe Family Law and Succession. It is the result of research which took place over a period of seventeen months, between April 1967 and November 1968, of which twelve months were spent in the Caprivi Zipfel, three months in Pretoria and two months in London.

Planning the research project

No anthropological, linguistic, historical or geographical study of any of the Caprivi tribes has yet been undertaken. The complete dearth of secondary sources concerning the territory and its inhabitants played an important part in determining the approach to and the scope of this study.

A detailed account of the geography, history and demography of the Caprivi was compiled and in addition an investigation of the Fwe kinship structure and social organization and their judicial process was carried out. This study provided cultural framework within which Fwe law operates.

As a description of the entire body of Fwe customary law would have been beyond the scope of an introductory study such as this, research was limited to only one category of Fwe traditional law. In deciding upon the delimitation of the category to be researched, the "delimitation of the province of customary law", suggested by the Symposium on the Future of Customary Law in Africa, held in Amsterdam in 1955, was followed.¹ Here African Customary Law was categorized as follows:²⁾

- (a) Family Law and Succession;
- (b) Law of Immovable Property;
- (c) Law of Movable Property;
- (d) Law of Contract;
- (e) Law of Delicts;
- (f) Criminal Law;
- (g) Evidence and Procedure.

1) Afrika-Instituut Leiden. The Future of Customary Law in Africa - Symposium 1955.

2) Ibid., p. 257.

The category Family Law and Succession was chosen as it forms the main body of Fwe litigation and indeed is the largest branch in Fwe customary law. The major part of this study is in the form of a re-statement of the rules which make up this branch of Fwe customary law, as applied by the court of the Chief of the Fwe, Chief Simasiku Mamili, at his headquarters at Chinchimane, one hundredkilometres south-east of Katima Mulilo.³⁾

This restatement is supported by summaries of cases heard in the Fwe customary court, by extensive discussions based on court cases, and where in certain areas of dispute no cases were recorded information was collected through interviews with both customary judges and ordinary members of the tribe (cf. Methods of investigation).

Methods of investigation

- (a) Three months were spent in Pretoria and two months in London, during which time a systematic examination of all available secondary sources possibly containing references to the Eastern Caprivi Zipfel or its peoples were carried out.
- (b) The court records of Mamili's court were examined as far as they were available, i.e. from 1963 onwards, as well as correspondence pertaining to a few cases.
- (c) Field work: For the most part the investigation both with regard to customary law and to the kinship structure and social organization of the Fwe, took the form of personal interviews and discussions, with the following people:
 - (i) With the Chief and his councillors at the Fwe court.
 - (ii) With other leading personalities in the tribe, such as headmen, teachers, and government employees.

The bulk of the investigative field work was done in the tribal court ("kuta") of the Fwe with all or most of the customary judges present. Because Chief Mamili's court has jurisdiction not only over the Fwe proper but also over the Mbukushu, Yeyi and Subiya within its area of jurisdiction, there was a possi-

3) A restatement is defined as follows: "A restatement of the law is a systematic, analytical and comprehensive account of a branch of law which is unwritten or to be found in a variety of sources or which has diverged in application by different courts; it is generally unofficial". Gluckman, M. (ed.) 1959: Ideas and Procedures in African Customary Law, p. 13.

bility of a conflict of law arising between Fwe law as practised in a homogeneous Fwe village and Fwe law as it is applied in the tribal court. Consequently all data received at the tribal court was again controlled with other Fwe sources.

- (iii) This control was carried out principally in Sibinda, a homogeneous Fwe village and one of the oldest known settlements in the Eastern Caprivi Zipfel. The principal informants were the headman and senior men of the village. The bulk of the investigation work with regard to Fwe social organization was also carried out in this village.
- (iv) Interviews were conducted with officials of the Department of Bantu Administration and Development, the Department of Health and the Department of Forestry, as well as with employees of the Roman Catholic Church and Seventh Day Adventist Church.

PART I

THE HISTORICAL AND GEOGRAPHICAL BACKGROUND

CHAPTER I

GEOGRAPHICAL BACKGROUND

1. Geographical location

The Eastern Caprivi Zipfel is the eastern part of the Caprivi Zipfel, a narrow strip of land jutting out of the north-eastern corner of South West Africa, between Angola and Botswana and bordering on south-western Zambia.

The borders of the Caprivi Zipfel, created by the Berlin Conference of 1889, are as follows:¹⁾

The northern border of the Caprivi Zipfel follows a straight line along latitude 18° S from the Okavango River to a point on the Zambezi River immediately upstream from the Katimo Mulilo Rapids; from there it follows the main stream of the Zambezi River as far as the confluence of the Zambezi and Chobe Rivers.

The southern border follows a straight line parallel to the northern border and 30 kilometres south of it from the Okavango to the Linyanti River. From there it follows the main stream of the Linyanti as far as the confluence with the Zambezi River (where the Linyanti is also known as the Chobe).

An imaginary north-south line about eight kilometres west of the Linyanti River marks the border between the Western and Eastern Caprivi Zipfel.

The Western Caprivi Zipfel is a nature reserve occasionally inhabited by wandering bands of Mbarakwengo Bushmen.

Further details of the Eastern Caprivi Zipfel's borders are contained in the Eastern Caprivi Zipfel Administration Proclamation, 1939 (Proclamation No. 147 of 1939), of the Republic of South Africa.

2. Climate

The climate is sub-tropical with a mean temperature of 22° C. The cold period (winter) lasts from May to August, June being the coldest month with a mean temperature of 16° C. During the latter period the

1) For more details about the Berlin Conference's agreement on the Caprivi Zipfel, see Chapter VI of Part I below.

climate is mild and dry, warm to hot during the day and cool during the night with occasional frost during June and July. During June the temperature drops to below 5°C for four days out of the thirty, on average.

The hot period (spring) lasts from September to November, October being the hottest month when on 28 out of 31 days, the temperature exceeds 27°C.

The wet period (summer) starts in December and lasts until the end of March, characterized by heavy storms as well as set-in rains lasting as long as ten days. The total annual rainfall varies from 375 mm. (1932-33 and 1937-38) to 1 000 mm. (1938-39 and 1939-40), the average being about 625 mm. per annum. The variation factor is very high and the rainfall decreases sharply towards the south-west, where the annual average is estimated at about 500 mm.

The main wind directions are easterly during the cold period and northerly in the summer.

3. Topography

The Eastern Caprivi Zipfel lies at an average altitude of 930 metres. The highest point is 948 metres and the lowest 911 metres above sealevel a variation of only 37 metres over an area of 11 520 kilometres.

The territory is slightly inclined towards the south and east where it becomes submerged by the vast swamps of the Linyanti-Chobe and the Zambezi Rivers. The territory can be roughly sub-divided into three regions: an upland region, a lowland region and a swamp and marsh region.²⁾ The latter region more than doubles its area during the wet season, when large parts of the lowland region are inundated by the rising floodwaters of the Zambezi River as well as the Kwando-Linyanti-Chobe river systems and by the masses of rainwater that accumulate on low-lying ground and in eroded troughs.

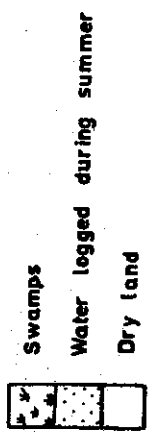
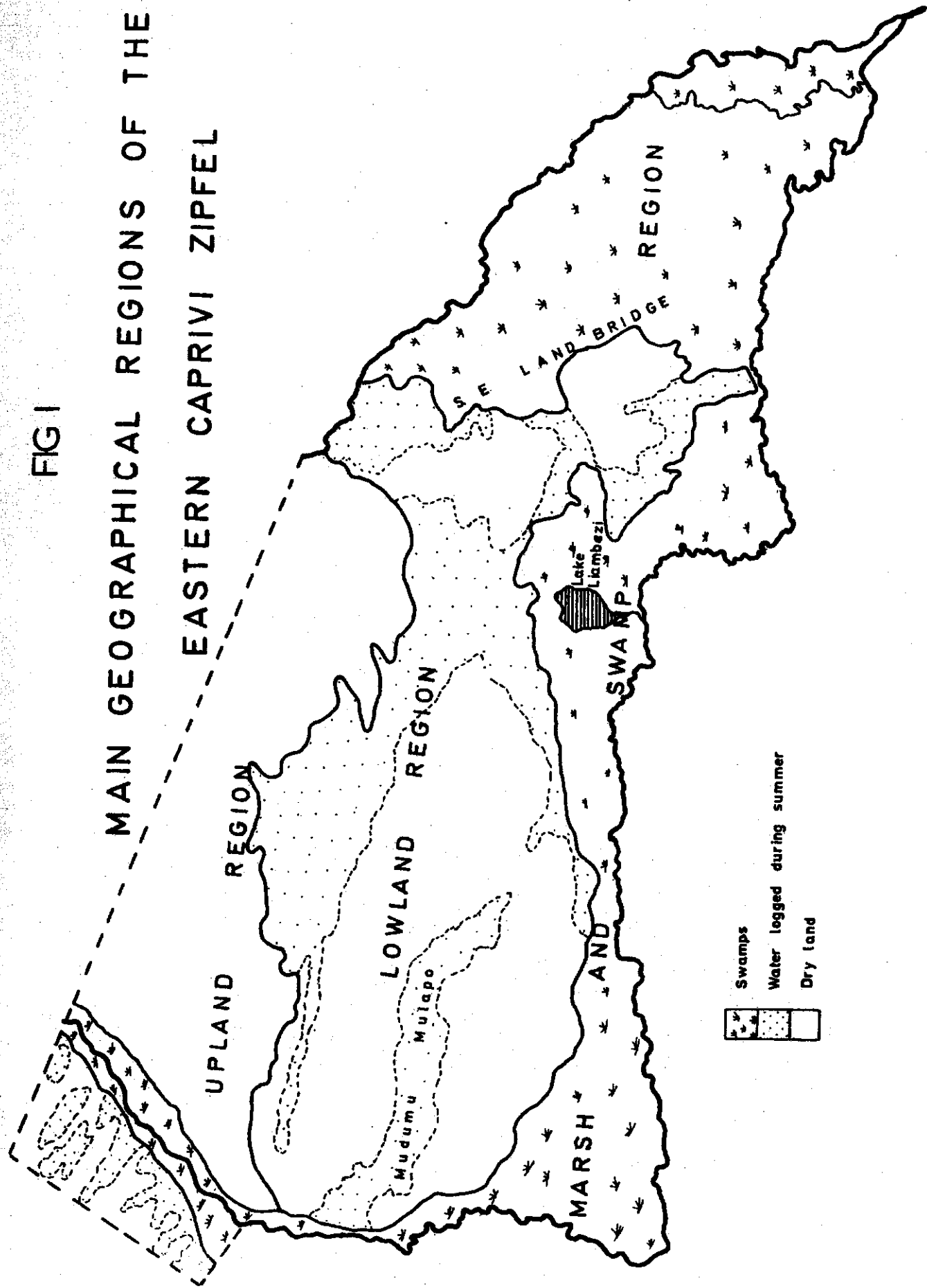
a) Upland Region

This is the somewhat elevated north-western region which fans out from the north-western corner of the territory, as far as Katima Mulilo in the east and approximately as far as the Katima-Mulilo-Sibinda-Kongola main road towards the south-east and south. In the east it ex-

2) See Figure I: The Geographical Regions of the E.C.Z.

FIG 1

MAIN GEOGRAPHICAL REGIONS OF THE
EASTERN CAPRIVI ZIPFEL



tends beyond this road in the form of a few isolated low-lying (barely discernable) ridges.

In the centre it is deeply indented by the northwards expanding seasonal swamps and floodplains of the Lowland Region.

b) Lowland Region

This region forms a buffer zone of varying width between the Upland Region and the Swamp and Marsh Region. Its most important feature is a wedge-like extension, starting at Katima Mulilo and piercing the Swamp and Marsh Region towards the south-east, which reaches the Chobe River at Ngoma. This vital landbulge or "peninsula" is the territory's life-line to the outside world.

c) Marsh-and-Swamp Region

This region includes the rivers which (with the exception of a 128 kilometres long stretch along the northern border with Zambia) surround the territory, and the more or less permanent swamps and marshes (mulapo)³⁾ which extend into the interior of the territory from these rivers. This region is expanding perceptibly year after year and presently forms between one-quarter and one-third of the total area of the territory. The rivers dominate the social and economic life of the territory's inhabitants.

(i) The Zambezi River: On its north-eastern border the territory is bordered by the Zambezi River. After cascading over the Katima Mulilo Rapids, where it enters the Caprivi, the Zambezi meanders over a broad flood plain more than 110 kilometres long, until it crosses the Mambova Rapids, north of Impalila Island. Over this entire distance the fall is only 7.7 metres.

At the height of the annual flood season, which usually reaches its maximum levels during March or April, the Zambezi rises between 5 and 8 metres (measured at Katima Mulilo). In normal years the population of the eastern sector of the territory have to retreat to isolated higher-lying areas barely large enough to accommodate small clusters of huts, and the only communication is by dug-out canoe. However, when the flood reaches 8 metres the entire eastern quarter of the territory has to be completely evacuated.

3) A full description of this characteristic feature of the Caprivi landscape is included in paragraph 3(d) below.

Along the Bukalo mulapo (seasonal marsh) the Zambezi floods have broken through the south-eastern land bridge of the Lowland Region and in 1958 the trapped flood water of the 1958 floods formed a new lake, Lake Lyambezi, south of the land bridge. Whenever the flood level exceeds 6 metres at Katima Mulilo a great mass of shallow water inundates the eastern parts of the territory and, flowing along the Bukalo mulapo cuts through the Lowland land budge into Lake Lyambezi.

(ii) The Kwando-Linyanti-Chobe: A river with four names marks the western, southern and south-eastern borders of the territory. The upper reaches of this river is known as the Kwando or Mashi. From where the Kwando enters the Caprivi near Singalamwe as far as the northern extremity of the Botswana border, it meanders across an eight kilometre wide flood plain, the main stream being bordered by thick, almost impenetrable, masses of reeds which continue all along the Caprivi-Botswana border as far east as Ngoma, in some places forming barriers over one and a half kilometre in width.

From the meeting point of the Botswana and Caprivi borders the plain broadens out and numerous channels branch out from the main stream, so that at the southern extremity it forms a vast, confusing maze of constantly shifting reedbeds, lowlying islands and shallow channels, about twenty-four kilometres wide. Here a wide, shallow channel, also called the Selinda Channel, enters the Kwando from the west, connecting it with the Okavango River. In high floods water from the Okavango spills into the Kwando, and vice versa.

In this area the Kwando is also called the Linyanti. South of the southern extremity of the Linyanti river system, the vast, treeless Mababe depression stretches southwards towards the Okavango marshes. Over this huge plain can still be seen the silted-up remains of the original riverbed of the Linyanti, now called the Savuti. A low-lying ridge blocks the way south and the Linyanti has been forced to wind its way in a north-easterly direction over a wide and flat flood plain towards Lake Lyambezi.

Between the Lake and the Zambezi the river is known as the Chobe. According to Oswell this is the oldest name of the river.⁴⁾ In the flood season the flow of the Chobe is reversed as the rising Zambezi waters stream overland and drain into the Chobe, pushing back along the Chobe

4) SCHWARZ, E.H.L.: The Kalahari and its Native Races, Witherby, London, 1928, p. 43.

channel as far as Lake Lyambezi.

The Kasane Rapids, a few miles south of the confluence with the Zambezi, forms a barrier to river traffic between the Zambezi and the upper Chobe.

d) Erosion

By geological standards the topography of the Eastern Caprivi Zipfel is changing extremely rapidly as a result of erosion. Consequently a brief summary of the process of erosion in the Eastern Caprivi is outlined:

There is an obvious over-all tendency towards increased waterlogging and inundation - the end-result of wind and rain erosion, initially caused by incessant fires and shifting cultivation. The fires, particularly, remove the protective cover from the soil, exposing it to the erosive effects of wind and rain. The Caprivi soils are extremely vulnerable to this type of erosion, consisting as they do mainly of fine, wind-borne Kalahari sands.

Soil exposure leads to the continuous erosion of small basins and new troughs, which in the course of time interconnect to form channels. Further erosion enlarges the channels until they form what is today perhaps the most characteristic feature of the Caprivi landscape - wide, shallow grass-covered basins winding through the woodlands, gradually eating their way deeper and deeper into the forests. They are called milapo (sing. mulapo).

These milapo grow wider and larger until they join up with the expanding seasonal swamps. They are gradually invaded by these swamps and as the ground water table in the mulapo consequently rises, neighbouring areas are converted, first, into seasonally waterlogged and, subsequently, into permanently flooded land.

This process is at its most visible along the south-easterly land bridge area of the Lowland Region. It is visibly weakening the protective barrier effect of the land bridge, which has gradually been levelled down and, in the centre, been broken through by the force of the Zambezi floods. In the north and south-west of this land bridge, e.g. in the vicinity of Lake Lyambezi, the soil has very recently been washed away over huge areas, and the formerly cultivated flood plains have been turned into marshes.

There is little doubt that the (chiefly) fire-initiated process of washing-off and levelling-down will eventually convert the remaining Upland and Lowland Regions of the Eastern Caprivi into uninhabitable swamps.⁵⁾

4. Soils

The basic material throughout the territory is light-coloured, very deep and fine (wind-borne) Kalahari sands.

In the north-western, somewhat elevated, region the soils consist almost exclusively of pure or humus-enriched sands, while the soils of the lower-lying southern and south-eastern parts are prevalently loamy sands or sandy loams which have been produced by alluvial deposits in the basic material.

5. Vegetation⁶⁾

Forests, woodlands and wooded savannas cover a total area of 690 000 hectares; 60 per cent of the territory. The remaining 40 per cent consists of marshes and swamps; meandering belts of milapo; and cultivated areas.

a) The Upland Region

The Upland Region is dominated by Baikiaea plurijuga (Rhodesian Teak or Mukusi). Other types found here are Baikiaea-Erythropleum Forest, Erythropleum-Combretum Woodland, and fire-devastated stages of Pterocarpus Baikaea Forest, Burkea-Pterocarpus Woodland, and Acacia-Burkea Woodland.

b) The Lowland Region

This area is characterised by the wide distribution of Colophospermum Mopane which in places are found in magnificent stands that extend for several kilometres. These mopane forests are among the finest sights in the territory and unparalleled elsewhere in Africa.

Other types of forest and woodland found in this region are Parinari forest, Burkea-Terminalia woodland, Terminalia-Acacia savanna, and Colophospermum-Parinari woodland.

5) BREITENBACH, F. von: Long-term Plan of Forestry Development in the Eastern Caprivi Zifpel, Department of Forestry, Republic of South Africa, 1968, pp. 20-26.

6) Loc. cit.

c) The Swamp-and-Marsh Region

In this region the swamps are covered by tall reed formations that extend for miles in every direction; the marshes by Ses-bania thickets.

This region is generally devoid of woody vegetation except for scattered clumps of Piliostigma-Phoenix woodland.

CHAPTER II
THE POPULATION

1. Population growth

South West Africa is one of the five African countries where the basis for population estimates is extremely poor¹⁾ and this is particularly true of the Eastern Caprivi Zipfel.²⁾

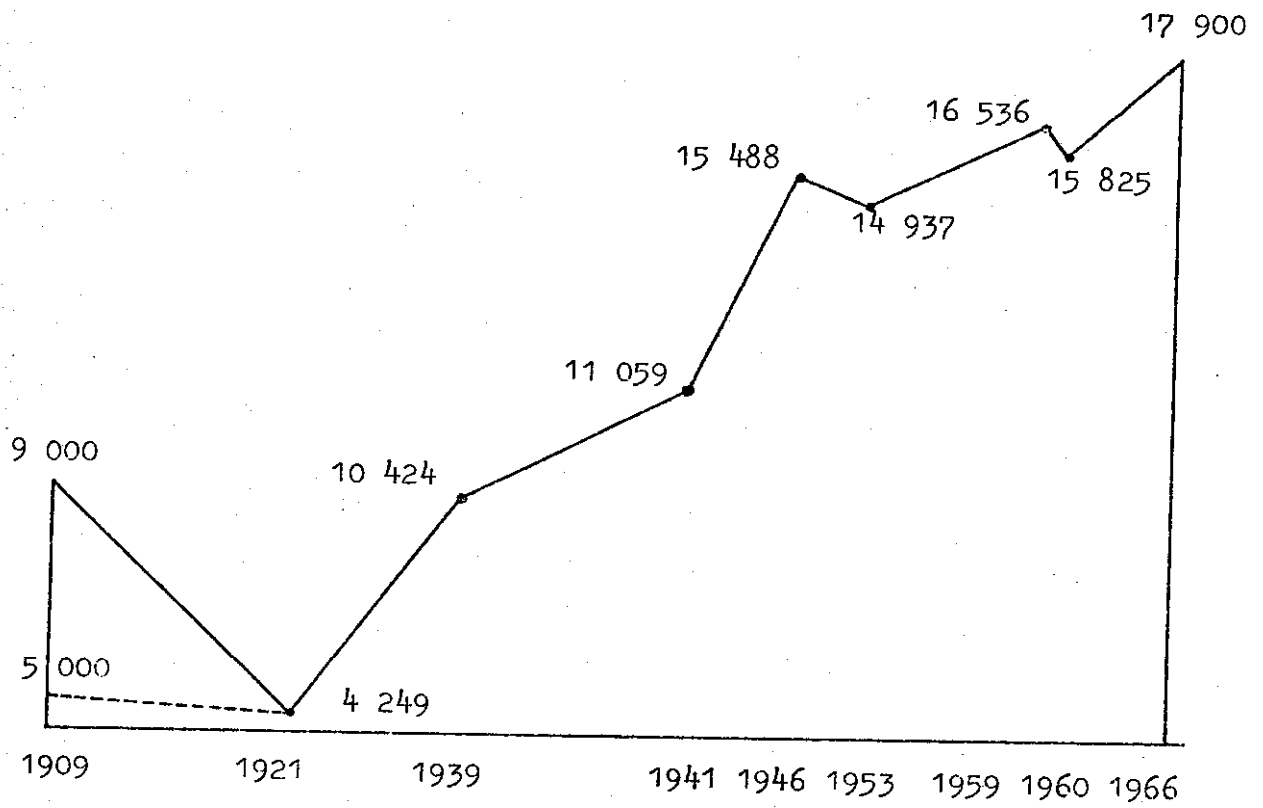
It is therefore extremely difficult to arrive at accurate population figures. The official figures (based on the 1960 census figures) are obviously wrong. Local officials estimate the population at roughly 22 000. My own estimate is at least 26 000.³⁾

The following illustration portrays the official population figures for the past six decades:

-
- 1) LORIMER, F.: Demographic Information on Tropical Africa, Boston University Press, 1961, p. 4.
 - 2) An investigation of the 1960 census found that in several areas entire villages had not been visited by the enumerators, who were semi-illiterate "constables" of the Magistrate at Katima Mulilo.
 - 3) Based on a projection which in turn is based on the known number of primary school children in the Caprivi schools (5 000) and the known composition of the population in other African countries (25 per cent in the 6 to 16 age group), with a further adjustment to allow for a large number of school-age children who are not going to school, estimated to number at least 1 200 children.

Table I.

Growth of the population of the Eastern Caprivi
Zipfel from 1909 to 1966.



| | | |
|-------|--------|----|
| 1909: | 9 000 | 4) |
| 1921: | 4 249 | |
| 1939: | 10 424 | |
| 1941: | 11 059 | |
| 1946: | 15 488 | |
| 1953: | 14 937 | |
| 1959: | 16 536 | |
| 1960: | 15 825 | |
| 1966: | 17 900 | |

4) The figure 9 000 is quoted in a report of 1940. An article in the Deutsches Kolonialblatt, Jahrgang 21, Nummer 1, gives Streitwolf's estimate in 1909 as 5 000.

The irregular growth pattern which emerges from the official population statistics (see Table I above) is not exclusively the result of faulty surveying. The undermentioned factors also caused fluctuations in the growth of the population.⁵⁾

(i) The tsetse fly

From time to time outbreaks of tsetse fly infestation have caused large-scale migrations. A particularly serious outbreak in the Caprivi, spreading eastwards from the Kwando River in 1948, is known to have reduced the 1948 cattle population of thirty thousand to barely eight thousand six years later. Entire villages migrated to Zambia in order to save their cattle, while others had to leave their villages and follow the migratory herds of big game, eking out an existence as hunters and gatherers of wild fruits. This partly explains the decrease in the population between 1946 and 1956 (see Table I).

(ii) Mobility of the population

The inhabitants of northern Botswana, the Eastern Caprivi Zipfel and Barotse Province in Zambia are traditionally a mobile population, moving freely from one part to another inside the vast area which formerly belonged to the Lozi empire. A succession of bad harvests, family squabbles, high flood levels, or outbreaks of cattle diseases were all sufficient reasons for evacuating a village site and moving to another area. The result has been an almost constant movement of population groups inside this area.

This tendency has been particularly marked, as far as the Caprivi is concerned, along the stretch of the Zambezi River which is the boundary between Zambia and the Caprivi. This division cuts right through the Subiya tribe, which occupies both banks of the river. It is known that large numbers of Subiya from the Caprivi migrated to river valleys north of the Zambezi during the early sixties, lured by the prospect of political independence for Zambia.⁶⁾

5) Cf. also letter from the Magistrate, Katima Mulilo, to the Secretary for Bantu Administration and Development, dated 2 July 1963. File No. 1/2/1, Magistrate's office, Katima Mulilo.

6) Information given by African sources. No figure could be established that would give an indication of the number of people involved. Father Raphael, of the Holy Family Mission at Katima Mulilo, said there was a great deal of movement in both directions with somewhat greater numbers going to Zambia. Mr. G. de Beer, Katima Mulilo, reported coming across several large settlements of former Caprivians living well north of the Zambezi River. He estimated that these groups totalled well over a thousand.

This flow has, according to informants, shown a tendency to decrease

(iii) Migratory labour

A large and varying number of men leave the territory to find work on the Copperbelt in Zambia, in Rhodesia and in South Africa. In Rhodesia they find work mainly on the mines in the Wankie area, as well as in Bulawayo. In South Africa they work mainly on the mines (e.g. about 300 leave annually to work in the Durban City Deep mine near Johannesburg).

Zambia's Zambianization policy, implemented since 1965, has sharply reduced the number of Caprivians who find work in that country, and the substantial increase in job opportunities inside the territory itself, caused by government-financed development programmes (building and road-making programmes, etc.), has partially succeeded in halting the exodus of males from the territory.

No definite figures are available, but an official estimated the number of males absent from the territory at any given time at about 1 000 (about 4% of the total population), but agreed that the figure could sometimes be double this estimate.

2. Population Density

The total land area of the Eastern Caprivi Zipfel varies from year to year, as the rivers which form the largest part of her boundaries change course as a result of high floods, silting up of channels, and with the appearance of new channels. The official figure for the territory's total area is 11 520 kilometres.

Between a third and a quarter of this area is annually inundated by floods making the actual land area available to the inhabitants even smaller. If the population is estimated at 26 000 the population density of the territory is 2.25 persons per square kilometre.

3. Distribution

The main features of the population distribution in the territory are as follows (see also Fig. 2):

(i) The population is clustered along the main waterways on the territory's western, south-eastern and north-eastern boundaries.

(ii) In the easternmost extremity of the territory, there is a heavy population concentration and the villages show a tendency to spread over the interior (which for the most part falls within the marsh and swamp region).

(iii) There are three other main concentrations, i.e. in the Singalamwe area along the Kwando River, in the Linyanti-Kanono area immediately north of the Linyanti River, and an inland cluster in the Sibinda area.

(iv) The villages are predominantly strung out in linear settlement patterns, more or less following the flood line.

(v) The eastern quarter of the territory, which is inhabited by the Subiya has a much higher population density, estimated to be nearly 4 per square kilometre; the western, drier three-quarters of the territory is much more thinly populated with a population density of about 1.8 per square kilometre.

(vi) In the western area there are two large inland areas which are completely uninhabited - separated from each other by the line of settlements running from east to west in the Sibinda area. (This is caused by the lack of water in these areas during the dry season.)

The above are the main characteristics which can be portrayed on a map. It can be further mentioned that there is a seasonal movement of the population in and out of the floodplains following the water level, and in the inland areas there is a tendency to have the gardens as far as five to nine kilometres away from the villages. During the crop-growing season (December to May) entire villages are often deserted, their inhabitants living in their gardens during this time. Extended hunting and fishing expeditions add to this fluid state of affairs.

From time to time the villages themselves break up and move a few miles because of the death of the headman, or because of unfavourable harvests, etc.⁷⁾

7) A detailed analysis of three villages in the Fwe area of the territory is presented in Part II, Chapter I.

4. Tribes of the Eastern Caprivi Zipfel

Wat van die Totela?

There are four tribes in the territory, the Fwe, Subiya, Yeyi and Mbukushu. The Subiya comprise about 38 per cent of the population, and occupy the easternmost extremity of the territory (about 25 per cent of the total area). The rest of the area is generally referred to as the Fwe area, but this area is in fact inhabited by three tribes, the Fwe proper being the largest (about 48 per cent of the population). The south-western corner of the territory (Sangwali area) is occupied by the Yeyi (about 9 per cent of the population), and along the Kwando River a large number of Mbukushu is scattered among the Fwe. The Mbukushu total about 4 per cent of the population.⁸⁾

There is a great deal of inter-marrying among these tribes, as well as between the Caprivian tribes and those of Zambia, as the analysis of two border villages along the Zambezi (Part II, Chapter I) illustrates. There is no clearly delineated boundary between the Subiya and Fwe, and the Paramount Chief of the Fwe, Chief Mamili, is genealogically of Subiya extraction, as are his more influential council members.

Bearing these factors in mind, a general idea of the distribution of the ethnic groups in the Eastern Caprivi Zipfel can be gained from the following table (Table 2)

With the help of the Forestry Officer, a map was compiled showing the distribution of the population in the territory and the geographical distribution of the various ethnic groups (Fig. 2).

8) The magistrate, Mr. E.C. Kruger, considers these figures should not be accepted too literally, but sufficiently accurate to be accepted as a rough indication of the relative strength of the various tribes.

Table 2. Bantu Population of the Eastern Caprivi Zipfel,
September, 1959. 9)

| Area | Tribe | Men | Women | Children | Total | Absentees |
|----------------|----------|--------------|--------------|--------------|---------------|--------------|
| Kabuta | Subiya | 134 | 187 | 372 | 693 | 127 |
| Ibolekwa | " | 115 | 129 | 213 | 457 | 25 |
| Kabbe | " | 209 | 303 | 558 | 1 070 | 159 |
| Ngoma | " | 217 | 314 | 646 | 1 177 | 73 |
| Impalila | " | 53 | 76 | 137 | 266 | 21 |
| Schückmansburg | " | 154 | 207 | 427 | 788 | 95 |
| Nongwali | " | 204 | 242 | 549 | 995 | 93 |
| Kalumbeza | " | 42 | 49 | 128 | 218 | 19 |
| Kalumbeza | Fwe | 150 | 213 | 393 | 756 | 76 |
| Mahundu | Subiya | 133 | 190 | 278 | 601 | 67 |
| Mahundu | Fwe | 44 | 66 | 86 | 196 | 25 |
| Sibinda | " | 431 | 811 | 1 108 | 2 350 | 108 |
| Kwena | " | 199 | 387 | 665 | 1 251 | 104 |
| Linyanti | " | 290 | 498 | 849 | 1 637 | 120 |
| Linyanti | Yeyi | 26 | 37 | 62 | 125 | 5 |
| Singalamwe | Fwe | 299 | 533 | 849 | 1 681 | 91 |
| Singalamwe | Mbukushu | 99 | 173 | 308 | 580 | 28 |
| Katima Mulilo | Fwe | 50 | 75 | 112 | 237 | 8 |
| Katima Mulilo | Mbukushu | 8 | 16 | 31 | 55 | 9 |
| Sangwali | Yeyi | 229 | 423 | 750 | 1 402 | 89 |
| TOTAL | | 3 086 | 4 929 | 8 521 | 16 536 | 1 342 |

Summary

The Fwe group, according to this table, represents about 61 per cent of the population:

Fwe proper: 48 per cent
 Yeyi : 9 per cent
 Mbukushu : 4 per cent
 61 per cent

The Subiya constitutes 38 per cent.

9) Census results for the year 1959, compiled by the Magistrate's office, Katima Mulilo, E.C.Z.

The actual composition of the population was therefore estimated to be as follows in 1968:

| | |
|----------------|----------------------|
| <u>Fwe:</u> | |
| Fwe proper | 12 480 |
| Yeyi | 2 340 |
| Mbukushu | <u>1 040</u> |
| | <u>15 860</u> |
| <u>Subiya:</u> | 9 880 |
| <u>Others:</u> | <u>260</u> |
| <u>TOTAL:</u> | <u><u>26 000</u></u> |

5. Non-Bantu ethnic groups

There is a small number of Barrakwengo Bushmen in the Eastern Caprivi, mainly along the Kwando River where they, for the most part, work for Fwe masters. There are a number of Bantu males who have marital relations with Bushman women as third or fourth wives.

There is also a small number of Euro-Africans - the 1960 census gave the number as six.

The number of Europeans have increased considerably during the past three years, and now number 70 adults.

Table 3. Number of European males in the Eastern Caprivi Zipfel categorized by nature of employment. 10)

| | |
|--------------------------|------------|
| a) <u>Non-government</u> | |
| Private trading | : 3 |
| Wenela | : 1 |
| Missions | : 3 |
| Construction | : 4 |
| b) <u>Government</u> | |
| General administration | : 3 |
| Medical department | : 2 |
| Bantu Development Corp.: | 1 |
| Education | : 2 |
| Agriculture | : 2 |
| Forestry | : 1 |
| Public Works 11) | : 5 |
| Police | : <u>7</u> |
| | <u>34</u> |

10) Number of employed European females is 12.

11) Including road- and bridge-building, vehicle maintenance, and general construction, but not including borehole drilling and other special projects.

Distribution

The white population lives at Katima Mulilo, a scattered settlement strung out along the south bank of the Zambezi from the Zambian border for a distance of about eight miles. This is the only place in the territory in which European settlement is allowed, but even here no European is allowed to hold freehold land.

6. Languages

The lingua franca of the territory is Lozi¹²⁾ which is the main language of the Barotse Province in Zambia, and also one of the five main languages officially recognized by the Zambian Government. It is a hybrid language, descended from the Sotho which was carried to Zambia by the Kololo. After the massacre of the Kololo males, the surviving women and children, who were all absorbed into the households of the Lozi aristocrats, ensured the continued existence of the Kololo language so that for instance Coillard and his Sotho evangelists were able to use Sotho books in their first schools. But the pure Kololo was rapidly replaced by a hybrid language, called Rotse or Lozi.¹³⁾ It consisted in the main of a simplified form of the original Sotho grammatical structure upon which the Luyi vocabulary was grafted, although a large number of Sotho words remain.

The majority of the adult Caprivi population has a fairly good knowledge of Lozi.

Lozi is the medium of education in the primary schools. The standard of Lozi as it is used in the territory is extremely low and the range of literature available in Lozi equally limited.

The use of Lozi as a lingua franca does not solve all the problems caused by the multiplicity of languages among the small population, particularly because in Zambia the educational authorities are not encouraging the development of Lozi as a medium of instruction in the same way as Swahili for example is being developed in Tanzania.

12) Many inhabitants still call the Lozi language, "siKololo", as the language of the Kololo was known a hundred years ago.

13) The same word. The oldest form is "Rotse"; the Zambezi tribes pronounce the Sotho "ts" as "z", and the Sotho "r" as "l".

We now turn to the indigenous languages of the territory.¹⁴⁾

Subiya is spoken in the easternmost part of the territory, from about 15° 15'E as far west as Katima Mulilo.

Totela has been recorded between 24° 15' and 24°E (probably in isolated communities).

Fwe is spoken from 24°E westwards as far as the Kwando River, where it intermingles with Mbukushu in the north and Yeyi groups in the south-west.

Subiya, Totela and Fwe, together with two other Barotse Province dialects, Toka and Shanjo, belong to the Tonga cluster of languages of Zambia.

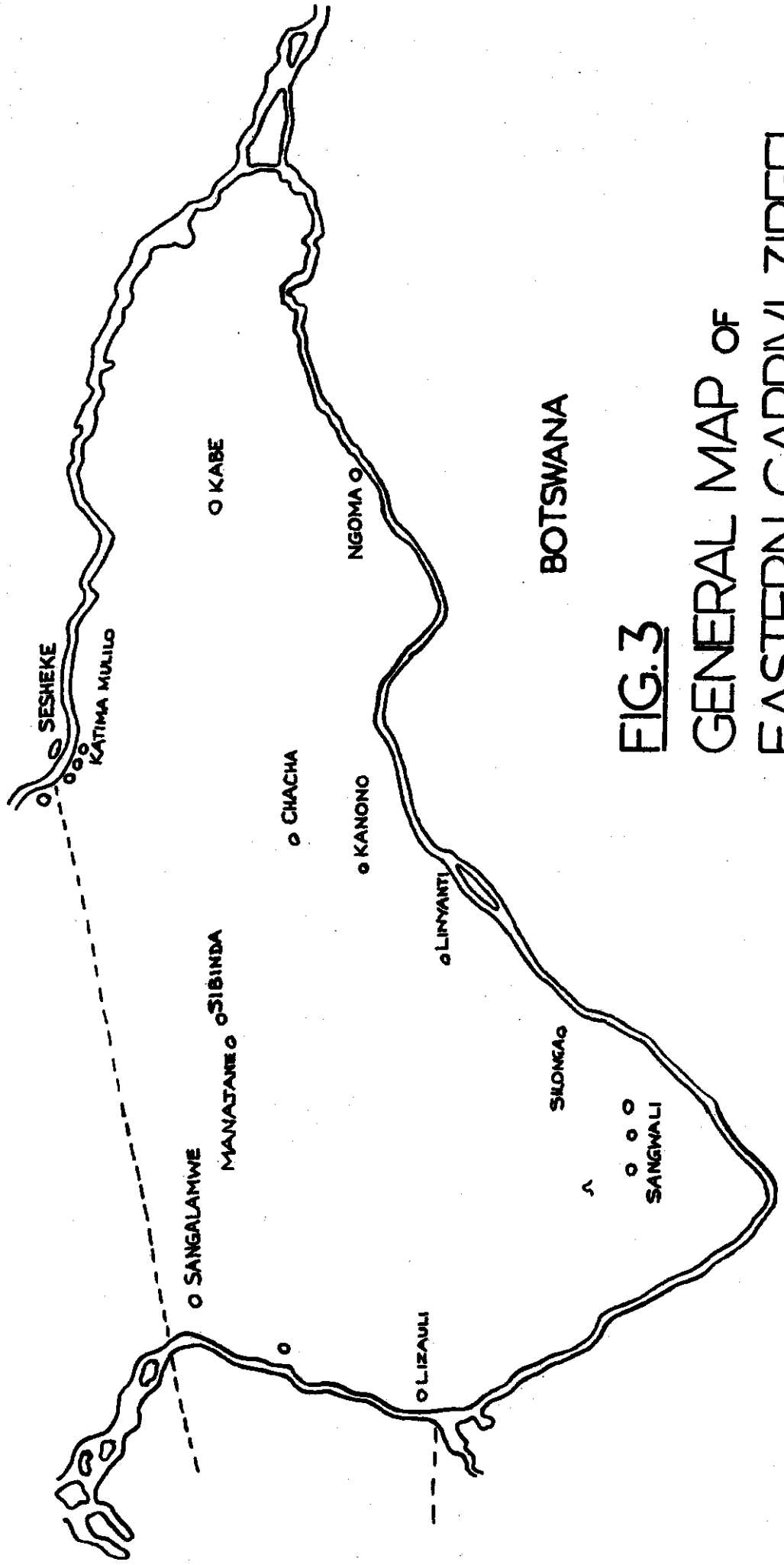
The Mbukushu which is spoken in the west, along the Kwando River, is a dialect of the Mashi cluster (North Kwando, Mashi, South Kwando, Mbukushu) which belongs to the Luyana group of languages.

Little is known about the Yeyi, but it is distinct from the Tonga and the Luyana languages. The Yeyi language appears in a table of languages in Doke's "The Southern Bantu Languages", but is not discussed. I tentatively place it with the north-western languages of Botswana, e.g. Tawana.

Apart from these languages another strange hybrid language is spoken in Linyanti, Chinchimane and vicinity (i.e. the immediate area of the Fwe chief's village and court). It is a mixture of Yeyi, Subiya, Lozi, Fwe and other languages, but mainly of Yeyi and Subiya. I lacked the time to investigate it further than this. It has no name, but is often used by the chief's council when it is in session. *Mbalangwe*

14) For the information on the distribution and classification of the Caprivi languages, I am indebted to a personal letter (of 27 January 1968) from Prof. George Fortune, Professor of African languages, University of Rhodesia, Salisbury, who had visited Barotse Province in 1962 and compiled word lists as part of a study of the languages of Barotse Province. The results of this research were published in the papers presented at the 17th conference of the Rhodes Livingstone Institute for Social Research, entitled, "The History of the Central African Peoples", Lusaka, 1963.

ZAMBIA



BOTSWANA

FIG. 3

GENERAL MAP OF
EASTERN CAPRIVI ZIPFEL

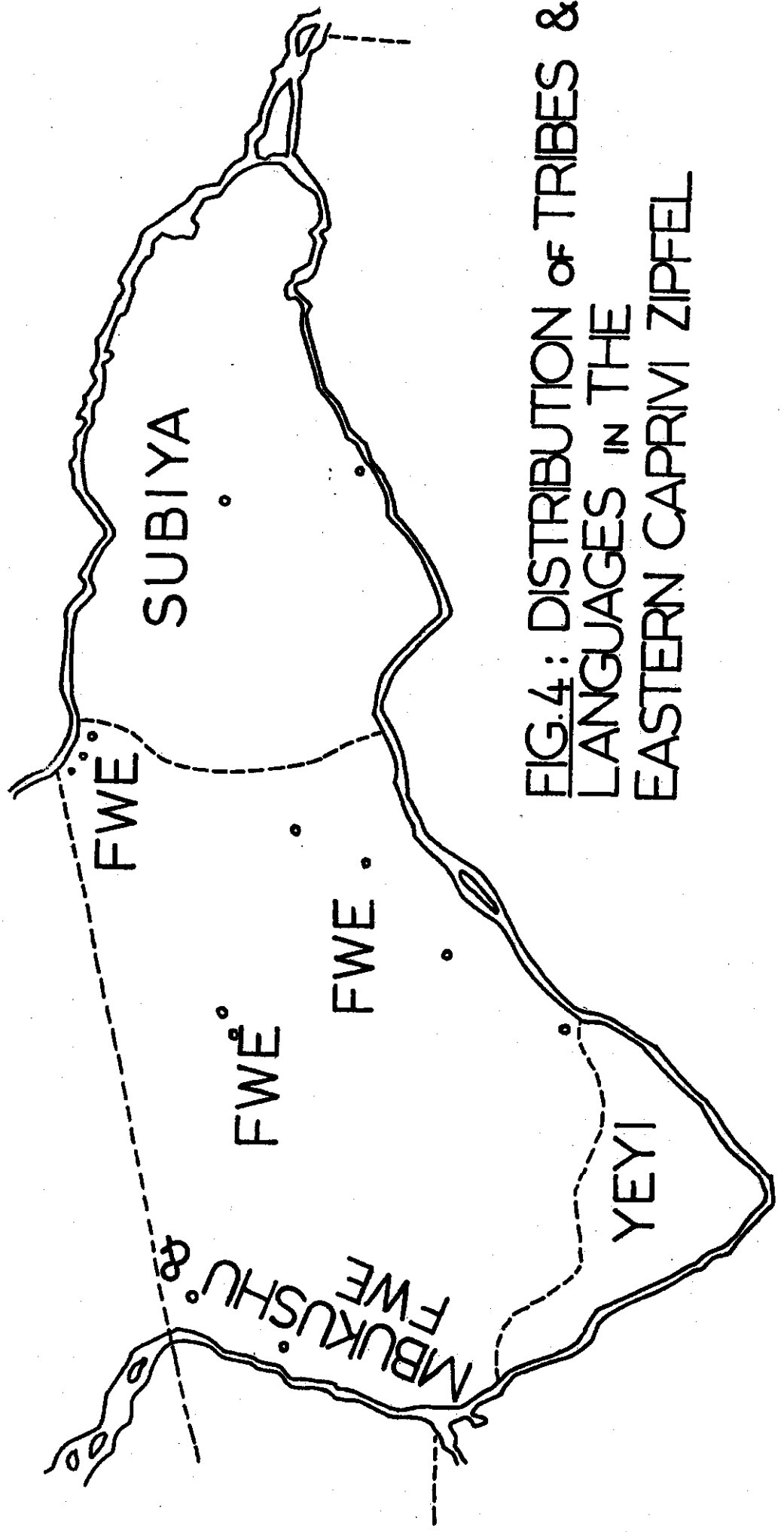


FIG.4: DISTRIBUTION OF TRIBES & LANGUAGES IN THE EASTERN CAPRIVI ZIPFEL

CHAPTER III

EARLY HISTORY OF THE CAPRIVI TRIBES1. Introduction

Very little is known about the origin of the tribes inhabiting the area known today as the Eastern Caprivi Zipfel.

Their history forms part of the history of that vast, heterogeneous mass of matrilineal tribes who by the seventeenth century were living on the flood plains of the four great rivers north of the Lake Ngomi depression - the Okavango, the Mashi, the Upper Zambezi and the Kafue Rivers.

The tribes of this area - the Batawana, the Okavango tribes, the subject tribes of Barotseland, etc. - probably entered this area over a long period during the early stages of the great dispersal of tribes from somewhere in northern Angola. This dispersal resulted in the broad belt of matrilineal tribes that are found today from southern Angola in the west to the Lake Malawi region in the east.¹⁾

Moving in relatively small bands in the majority of cases, they filtered into this huge area, gradually moving southward. They learned to utilize the floods - trapping and spearing fish, hunting the herds of marsh antelopes with dugout canoes and cultivating the low-lying flats when the annual floods receded.

2. The Aluyi

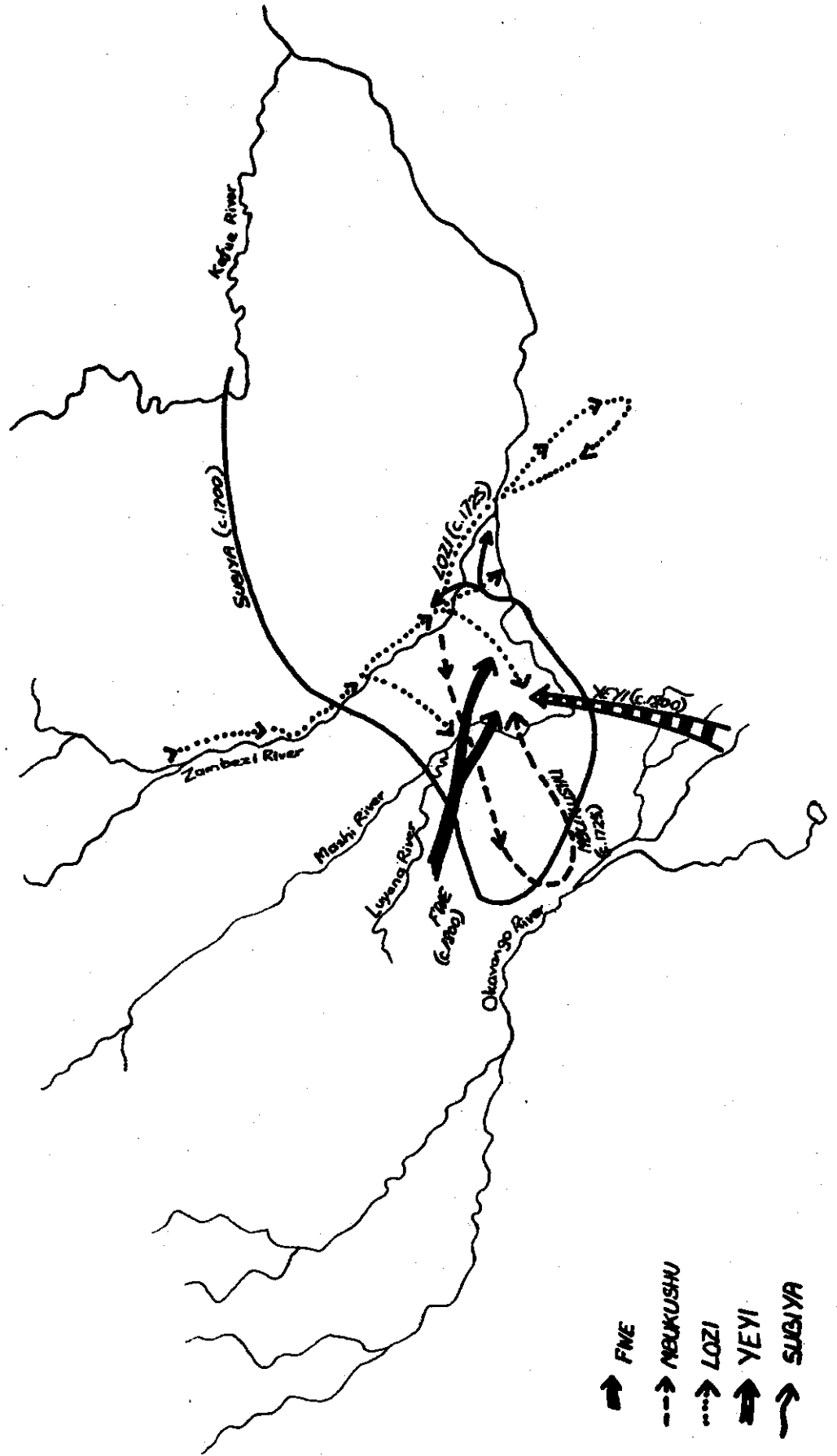
During the 17th century or probably earlier, another matrilineal tribe, nicknamed the Aluyi by the inhabitants of the Upper Zambezi, made their appearance.²⁾ Numerically stronger, the Aluyi gradually spread over the great flood plain now known as the Central Barotse Plain and enslaved, subdued or drove out the smaller tribes and so brought into being a conquest state, eventually ruling over some twenty-five flood plain tribes.³⁾

1) Cf. WILLS, A.J.: Introduction to the history of Central Africa, Oxford University Press, 1964, pp. 14 and 15.

2) According to Mr. Neo S. Zaza of Sinumuyambi, "Aluyi" meant literally "strangers". Quoted in Stokes, E. and Brown, R. (ed.): The Zambian Past, Manchester University Press, 1966, pp. 241 and 242.

3) GLUCKMAN, M.: The Judicial Process among the Barotse of Northern Rhodesia, Manchester University Press, 1955, p. 4.

FIG. 5: MOVEMENT OF THE
CAPRMI TRIBES BEFORE 1830



From about the beginning of the eighteenth century the Aluyi or, as they are now known, the Lozi or Barotse, have played such a dominant role in the area now known as the Eastern Caprivi Zipfel that it is essential to give a brief outline of their history and the cultural influences that shaped their way of life and in particular their system of law. (The profound influence of the Kololo will be discussed at greater length in the next chapter.)⁴⁾

There are several theories with regard to the origin of the Lozi. There is firstly the "official", court tradition of the Lozi as it appears in A.D. Jalla's book, History, Traditions and Legends of the Barotse Nation,⁵⁾ which claimed a divine origin for the Lozi kings, beginning with the first king Mbo. In this tradition the Lozi is said to come from the north.

Secondly there is the Lunda oral tradition according to which a brother of one of the Mwatiyamwa chiefs of the Lunda, Mutanda Yembeyembe, had to flee after it was found that he had discovered deposits of salt which he had hidden from the king. According to this tradition he subsequently founded a dynasty of Lozi chiefs on the Upper Zambezi.⁶⁾

Thirdly, there is the Rozwi oral tradition. The early Rozwi was found by the first Karanga in the fourteenth century. There are typological analogues between the ceramics of this culture and that of the early Sotho-Tswana. Furthermore, Rozwi dialects are heavily impregnated by Tswana lexical and phonological characteristics (- perhaps pertinent factors to consider in the light of Sir Harry Johnston's account which will be outlined below).

By 1480 King Matope had created a veritable empire stretching from the Kalahari to the Indian Ocean, the element of unity being primarily furnished by the sons, sisters' sons and trusted henchmen installed by him as rulers of the conquered provinces. When he died this empire split up almost immediately.⁷⁾ In the ensuing confusion one of the great Rozwi princesses fled to and conquered Barotseland.

4) Chapter IV: Kololo and Lozi rule, 1830-1907.

5) Jalla, A.D.: History, Traditions and Legends of the Barotse Nation. Sefula, 1939.

6) Historical Traditions of the Eastern Lunda, Mwata Kazembe XIV. Rhodes Livingstone Communications, No. 23, Livingstone.

7) VANSINA, J., MAUSSY, R., THOMAS, L.V. (Ed.): The Historian in Tropical Africa. Oxford University Press, 1964, pp. 107 and 108.

Evidence put forward to support this tradition includes the following:

Lozi (the local pronunciation for the Twana form, Rotse) is probably a corruption of the name Rozwi,⁸⁾ and the royal Lozi name Lewanika, could very possibly be derived from the royal Rozwi name, Ruwananyika.⁹⁾ Supporting this evidence is the fact that the Fwe term for the Lozi is Rizwi, which closely resembles Rozwi, and is difficult to explain unless it is derived from the latter. It may further be noted that the basic lay-out of the Zimbabwe Ruins and that of the "mileleni" (royal places) in Barotseland are identical.¹⁰⁾

Francois Collard's theory also seemed to support the Rozwi origin:

"The Marotsi came from the southern extremity of Africa. Mr. Coillard is of opinion that they came from the Bon-yai, a territory bordering on Matabeleland".¹¹⁾

Sir Harry Johnston also favoured a southern origin for the Lozi rulers of the Upper Zambezi:

"Prior to their (the Lozi) dominancy, the Upper Zambezi regions had been invaded by terrible armies of cannibals in the latter half of the sixteenth century /They were known as/ the Jagga, Bazimba, Vachokwe or Bajoko (according to Livingstone) At the end of the 18th century a section of the Bahurutse, a Tswana tribe, settled on the Upper Zambezi. Their name became shortened into Ba-rotse, the name by which they were known to the French missionaries".¹²⁾

Among the Lozi themselves local tradition supports the Lunda origin more strongly.¹³⁾

The existence of two apparently conflicting traditions regarding the origin of the Lozi suggests that incursions from both the Rozwi and the Luba-Lunda empires occurred so that the Lozi political institutions were influenced by both these great centres of political power which dominated sixteenth century Central Africa.

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- 8) MAINGA, M.: "The Origin of the Lozi: Some Oral Traditions", in Stokes, E. and Brown, R. (Ed.): The Zambian Past: Studies in Central African History, Manchester University Press, 1966, p. 240.
- 9) Ibid., p. 240.
- 10) CLARK, J.D.: Prehistory of Southern Africa, Pelican Books, 1959, p. 29
- 11) BERTRAND, A.: The Kingdom of the Barotse, London: T. Fischer Unwin, 1899, p. 271.
- 12) STIRKE, D.W.: Barotseland: Eight years among the Barotse, John Bale, Sons and Danielsson, Ltd., 1922, pp. 3, 4 and 38.
- 13) MAINGA, M., op. cit., p. 243.

In the Caprivi itself the earliest reference that could be found to the Lozi rulers is the Subiya tradition ¹⁴⁾ that the first Lozi invader was Chief Mwanambinyi, who ruled Barotseland in 1700 according to Gluckman. ¹⁵⁾

Mwanambinyi first defeated Lukonga, chief of the Mbukushu, who lived between present-day Katimo Mulilo and Longa island (several miles upstream), and captured Lukonga's "maoma" (royal drums). Moving on he defeated and captured a Sibiya chief Mwanamwalye, while putting to flight the two other important Sibiya chiefs - Liswane, who fled to Kazungula, and Cheete who fled into Tokaland (near Livingstone).

Since that time the area between the Chobe and the Zambezi Rivers has remained almost continuously under the rule of the Lozi kings. At that time this area, now known as the Eastern Caprivi Zipfel, was called Itenge. ¹⁶⁾

The origin and early history of the tribes who inhabited Itenge itself are discussed below.

3. The Subiya

Without doubt the Subiya, who lived between the confluence of the Chobe and the Lyambai ¹⁷⁾ and along the northern banks of the Lyambai as far north as Katima Mulilo, was politically and militarily the dominant tribe.

The Subiya were originally called the Batwa - a collection of small clans who lived under autonomous headmen on islands in the Kafue flood plains. At the end of the 17th century, one of the headmen, Sundane, the son of Sancho, also known as Lipelenge, had to flee as a result of trouble with other Batwa headmen. It is said that his group did not only consist of Batwa but also included Fwe, Leya and Toka. It is not clear whether the elements from other tribes joined him at the outset or whether they joined him during his wanderings. ¹⁸⁾

14) As told by Chikamatondo, a headman of Yeta III and Nduna N. Fwambi of Moraliswane to Mr. A.M. Mutonga, headmaster of Kanono F.P. School.

15) GLUCKMAN, M.: Seven Tribes of Central Africa, Manchester University Press, 1961, p. 2 to 3.

16) No explanation for this name could be found, beyond the repeated statements that this is the "old name" for the Eastern Caprivi Zipfel.

17) Lyambai is the original name of the Zambezi River.

18) The name Lipelenge was an honorary title bestowed on a warrior who showed great bravery and prowess.

Sundano moved westward until he reached the Lyambai (Zambezi) where he settled on the islands of Mbeta and Sitoti. However, trouble soon erupted between Sundano and the Kwandi of Senanga, who probably resented the presence of the new arrivals, and once more Sundano moved westwards. In all probability Sundano's group fought and raided other tribes on their journey westwards, thereby swelling their own ranks with new recruits and gaining in power and prestige. They crossed the Mashu and reached Chief Libebe on the Okavango River where they stayed for two years. Here Sundano acquired rainmaking medicine from Libebe which presumably added to his prestige.

From here he moved along the southern banks of the Kwando-Linyanti until he made a crossing near present-day Ibbu. From here he conquered the eastern parts of Itenge, crossed the Lyambai (Zambezi) and conquered large parts of Katombora and Mambora in present-day Zambia.

The name Subiya, it is said, was given to the Batwa by the Aluyi; it is a pun on the word "subalala". Apparently because of the active part the Batwa played in the government of the Aluyi and their successors the Kololo and Lozi, there was a saying:

"Subiya nokusubalala umulonga" (The Subiya are trying to push the kingdom.)

It may well be that the account of the warrior chief Sundano, son of Sancho, does not represent the movement of the entire Subiya people, but only of the movements of a splinter group. However, there seems to be no doubt that Sundano founded the dynasty who still rules over the Subiya in the Caprivi today.

The Subiya claim that they have always ruled over the entire Eastern Caprivi Zipfel and as far west as the Okavango River. This claim is hotly disputed by spokesmen for the other tribes. Nevertheless, the Subiya have always played a prominent role in the affairs of state of the Lozi empire. It is the only Caprivi tribe with a recognised line of chiefs dating back two and a half centuries, and the only Caprivi tribe (apart from the Yeyi in Botswana) mentioned by the early explorers and missionaries during the 18th Century.¹⁹⁾ They also provided the present ruling dynasty of the Mafwe.

19) Those whose writings were examined include Oswell, Livingstone, Price, Arnot, Coillard, Jalla and Capt. Bertrand.

4. The Yeyi

The Yeyi of the Caprivi are members of the Yeyi tribe of Botswana, described by Oswell, Livingstone and Capt. Bertrand in the previous century. As recently as 1925, E.H.L. Schwarz described them as "the slaves of the Tawana".²⁰⁾ Livingstone mentions that the other Botswana tribes called them Bakoba "which contains somewhat of the idea of slaves". "They have never been known to fight - invariably submitted to the rule of every horde which has overrun the countries adjacent to the rivers on which they specially wish to dwell The Yeyi lived much on fish, catching it with nets and spearing. They also show great dexterity in harpooning hippopotami".²¹⁾

Livingstone also mentions one of their chiefs, Lechulatebe, a young man in 1849.²²⁾ This is probably Lesulatebe of the Barwa of the Mababe plains, as he is known in the oral tradition of the Fwe.²³⁾ He fought on several occasions against Mamili, chief of the Fwe under the Lozi ruler Sepopa, and it is possibly under his rule that the Yeyi of Botswana twice defeated the Matabele.²⁴⁾ However, for the most part the Yeyi has been a despised servile tribe used as servants or slaves by the Tawana. Livingstone mentions that Yeyi boys were exchanged for clothes when Mambari (half-caste) slave traders from the west Coast visited the area in the early 1850s.²⁵⁾

The Yeyi came to the Eastern Caprivi Zipfel in small groups. According to tribal tradition they came from Sankuyu (in Botswana near the South West African border), moved from there to Ngabamukuni (on the Okavango River) where they met the "Mbukushu of Libebe". From there they moved to Sholoka (Xoloha) and thence to the Chobe River. It seems likely that this account refers only to one group, led by a headman Matiti.

The earliest known Yeyi headman was Mutou (chief, literally, elephant) Chata, who lived on the Chobe River near Batubaja. The Pepe stream (near present-day Kanono) formed the boundary with the Subiya of Buchani.

20) SCHWARZ, E.H.L.: The Kalahari and its Native Races, Witherby, London, 1928, p. 211.

21) LIVINGSTONE, D.: Missionary Travels and Researches in South Africa, John Murray, 1857, pp. 64, 72 and 73.

22) Ibid., p. 68.

23) Information by Sinkosiyana, headman of Sibinda.

24) SCHWARZ, E.H.L.: op. cit., p. 211.

25) LIVINGSTONE, D.: op. cit., p. 91, 180 and 181.

Chata was followed by Matiti, who seems to have been the most prominent of the Yeyi headmen. He was followed by other clans who are said to have come from the south, across the Mababe. Among them were Muswema, Kulatau, Sangwali and Mwanamambwe. All of them settled on the islands of the Sangwali swamps, except for Mwanamambwe who settled west of Lianshulu.

The influx of the Yeyi swamp inhabitants occurred (probably) in the late eighteenth and early nineteenth centuries, as Kulatau is said to have been murdered by Sebitwane (who arrived in 1830).

5. The Mbukushu

The Mbukushu is an Okavango tribe but scattered groups of Mbukushu seem to have been dispersed along the Mashi and Zambezi Rivers for centuries. For example there is the account of the Mbukushu under Lukonga who were defeated at Katima Mulilo at the beginning of the 18th Century, and transferred to the islands of Mbeta and Sitoti from where they subsequently escaped and made their way westwards. Today they live along the Kwando River, mostly concentrated around Singalamwe but also further south towards Kongola.

6. The Fwe

The Fwe, the only Caprivi tribe who lives almost wholly within the Caprivi itself, is historically also the least known tribe. The first mention of the Fwe in writing, is in the German Resident, Hauptman Streitwolf's report on the Eastern Caprivi Zipfel in 1910.²⁶⁾

They were never a strong, centrally organised tribe and even the oldest members of the tribe can recall no tradition of tribal chiefs prior to Simataa Kabende, who was appointed as chief of the Fwe by the Lozi in the 1860s. There is a tradition that they came from the west, and indeed the tribal customs of the Fwe proper show many similarities with those of the Okavango tribes.²⁷⁾

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- 26) Deutsches Kolonialblatt, Jahrgang 21, Nummer 1, Berlin, 1910.
"Die Expedition Streitwolfs nach dem Caprivi Zipfel", pp. 54 to 59.
- 27) Details of Simataa's appointment by the Lozi chief Sepopa soon after 1865 are given in Chapter IV, below, under sub-heading: (3) The return of the Lozi.

Simataa was not a true Fwe. On his mother's side he was said to be a great-grandchild of Sundano, the Subiya chief, and among his other ancestors were members of the Shanjo and Toka tribes. From his appointment dates the political organization of the Fwe, Yeyi and later Mbukushu tribes in one administrative and political unit, with the Fwe proper as the dominant group.

CHAPTER IV

KOLOLO AND LOZI RULE, 1830-18851. Introduction

The Luyi rulers had to contend with trouble in the southernmost parts of their empire almost immediately after Mwanambinyi's expedition had returned north. Ngombala (who ruled from about 1725 to 1775)¹⁾ subdued the area and this time left a representative behind to maintain Luyi authority in the person of Linyanti, who settled at present-day Sangwali.²⁾ Ngombala³⁾ continued eastwards and southwards defeating the Matoka and other lesser tribes, as far as present-day Wankie, where he left another representative, Wange, who ruled the Mananzwa and gave his name to present-day Wankie. On his return Ngombala appointed rulers in all the areas he had conquered, and when he reached Linyanti he found Linyanti had died. In his stead he appointed Mwanangombe, who built his village (also called Linyanti) on the exact spot where present-day Sangwali is situated, and where Sebitwane settled about a century later. Returning home via the Kwando River he posted representatives in every area. From this time dates the representatives Ingenda, Mwamba, Siluka, Imusho and others, along the Kwando-Mashi River.

By 1800 there were approximately twenty-five tribes grouped under Luyi authority, the Luyi proper being concentrated mainly in the Central Barotse Plains (of which the southernmost edge is about 160 km. north of Katima Mulilo).

The Paramountcy of Mulambwa, the greatest of the Luyi chiefs, marked the highest level of Luyi history prior to the Kololo conquest. Mulambwa who ruled from 1812 to 1830 is remembered for the firm justice of his rule, and for the making of laws on a wide range of subjects including tax collection, the punishment of thieves, the provisioning of armies and the care of relatives of war casualties.⁴⁾

1) GLUCKMAN, M. and DOLSON, E. (ed.): Seven Tribes of British Central Africa, pp. 2 and 3.

2) Ibid., pp. 3 and 4.

3) The details of Ngombala's expedition which follow were gathered in the Eastern Caprivi between March and June 1968. The main informants were Headman Sinkosinyana and Mr. A.M. Mutonga.

4) LIVINGSTONE, D.: Narrative of an Expedition to the Zambezi and its Tributaries, 1865, pp. 356-7.

FIG 2

POPULATION DENSITY AND DISTRIBUTION
IN THE EASTERN CAPRIVI ZIFFEL

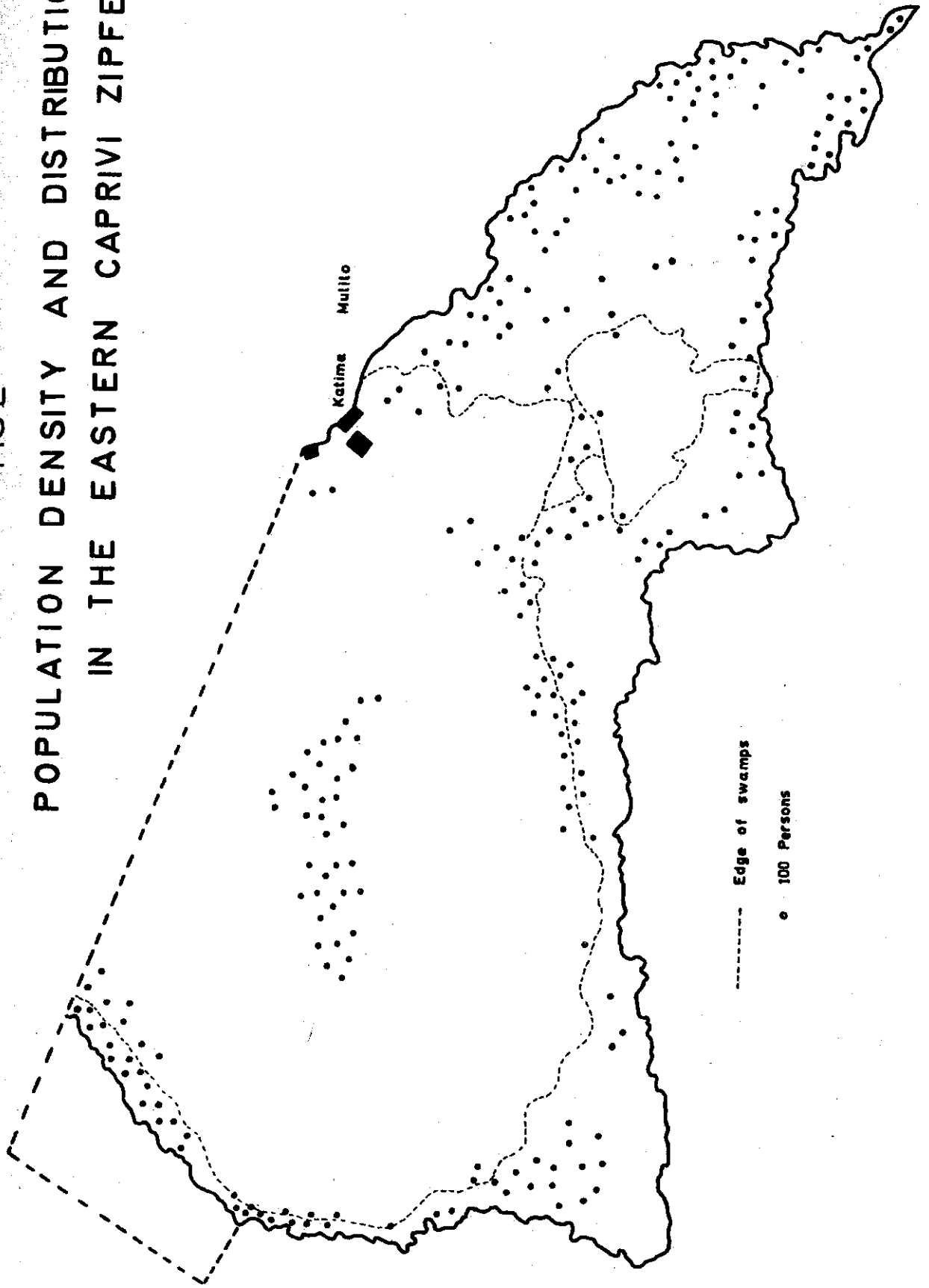
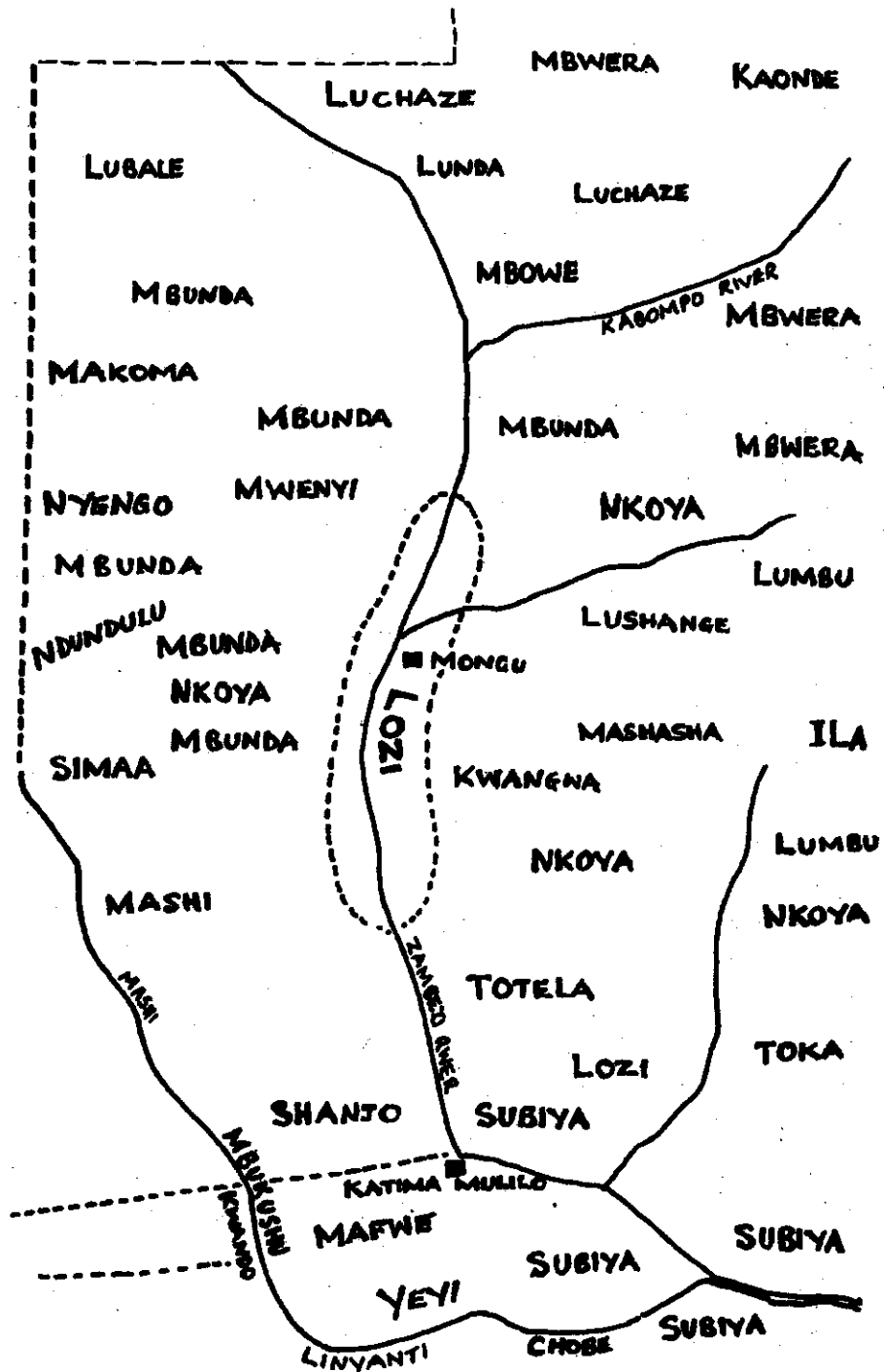


FIG. 6
 THE LOZI EMPIRE CIRCA 1890



Mulambwa died in 1830 and after his death the chieftainship was disputed. The Luyi empire was thus a divided state when the Kololo entered the area soon after Mulambwa's death.⁵⁾

2. The coming of the Kololo

Perhaps the most far-reaching episode in Bantu history since the beginning of the southward migration was the tyrant Shaka's reign in Natal during the first decades of the 19th Century. As hordes of desperate fugitives streamed northwards through the mountain passes, they clashed with the tribes of the interior setting off a continuing chain of violence and chaos that was to last a quarter of a century, called by the Sotho-Tswana tribes the Time of Troubles - the Difaqane.⁶⁾

Most important, from the point of view of the Central African peoples, was the violent irruption northwards of four aggressive groups that were to become dominant over large areas north of the Limpopo River.

One of these groups was the Kololo of Sebitwane.

Sebitwane's people were the Patsa, a section of the Fokeng, a Sotho tribe, who lived on and around Kurutlele Mountain between the Vet and the Sand Rivers. The forays of a fugitive Zulu general, Umzilikazi, added to the confusion, and in 1823 Sebitwane found himself at the head of one of the many groups wandering aimlessly over the vast open plains of the South African interior, murdering and pillaging as they went or suffering a similar fate at the hands of others. Famine, banditry and even cannibalism became a way of life.⁷⁾

There followed years of wandering and fighting for Sebitwane's group. After a battle with the Phuthing a young widow, Sethuthu, took Sebitwane's fancy. Tradition has it that she was of the Kollo tribe and seeing the favours Sebitwane bestowed upon her, people started calling Sebitwane's followers Kollo or Kololo, the name by which they are known to history.

Sebitwane settled for several years south of the Makarikari Pans and it is possibly during this time that he helped Sechele to wrest the chieftainship of the Kwena from a usurper. There are several contradictory versions of this venture, which was of great historical importance. Sechele's unbounded admiration for Sebitwane subsequently prompted Li-

5) WILLS, A.J.: Introduction to the History of Central Africa, Oxford University Press, 1964, p. 58.

6) SMITH, EDWIN W.: Great Lion of Bechuanaland, Independent Press Ltd., London, 1957, p. 368.

7) Ibid., pp. 367, 368 and 369.

Livingstone to visit Sebitwane, a visit which proved to be a turning point in Livingstone's career.⁸⁾

Leaving the Makarikari Pans and wandering aimlessly for several years through what is now northern Botswana, Sebitwane entered present-day Caprivi via the Okavango delta and the Selinda spillway.

Sebitwane persuaded the Yeyi chief Kulatau to transport the Kololo over the Linyanti in return for payment, and then killed him.⁹⁾

Through a mixture of guile and military ability Sebitwane succeeded in crossing the Zambezi near Impalila Island and subjecting the Toka Plateau. Following the advice of a seer, he then penetrated the Luyi-held plains of the Upper Zambezi in 1833.¹⁰⁾

He had chosen his time well. Although Mubukwanu had succeeded in gaining the Lozi paramountcy, his claims to it were still being disputed when Sebitwane attacked in 1833. Over a period of five years, during which Sebitwane fought four major battles, the Luyi forces were at last defeated and the remnants fled into the northern swamps under their new chief, Imasiku, in 1838.¹¹⁾

Throughout the areas he had conquered, Sebitwane appointed sub-chiefs and built villages. Some of these chiefs were Kololo, others were local chiefs. All were treated on an equal footing. Through these appointed sub-chiefs, Sebitwane ruled with generosity and firmness. The language of the Kololo, their customs and manners were rapidly taken over by the tribes of the Upper Zambezi.¹²⁾

Sebitwane eventually settled in the south-western corner of the present-day Eastern Caprivi, at Linyanti (not the Linyanti of today) on the site of the Government Clinic at Sangwali, where there is also a tree stump said to mark the camping site of David Livingstone during his historic visit to Sebitwane in 1851.

8) LIVINGSTONE, D.: Missionary Travels and Researches in South Africa, John Murray, 1857, p. 14.

9) According to local tradition. Information from, inter alia, Headman Sangwali.

10) It may also be that fear of the Matabele prompted Sebitwane to move northwards.

11) WILLS, A.J.: op. cit., p. 62.

12) To such a degree that forty years later Coillard wrote: "We hear everyone around us speaking Sesuto ... The same customs, the same manners, the same dress, the same sociability and official code of politeness It really requires an effort of mind to believe oneself on the Zambezi". (Coillard, F.: On the threshold of Africa, Hodder and Stoughton, London, 1897, p. 58.)

In 1851 Sebitwane died while still in the prime of his life, despite Livingstone's efforts, who was present. He was succeeded by Sekeletu, his son, by all accounts an unwilling successor, who imagined himself under continual witchcraft attacks by jealous relatives. According to local tradition, "Sekeletu's uncle, Mamili, wanted his son Liswaniso to be the chief, and Mamili killed those men who opposed his plans".¹³⁾ Consequently Sekeletu lived a secluded life and took almost no part in affairs of state. Kololo prestige decayed rapidly.

A.J. Wills comments:

"The rapid descent from the pinnacle of warrior statesmanship achieved by Sebitwane can perhaps be ascribed to a lack of common tradition among the Kololo, a heterogeneous group born in disintegration and held together only by the personality of a great leader." ¹⁴⁾

Sekeletu was succeeded by Mpololo who moved the capital to Old Sesheke, opposite the site which later became Shuckmannsburg, the headquarters of Hauptman Streitwolf. But the Kololo was divided, and Mpololo an unpopular chief.

3. The return of the Lozi

The rebellious Lozi (as the Kololo called the Luyi) now called on Sepopa, who had meanwhile succeeded Imasiku, to return from his exile in Lukwakwa country. Sepopa led an invading force southwards in 1865. The Zambezi tribes rose with him and the Kololo rulers were exterminated to a man; the children were spared and the women distributed among the Lozi rulers.

The restored Lozi chief Sepopa proved to be a cruel autocrat and was forced into exile and death in 1868. His nephew, Ngawina, succeeded him. However, a grandson of Mulambwa, Robosi, who had been living in refuge north of the Kabompo River, forced Ngawina off the throne in 1870.¹⁵⁾

Lozi hegemony over the surrounding tribes were by this time either insecure or had lapsed. Robosi set about restoring Lozi rule over the former subject tribes with ruthless vigour and severity. His cruelty caused great resentment and in Itenge a rebellion broke out in 1884 after

13) From an account by Chief Mamili, 14 September 1967.

14) WILLS, A.J.: op. cit., p. 63.

15) JALLA, A.: Litaba tsa Sechala sa Marotse. (Unpublished notes). By courtesy of the Roman Catholic Mission, Katima Mulilo. (Notes on the history of the Lozi).

years of restiveness, organized by an ambitious commoner, Mataa, who had become Ngombela (principal councillor) to the new chief Akufuna, who ruled from Sesheke. The following year, however, Robosi counter-attacked and after a bloody massacre regained his throne.¹⁶⁾

Apparently the Fwe-Yeyi area was not as deeply involved in the bloody feuds of the two decades following Sekeletu's death and the massacre of the Kololo as the politically-minded and ambitious Subiya. So the Lozi-appointed sub-chief Simataa Kabende, survived the carnage.

After Sepopa took over the reins in 1865 there were long and inconclusive discussions in his council about who should be sent as sub-chief to the south-western corner of Henge. Nobody was eager to go, according to local tradition. It was considered to be the most dangerous and exposed area in the Lozi Kingdom, apparently because of the activities of the Yeyi-Tawana chief Lisulatebe (Lechuatebe) and the recurring threat of Matebele armies. Eventually Sepopa picked Simataa Kabende and bestowed upon him the name of the previous Kololo sub-chief, Mamili Nchumbe, uncle of Sekeletu. Simataa duly built his village and called it Linyanti. In the ensuing years he fought almost continuously, as tribes from the south and the west raided his domain, until he succeeded in defeating the Mbukushu and negotiating a peace with Lisulatebe.¹⁷⁾

After Robosi¹⁸⁾ defeated Akafuna, he assumed the royal name Lewanika and returned to his capital in the Central Barotse Plain in 1885.¹⁹⁾

This point marks the beginning of European influence both north and south of the Zambezi in Barotseland, including the present-day Caprivi Zipfel.

16) Ibid.

17) Information from Chief Simasiku Mamili, September 1967.

18) Robosi: also written Lubosi.

19) WILLS, A.J.: op. cit., p. 106.

CHAPTER V

CONTACT WITH EUROPEAN MISSIONARIES AND ADMINISTRATORS, 1851-19081. David Livingstone

In 1840 Dr. David Livingstone joined Robert Moffat in his mission work at Kuruman. Ranging beyond Kuruman, he set up outstations at three places, the last of which was Kolobeng, 300 miles to the north, in 1847. Here Livingstone heard for the first time of a forest country beyond the Kalahari Desert, well-watered by the tributaries of a great river.

Setting out from Kolobeng in 1849, Livingstone and his companions crossed 250 miles of desert and succeeded in reaching Lake Ngami, then a considerable expanse of water.¹⁾

On a further expedition in 1851, Livingstone crossed the Linyanti and met Sebitwane. It was an historic meeting. Livingstone resided for some time at Sebitwane's village, Linyanti, which stood on the site of the present-day Sangwali Clinic. Each was impressed with the other. Livingstone was making plans for founding a mission station (in the southern part of Itenge) when Sebitwane suddenly died.²⁾

Travelling along the Chobe River, Livingstone penetrated further into southern Caprivi until he reached the Zambezi, in the vicinity of present-day Schuckmannsburg, before he returned south.

In May 1853, Livingstone visited the Caprivi once again. Sebitwane's son, Sekeletu, was now ruling.³⁾

On this occasion Livingstone's closer acquaintance with Kololo life and custom dampened his earlier optimism with regard to the possibility of starting mission work among them. He also searched in vain for a mission site in the swampy country surrounding Sekeletu's capital. Rather than give up his dream of establishing a Christian influence in the heart of Africa, Livingstone now set out on a journey that lasted almost four years.

1) WILLS, A.J.: An Introduction to the history of Central Africa, Oxford University Press, 1964, p. 85.

2) Ibid., p. 85.

3) Sekeletu built his village about 22 kilometres east of Sebitwane's. He is reputed to have built the first house of burnt brick in Barotse-land, at the site of which broken bricks may still be found. There also survives the remains of a huge canal said to have been dug on Sekeletu's orders in an effort to drain the site.

His friendship with and acceptance by the Kololo rulers opened up a route into Central Africa and set Livingstone on a career which drastically changed the history of Central Africa.

On this second, perhaps his greatest journey, Livingstone travelled upstream along the Zambezi, then crossed the continental divide and eventually reached Loanda on the west coast.⁴⁾ From here he returned his steps to Linyanti, then proceeded down-stream with the Zambezi until he reached the Indian Ocean, where he boarded a ship for England.

One of the results of this journey was a decision by the London Missionary Society to establish a mission station among the Kololo, Sekeletu having agreed to move northwards to the healthier Toka Plateau if a missionary would be placed at his capital to protect him against forays by the Matebele.⁵⁾

Livingstone's proposals to the London Missionary Society included the establishment of two missions in the interior of Central Africa which would radiate both the Gospel and legitimate commerce, thereby bringing an end to the slave trade and the hideous cruelty which were threatening to devastate the entire vast inland plateau of Central Africa.⁶⁾ Livingstone envisaged one mission station among the predatory, ferocious Matebele in present-day Rhodesia, and one among the Kololo on the healthy highlands immediately north of the Victoria Falls, thereby establishing a Christian influence at the headquarters of the two most powerful kingdoms in Central Africa.

It was a bold concept and if it could have been successfully implemented it is not too much to say that it might have changed the entire course of history in the region comprising the present-day Zambia and Rhodesia. However, it depended for its success almost wholly on the enormous personal prestige of two men among the tribes concerned - Robert Moffat and David Livingstone. When the scheme went ahead without their personal presence it failed, both in Matebeleland and among the Kololo.

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- 4) The route Livingstone followed was probably one of several established trade routes used by half-caste traders from the Atlantic coast who traded regularly with the tribes of the interior.
- 5) SEAVER, G. (ed.): David Livingstone, His Life and Letters, Lutterworth Press, London, 1957, p. 376.
- 6) SMITH, E.W.: Great Lion of Bechuanaland, Independent Press Ltd., London, 1957, pp. 22-23.

Here we are concerned mainly with Livingstone's proposals regarding the Kololo. The Society endorsed his proposals but there were delays and personal differences, mainly between Livingstone and the Society's secretary, Dr. Tidman, with the result that the mission to the Kololo, the first attempt at establishing a permanent Western presence in the present-day Caprivi, was deprived of its natural leader, Dr. David Livingstone.⁷⁾

2. The Price-Helmore Expedition

In 1859 the London Missionary Society sent out James Helmore and Roger Price with their wives and Helmore's three children (a fourth was born during their desert journey) to found a mission among the Kololo. In July 1859 they set out by ox-waggon across the Kalahari Desert, hoping to meet up with Livingstone (who had returned to the Zambezi the previous year) at Sekeletu's capital in the Chobe Swamps.⁸⁾

Surviving incredible hardships the party reached Linyanti in the rainy season. Several of them were weak and ill. There was no sign of Livingstone and Sekeletu, who had been hoping for a missionary of some stature, was disappointed and suspicious. He offered the strangers no hospitality. Sekeletu's antagonism stemmed from his disappointment. His reason for desiring a resident missionary was that he would thereby have a powerful intermediary who would prevent the Matebele from making their dreaded forays - an abiding fear among the Zambezi tribes which did not disappear until the final defeat of Lobengula in 1896. From this point of view the two new arrivals were a bitter disappointment and Sekeletu allowed them to be robbed and maltreated.⁹⁾ The small band

7) Ibid., pp. 25-26.

8) SEAVER, G.: op. cit., p. 376.

9) Sekeletu wished to have Livingstone and his wife, daughter of Robert Moffat, to restrain Umzilikazi from further raiding as Umzilikazi held Robert Moffat in great respect. The following year Sekeletu said to Dr. Livingstone: "Had Ma Robert (Mrs. Livingstone) come, then I should have rejoiced, because Mosilikatse would leave her alone, and us, she being a child of Moshete (Moffat). Give me your people to dwell with me, and I shall cut off a country for them to dwell in". Wallis, J.P.R. (ed.): Zambezi Expedition of David Livingstone, 1858-1863, Oppenheimer Series No. VII, London, 1954, pp. 395-396.

M. Gluckman formulated Sekeletu's attitude to missionaries as follows: "Sekeletu wished to use the Livingstones as key figures in his foreign policy (towards the Matebele)". - A broadcast address printed in The Listener, September 22, 1955; quoted by Seaver, G.: David Livingstone. His life and letters, Lutterworth Press, London, 1957, pp. 372 to 373.

suffered great misery and either as a result of malaria or poisoned food Helmore, his wife and two of his children died.

At last Roger Price decided to withdraw. He managed to get away with his wife, only child and the two surviving Helmore children. On his way back his young wife and baby succumbed. Weary and broken in spirit, he was eventually discovered with the two Helmore children at Lake Ngami, by John Mackenzie, a missionary who had been sent out to look for him.

It remains a mystery, however, why the Kololo treated the Price-Helmore expedition so badly. It is probable that the non-appearance of Livingstone and the party of 120 carriers who had accompanied him to the east coast several years before had soured the Makololo.¹⁰⁾

In spite of the tragic end of the first effort to establish a mission among the Kololo, Roger Price and John Mackenzie twice prepared to make another effort, but the increasing unrest in the Kololo empire and the years of bloodshed between 1865 and 1885 withheld them from realizing it.¹¹⁾

As far as Livingstone was concerned, the Price-Helmore disaster and the turmoil in Barotseland made him turn his attention to the Lake Malawi regions. It was left to Frederick Arnot and Francois Coillard to win the confidence of the Lozi more than twenty years later.

3. Francois Coillard and Frederick Arnot

In 1877 Francois Coillard and Adolphe Mabilie reached Soshong, capital of Chief Khama of the Mangwato (who had lived in the household of Roger Price as a son for many years), after being ordered out of Matabeleland by Lobengula. Mainly for linguistic reasons, Coillard's group (who came from Basotholand), thought the Upper Zambezi would be a suitable field of operations. However, many obstacles and delays had to be overcome before Coillard was finally admitted into Lozi territory in 1885, after the way had been opened for him by a young missionary, Frederick Arnot, who spent two years at Lealui, the Lozi capital.¹²⁾

Arnot had also played a part in bringing together Lewanika and Khama, a relationship which had a farreaching effect on the developments in Barotseland during the last decades of the nineteenth century. Khama per-

10) CLAY, G.: Your Friend Lewanika, Chalton and Windus, 1968, p. 11.

11) NORTHCOTT, C.: Robert Moffat: Pioneer in Africa, 1961, p. 308.

12) Cf. BAKER, E.: The Life and Explorations of F.S. Arnot, Seeley, S. & Co., 1923.

suaded Lewanika not to join forces with Lobengula who wished him to join the Matebele in driving out the invading white man.¹³⁾ In 1878 Khama also recommended the French missionaries to Lewanika,¹⁴⁾ and in 1889 he recommended British protection.¹⁵⁾ In 1890, when Lewanika encountered dangerous opposition to his plans for British protection among his own councillors, Khama supported Lewanika against his councillors with a threatening letter which helped Lewanika to overcome their opposition.¹⁶⁾

Whereas Coillard was a valued advisor and had a tremendous influence on the internal policies of Lewanika, it is doubtlessly Khama's influence which had the most decisive effect on Lewanika's foreign policies.¹⁷⁾

Coillard's party of ten people reached Leshoma on the Zambezi in July, 1884, in time to witness the bloody scenes that restored Lewanika to power after the Mataa rebellion, centred in the Subiya area (the present-day Caprivi), had toppled him from power the previous year.

4. Life in the Lozi empire

The writings of Livingstone, Pinto, Arnott, Coillard, Jalla, Bertrand, Depelchin, Declé, Gibbons, Goy, Harding, Johnston, Luck, MacConachie, Hamilton, and others, have left us with ample details of the conditions prevailing in the Lozi empire during the latter part of the nineteenth century.¹⁸⁾

These descriptions are of interest as they provide a picture of life in the Lozi empire, and therefore of the conditions under which the Fwe, Yeyi, Subiya and Mbukushu of the Caprivi area found themselves during this period - and, presumably, during most of the time that they were ruled by the Luyi, Kololo and Lozi.

From these accounts three dominant characteristics of the Lozi empire in the late nineteenth century emerge. They were as follows:

13) Ibid., p. 97.

14) COILLARD, F.: On the threshold of Africa, 1897, p. 342.

15) MACKINTOSH, C.W.: Coillard of the Zambezi, T. Fischer Unwin, 1907, p. 382.

16) Ibid., p. 385.

17) Ibid., p. 314.

18) More details of their publications are provided in the bibliography.

- (i) The nature of the relationship between the dominant, free-born Lozi and the rest (the vast majority) of the population; a relationship in which a Lozi could with impunity rob, ill-treat, give orders to and demand any kind of service from any non-Lozi subject of the King.
- (ii) Slavery.
- (iii) An all pervading belief in witchcraft, ruthlessly exploited by virtually everyone in a position to do so in order to protect himself, settle old scores or to get rid of rivals.

The combined effect of these three factors was to introduce a degree of harshness and an indifference to the value of a human life, which is difficult to comprehend today only 70 years later.

Extracts from some of these writings will suffice to portray in broad outline the conditions under which the Caprivi tribes were living in the previous century:

Livingstone wrote:

"A great number of people lose their lives annually by the cruel superstitions to which they are addicted. They drink the infusion of a poisonous tree, and perish." 19)

Mme. Coillard wrote on 27th May 1887:

"Oh, the quantities of people that have been burnt as witches and wizards since we came here! It is almost a daily occurrence." 20)

Capt. Bertrand's descriptions include a vivid description of the miserable lot of those who were not privileged to belong to the Lozi (circa 1895):

"The (Lozi) chiefs can carry off a child from a family who are not Lozi; the child then becomes a slave. All his labour he gives to his master who has the right of life and death over him The king and his elder sister, Queen Mokwai receive every year as tribute a number of children of both sexes who become their servants They give those they have no need of to their chiefs or other persons. 21)

"A Morotsi can never be a slave.

"All the king's subjects excepting the Barotsi are liable to enforced labour.

19) LIVINGSTONE, D.: Missionary Travels and Researches in South Africa, John Murray, London, 1857, p. 434.

20) MACKINTOSH, C.W.: Coillard of the Zambezi, T. Fischer Unwin, 1907, p. 359.

21) BERTRAND, CAPT. A.: The Kingdom of the Barotse, T. Fischer Unwin, 1899, p. 274.

"For a mere nothing - a delay, an order ill-executed, or a utensil broken - the servant, slave or child will have his throat squeezed by his master's hands until he falls to the ground unconscious. Sometimes the victim does not come to life again.

"Last year at Kazungula a little girl stole some maize. The owner of the field, an old woman, seized the child and held her hand in the fire until it charred through and through. The child died the next day.

".... A malefactor will be bound, placed in the path of 'senuji' (warrior ants) and be gradually devoured by them.

"The unfortunate creature who was accused of casting a spell on one of his fellows was forced to plunge his hands into boiling water. Once the hands were blistered the accused was placed forcibly on a rack and a violent poison given him; he was then burned while still living." 22)

Coillard often protested about the casualness with which slaves were put to death on the slightest pretext. He wrote afterwards:

"I have studied heathenism in Basutoland, among the Zulu and among other tribes, and horrible it was. But here it surpasses all conception." 23)

Lewanika held Coillard in high regard and increasingly deferred to his opinion, and it was in a large measure due to Coillard's unceasing efforts and his influence that Lewanika brought about many important social changes:

In 1889 slaveraiding by Mambari from Angola was stopped. In 1892 the "mwavi" practice (poison cup) was stopped at Lealui, the capital. Finally in 1906 Lewanika issued a Royal Proclamation which freed 30 000 slaves, about a quarter of the total population.²⁴⁾

"Coillard had witnessed the transformation of that vast kingdom from anarchy and bloodshed to peace and security. He had seen the abolition of the most inhuman atrocities: slave raiding and trading, infanticide, trial by ordeal, cruel torture, witchcraft." 25)

5. The Caprivi's isolation

Doubtless, in the area which is now the Eastern Caprivi Zipfel, the mellowing influence of Coillard on Lewanika had been noticeable, yet there was a lack of European penetration or of mission work in the Caprivi it-

22) Ibid., p. 276.

23) MACKINTOSH, C.W.: cp. cit., pp. 329 and 330

24) Mainly as a result of British pressure. See Clay, G.: Your Friend, Lewanika, Chatto and Windus, London, 1963, pp. 140 and 141.

25) BOLINK, P.: Towards Church Union in Zambia, T. Wever Franeker, 1967, p. 58.

self until the arrival of Streitwolf in 1908 and a Seventh Day Adventist missionary in the 1920s.²⁶⁾

The reason for this seems to be threefold:

Firstly, the Lozi as self-style "Borena"²⁷⁾ obstructed Coillard's efforts in every way to reach the non-Lozi tribes and slaves, among whom, of course, were the Caprivi tribes. For a long time only royal children were allowed to come to school and as late as 1902 Coillard complained that he had not yet reached the slaves and the poor.²⁸⁾

Secondly, the swamps of the Chobe and Zambezi were extremely unhealthy and the death rate among the French missionaries (many of whom were Basotho) were so high that it would have been difficult to expand the work. Between 1885 and 1902 no fewer than 36 missionaries succumbed, and of the fifteen missionaries that Coillard brought in 1899, nine died within two years.²⁹⁾

Lastly, the inaccessability of the Caprivi area must have played a role. Schwarz recorded that in 1925 the American Seventh Day Adventist missionary at Katima Mulilo had attempted to go to Mamili's, but the oxen had sunk up to their bellies in the mud and he had given up the attempt.³⁰⁾

The only other recorded attempt of a missionary to penetrate into present-day Caprivi was of a Rev. Reed of the London Missionary Society who had tried to reach Mamili's village by crossing the Linyanti towards the end of World War I, but his canoe was overturned by a hippopotamus and as a result of his journey he contracted malaria and died.³¹⁾

These three reasons seem to have been the main reasons why the Eastern Caprivi Zipfel until only very recently had remained virtually untouched by Western influences, apart from the visits by wandering ivory poachers³²⁾ and the five years of German administration which was cut short by the outbreak of World War I.

26) Memorandum by E.C. Kruger, Magistrate, Katima Mulilo, 1963, par. 73.

27) "Borena": chiefs.

28) MACKINTOSH, C.W.: op. cit., p. 430.

29) BOLINA, P.: op. cit., p. 62.

30) SCHWARZ, E.H.L.: The Kalahari and its Native Races, Witherby, London, 1928, p. 32.

31) Ibid., p. 42.

32) Counter-memorial filed by the Government of the Republic of South Africa, Vol. III, South West Africa Cases (Ethiopia and Liberia v. The Republic of South Africa). International Court of Justice, The Hague, 1963, p. 21.

33) Cf. "Die Expedition Streitwolfs nach dem Caprivi Zipfel", Deutsches Kolonialblatt, Jahrgang 21, Nummer 1, Berlin, 1910, p. 55.

CHAPTER VI

THE EUROPEAN ADMINISTRATIONS, 1890-19671. Introduction

Lewanika's first moves towards contact with a European authority was prompted by his fear of a Ndebele invasion. He knew that Khama, the Mangwato chief, had secured immunity from Ndebele forays by placing himself under British protection.¹⁾ As early as 1889 Lewanika inquired from Khama, whom he greatly admired, how the Mangwato chief was getting on with the British, and how, if advisable, the protection of Britain could be obtained. In his reply Khama recommended British protection.²⁾

As a result Lewanika signed a treaty on 27th June, 1890, with F.E. Lochner, who acted on behalf of the British South Africa Company, which in turn acted within the terms of its royal charter. This charter gave it authority "to make treaties, promulgate laws, preserve the peace, maintain a police force and acquire new concessions", within a vast area within which Barotseland fell.³⁾

For seven years nothing came of the Lochner concession, much to Lewanika's concern. Then the Resident whom Lewanika had waited for so long, arrived in the person of Robert Coryndon. Coryndon at once commenced the negotiation of a new agreement, which was finally agreed to on 25th June, 1898. It was called a "treaty of alliance" and the B.S.A. Company undertook "to protect the King and nation from all outside interference and attack".⁴⁾ At last Lewanika had achieved his aim.

In 1899 the Barotseland (North-Western Rhodesia) Order-in-Council declared North-Western Rhodesia to be a British Protectorate⁵⁾ and the B.S.A. Company's administrator played an increasingly important role in the affairs of the Barotse state.⁶⁾

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- 1) CLAY, G.: Your Friend Lewanika, Chalto & Windus, 1968, p. 58.
 - 2) MACKINTOSH, C.W.: Coillard of the Zambezi, T. Fischer Unwin, 1907, p. 382.
 - 3) Cf. Reproductions of B.S.A. Company Charter (1889), Mashonaland, Order-in-Council (1891) and Matabeleland Order-in-Council (1894), C.8773.
 - 4) WILLS, A.J.: An Introduction to the History of Central Africa, Oxford University Press, 1964, p. 167.
 - 5) Dated 28 November 1899. See also letter from B.S.A. Company to the Colonial Office, HC/3/3/3 (2202/00)1233, 9 April 1900.
 - 6) For a vivid description of this period see Clay, G.: Your Friend Lewanika, Chapters IX to XI.

2. The Berlin Conference, 1890

While the above developments were taking place in Barotseland, and Great Britain was going through the motions of constitutional negotiations with Lewanika, the European colonial powers held a conference in Berlin regarding their spheres of influence in Africa and other relevant matters concerning Africa. At this Conference scant attention was paid to the claims or interests of indigenous African governments, while the European rulers divided up Africa among themselves.

The German negotiators were led by Bismarck's Foreign Minister, Count Georg Leo Von Caprivi de Caprepa de Montecuccoli. He had been appointed to his post in March, 1890, and his first achievement was the conclusion of an agreement with Great Britain regarding the spheres of influence of the two countries in Africa at this Conference.⁷⁾

In an agreement dated 1st July, 1890, Caprivi made an excellent bargain for his country in Nigeria while he obtained a narrow extension of the German protectorate in South West Africa, eastwards towards the Zambezi, in exchange for withdrawing any German claims on Ngamiland. This agreement gave Germany access to the Zambezi River.⁸⁾ (The river itself was recognised as an international waterway.) This strip of territory became known as "Caprivi's fingertip" ("Der Caprivi Zipfel").⁹⁾

Germany did not occupy the Caprivi Zipfel until eighteen years later. At infrequent intervals the German Government received reports on the Caprivi Zipfel, but exercised no authority over the inhabitants who were still being ruled from Lealui, the Barotse capital. In the east Moraliswani governed the Subiya, while in the west Simataa Kabende Mamili, who ruled for more than forty years until his death in 1918, governed from Linyanti. A Lozi headman Siluka ruled the present-day Sibinda area, but moved away towards the Mashi River, north of the Caprivi, before the end of the century. Mayuni, a Iwe, was appointed as a sub-chief under Mamili to look after the north-western area, although apparently Siluka still governed a large area in present-day Caprivi.¹⁰⁾

7) Encyclopaedia Britannica, Vol. 4. Encyclopaedia Britannica, 1962, pp. 819 and 820.

8) South West Africa Survey, 1967. Department of Foreign Affairs of the Republic of South Africa, 1967, p. 17.

9) Cf. Counter-memorial filed by the Government of the Republic of South Africa, Vol. III, South West Africa cases (Ethiopia and Liberia v. The Republic of South Africa), International Court of Justice, 1963, p. 20.

10) Information by Sinkosiyana, headman of Sibinda from 1900.

The south-western borders of Lewanika's kingdom were ill-defined and subject to constant raids from the Tawana and Kwangari of the Okavango, and the British Government authorized punitive expeditions in this area as late as 1903.¹¹⁾

In the eighteen seventies Simataa Mamili fought no fewer than three full-scale wars against Letsulatebe before they apparently worked out a more or less lasting peace, but there is mention of Letsulatebe's son, Mulemi, sacking some of Lewanika's villages in 1885, so hostilities seem to have been resumed.¹²⁾ A chief called Sekumi, presumably of the Kwangari, is mentioned as one of the chief sources of trouble from 1900 to 1903.¹³⁾

3. German Occupation of the Caprivi, 1909

In 1908 the German Government at Windhoek decided to initiate some form of administration in the Caprivi Zipfel.¹⁴⁾ Hauptmann Streitwolf, "distriktchef" of Gobabis, was appointed the first "Resident" in the Caprivi.¹⁵⁾

On 15 November, 1908, Streitwolf left from Gobabis on the eleven-week journey, in the company of a Feldwebel, two sergeants and fourteen African soldiers. He managed to cross the Chobe and enter the Caprivi on 27 January, 1909, and reached the banks of the Zambezi, opposite Sesheke ("old Sesheke") on 3rd February. Streitwolf built his residence here and called it Shuckmannsburg, after the German Governor in Windhoek.¹⁶⁾

According to Streitwolf the Caprivi area encompassed two of the Barotse "provinces" - one under Letia (later Lewanika's successor) who lived at Sesheke (opposite Shuckmannsburg) and one under Letia-njana of Kaunga. Both were sons of Lewanika and presumably the Lozi sub-chiefs mentioned by the Caprivians (see above) were under their jurisdiction. It is said that Letia (Yeta) was actually living in the Caprivi but cleared out when he heard that the Germans were coming.¹⁷⁾

11) CLAY, G.: op. cit., p. 131.

12) COILLARD, F.: On the threshold of Africa, T. Fischer Unwin, London, 1907, pp. 219 to 220.

13) CLAY, G.: op. cit., p. 131.

14) Counter-memorial, op. cit., p. 21.

15) "Die Expedition Streitwolfs nach dem Caprivi Zipfel", in Deutsches Kolonialblatt, Jahrgang 21, Nummer 1, Berlin, 1910, p. 55.

16) Ibid., p. 55.

17) Information by Mr. Robert Chindu, Chief Constable, Magistrate's office, Katima Mulilo.

When the Lozi were warned that the Germans were going to place a German Resident in the Caprivi, the ruling Lozi families left, stripping the territory of every single head of cattle. Some members of the subject tribes accompanied their rulers voluntarily, but many were taken away as slaves, despite Lewanika's edict against domestic slavery two years earlier.

According to oral tradition in the Caprivi, their Lozi rulers had been warned by the British that "The Germans were bad people who ate people". It is also very likely that the news of the outcome of the Herero wars had reached the Zambezi. Whatever the reason, Streitwolf found a territory stripped of all its cattle, its entire ruling class and a good portion of its original inhabitants.

Streitwolf immediately set about negotiating with the B.S.A. Company and achieved the return of some of the cattle and the people.¹⁸⁾ Turning his attention to the dire state of the tribal administration, he reconstructed a system of tribal rule which continues to this day.

Streitwolf was faced with a heterogeneous collection of leaderless fragments of tribes. In the east the entire Liswane family under Moraliswane had fled into Botswana and Zambia. In the north-western corner of the territory a number of Fwe and Mbukushu now found themselves cut off from Siluka. South of them, Mayuni and his sub-chiefs had fled, and only in the south-west the ageing Simataa Mamili who had said he was too old to flee, had remained behind.

Streitwolf ordered a series of tribal gatherings and in consultation with the people most of the Subiya were grouped under Chikamatondo, an able and popular commoner, who acted as regent for the Liswane family until his death during World War II. Streitwolf confirmed Simataa Mamili's position as chief and extended his jurisdiction over the entire non-Subiya area of the Caprivi, including the Yeyi and Mbukushu tribal groups.¹⁹⁾

In effect Streitwolf re-introduced the Lozi system of government in the Caprivi areas, consolidated and regularized the system under which the Caprivi people had lived as long as they could remember, but rid it of malpractices and injustices as far as he could.

18) Streitwolf, op. cit., pp. 56 and 57.

19) Ibid., pp. 56 and 57.

For a full account of Streitwolf's administration, see Hauptmann Streitwolf: Der Caprivi Zipfel (236 pp.), Berlin, W. Süsserott, 1914.

4. British Military Rule, 1914-1921

In 1914, immediately after the outbreak of the First World War, a Rhodesian force was assembled at Sesheke, which formally invested Schuckmannsburg and took over control of the Caprivi - the first Allied occupation of German territory in the 1914-1918 War.²⁰⁾

A small detachment of troops was stationed at Schuckmannsburg and controlled the territory until 1921 under the command of a certain Corporal Lake.²¹⁾

5. The Period 1921 to 1929

According to Proclamation No. 12 of 1922 (second paragraph of the Preamble), the Caprivi Zipfel had since the withdrawal of martial law on the 1st January, 1921, been administered by the High Commissioner for South Africa, the Governor-General, who as representative of the British Government was then also in charge inter alia of Bechuanaland. By that proclamation the High Commissioner was declared to be the Administrator, with legislative powers, for the Caprivi Zipfel as from the 1st January, 1921.²²⁾

The High Commissioner, by Proclamation No. 23 of 1922 (S.A.), provided for the administration of the Eastern Caprivi Zipfel as if it were a portion of the Bechuanaland Protectorate, and for the laws of the Protectorate to be applied thereto. The Resident Commissioner of Bechuanaland Protectorate was to exercise authority in the area on behalf of the High Commissioner.

The reason for the issue of Proclamation No. 12 of 1922 (S.A.) was stated by the Administrator of South West Africa as follows:

"By reason of its geographical situation and lack of communication the administration of Caprivi Zipfel by this Administration is impracticable."²³⁾

The Permanent Mandates Commission of the League of Nations, under the chairmanship of Sir Frederick Lugard questioned the propriety, under the Mandate, of administering the Eastern Caprivi Zipfel through the

20) Counter-memorial, op. cit., p. 22.

21) Information by Mr. A.M. Mutonga, Kanono F.P. School.

22) Counter-memorial, Vol. VIII, p. 129.

23) Annual Report of the Administration of South West Africa, 1922: U.G. 21 - 1923, p. 2.

Bechuanaland authorities,²⁴⁾ particularly as neither the High Commissioner nor the Resident Commissioner of Bechuanaland Protectorate were under the authority of the Union Government and therefore the Mandatory, the Union Government, could not issue instructions to them.²⁵⁾

From the inception of the Mandate of the Union of South Africa over South West Africa after World War I, the administration of the Caprivi Zipfel was thus separated and excluded from not only the competence of the Legislative Assembly of South West Africa, but also the administration of South West Africa.²⁶⁾

In practice the Bechuanaland Protectorate's administration was of the most nominal nature exercised by a sergeant of police stationed first at Kazungula, then later at Kasane in Bechuanaland, on the Chobe River.

During the early twenties there was a Seventh Day Adventist missionary, a Mr. Konigmacher, his wife and son, based at Katima Mulilo, the former site of a store run by a certain Moodie whose property was confiscated during World War I. Mr. Konigmacher's work was confined to the Subiya tribe.²⁷⁾ Three other Europeans traded and hunted in the area. Michaelsen ran a store at Kabulabula (which could only be reached by canoe), Ben Johnson ("Kapitura"), described as "a good fellow and a gentleman though undoubtedly mad", lived at Seanga, and the third, known as John the Greek, a fearless hunter and storekeeper, lived just north of the Caprivi at the junction of the Kwando and the Luyana.²⁸⁾

The European trading community was reduced by two-thirds before 1925, when during a drinking session Ben Johnson shot John the Greek. Johnson went to give himself up at the Portuguese fort on the Mashi River, but when the Portuguese garrison saw him coming they fled. He returned to his place, shot all his animals and then himself.²⁹⁾

In 1929 the administration of the territory once again changed hands.

24) See Minutes of the Permanent Mandates Commission (League of Nations), Session III, p. 102 and p. 325 (1923); Session IV, p. 57 (1924); Session VI, p. 58 and p. 61 (1925); Session VII, p. 16 (1925).

25) Ibid., Session VII, pp. 16-17.

26) Counter-memorial, Vol. VIII, op. cit., p. 128.

27) SCHWARZ, E.H.L.: The Kalahari and its Native Races, Witherby, London, 1928, p. 32.

28) Ibid., p. 33.

29) Ibid., p. 33.

The Period 1929 to 1939

The misgivings expressed by certain members of the Permanent Mandates Commission about the legality of the Bechuanaland administration of the Caprivi Zipfel, influenced the Union Government to bring about a change in the administration of the area.³⁰⁾

Accordingly by Proclamation No. 196 of 1929 (S.A.) the administration of the Eastern Caprivi Zipfel was transferred from the Bechuanaland Authorities to the South West African Administration.

The Administrator of South West Africa was appointed as Administrator of the Caprivi Zipfel and the Governor-General's legislative powers were delegated to the Administrator.³¹⁾

By Proclamation No. 26 of 1929 (S.W.A.) the Administrator applied the laws of South West Africa to the Caprivi Zipfel.

During the period of the South West African administration of the Caprivi Zipfel constant difficulties were experienced in the administration of the area by reason of its geographical inaccessibility from the rest of South West Africa.

"Ever since it was decreed by Union Proclamation No. 196 of 1929 that the Caprivi Zipfel should be administered as part of the said Territory, difficulty has been experienced in controlling the Eastern portion owing to its geographical position. The only way of reaching it from Windhoek is either through Bechuanaland or by rail through the Union of South Africa and the two Rhodesias via Livingstone A direct way via Grootfontein is impossible, there being two large rivers (the Okavango and the Kwando) to be negotiated and a dry, uninhabited, trackless, desertlike stretch to be traversed." ³²⁾

These difficulties, according to an official report,³³⁾ resulted in "a period of complete stagnation", a stagnation, one might add, which had set in with the occupation of the Zipfel in 1914.

The South West Africa Administration accordingly requested the Union Government to be relieved of the administration of the area.³⁴⁾

30) Counter-memorial, Vol. VIII, op. cit., p. 131.

31) Proclamation No. 196 of 1919 (S.A.).

32) U.G. 30 - 1940, pp. 134-135.

33) Report on the Administration of the Eastern Caprivi Zipfel, 1940, by L. Trollope, Magistrate, (unpublished), pp. 10-11.

34) Ibid., p. 11.

7. The Period since 1939

The Permanent Mandates Commission was informed of the proposed transfer of the administration to the Union Government, early in 1939.³⁵⁾

The Commission decided that:

"..... The administrative arrangement contemplated calls for no observations on its part provided all the provisions of the mandate are properly applied in the eastern portion of the Caprivi Zipfel." 36)

It was therefore decided, subject to the terms of the Mandate, that control of the territory should be vested in the Union's Minister of Native Affairs,³⁷⁾ and this was accomplished by the promulgation of the Eastern Caprivi Administration Proclamation, 1939 (Proclamation No. 147 of 1939).

The second paragraph of the preamble to the Proclamation read as follows:

"..... Experience has shown that the geographical position of the Eastern Caprivi Zipfel, makes it expedient that it should be administered by the Minister of Native Affairs of the Union" 38)

And in the Annual Report of the League of Nations in 1939, the hope was expressed that by this transfer:

"..... the Government will be able to comply more fully with the terms of the Mandate by devoting more attention to the welfare of the Native population." 39)

Following the transfer, Proclamation No. 243 of 1939 constituted the Eastern Caprivi Zipfel as a magisterial district. Government Notice No. 1607 of 1939 established a Bantu Affairs Commissioner's Court and by Government Notice No. 1210 of 1940 the territory was declared a Bantu Reserve.

As far as the exercise of legislative functions in respect of the Caprivi Zipfel is concerned, the position is the same as that which pertains in respect of "native affairs or any matters specially affecting natives"⁴⁰⁾ in the rest of South West Africa:

35) Counter-memorial, Vol. VIII, op. cit., p. 133.

36) Permanent Mandates Commission, Session XXXVI, pp. 280-281.

37) U.G. 30 - 1940, pp. 134-135.

38) Proclamation No. 147 of 1939 (S.A.), 21st July, 1939, in The Laws of South West Africa, 1939, Vol. XVIII, p. 28.

39) U.G. 30 - 1940, p. 175.

40) Act No. 42 of 1925, Sec. 26(a), in The Laws of South West Africa, Vol. II (1923-1927), p. 16.

In both cases no act of the South African Parliament applies unless it is expressly declared to be applicable. In both cases the State President can legislate by proclamation as long as the provisions thereof are not repugnant, or inconsistent with, an applicable act of Parliament.⁴¹⁾ In both cases an Ordinance of the Legislative Assembly of South West Africa can apply only when it has received the prior consent of the State President-in-Council.⁴²⁾ In fact no Ordinances of the Legislative Assembly of South West Africa have been applied to the Eastern Caprivi Zipfel.⁴³⁾

The Eastern Caprivi Zipfel is at present administered by the Minister of Bantu Administration and Development on behalf of the State President.⁴⁴⁾

This concludes the brief outline of the history of the Eastern Caprivi Zipfel. Its early history is a history of endless feuding; its creation 75 years ago as a political entity by the European powers must surely rank as one of the most bizarre results of the "scramble for Africa"; its geographical features and location ensured that right up to 1964 it remained as backward as the areas surrounding it - northern Botswana, south-western Angola and Barotseland. It is now poised at the beginning of a new era, an era with problems of great complexity but also an era of rapid political and social development.

41) Counter-memorial, Vol. VIII, op. cit., p. 134 and p. 135.

42) Ibid., p. 135.

43) Ibid., p. 135.

44) Ibid., p. 135.

CHAPTER VIITHE EASTERN CAPRIVI ZIPFEL TODAY(A Survey of the recent administration and development in the Eastern Caprivi Zipfel)1. General administration

In November 1939 Major French Trollope was sent out as the first Magistrate of the Union Government, accompanied by an Assistant Magistrate, Capt. E.C. Kruger.

The jurisdiction of the tribal courts, etc., are dealt with in more detail in Part II. Two extracts from official documents will, however, give a fair indication of the Government's approach and the application of its policies in the Eastern Caprivi Zipfel:

The Secretary for Native Affairs instructed the newly appointed Magistrate for the Eastern Caprivi Zipfel in a handwritten note, dated 12th October 1939 as follows:¹⁾

"Wherever possible you should endeavour to have matters settled by the Native Courts. Your judicial jurisdiction should only be exercised in cases where it appears that proper justice will not otherwise be done or when the magnitude of the offence makes it desirable that the matter should be withdrawn from the Native Courts. Especial attention should be paid to the necessity for the eradication of witchcraft."

In 1963, the Magistrate, Mr. E.C. Kruger, summed up the administration's policy over the previous two decades as follows:²⁾

"The tribal set-up and its chieftainships were accepted and confirmed (by South Africa) as the basis for local government and arrangement; interference with that order having been insignificant (except for elimination of features against natural justice and morality), development taking a natural, even and accepted course under local supervision, lightly applied, of one government officer."

In practice, the Bantu Affairs Commissioner works through two local tribal authorities which have exactly the same powers - the Subiya chief and kuta (tribal council) and the Fwe chief and kuta. This equality is jealously guarded and strictly observed, in order to preserve good relations within the territory.

1) File No. 1/2/1, Magistrate's office, Katima Mulilo.

2) Memorandum by C. Kruger, (Unpublished), 4th January, 1963, Par. 17.

Apart from the somewhat different relationship between the Commissioner and the tribal courts, the duties and authority of the Bantu Affairs Commissioner at Katima Mulilo are the same as those of a Bantu Affairs Commissioner in the Republic of South Africa.

2. Education

The earliest record of education in the Caprivi is dated 1925; during E.H.L. Schwarz's visit to Katima Mulilo he noted that the American missionary and his wife at Katima Mulilo were "busy teaching the Masubeia young ladies and gentlemen the elements of arithmetic and such-like accomplishments".³⁾

Government records show one teacher on the pay roll at a small school near Kasika in 1929⁴⁾ but education was not tackled on an organized basis until the early forties, when the South African authorities decided to introduce primary schools by using Christian missions. The resident Seventh Day Adventist missionary was approached to carry out this programme, but declined the offer. The Government then turned to the Roman Catholic Mission at Sesheke, across the river, which accepted it and moved across the river, establishing a mission station just south of Katima Mulilo.⁵⁾ By 1962 the Mission had 18 primary schools under its control, financed by the South African Government. Only five of these schools, however, were situated in the western (Fwe) area of the Caprivi.

The so-called "Odendaal Commission's" recommendations⁶⁾ triggered an overall acceleration in the development of the Caprivi, dramatically illustrated by the development of educational facilities:

In 1962 there were 18 schools, 1 500 pupils and 42 teachers. In 1967 there were 35 schools, 4 200 pupils, a secondary school and a teachers' training college, with 98 primary school teachers.⁷⁾

The Bantu Education Act of 1953 is not applicable in the Eastern Caprivi Zipfel. Education is therefore controlled by the Department of Bantu Administration and Development with the aid of two officers - an

3) SCHWARZ, E.H.L.: The Kalahari and its Native Races, Witherby, London, 1928, p. 32.

4) Information by C. Kruger, Magistrate.

5) Ibid.

6) Republic of South Africa - Report of the Commission of Enquiry into Affairs of South West Africa, 1962-1963. Government Printer, Pretoria, 1964.

7) In 1968 the number of school children were well over 5 000.

inspector and a sub-inspector - seconded from the Department of Bantu Education.

There are no school fees and school books are free. Universal school education will probably be possible before 1970.

In spite of the low quality of the Lozi primers, the quality of teaching is steadily improving, not only as a result of the improved quality of teachers' training but also by intensive supervision on the part of the two inspectors.

There are many factors inhibiting the development of education in the Caprivi. Among the obstacles are poor communications; the continual change in the water level of the low-lying areas, resulting in a population which advances and retreats with the rise and the fall of the annual floods; scarcity of building materials; and the low density of the population which necessitates a large number of small schools.

In spite of these obstacles there is now a school within walking (or paddling) distance of almost every child in the Caprivi, and more schools are still being planned.

A new state secondary school and a technical school are also planned to supplement the junior secondary school at the Catholic Mission. University education is provided at the University of the North at Turfloop, in the Northern Bantu Areas of South Africa.⁸⁾

3. Health

The Department of Health of the Central Government is responsible for the provision of medical services in the Caprivi Zipfel, while the Department of Bantu Administration and Development provides the finances.

A health officer heads a team of local health workers who are responsible for rural preventative measures. These measures include the following:

- (a) The entire population is provided with free iodised salt. This has dramatically cut a formerly high incidence of goitres.
- (b) The ointment for treating trachoma in the early stages is distributed free. In some areas the incidence of trachoma ("river blindness") is reported to be as high as 70 per cent.⁹⁾

8) Information by P. Felstead, Education Department, Katima Mulilo.

9) Surveys by Dr. F.J. Blignaut, Katima Mulilo Hospital.

(c) Malaria is endemic but the available statistics are not regarded as accurate. Malaria is combatted by spraying of houses, pools and undergrowth and the free distribution of prophylactics.

Backing up the preventative health measures is a state-subsidized mission-run hospital of 110 beds (built in 1946) which has undergone extensive improvements in recent years totalling about R90 000. The hospital is staffed by a Government doctor, several male medical aides, five European sisters, and seventeen African assistant-nurses. The hospital has recently been approved as a training centre for assistant nurses.

The hospital is also responsible for a lepers' settlement.

The three mission-run clinics existing in 1962 have been supplemented by an additional nine Government clinics at a capital cost of R102 000.

At all the clinics, which are visited regularly by the Government doctor, services and drugs are provided free. In addition an ambulance service is provided free of charge for the whole territory.

A modern Government hospital will be built in the near future next to Ngweze township.

The hospital also serves the Zambian population across the river, mainly of Sesheke town and district.

4. Agriculture

Although the agricultural department claims 121 500 ha of crop-producing land, only 55 700 ha are recognisable on aerial photographs.¹⁰⁾

A variety of crops are grown, mainly maize, millet, pumpkins and melons, and surpluses are sold locally. The Government has constructed a number of storage tanks for maize at strategic points, where maize is bought up and stored for use in the event of seasonal shortages.

The distance to suitable markets and high transportation costs have so far been the main obstacle with regard to boosting the crops output, and will continue to be a problem with the increased hostility of Zambia towards the Republic, which deprives the Caprivi of its "natural" market, the Copper Belt. Many possibilities including overhead irrigation, and the production of cash crops like rice, jute and groundnuts are being investigated.

Traditionally the Caprivi tribes have always owned large herds of cattle, but an outbreak of ngana (spread by tsetse) created havoc in the

10) BREITENBACH, F. VON.: Longterm Plan of Forestry Development in the Eastern Caprivi Zipfel, Department of Forestry, George, 1968, p. 17.

early fifties, so that the cattle population of 30 000 in 1948 was reduced to only 8 000 head in 1957. By 1967 the cattle population had increased to about 20 000 (7 500 in Subiya area and 12 500 in the Fwe area).

Large-scale spraying, just completed, has cleared the Eastern Caprivi Zipfel of tsetse and a target of 100 000 head is set for the cattle population. The cattle belong to the Sanga type and the herds are being improved by annual culling by experts from Pretoria. The main export market is provided by the Zambian Cold Storage Commission. Here again the development of export-markets is dependent on the improvement of transportation facilities.

5. Forestry¹¹⁾

Forests, woodlands and wooded savannas cover 60 per cent of the land area. But there are only two tree species which combine suitable timber qualities and log dimensions with the abundance required for industrial utilization. They are baikiae plurijuga (mukusi or Rhodesian teak) and pterocarpus angolensis (mukwa or kiaat).

- (a) Mukusi: There is a total growing stock of 850 000 m³ of which 354 000 m³ are of maturity size. Only 172 500 m³ are stocking in exploitable areas.
- (b) Mukwa: Growing stock totals 283 000 m³ of which 127 500 m³ are of maturity size (i.e. supplying logs of 400 mm. minimum mid-diameter under the bark). About 124 800 m³ are stocking in exploitable areas.

The following management has been recommended:

About 33 per cent of the total wooded areas should be set aside for soil conservation purposes and timber production. Of this area two-thirds should be set aside for the sole purpose of soil conservation; another 20 per cent should be subject to improvement management (i.e. reconstruction of a fully productive stock); and the remaining 14 per cent should be subject to productive management for the purpose of timber supply at sustained yield.

This management would then yield timber as follows:

11) This section is a summary of the relevant details in F. von Breitenbach's report, Longterm Plan of Forestry Development in the Eastern Caprivi Zipfel, 1968.

(a) Mukusi (Rhodesian teak)

The annual yield will build up from 290 m³ in 1969 to 1 200 m³ in 1975. It will remain constant at this level for 120 years, after which it will increase substantially.

(b) Mukwa (kiaat)

The annual yield will build up from 1 800 m³ in 1969 to 6 100 m³ in 1975. This will be sustained for 20 years only, then gradually decrease to 1 130 m³ during subsequent 60 years, thereafter produce a perpetual annual yield of about 2 800 m³.

It is estimated that for the successful implementation of these recommendations, forestry management and development on a large scale will be necessary with a staff of at least forty persons and annual current expenditure only of at least R50 000. In addition a sawmill will have to be erected at Katima Mulilo and the problem of marketing and transportation overcome.¹²⁾

If the problems could be overcome the annual income could be in excess of R500 000 in 1975.

It is not known to what extent these proposals will be accepted and implemented.

At present a European forester of the Department of Forestry is stationed in the Caprivi Zipfel. He has completed a network of access roads and has been assisting with the assessment of the timber potential of the territory, as well as supervising experimental plots.

6. Transport and communications

So far the efforts to provide the Eastern Caprivi Zipfel with one of the most basic prerequisites for economic development, i.e. reliable and adequate communications, have only met with partial success.¹³⁾

Until very recently the only dependable year-round line of communication to the outside world was by barge along the Zambezi from Katima Mulilo to Kasane in Botswana; and from there to the railway at the Victoria Falls by road. Now a sand-surfaced road links Katima Mulilo to

12) The above estimates of personnel requirements and expenditure are unofficial estimates by forestry officials given to me personally.

13) It is ironical in view of its atrocious communications that the Caprivi Zipfel owes its existence to the German desire for a route from South West Africa to the Indian Ocean via the Zambezi.

Ngoma where an earth embankment spans the Chobe River and links up with the road to the Victoria Falls in Rhodesia. This road, however, tends to deteriorate rapidly and is sometimes cut by the Zambezi floods. It is the only road in the Caprivi that can be used by two-wheel drive vehicles, although great efforts are being made to improve the Katima Mulilo-Sibinda-Kongola road and the Katima Mulilo-Linyanti road. The main problem is the complete absence of suitable surfacing materials in the Caprivi, the deep sandy soils and the seasonal waterlogging of these soils. Between 1964 and 1966 400 kilometres of road were made at a cost of over R160 000, with limited success.

There are two airstrips and a regular weekly flight of the Witwatersrand Native Labour Association (Wenela) between Francistown and Katima Mulilo.

There was no post office and mail came either via Sesheke Post Office in Zambia, Victoria Falls Post Office in Rhodesia, or Francistown Post Office in Botswana. Now there is a small post office.

There is no public transport apart from the Zambezi barges.

7. Urban Development

Katima Mulilo is the only "urban" centre in the territory. The administrative centre moved here in 1935. Most of the development is very recent, and has been triggered by the large-scale development of the area since 1962.

Building costs are extremely high - five times higher than in the Republic. The reason for this is not entirely clear.

Expenditure on a model township for 1 000 Africans totalled R434 000 for housing and basic services.

PART IIOUTLINE OF THE SOCIAL ORGANIZATION AND
JUDICIAL SYSTEM AND PROCESS OF THE FWECHAPTER IOUTLINE OF THE SOCIAL ORGANIZATION OF THE FWE1. Introduction

As described earlier, the Fwe have been under foreign dominance for at least three centuries. As a result their society has undergone deep-going changes. Nevertheless, it is remarkable to what extent Fwe society has retained its original matrilineally organized social structure, particularly if it is borne in mind (a) the natural tendency among all Central African matrilinear tribes towards change into patrilineal structures and (b) the disintegrating effects of the harsh conditions of life under the successive Luyi, Kololo and Lozi regimes over a period lasting for many generations. The rulers of the Fwe during this period regularly plundered their subjects' villages and carried away the young children as slaves, mothers as concubines and removed the men to perform forced labour or to go to war. Often entire villages were uprooted and sent to other areas at the Paramount Chief's bidding.¹⁾

In the absence of any secondary sources which describe the social organization and kinship system of the Fwe,²⁾ a considerable part of the field work was directed towards this subject in order to present, albeit only in broad outline, the social milieu or framework within which Fwe Family Law operates.

The greater part of this field work was carried out at Sibinda village, which was selected for this purpose because of its location in the heartland of Fwe territory, and because it is one of the most homogeneous Fwe villages and also one of the oldest in the territory.

1) Cf. the eyewitness accounts of Coillard, Bertrand and others, quoted in Part I above.

2) In the only known work which refers to the social organization of the Eastern Caprivi tribes, (Counter-memorial filed by the Government of the Republic of South Africa, Vol. III (pp. 22-24)), the Eastern Caprivi tribes are mistakenly described as patrilinearly organized.

2. The Clan (sing. "chilongo", plur. "zilongo")

Fwe society is divided into clans. There are at least six, which are called as follows:

- Mukwanyati (man of the buffalo)³⁾
- Mukwazita (man of the hippopotamus)
- Mukwevu (man of the elephant)
- Mukwasheya (man of the leopard)
- Mukwansara (man of the hyena)
- Mukwang'andu (man of the crocodile).

There are also variant forms of these names as in the case of Mukwatou, where -tou is the Lozi for elephant, which would mean therefore the same as the pure Fwe rendering Mukwevu. Other clan names such as Mukwachunga and Mukwachuma were also collected but there was conflicting evidence as to whether these were variant forms or not of the above list of six clans.

While the clans are named after animals and are therefore not eponymous (i.e. named after an ancestor), this linking of the clans with animals apparently, as far as could be ascertained, has no totemic significance.

As far as could be ascertained there is, for example no taboo attached to the respective clan names, nor to the animals they refer to. There is for instance no ban on eating the meat of the animal after which one's clan is named.

Also, in sharp contrast to other matrilineal tribes in Central Africa there is no ban on members of the same clan marrying each other.⁴⁾

Affiliation to a "chilongo" is based on descent. Descent is traced matrilineally, i.e. through the mother or her male siblings.

Persons who share a clan name do not necessarily expect to trace a genealogical relationship; the Fwe do not trace their genealogical descent for more than three or four generations from the adults.

Each clan is widely dispersed; in every village any number of clans are represented.

Thus the Fwe is organized in broadly based unilineal groups, but these groups, the clans, do not appear to perform any discernible func-

3) Mukwane: Man. Nyati: buffalo

4) All informants are positive that members of the same clan may marry. However, only one example of such a marriage could be found during the investigation.

57.
tion, either with regard to political organization, religion, inheritance and succession, or to the use and occupation of land.

Although the matrilineal tribes of Central Africa vary greatly one from the other with regard to the nature and function of the clan, in the vast majority of cases it functions as an exogamous unit.

In this respect the chilongo of the Fwe is different and resembles the mushiku of the patrilineal Lozi, which Gluckman calls a "descent-name" among the Lozi.⁵⁾ Indeed there are many apparent similarities between the Lozi descent-name and the Fwe clan:

The members of a Lozi mushiku (plur.: mishiku) do not have any specific obligations to each other, there are no ritual beliefs or practices attached to any mushiku and a Lozi may marry a woman from the same descent-name as himself. In these respects the Lozi mushiku and the Fwe clan bear a marked resemblance to each other.

It could be advanced as a hypothesis that the social structure of the dominant Lozi had gradually influenced the content, if not the form, of the Fwe clan, a process aided by the fact that the Fwe never had a strong central political organization to stabilize and maintain the clan system in its original form and content.

It should also be noted that there are important differences between the Lozi descent-name and the Fwe clan.

The Lozi descent-name is not a unilineal group. Descent is traced through both the patriline and the matriline, and also in the lines of all those with whom they wish to maintain connections. Every Lozi might be able ultimately to claim descent from all the Lozi descent-names. This method of tracing descent is, to say the least, completely incomprehensible to the Fwe, although the majority of spokesmen were aware of it.

It is my impression that more light could be shed on the origin and development of the Fwe social structures by a comparative study of the Fwe and the tribes to the west of them - the tribes of the Okavango and Mashi Rivers - rather than to the north of them, i.e. the tribes of the present-day Barotse Province.

5) GLUCKMAN, M.: Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal, in Radcliffe-Brown, A.R. and Ford, D. (eds.): African Systems of Kinship and Marriage, London, Oxford University Press, 1950, p. 172.

It seems that centuries of serfdom and of the disintegrating effect of slavery had weakened the Fwe clan to such an extent that it lost its original functions within the social structure of the Fwe, so that today the largest functional unit within the Fwe social system is the local kin group.

3. (The Local Kin Group) ("o munzi")

The local kin group is the largest functional social unit in Fwe society. It usually forms a geographical unit, i.e. a single settlement, under the authority of a headman ("o mfumu"). He has under his authority in addition to his own wife or wives, the families of his married children with the exception of those who had decided to settle in the villages of their spouses' kin groups. In addition to this extended family, or as Bruwer terms it, "the three-generation unit"⁶⁾ there are usually two or three other extended families, or the remnants thereof, living within the same local kin group. These families are related to the "o mfumu" - usually the heads of these families are brothers, or brothers-in-law, of the "o mfumu" - and under his authority. Usually there are also a few strangers who had received permission to settle in the village.

The composition of and marriage patterns in a local kin group is best illustrated by analysing the composition of a typical Fwe village and comparing it to the composition of local kin groups located on the fringes of the Fwe area of jurisdiction.

(a) Sibinda village

(i) General description and history

Sibinda village was selected as a typical Fwe village because it is one of the oldest Fwe villages in the Caprivi, is situated in the middle of a line of Fwe villages and is relatively cut off from the non-Fwe societies or heterogeneous societies which cluster along the floodplains of the Zambezi and Kwando-Linyanti Rivers. It is situated 69 kilometres west of Katima Mulilo.

Little is known about the early history of the Sibinda Fwe, except for a vague tradition that their ancestors had come from "Mombokelo", a

6) BRUWER, J.P.: Die gesin by die moederregtelike Acewa. Unpublished M.A. thesis, Pretoria, 1948, p. 83. A.I. Richards uses the term "grand-family". Cf. Radcliffe-Brown, A.R. and Ford, D. (eds.): African Systems of Kinship and Marriage, London, Oxford University Press, 1965, p. 210.

place apparently somewhere west of the Kwando River.

Sibinda was already in existence "in the time of Sikeretu", i.e. around the 1850s. It was then known as Nziba. It was much larger and the site of the village was about two miles west of the present site.

Sinemengoma of the Mukwanyati clan was headman in the time of Sikeretu. After his death he was succeeded by a younger sister's son, Samakunguru, who died about the turn of the century.

Samakunguru was succeeded by a younger brother, Sinkosinyana, who is still nominally the headman but "retired" in 1944 because of advanced age. Acting on his behalf is Said Mubyana, the son of a sister of Sinkosinyana who is approximately 100 years old.

Sinkosinyana stated that when he became headman at the turn of the century, there were ten Fwe villages in the present-day Eastern Caprivi Zipfel, of which five were in the present-day Sibinda area: Nziba (Sibinda), Mahajane, Muzilikazi, Masida and Bozi. On the Kwando River (always referred to as the Mashi by the Fwe) there were the villages of Sahona, Mayuni, Sambara, Mukumbila and Imusho.

All these villages tended to be larger than today, as the inhabitants tended to group together for defensive purposes. Sibinda itself consisted of no less than seven extended families, according to Sinkosinyana, whereas today the village consists basically of three extended families - those of Said Mubyana, Champa and Sikambi.

(ii) Settlement pattern

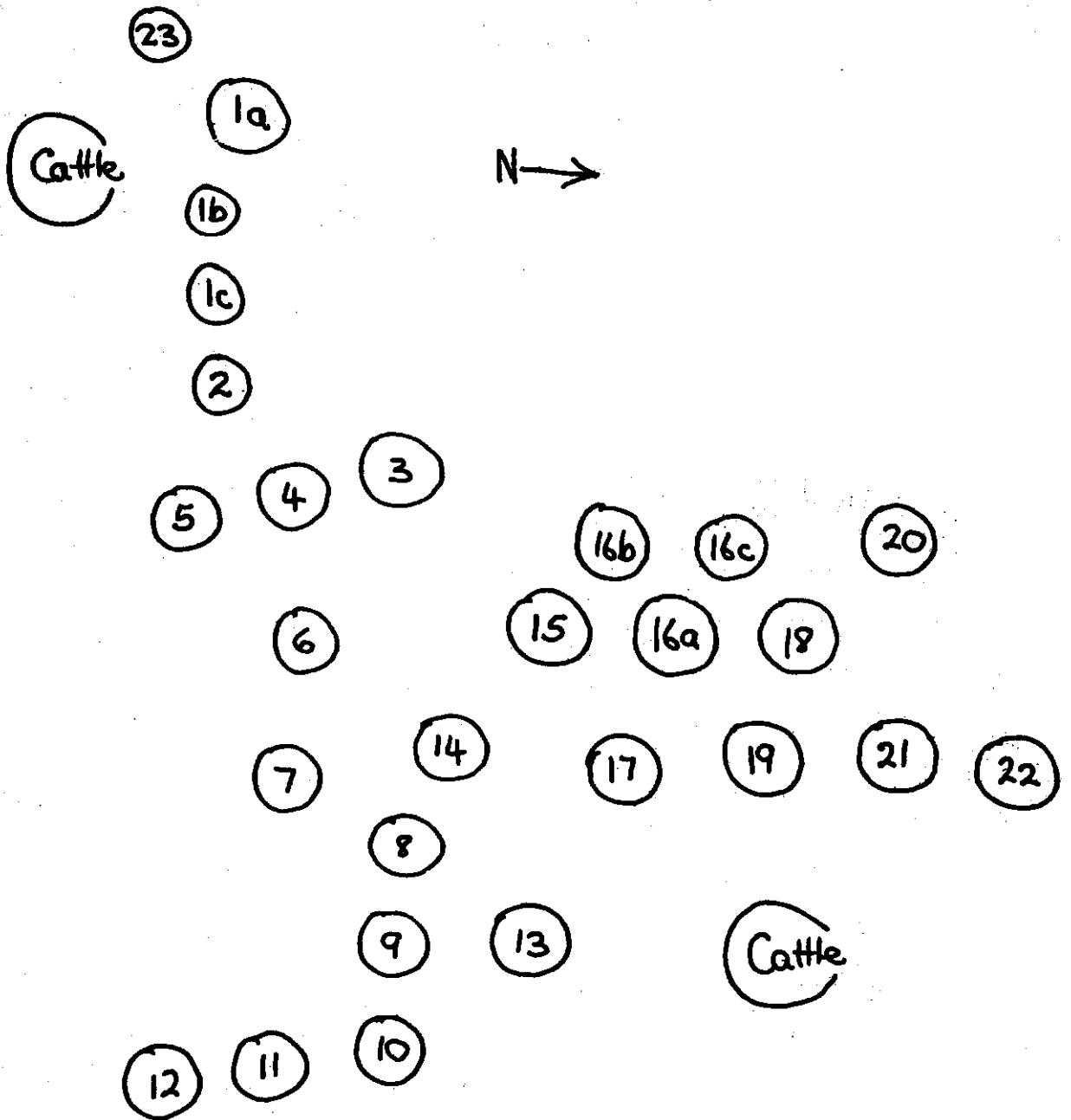
There is no set settlement pattern among the Fwe as the sketch maps depicting the settlement patterns of Sibinda, Mbulamulozi and Juda's villages show. (Figures 7, 9 and 19).

Every hut owner merely picks a site he prefers and with the permission of the headman builds his huts on the spot. Under the influence of the Tswana, there is an increasing tendency to build an enclosed courtyard round each hut, but in Sibinda and the other two villages which were investigated no such "lapa" had been built.

(iii) Summary of the composition of the population of Sibinda village

In Figure 7 each hut has been numbered. The occupants of each hut are as follows:

FIG 7. SETTLEMENT PATTERN OF SIBINDA VILLAGE



Huts 1 (a) to (c): Said Mulyana, acting headman Fwe, Mukwanyati clan.

Married to the following:

Hut 1 (a): Ziro. Yeyi, from Kanono. Senior wife.

(b): Tumbulu. Fwe, Mukwatou clan. From Sibinda. Daughter of headman Sinkosiyana, i.e. daughter of Said's mother's brother.

(c): Kapande. Barrakwengo Bushman woman from Nandavu.

Note: Said had previously been married to but subsequently divorced a daughter of his father's younger brother - a cross-cousin marriage.

Hut 2: Sinkosinyana, headman, now "unofficially" retired. Fwe, Mukwanyati clan.

Wife: Nalucha. Fwe, Mukwanjovu clan, from Kakunikwa Village near Katima Mulilo.

Note: Sinkosinyana's first wife has died. She had been his father's sister's daughter. He has, in addition, divorced two other wives.

Hut 3: Wilson Mushalo. Fwe, Mukwang'andu clan.

Wife: Tubasoye. Fwe, from Sibinda. Mukwachuma clan. Daughter of Wilson's father's sister.

Hut 4: Gilbert Muinahande. His father of Mbukushi tribe; his mother, Fwe of Sibinda. Mukwang'andu clan.

Wife: Mwanenwa. Fwe, Mukwachunga clan, from Mutotela Village (2 miles away).

Hut 5: Simon Malumboano. Fwe, Mukwachunga clan, from Sibinda.

Wife: Tubazalile (I). Fwe, from Sibinda. Mukwazita clan. Tubazalile's paternal grandmother the sister of Simon's maternal grandfather.

Hut 6: Puteho. Fwe, Mukwanyati clan, from Sibinda.

Wife: Cibuku, Mukwachuma clan, from Sibinda. Daughter of Puteho's maternal uncle.

Hut 7: Kukalilwa. Fwe, Mukwachuma clan.

Wife: Makutela. Fwe, Mukwashongo clan. Daughter of Kukalilwa's paternal grandfather's younger brother.

- Hut 8: Nako. Fwe, Mukwang'andu clan, from Sibinda.
Wife: Nang'alelwa. Fwe, Mukwanyati clan, from Mahajane Village, (4 km. away).
- Hut 9: Sikutamushukwe, died.
Widow: Masikabi. Fwe, Mukwachuma clan. Daughter of her late husband's paternal grandfather's sister.
- Hut 10: Maluli. Fwe, Mukwachuma clan, son of Sinkosinyana's father's sister.
Wife: Shando. Fwe, Mukwanyati. Exact relationship with husband not established but have a common grandmother.
- Hut 11: Gabriel Mazumo. Fwe, Mukwanyati clan, from Sibinda.
Wife: Mbonabi. Fwe, Mukwachuma, from Silawo (5 km. away).
- Hut 12: Jakwayi. Fwe, Mukwang'andu clan, from Sibinda.
Wife: Mushokobanje. Fwe, Mukwachuma clan, from Sibinda.
Daughter of Jakwayi's father's sister.
- Hut 13: Fani Mukoya. Fwe, Mukwachuma clan from Sibinda.
Wife: Kalingoma. Yeyi from Linyanti.
- Hut 14: Muchana. Fwe, Mukwachuma clan from Lisobe Village (8 km. away).
Wife: Masikawi. Fwe, Mukwachuma clan, from Sibinda.
- Hut 15: Julayi. Fwe, Mukwanyati clan, from Sibinda.
Wife: Tubazalile (II). Fwe, Mukwachuma clan, from Sibinda.
- Hut 16: Champa. Fwe, Mukwanyati clan, from Sibinda.
Wife: (a) Munyanywa. Fwe, Mukwazita clan, from Singalamwe.
(b) Kakobe. Mbukushu from Singalamwe.
(c) Mambi. Yeyi from Sangwali.
- Hut 17: Sikambi. Fwe, Mukwanyati clan, from Sibinda.
Wives: (a) Nasalo. Yeyi from Linyanti.
(b) Lushwelani. Fwe, Mukwashongo clan, from Silao.

- Hut 18: Ruben Sinkela. Fwe, Mukwanyati clan, from Sibinda.
Wife: Mainga. Yeyi from Silonga (near Sangwali).
- Hut 19: Linyunga Masule. Fwe, Mukwanyati clan, from Sibinda.
Wife: Pepi. Fwe, Mukwajita, from Nampengo Village
(6 km. away).
- Hut 20: Petrosi Lishembo. Fwe, Mukwamwemba clan, from Sibinda.
Wife: Sobozi. Fwe, Mukwazita clan, from Lisobe Village
(5 km. away).
- Hut 21: Albert Mitibi. Fwe, Mukwaziti, from Sibinda.
Wife: Njara, Fwe, Mukwanyati clan, from Sibinda.
- Hut 22: Clement Chibozo. Fwe, Mukwashonga clan, from Sibinda.
Wife: Sitombole. (Fwe, Mukwachuma clan, from Nakanga
Village (5 km. away).
- Hut 23: Albert Sitamalaho. Fwe, Mukwaziti clan, from Sibinda.
Wife: Nankole. Yeyi from Linyanti.
- Hut 24: Edward Kanyimba. Fwe, Mukwanyati clan, from Sibinda.
Wife: Mbaita. Fwe, Mukwazita clan, from Singalamwe.
- Hut 25: Simanga II. Fwe, Mukwazita clan, from Sibinda.
Wife: Lisulo II. Fwe, Mukwanyati clan, from Sibinda.

(iv) Marriage patterns in Sibinda

Aged couples

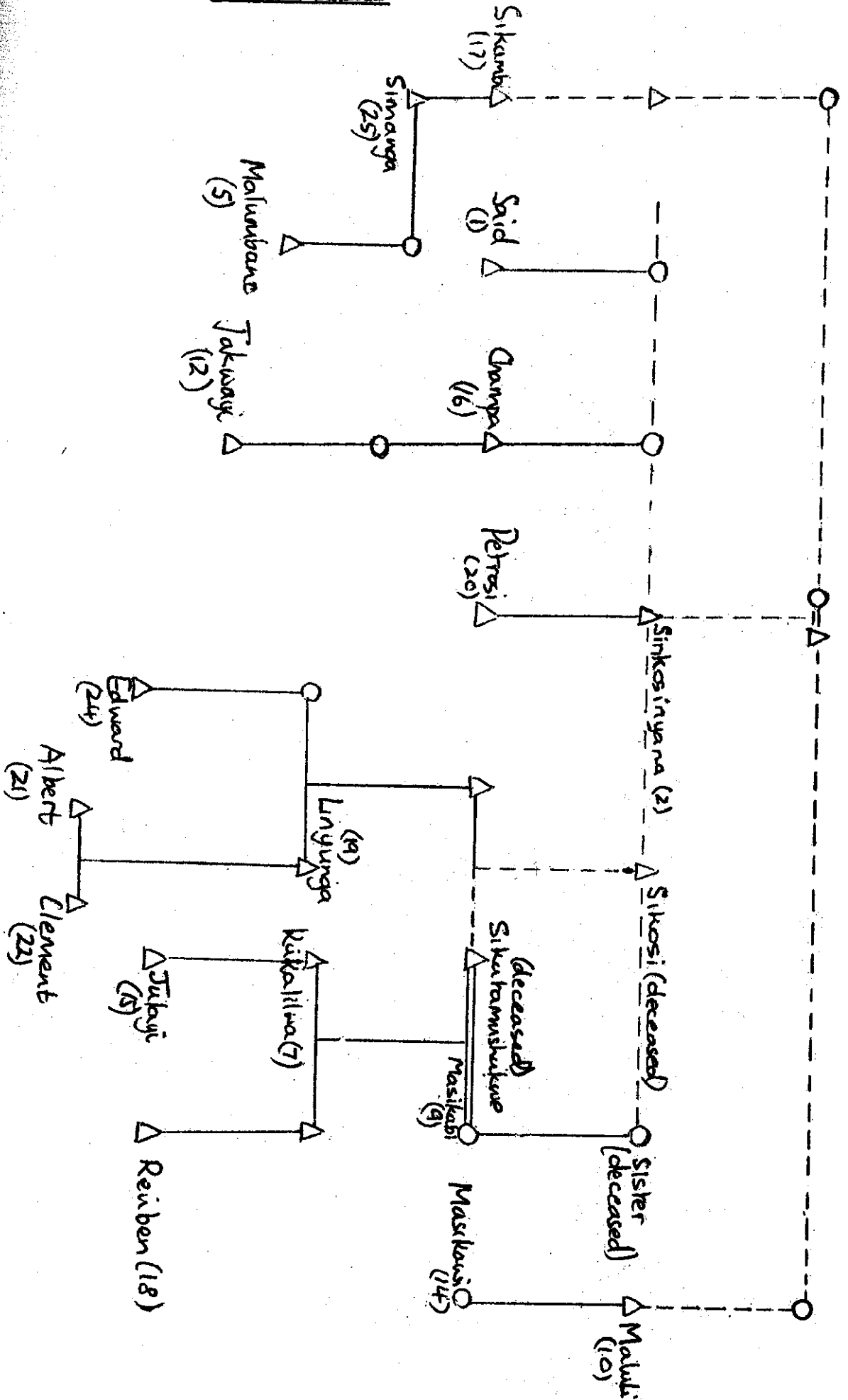
- Hut 2: Sinkosinyana's first wife, who died many years ago was his father's sister's daughter - a cross-cousin marriage. His other wives came from neighbouring villages or from relatively distant places like Katima Mulilo.
- Hut 3: Wilson Mushalo's present wife, Tubasoye, is his father's sister's daughter - a cross-cousin marriage.
- Hut 9: Widow Masikabi. Her husband Sikutamushukwe was son of her mother's brother - a cross-cousin marriage.

- Hut 10: Maluli's relationship with his wife Shando could not be confirmed in his absence, but they have common grandparents on her mother's side - apparently a cross-cousin marriage.
- Hut 6: Putcho, married to Cibuko, daughter of Puteho's mother's brother - a cross-cousin marriage.
- Hut 7: Kukalilwa is married to Makutela, daughter of Sinkosinyana, younger brother of Kukalikwa's paternal grandfather, Sikosi, now deceased. Kukalilwa has therefore married his father's cousin; in Fwe terms, his female father.
- Hut 17 (a) and (b): Sikambi, presently married to a Yeyi woman and a Fwe woman from Silao. No cognatic relationship.
- Hut 19: Linyunga, presently married to a Fwe woman from Nampengo village some distance away. No cognatic relationship.
- Hut 20: Petrosi, presently married to a Fwe woman from Lisobe, about 5 km. away. No cognatic relationship.

Younger couples

- Huts 1(a) to (c): Said, married to a Yeyi from Kanono, a Barrakwengo (Eushman) from Singalamwe and a Fwe, Said's mother's brother's daughter (a daughter of Sinkosinyana) - a cross-cousin marriage. Has divorced only one woman, a daughter of Said's father's younger brother - another cross-cousin marriage.
- Hut 4: Gilbert, married to a Fwe woman from Mutotela (two miles away). No cognatic relationship.
- Hut 5: Simon, married to Tubazalile, daughter of Simon's maternal grandfather's sister's son.
- Hut 8: Nako, married to a Fwe woman from Mahajane. No cognatic relationship.
- Hut 11: Gabriel, married to a Fwe woman from Silao. No cognatic relationship.
- Hut 12: Jakwayi, married to Mushokobanji, the daughter of Jakwayi's father's sister - a cross-cousin marriage.

FIG 8. DIAGRAM SHOWING KINSHIP STRUCTURE OF SIBINDA VILLAGE



- Hut 13: Fani, married to a Yeyi woman from Linyanti. No cognatic relationship.
- Hut 14: Muchana, from Lisobe, a Fwe, married to Masikawi of Sibinda. Both are of the Mukwachuma clan. No cognatic relationship.
- Hut 15: Julayi, married to Tubazalili II, daughter of Sinkosinyana's brother and brother of Julayi's paternal great-grandfather.
- Hut 16(a) to (c): Champa, married to a Fwe woman from Singalamwe, a Mbukushu from Singalamwe and a Yeyi from Sangwali. No cognatic relationship with any of his wives.
- Hut 18: Ruben, married to a Yeyi woman from Sangwali. No cognatic relationship.
- Hut 21: Albert Mitibi, married to Njara, Albert's paternal great-grandfather's sister's son's daughter.
- Hut 22: Clement, married to a Fwe woman from Linyanti. No cognatic relationship.
- Hut 23: Albert, married to a Yeyi woman from Linyanti. No cognatic relationship.
- Hut 24: Edward, married to a Fwe from Singalamwe. No cognatic relationship.
- Hut 25: Simanga, married to Lisulo II, Simanga's mother's brother's daughter. A cross-cousin marriage.

Summary

An examination of the present marriages in Sibinda show the following tendencies:

Among the older couples (i.e. approximately over 60 year old) there are five cross-cousin marriages out of a total ten marriages, i.e. half of the total.

Among the older couples a cross-cousin marriage is therefore clearly a preferential marriage.

Among the younger couples (i.e. below approximately 60 years of age) there are four cross-cousin marriages, and in a further two marriages

there is a cognatic relationship between the spouses, while in the remaining thirteen marriages there is no cognatic relationship between man and wife.

There is therefore clearly a tendency away from the preferential cross-cousin marriage among the younger couples.

(v) Kinship structure in Sibinda village

The diagram in Figure 8 summarizes the kinship structure in Sibinda village, and shows that all the families can trace their relationship to Sinkosinyana, his brothers or sisters, or his parents.

The village is clearly a closely knit genealogical unit, spread over several generations, hence the term, local kin group, to describe the village.

(b) Settlement pattern and composition of Ngwala's village

(i) Settlement pattern

Ngwala's village is a young settlement, six km. south-east of Katima Mulilo, the headman having broken away a few years ago from nearby Mwangomo village. Figure 9 shows the settlement to consist of only six huts arranged in the shape of a horseshoe with the closed end towards the south-east - as in the case of Sibinda the layout is the result of the whims of the house owners.

(ii) Composition

Following the hut numbers in Figure 9, the occupants are as follows:

- Hut 1: Headman Juda Ngwala (Father: Toka. Mother: Subiya) from Mwangomo village.
Wife: Liswaniso. Totela from Zambia.
- Hut 2: Amos Kibale. Mbukushu from Singalanwe.
Wife: Esinati Ngonya. Daughter of Ngwala.
- Hut 3: Harrison Muleta. Son of Ngwala.
Wife: Lilveko. Subiya, from nearby.
- Hut 4: Stephen Kamwi. Son of Ngwala. Unmarried.
- Hut 5: Brison Mundala. Son of Ngwala.
Wife: Namakando. Subiya-Yeyi from Kanono.

FIG 9. SETTLEMENT PATTERN OF JUDA NGWALA'S VILLAGE

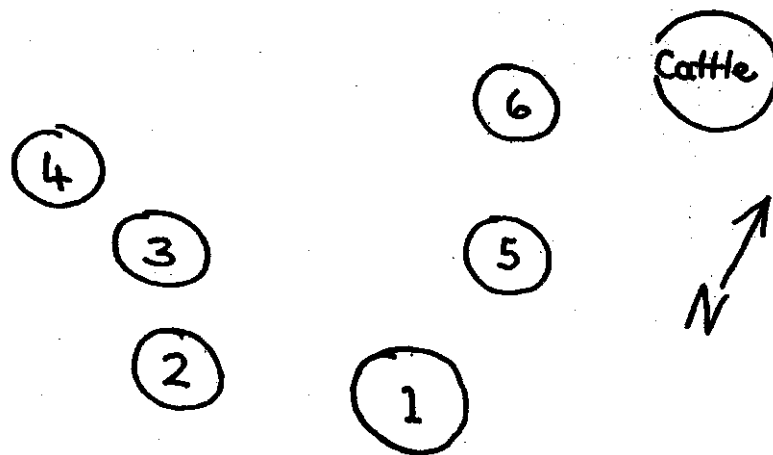
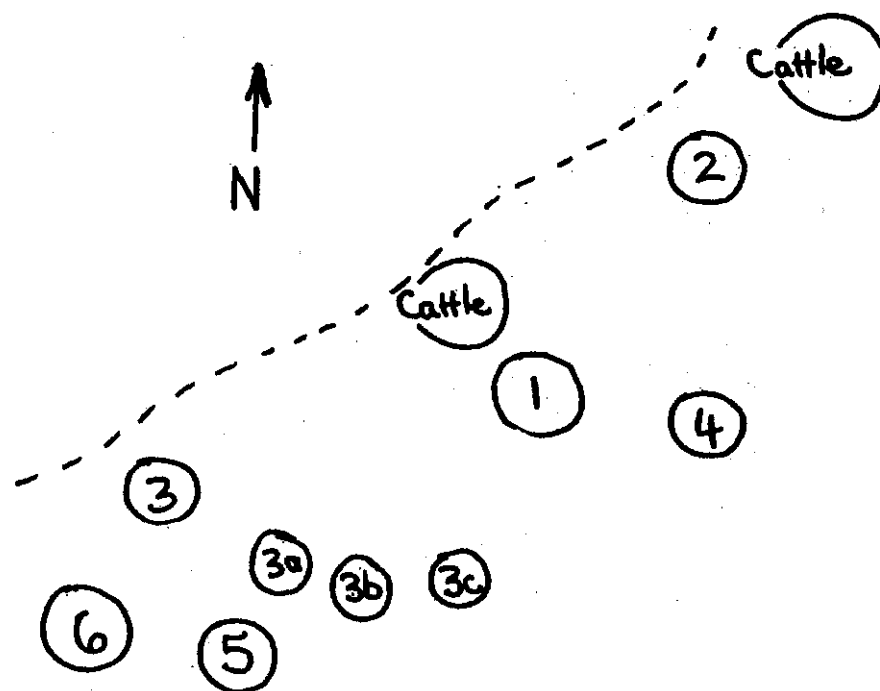


FIG 10. SETTLEMENT PATTERN OF MBULANULOZI'S VILLAGE



Hut 6: Thomas Kaunda. Son of Ngwala.
Wife: Semuso. Subiya-Ndebele, from nearby.

(iii) Summary

The village consists of a single family - a father with his sons and daughter and their families. All the marriages are between members of different tribes - a typical example of the heterogeneous nature of marriages along the boundaries of the Fwe area of jurisdiction.

(c) Settlement pattern and composition of Mbulamulozi's village

(i) Settlement pattern

As Figure 10 illustrates, this settlement consists of a ragged group of four large huts, five small ones and two cattle kraals scattered along the flood line of the Zambezi River, a few km. away. The village is approximately 10 km. south-east of Katima Mulilo, almost on the boundary dividing the Fwe and Subiya areas of jurisdiction in the Caprivi.

(ii) Composition

Hut 1: Headman Mbulamulozi. Kwandi-Toka, from Zambia.
Wife: Nteramomuyenda. Shanjo, from Zambia.

Hut 2: Robison Kwatisa. Fwe, from Singalamwe. (Father-in-law of Mbulamulozi's late elder brother).
Wife: Nakwezi. Toka, from Zambia.

Hut 3: Mapipo Sikumba. Grandson of Robison.
Wife: Lulambo. Subiya, from Linyanti.

Huts 3(a) and (b): Young sons, of Mwale and Robison

Hut 3(c): Cattleherd. No relation - other details unknown.

Hut 4: Mwale. Sister of Mbulamulozi, divorced.

Hut 5: William Likukela. Son of Mwale.
Wife: Namataka. Subiya, from Nantungu.

Hut 6: Francis Kakona. Son of Mwale.
Wife: Milinga. Daughter of Juda Ngwala.

(iii) Summary

We have here a kin group-in-embryo - a young headman with his sister and her children, and a distant relative-by-marriage with his dependants, who have placed themselves under Mbulamulozi, a fairly recent immigrant to the Caprivi. The group is another example of the heterogeneous nature of marriages in the border areas.

d) The function of the local kin group

Many of the functions of the local kin group in Fwe society find expression in the role which the headman fulfils. This is discussed in detail in Chapter II below.

The kin group acts as a corporate unit in its relations with outside groups or individuals; its members act corporately with regard to a wide variety of social activities, e.g. clearing new lands, hunting, food-gathering, hut-building, and so forth. The cohesion of the unit is further strengthened by the fact that virtually all the members of the group are related by descent or by marriage. Through the local kin group members who originate from neighbouring tribes are absorbed into the tribe and in so doing the local kin group fulfils a powerful unifying function in Fwe society.

In traditional Fwe society the kin group also acts as a corporate unit in religious activities and through the headman, who acts as mediator with the ancestral spirits, the local kin group approaches the objects of its worship as a corporate unit, through communal sacrifices, feasting and other communal rites.

The local kin group is not only a social and religious unit but also the most important political unit in Fwe society, about which more details are given in Chapter II below.

(iv) The hut unit

The basic social unit in Fwe society is the hut unit, consisting of a man and his wife, with or without children. The husband is the head of the hut unit, and he also exercises a measure of authority over the hut units of his married children. Every hut unit is a local kin group-in-embryo; if a hut unit breaks away from an existing village and starts a new settlement, it can develop into a local kin group in its own right.

The hut unit is founded on the marriage contract around which most of Fwe family law revolves and this is examined in detail in Part III of this study.

CHAPTER II

THE JUDICIAL SYSTEM OF THE FWE1. The influence of the Luyi, Lozi and Kololo

For most of the long period during which the Fwe were ruled by the Luyi and Lozi, the Itenge area was one of the remotest parts of the Lozi empire. But when Sebitwane's Kololo made their headquarters at the present-day Sangwali, the inhabitants suddenly found themselves in close proximity to the hub of the Kololo empire, its ruthless rule, and to the bloodshed and violence which marked its disintegration.

Unlike the neighbouring Subiya, no member of the Fwe ever achieved any position of prominence in the Kololo and Lozi conquest states. The explanation for this seems to be the lack of any form of centralized political organization among the Fwe. The Fwe tribal organization consisted of loosely connected self-governing local kin groups with no higher political authority than the local headmen. The Kololo and Lozi system of administration consisted of grouping these headmen under a district chief, with a chief councillor and a group of councillors, all Lozi by birth or "adoption", to advise and assist the district chief. This court ("kuta") ruled according to Lozi law and applied Lozi law in the disputes brought before it.

This was the system under which the Fwe had been living for several generations, perhaps centuries, when they were suddenly deserted by their foreign rulers in 1908. But although the autocratic Lozi never returned to the Caprivi, their system of administering law - in modified form - still operates in the Caprivi today, both among the Subiya and the Fwe.

2. The relationship between the European administrations and the tribal courts(a) Streitwolf's arrangements

Hauptmann Streitwolf's administration of the Caprivi Zipfel has been described in Part I, Chapter VI, above.

Faced with a leaderless collection of tribes and remnants of tribes, he divided the Caprivi into two areas, the Subiya in the east and the Fwe in the west. When Streitwolf arrived he found that of the several Lozi sub-chiefs in the Caprivi only one, Simataa Mamili, had remained. At a meeting of tribal leaders it was decided that Mamili would become chief

of the Fwe tribe, while a commoner, Chikamatondo, would become chief of the Subiya.

Each chief and his Lozi-style council had identical jurisdiction and equal status.

Streitwolf did not interfere in tribal affairs and basically his administrative arrangements have continued with very few changes up to the present.

(b) The South African administration since 1939

The statutory arrangements with regard to the South African administration of the Eastern Caprivi Zipfel were discussed in Part I, Chapter VI, above.

The relationship between the Magistrate and the tribal courts and the jurisdiction of the tribal courts were very loosely defined and very largely left to the discretion of the Magistrate, who was instructed to allow the tribal courts "as much freedom of action as possible".¹⁾

Accordingly, shortly after the establishment of the South African administration, the Magistrate called a meeting of the Fwe tribe at Katima Mulilo on 8 and 9 November, 1939, to discuss the jurisdiction of the Fwe tribal courts.²⁾

During this meeting the principles on which the judicial administration of the territory was to function, were explained and the following brief summary of these decisions sets out the relationship between the Magistrate and the tribal courts.

(i) The Governor-General

The Governor-General of the Union of South Africa, as representative of the King, was the "Supreme Chief". Since 1961 the State President fulfils this role.

(ii) The Magistrate (Bantu Affairs Commissioner)

The Magistrate was the representative of the Governor-General. Since 1961 he represents the State President of the Republic of South Africa.

1) Cf. letter from the Secretary for Native Affairs, 12th October 1939.

2) Cf. Notes on a tribal meeting with the Mafwe, 8-9 November 1939. Magistrate's office, Katima Mulilo.

(iii) Judicial powers of the Magistrate

"All wrongdoers" can be punished by the Magistrate's Court. The intention is, however, that only "important" cases would be dealt with by the Magistrate; the remainder to be dealt with by the tribal courts.

The following cases were to be brought before the Magistrate in the first instance:

Persons killed or who had died from unnatural causes, such as murder, as a result of drowning or fighting, killed by lions, etc.

Serious assault cases.

Rape.

Witchcraft.

All cases in which one of the parties belonged to a tribe outside the jurisdiction of the Fwe court.

All cases between Council members.

All cases involving the Chief himself.

(iv) Conduct of cases

In every case litigants should first go to their headman, who may listen to the case. If the parties agree to adopt the headman's decision on the matter in question, the dispute is regarded as settled, but there is no legal sanction attached to the headman's decision.

If the headman's decision is not accepted, the case must be taken before the Chief, who with his council tries the case and gives judgment.

The judgment of the Chief must be enforced.

If the judgment of the Chief is found to be correct, the Magistrate would grant assistance in carrying it out, but only in difficult cases should the Magistrate be referred to for assistance.

The proceedings of the Chief's court must be conducted "according to their own laws and customs" which must be "true" tribal laws and customs.

(v) Appeal

If a party is dissatisfied with the Chief's judgment he may appeal to the Magistrate who will enquire into the case and confirm or upset the Chief's judgment.

This flexible policy has been maintained up to the present.

In any matter where the parties so desire, or where for any reason it is not desirable that the matter should be dealt with by the Chief and his council, the matter is summarily dealt with by the Bantu Affairs Commissioner, who then has the powers and jurisdiction of a Chief-in-council.

In addition, the judgment records kept by each Council is produced from time to time for inspection by the Bantu Affairs Commissioner, who may, even without appeal, confirm the judgments or may order any matter to be reopened or to be brought before him for re-hearing.

In practice it is extremely rare for the Bantu Affairs Commissioner to intervene, and several classes of cases which were originally listed as being outside the jurisdiction of the tribal courts, e.g. rape, witchcraft and cases between council members, are now tried by the court of Chief Mamili.³⁾

3. The court system of the Fwe

The Fwe has a three-tier hierarchy of courts: the court of the Chief-in-Council (the Kuta); the courts of the Ward Councillors (induna ya silalo); the courts of the Village Headmen (o mfumu oa o munji).

a) The Chief-in-Council

(i) The Chief (Morena)

Appointment

Appointment of a chief is subject to approval by the President who has the power to appoint a person of his choice. In practice the Administration would be most reluctant to appoint someone who is not the choice of the tribe.

The procedure with the appointment of a new Chief is as follows:

Soon after the Chief's death, the deceased chief's principal councillor (ngambela) calls together a tribal meeting (mukopano) to decide on a successor.

Normally the heir is the first son of the first wife. The Fwe say:

"A chief is born, not chosen."

3) I am indebted to Mr. C. Kruger, the local Bantu Affairs Commissioner, for this information.

It is however by no means a foregone conclusion that the eldest son, or even any son, will succeed his father. All the sons of the deceased chief, as well as his brothers are considered for the position, and the possibility of a daughter being appointed is not excluded.⁴⁾ The new chief must be married.

The present chief, Chief Simasiku Mamili, succeeded the son of his elder brother, when the son was deposed in 1945. With his appointment, the paternal uncle of the previous chief was thus installed, a jump of one generation backwards. However, the fact that his predecessor had been deposed because of misbehaviour probably influenced the appointment.⁵⁾

The chief may during his lifetime nominate a successor but his choice is subject to his Council's approval. If his choice is approved, it nevertheless has to be approved again at a meeting of the tribe after his death.

The tribe, therefore, has the decisive say in the choice of a chief.

Within a few days of the Chief's death, the Ngambela has to call a tribal meeting for the purpose of appointing a new chief.

According to Fwe custom the meeting follows a set pattern:

The Ngambela, who chairs the meeting, also opens it with a speech which prepares the way for the person whom he wishes to nominate. After he has spoken, the meeting asks him who the successor should be. If they do not agree with the name put forward by the (Ngambela) the meeting is free to put forward other proposals. If a successor cannot be agreed upon unanimously, the one supported by the majority will be accepted.

It was clear from our discussions that it would be highly unlikely that the tribe would accept anyone as chief who was not either a direct descendant of the deceased chief or a brother or sister of the deceased, or a direct descendant of such a brother or sister.

Powers

The chief has (considerable but not unlimited powers.)

He appoints his own principal councillor (ngambela) but only from nominations by the assembled tribesmen at the meeting during which he received his appointment.

4) Nevertheless it seems that there is a strong preference for the eldest son of the deceased chief.

5) See Appendix I for a genealogy of Chief Simasiku and his kinship ties with his principal councillor.

He also appoints new members of the Chief's Council (kuta), but in consultation with the serving kuta members.

He is expected to consult his Council with regard to all matters of state, but has the power to act against his Council's advice, although he would not do so lightly.

He may also dismiss any Council member. This is, however, a very grave matter, and the Chief would take this step only if he had the full support of the other members of the Council.

All legislation must be approved by the Chief, and he has the power of veto over any decisions of his Council.

In the judicial sphere the Chief's jurisdiction is equally wide. The Chief holds the ultimate authority in the court of the Chief-in-Council (kuta). He may amend or overrule the judgment of the court. No judgment in a court case before the Kuta has legal sanction unless it has been reported to and approved by the Chief.

(ii) The Principal Councillor (Ngambela)

The Ngambela is, next to the Chief, the most powerful person in the Fwe society.

Appointed by the Chief and usually closely related to him, the Ngambela is the Chief's senior and most powerful advisor.

The Ngambela deals with the day to day running of tribal affairs. All matters brought before the Kuta - including court cases - and all matters of state are first referred to him.

In consultation with the other Kuta members the Ngambela disposes of all matters of minor import although all decisions and judgments should be reported to and confirmed by the Chief.

The Ngambela decides which matters are of sufficient importance to warrant the personal attention of the Chief. After these matters have been discussed and sifted by the Kuta, the Ngambela takes it before the Chief, who then makes his own decision or confirms the Kuta's recommendation.

The Ngambela is the go-between between the Chief and the tribe. On the one hand he is the mouthpiece of the Chief; it is his duty to make all pronouncements and addresses on behalf of the Chief. The Ngambela also has the power (subject always to confirmation by the Chief) to issue orders to individual Councillors. On the other hand, the Ngambela is also the mouthpiece of the tribe. He has to keep the Chief informed

about all tribal matters and the state of public opinion with regard to any matter of state, and to bring to the attention of the Chief the wishes of the people.

Judicial powers

It is clear that the Ngambela's position enables him to wield tremendous influence on the policies and decisions of the Chief. Yet it is perhaps in the judicial sphere where the influence of the Ngambela is most conspicuous.

As leader of the Chief's Council, the Ngambela presides over all except the most important court cases (when the Chief may preside personally). The Ngambela's decisions, subject to confirmation by the Chief (or of course the Bantu Affairs Commissioner) are final.

In addition to hearing cases at the Chief's court, the Ngambela from time to time visits all the tribal wards ("lilalo") and adjudicates local disputes. Such cases, however, are subject to appeal to the Chief's Council.

(iii) The Chief's Council

The Chief's Council (Kuta) consists of the Chief, his Principal Councillor (Ngambela) and twelve councillors (Nduna).

In former days the Chief and his Ngambela appointed the members of the Council, but nowadays they do so in consultation with the inhabitants of the area represented by each councillor. This area, or tribal ward, is called silalo (plur.: lilalo), and the area which falls under the Fwe chief's jurisdiction is divided into twelve wards.

This system of tribal representation was instituted under the influence of legislation passed in Barotseland in 1937,⁶⁾ an interesting example of the profound influence of the Lozi on the political and legal institutions of the Eastern Caprivi Zipfel.

Although the Fwe spokesmen claim that the silalo system is traditional, this does not appear quite correct. In fact, the traditional Lozi subdivision, and, it can be assumed, the one which operated in the Caprivi until the Lozi abandoned the Caprivi in 1908, was the likolo (plur.: makolo) system.⁷⁾

6) The Barotse Native Authority and Native Courts Ordinance, January 1937.

7) Cf. GLUCKMAN, M.: Economy of the Central Barotse Plain. The R.L. Papers No. 7, Rhodes Livingstone Institute, 1941, p. 94, 97 and 98.

The basic difference between the likolo and the silalo concept is as follows. While the silalo is purely a geographical unit, the likolo was not only a geographical unit, but was also a grouping of people who often were scattered over a very wide area and were intermingled with villages belonging to other makolo.

For reasons of efficiency the Northern Rhodesian authorities abandoned the traditional likolo system under the Barotse Native Authority and Native Courts Ordinance, January 1937, and introduced a new concept: the silalo. The silalo is a definite geographical area, demarcated by boundaries, and refers to the land only, unlike the common Bantu concept of a district or ward which connotes both land and inhabitants, as was the case with the likolo.

(It is quite remarkable that the Caprivi tribes voluntarily adopted the revised Lozi system more than thirty years after the local tribal authorities had become independent of the Lozi authorities.)

The Kuta members live permanently at the Chief's court near Linyanti, although they have their villages in the wards which they represent. Periodically, with the permission of the Chief they may go back to their home villages to attend to their affairs. However, the Chief takes care that only a small number of his councillors are absent at any one time, so that there are always enough members present to carry on with the functions of the council. There is however no specific quorum.

The members of the Chief's Council do not all have the same status. The twelve members occupy positions of descending seniority, beginning with the Senior Induna at the top and the youngest member at the bottom. (In Appendix 2 the names of the Council members, arranged according to seniority, are listed.)

The seniority of a Council member depends on various factors - his age; his length of service; the quality of his contributions to debates or court cases; the status of his family in the tribe.

The functions of the Council members are described in the following section.

(iv) The functions of the Chief-in-Council

1) Legislative function

The Chief-in-Council is the only body with legislative powers in the tribe.

Laws in respect of and binding on persons living in the area of jurisdiction of the Fwe Chief may be made.

These laws are however not valid unless and until a mukopano (a meeting of all male adults in the tribe) has been called together and informed of the new legislation.

The tribal meeting has no power to reject or to amend the new laws, but if the tide of public opinion is seen to be running strongly against a ruling, the Chief-in-Council will normally reconsider such a rule.

All laws remain in force until new laws are promulgated according to the above procedure.

2. Advisory function

The main function of the Council is to advise the Chief on all legislative, juridical and executive matters.

The Council deals with all tribal affairs which are brought to the Chief. No important political matter or court case may be decided except through the Council.

Presided over by the Ngambela, the Council discusses all matters of state before they are referred to the Chief, and the Council is expected to make recommendations on these matters to the Chief.

3. Responsibility for the Chief's well-being

The Council is responsible to the tribe for the well-being of the Chief.

4. Balancing the power of the Chief

The Council plays an important role in curbing the wide powers exercised by the Chief. Although in theory the Chief has the authority to overrule his Council, in practice he is extremely reluctant to do so.

5. Juridical functions of the Chief-in-Council

The Chief-in-Council is the highest court in the tribe.

Litigants who are dissatisfied with decisions of the lower courts, or lower courts whose decisions are ignored, have the right of appeal to the Chief-in-Council.

Certain classes of cases may only be heard by the Chief-in-Council in the first instance. These cases include the following:

- Cases involving any member of the Chief-in-Council;
- Cases where the authority and dignity of the Chief-in-Council or any individual member thereof is challenged;

Cases where blood has been drawn;
 Cases where the life or security of persons were
 threatened.⁸⁾

(b) The Ward Councillor (Induna ya Silalo)

Subject to confirmation by the Chief-in-Council, each member of the Chief's council appoints a ward councillor for his ward, in consultation with headmen and elders in his ward.

The Induna ya Silalo is subordinate to his representative in the Chief's Council, and is his local representative while the Kuta member is living at the Chief's headquarters.

On behalf of the absent Council member (Induna ya Kuta), the Induna ya Silalo generally manages affairs and adjudicates disputes which are referred to him by headmen in his silalo.)

The Induna ya Silalo may give judgments, impose fines, etc., but cannot enforce his judgments and in any event must report all cases to his councillor.

The Induna ya Silalo represents his Induna ya Kuta and, through him, ultimately, the Chief-in-Council, and acts as their spokesman.

He therefore occupies a key position in the tribal administration, linking the central tribal government with the local kin groups under his jurisdiction.

Also in the judicial sphere he carries out an important function, adjudicating in disputes between different kin groups and performing a valuable function in providing a forum where local disputes can be settled informally.

(c) The Village Headman (o mfumu oa omunzi)

It has been stated previously that it appears that originally the Fwe had no central political organization, the largest political unit apparently having been the local kin group - as is the case with their neighbours, the Totela of Zambia⁹⁾ - under village headmen.

The Village Headman occupies a central position in Ewe society. The Fwe village consists, as we have seen, of a corporate group of genealogically related members, i.e. a kin group. But it is also a po-

8) All the information on the Chief-in-Council was provided by Chief Simasiku Mamili and his council.

9) Cf. Rhodes-Livingstone Papers No. 14: Land holding and usage among the Plateau Tonga, Oxford University Press, 1945, p. 62.

litical or administrative unit. With regard to this dual function of the kin group Meyer Fortes speaks of the "domestic domain" and the "politico-jural domain".¹⁰⁾ Gluckman refers to it as the "domestic-kinship" and "political" systems operating in the kin group.¹¹⁾

The headman occupies a position in which these two systems or "domains" meet.

Politically the headman symbolizes the corporate identity of the village. He represents the o munzi in all important tribal affairs, attending all ward meetings or tribal meetings accompanied by a few elders of his kin group (usually two elders).

In the "domestic domain" the Fwe headman has executive powers regarding virtually all matters affecting the daily life and activities in the village. For example, he allocates gardens, decides on communal hunts and fishing expeditions, and is kept informed of all events of importance which take place in the village, and decides what action should be taken with regard to them - e.g. sickness, death, accidents, births, arrivals, departures, disputes, etc. It is unthinkable that anything of any consequence should happen or be decided without the headman being involved in it.

Fwe spokesmen say that the headmanship is a much sought after position. It carries great prestige; it is also rather vulnerable. A headman who displeases his kin group can in extreme cases be displaced, or, which happens more often, be deserted by the discontented factions in his village.

The headman also occupies a central position in the religious domain.

The Fwe believe that the spirits of deceased village members continue to take an active interest in the affairs of the village or kin group that they require the living members to observe the customs and rules which govern Fwe society, and that these spirits, if displeased, can manipulate supernatural forces to harm the kin group.

Between the departed and the living members of the o munzi stands the headman.

He is the person through whom the kin group approaches the spirits of the departed; the groups spokesman and mediator when sacrifices are

10) GOODY, J. (ed.): The development cycle in domestic groups, Cambridge University Press, 1958, p. 9.

11) GLUCKMAN, M. (ed.): Order and rebellion in tribal Africa, London Cohen and West, 1963, pp. 148 and 149.

brought to the spirits. At the same time it is also believed that of all the members of the kin group he is the most vulnerable and exposed to the forces of evil which may threaten the kin group.

Within this network of domestic, religious and kinship links, the headman also exercises power of another kind: he has to implement and maintain the legal rules and sanctions of Fwe society, supported by political authority - the rules of the "politico-jural domain".

Judicial function of the o mfumu

There is a general tendency in Fwe legal system to endeavour to confine tensions (and the resultant disputes) between individuals or groups, within the "domestic domain". The entire court system of the Fwe is, it is true to say, designed to confine a dispute to the "domestic domain", i.e. is designed to achieve pre-trial reconciliation.

The first stage in this pre-trial "screening process" is the headman:

All disputes, transgressions and grievances must be reported to the headman. Apart from the fact that no higher court will allow a case which has not been submitted in the first instance to the appropriate headman, it is also a serious offence to fail to do so.

The headman convenes an informal court consisting of several senior men in the village, whenever a case is reported, and the court either endeavours to settle the matter or decides to report it to the induna ya silalo.

The "court proceedings" are somewhat disorganized and informal. Although they may not actively participate in the judgments, the opinion of the women who are past child-bearing age carry considerable weight, as is often the case in matrilineal societies.

The headman is allowed to give judgment in minor cases and impose fines, subject to confirmation by the induna ya silalo, but he cannot enforce payment of the fines or other sanctions which he is allowed to impose.

When a party to a dispute does not accept the judgment of the headman, or if the dispute is between the members of two villages, the dispute is referred to the induna ya silalo.

Appointment of the headman

The headman is appointed by a meeting of the adult male members of the kin group, who selects a successor from among the descendants of the

female siblings of the deceased headman. In the case of Sibinda Village, for example, the acting headman is the son of a younger sister of the previous headman.

It should, however, be noted that each hut unit is a kin group-in-embryo. If a hut unit breaks away from an existing kin group and starts a new settlement, it will normally develop into a fully-fledged kin group with the founder of the new village as headman.

CHAPTER IIICONCEPTS AND PROCEDURES IN FWE JURISPRUDENCE1. Introduction

The Fwe concepts of jurisprudence and the Fwe judicial process and procedures appear to be impregnated with Lozi terminology and concepts, which in turn appears to have been profoundly influenced by the Sotho-Tswana traditions of the Kololo empire under Sebitwane and Sikeretu, which had left such an indelible mark on Lozi society.

At the Fwe court of Mamili the Kololo genius for jurisprudence were often referred to and appears to be held in high regard, particularly by the older men.

In expounding Fwe jurisprudential concepts and procedures the legal terminology of the Lozi were freely used, both at Mamili's court and at Sibinda village. To a certain extent this was to be expected, as our medium of communication was Lozi. Nevertheless, it is apparent that the Lozi words and their concepts are as familiar to the Fwe judges as to the judges in Barotseland, and applied in much the same way. A brief list of such words or phrases is as follows:

- mulao (the law)
- swanelo (obligation)
- mutu yangana (the sensible, normal man)¹⁾
- mutu yalukile (the good (law-abiding) man)
- milao yetumilwe (written (statutory) laws)
- mikwa (customs)
- likatulo zakale (precedents)
- kulikana (equity)
- sishemo (morality)
- bupilo bwasicaba (public policy)
- tukelo (justice)
- tatuluhelo (reconciliation, agreement)
- kozo (peace)
- sinyeho (injury or damages)
- kabelo yelikana (equal or fair share)

1) Gluckman translates this phrase as "the reasonable man". Gluckman, M.: The Judicial Process among the Barotse of Northern Rhodesia. (Second Edition.) Manchester: Manchester University Press, 1967, p. 83.

- fosa (to do wrong, to err)
- safosa, hakusina mulatu (to be innocent)
- eza hande (to do what is right)
- sepehala (trustworthy)
- babalela (to care for well)
- tompeha (respectful)
- linto zelukile (things which are right)

The following discussion of the Fwe concept of law and its application is based in the first instance on extensive interviews in Mamili's court, secondly on observing the court while cases were in progress, and thirdly on interviews in Sibinda village with the village elders, particularly headman Sinkosinyana and acting headman Mr. Said Mubiana.

Lozi and English were mainly used in the interviews whereas Mamili's court is administered in the main in the peculiar dialect spoken at Mamili's court, as well as Chifwe and Lozi. At Sibinda Chifwe is used almost exclusively in local discussions. The language problem compounded the spokesmen's difficulty in discussing Fwe jurisprudence in the abstract. Nevertheless, by using concrete examples and in discussing actual cases, the concepts and procedures as outlined below were readily identified and expounded upon by the Fwe spokesmen.

2. The function of Fwe law

Fwe law (mulao) embraces all factors which are subsumed in what Gluckman calls "the total process of social control".²⁾ In Fwe society this system of control defines the right and reasonable ways in which people ought to behave in relation to each other in many different situations, and in ways of obtaining redress.

Van Velsen's definition of the function of social control as "the preservation of peaceful co-existence of the members of a community despite divergent interests"³⁾ is particularly descriptive of the Fwe attitude to the function of the law. While there is general agreement among

2) GLUCKMAN, M.: The Judicial Process among the Barotse of Northern Rhodesia. Manchester University Press, 2nd Edition, 1967, p. 296.

3) VAN VELSEN, J.: Informality, Reconciliation and false Comparisons, in Gluckman, M. (ed.): Ideas and procedures in African Customary law. Oxford University Press, 1969, p. 146.

the Fwe that the function of "mulao" ("the law") is fourfold (i.e. to defend the customs and moral standards or norms of the tribe; to right wrongs; to adjust claims; to prevent the complex web of relationships which hold Fwe society together from being broken), they nevertheless seem to lay the greatest stress on the latter function, namely the preservation of the complex web of internal relationships in Fwe society. The ultimate aim of Fwe law is to ensure that there is

"peace (kozo) in our land",⁴⁾

or,

"peace (kozo) in our village".⁵⁾

The frequent and spontaneous use of the word kozo (peace) by the Fwe whenever the function of the law was discussed, indicate the great importance attached to the conciliatory function of Fwe law. The Fwe jurisprudential process and court procedure (described later in this chapter) also reflect the dominant role which reconciliation plays in the Fwe concept of jurisprudence.

The question arises whether this emphasis on reconciliation is so dominant that the Fwe system of law can be said to function in a uniquely different way compared to Western systems of law, and whether this emphasis alters the basic principles of Fwe jurisprudence so fundamentally (compared to Western jurisprudential concepts) that here we have to do with a law system which operates in a manner fundamentally different from law systems in Europe and North America.

There is a large body of literature, by writers on traditional African systems of law, which debates this very point. Two schools of thought have developed on this issue, and before it is discussed with regard to the Fwe, a brief examination of the two main schools of thought is necessary.

One school of thought (represented by the vast majority of writers) emphasises the sharp contrast between Western and African judicial processes, and claim, with a varying degree of emphasis, that in African traditional jurisprudence an almost mystical value is attached to reconciliation; the courts' highest function is said to be to effect reconciliation.

4) The phrase was frequently used in Chief Mamili's kuta, and by himself.

5) The phrase was used by the elders at Sibinda.

A leading exponent of this school is Van Warmelo⁶⁾ who writes with regard to the Venda:

"Now if security within the group was the highest good then the survival of the bloodgroup would be the first consideration, the standard by which all other institutions, all ethics and morals would be measured ... the disruption of the bloodgroup would be the greatest evil ... 7)

"... To a greater or lesser degree, every divorce, every quarrel, every dispute about property which comes before a tribal court, is not a suit of law at all, but a national crisis ... 8)

"... We observe the court not only listening to a great deal of apparently irrelevant and inadmissible evidence, but also re-monstrating and arguing on both sides, reasoning and threatening, cajoling and persuading, all with the avowed purpose of preventing the necessity of a judgment, of effecting a reconciliation, or preventing bad feeling, of avoiding irrevocable error. Infinite patience is brought to bear even on apparently small matters when latent possibilities of serious trouble are sensed, and if peace can be restored, the threat to security removed, the time is deemed well spent." 9)

Writing about the Tiv in western Nigeria, Bohannan¹⁰⁾ too, stresses that the aim of a Tiv court is "to determine a modus vivendi", i.e. to bring about a settlement which is acceptable to both litigants, but not "to apply laws".

Holleman¹¹⁾ draws a sharp contrast between the European and the African judicial process and states that the Shona chiefs of Rhodesia "would settle rather than decide; appease and reconcile rather than enforce".

Referring to the Kiambu district in Kenya, Lambert¹²⁾ writes: "The judicial system of the European culture involves justice by decree and the granting of exclusive rights to an individual; the African system involves justice by agreement and the maintenance of social equilibrium."

6) VAN WARMELO, N.J.: Venda Law. Volume I. Department of Native Affairs, Ethnological Publications No. 23, Pretoria: Government Printer, 1948, p. 7.

7) Ibid., p. 7.

8) Ibid., p. 8.

9) Ibid., p. 9.

10) BOHANNAN, P.J.: Justice and Judgment among the Tiv. London: Oxford University Press, 1957, pp. 19, 61-65.

11) HOLLEMAN, J.F.: Shona Customary Law. London: Oxford University Press, 1952, pp. 53-54.

12) Quoted in Phillips, A.: Report on Native Tribunals. Nairobi: Government Printer, 1945, p. 65.

In similar vein, Hammond-Tooke¹³⁾ emphasises the preoccupation of Bhaca court procedure with "restitution and a restoration of the social equilibrium", and sees this as being in contrast with "(the European law systems') preoccupation with the niceties of legal procedure".

This random selection of opinions typifies the point of view of the majority of writers on African systems of law. However, three writers, Epstein, Gluckman and notably Van Velsen, oppose the thesis that there is an inherent difference between Western and African traditional jurisprudence with regard to the role of reconciliation.

Gluckman¹⁴⁾ does not deny the importance of reconciliation in Lozi jurisprudence. He writes:

"The Lozi disapprove of any irremediable breaking of relationships. For them it is of supreme value that villages should remain united, kinsfolk and families and kinship groups should not separate, lord and underling should remain associated.

"The court tends to be conciliating, it strives to effect a compromise acceptable to, and accepted by all parties."

Having said this, however, Gluckman¹⁵⁾ proceeds to point out this reconciliation can, in the Lozi law system, only be achieved within the rules of the law:

"(The Lozi court) should not achieve reconciliation without blaming those who have done wrong."

Furthermore, he states that an essential part of every Lozi court decision is "the exposition of the law in support of the decision."¹⁶⁾

Obviously such an exposition would be impossible if the judges had been led by a striving for reconciliation which overrode those very rules which they were expected to expound in support of their decision.

Gluckman's line of argument was taken up by Van Velsen whose comparison of African and Western law systems in this regard seems to have put the issue in its proper perspective.

Van Velsen's argument can be summarized under four headings:¹⁷⁾

13) HAMMOND-TOOKE, W.D.: Bhaca Society. Cape Town: Oxford University Press, 1962, pp. 215-216.

14) GLUCKMAN, op. cit., p. 76.

15) Ibid., pp. 77-78.

16) Ibid., p. 78.

17) Here I have summarized the argument set out by Van Velsen in Gluckman, M. (ed.): Ideas and Procedures in African customary law. London: Oxford University Press, 1969, pp. 137-149.

(a) Writers on African law systems have an inadequate understanding of Western law systems:

Most writers, Van Velsen states, regard reconciliation in the judicial process to be a characteristic only found in small-scale, "face to face", multiplex¹⁸⁾ societies (such as traditional African societies), and which is absent from the judicial processes in simplex,¹⁹⁾ industrial societies (such as those of North America and Europe). This, Van Velsen says, is a crude typology and a false comparison. It is the result of having an imperfect understanding of their own (Western) legal systems with which they either implicitly or explicitly compare African legal systems.

In western countries the study of the legal system is still dominated by "legal technicians" and little attention is given to the roles of courts and judges in social life. Furthermore, writes Van Velsen, there is an almost exclusive concentration on superior courts, while the courts at the bottom of the hierarchy are ignored, in spite of the fact that the bulk of litigation starts and ends in precisely those courts - e.g. the lay magistrates' courts in Britain, the Small Claims Courts in the U.S.A., and so forth.

Van Velsen stresses that studies of the procedures in these inferior courts show a revealing similarity with those in African customary courts.

For example, Ploscowe²⁰⁾ describes the inferior criminal courts of the U.S.A. as courts of "grievances" which attempt "to do substantial justice, without too much regard for the niceties of civil and criminal jurisdiction ... and a sort of court of equity."

As in the case of the English lay magistrates' courts,²¹⁾ these inferior criminal courts in the U.S.A. "are the most important tribunals in the land, because they influence ... far more lives than any other court".²²⁾

18) I.e. where members of a society interact in relationships serving a variety of purposes. Cf. Gluckman, 1967, op. cit., p. 19.

19) I.e. 'single interest' relationships.

20) PLOSCOWE, M.: The inferior criminal courts in action. The Annals of the American Academy of Political and Social Science, Vol. 287, 1953, p. 10.

21) Cf. Lloyd, D.: The Idea of Law. Penguin, 1964.

22) PLOSCOWE, op. cit., p. 12.

Van Velsen also quotes Myers²³⁾ who stresses the flexible procedure and conciliatory aspects of American small claims courts, and for similar conditions in inferior German, Swiss and Austrian courts he quotes Bedford,²⁴⁾ while for a record of similar conditions in Moscow courts he refers to Feifer.²⁵⁾

(b) Stress on pre-trial reconciliation:

Secondly, Van Velsen points out that in both African and Western societies pressure tends to be applied to disputants to compromise over their disagreements and not to worsen or disrupt social relationships by going to court.²⁶⁾

He points out that this aspect has been fairly extensively studied in Africa, where there are useful accounts by Beattie,²⁷⁾ Bohannan,²⁸⁾ Abrahams²⁹⁾ and others, but in the European systems these processes of pre-trial reconciliation have not been adequately studied although it is known that they are present,³⁰⁾ so that here, too, the apparent contrast between the African and the Western systems appear to be a great deal less marked than is often alledged.

(c) The traditional African court and its duty to apply the law:

Van Velsen points out that the majority of writers tend to concentrate on the conciliatory aspects of African courts and tend to ignore the judges' task of applying laws - with the exception of Gluckman³¹⁾

23) MYERS, F.H.: The Small Claim Courts in the District of Columbia. The Annals of the American Academy of Political and Social Science, Vol. 287, pp. 23-24.

24) BEDFORD, S.: The faces of Justice. London: Collins, 1961.

25) FEIFER, G.: Justice in Moscow. London: The Bodley Head, 1964.

26) VAN VELSEN, op. cit., p. 146

27) BEATTIE, J.H.M.: 'Informal judicial activity in Bunyoro'. Journal of African Administration, ix, 4, pp. 188-195.

28) BOHANNAN, op. cit.

29) ABRAHAMS, R.G.: 'Neighbourhood organization: a major sub-system among the northern Nyomweji'. Africa, XXXV, 2, pp. 168-86.

30) VAN VELSEN, op. cit., p. 146.

31) GLUCKMAN, 1967, op. cit., p. 55.

and Epstein.³²⁾

It appears, argues Van Velsen, that the majority of writers start from the assumption that "judgment by agreement" and "judgment by decree" are mutually exclusive. This assumption is related to the fact that the literature in this field generally pays inadequate attention to the different stages of the judicial process. In general, writers tend to identify reconciliation with the court's decision; they fail to distinguish between the two decisions any court anywhere must make, namely:

- (a) A decision as to the relevant facts and the appropriate rules to be applied (i.e. the judgment or verdict);
- (b) A decision as to the appropriate sanction for the judgment (i.e. the award or sentence).

In making its judgment, the African traditional court (as is the case with any other court) judges the acts of the litigants by measuring them against certain legal norms. At this stage there is little room for reconciliation, because the court is primarily concerned with interests lying beyond those of the litigants, namely the rights and interests of all persons who organize their lives on the assumption of the general and persistent validity of the norm which the court has to uphold.

Only after the first decision has been made and the legal norms upheld, the final stage in the judicial process is reached, when the judges take their second decision, viz. what sanctions to attach to their first, legal, decision. This second decision leaves the judges much more scope for attempting reconciliation. This decision (the award or sentence) is more flexible, more adaptable to non-legal desirabilities, and it is in making this decision that the judges can and do strive for reconciliation.

It is also this stage of the judicial process, Van Velsen argues, that writers often confuse with the previous stage, i.e. the verdict, which precedes the award or sentence, and in so doing they have unduly stressed the role of reconciliation in traditional African jurisprudence.

(d) The pressure for reconciliation and court hierarchies:

Finally, Van Velsen points out that it is erroneous to assume that in small scale societies the pressure for reconciliation operates, or

32) EPSTEIN, A.L.: Juridical techniques and the judicial process: a study in African customary law. Rhodes Livingstone Paper No. 23, 1954, p. 2.

operates equally, in all courts. In African societies with a hierarchy of courts reconciliation may (as is the case in Western society) be less important in the superior courts. The very fact that a dispute had reached a superior court may be an indication that the parties want to "fight it out"³³⁾ and are therefore less amenable to reconciliation. Secondly, the higher the court, the less likely the judges are to be involved in the litigants' relationships and therefore the less likely they are to feel the pressure for reconciliation.³⁴⁾

Van Velsen's argument can be summarized as an exposition of the rational, logical process underlying African jurisprudence, and an emphatic insistence on the many similarities between African and Western systems of law. He emphasises the important fact that, in spite of the many differences in procedure, emphasis, etc., quintessentially both the African and Western jurisprudence assign similar functions to their respective court systems; we are not dealing here with systems of law with completely different functions.

These statements seem to be equally valid for the Fwe law. With regard to Fwe law and its conciliatory function, mention was made above of the importance which the Fwe spokesmen and courts appear to attach to this aspect of Fwe jurisprudence. In the light of the differing opinions quoted above of writers on traditional Bantu law regarding the role of reconciliation in these systems of law, the conciliatory function of Fwe law is more closely examined in the following paragraphs.

The functioning of Fwe law can best be illustrated by describing a court case in which the litigants were in a close relationship. In Lumba Mukuni vs. Sampson Sitengu (20 February 1967), the complainant accused Sampson, her husband, of threatening to kill her with witchcraft. He had done so in front of witnesses and had also forbidden her to enter his hut, i.e. thereby proving that his threat was made in earnest. In his defence, Sampson listed a long series of complaints against Lumba, supported by witnesses, designed to prove that he had acted under severe provocation over a long period. She was quarrelsome, did not respect his authority and neglected her duties.

Upon cross-examining both parties, the judges dwelt at great length on the relationship between the two parties as husband and wife. They

33) VAN VELSEN, op. cit., p. 149.

34) Ibid., p. 149.

clearly saw as their task not only to deal with the complaint of witchcraft but to reconcile the husband and wife.

The court ordered Sampson to pay his wife £1 (R2.00) and reprimanded him, while his wife received a lengthy sermon on her shortcomings, until finally she admitted her faults and the two were reconciled.

In our discussion of the dispute the judges brought up several points which are significant regarding their attitude to their function. They regarded the decision of the court in this case as particularly satisfactory, for the following reasons:

Firstly, the court's primary task is to uphold the law. In this case the law was that it is an offence to threaten the use of witchcraft, a rule of which Sampson was repeatedly reminded of. By doing this the rules of public policy ("bupilo bwasicaba") have been defended.

Secondly, they felt that the Fwe concept of justice ("tukelo") was done, as applicable to this particular case. Not only was Sampson fined for his transgression, but Munda had been publicly rebuked for her shortcomings, which had been the root cause of the trouble in the judges' opinion.

Thirdly, by succeeding in bringing about a reconciliation ("tatuluhelelo") between the husband and wife they had fulfilled their task of regulating relationships which had been broken, thereby eliminating the basic cause of the dispute.

It is clear, on the basis of the above summary of the judges' viewpoint that Fwe jurisprudence is not, so to speak, merely a peacemaking exercise in which differences are buried. On the contrary, in each dispute, as happened in this example, the judges see it as their task to restate all the rules adjudged to be relevant to the dispute, to measure and judge all the litigants' activities against these rules, and, in so doing, to reinforce and to bring to the attention of the community the relevant legal rules.

In spite of the informal, flexible nature of the Fwe jurisprudential procedures, therefore, it seems clear that the rule of law is felt to be paramount and that the court's task to reconcile disputing parties cannot operate outside the framework of that law.

It should be borne in mind that the Fwe legal process results in reducing the pressure for reconciliation by the time a dispute reaches the Chief's court. This study is based primarily on proceedings in Ma-

mili's court, i.e. the highest court in the Fwe judicial hierarchy. Within this hierarchy it is therefore the court which would be the least influenced by pressure for reconciliation. Van Velsen points out that such a court can reach decisions free from much of the pressure for reconciliation which is such a feature of the lower courts. In similar vein Rattray writes with regard to the higher courts of the Ashanti:³⁵⁾

"The question of possible reconciliation of the parties - which was such a marked feature of the lower unofficial tribunals - did not enter the province of the higher court."

It would be incorrect to state that among the Fwe the Chief's court does not strive for reconciliation.

However, as described in Part Two, Chapter Two, above, a case which is heard by Mamili's court will already have passed through the (informal) court of the headman, the court of the silalo induna, and the silalo representative at the Chief's court. It follows that only the most stubborn cases, where feelings may have run too high, or where the particular dispute is the culmination of a series of previous ones, will survive this elaborate screening process, and this process would tend to reduce the pressure for reconciliation in the disputes brought before this court.

The role of reconciliation in the judicial process of the lower courts was not examined in depth, but it seems that reconciliation plays a much greater role at the more personal and informal levels of the village and silalo courts, than at the Chief's court.

Finally it should be noted that in the cases where the litigants were not kinsfolk, or did not live in the same village, the court did not appear to attempt reconciliation but simply dealt with the legal issue at stake, such as whether or not a crocodile skin had been stolen, or an ox slaughtered without permission, or whether a witchdoctor had been paid for curing his patient, and so forth. In these cases there was no pressure for reconciliation and no attempt at reconciliation.

3. Court procedure

a) Introduction

Among the Fwe a dispute follows a tortuous route before it eventually arrives in the court of the Chief, and indeed the vast bulk of litigation

35) RATTRAY, R.S.: Ashanti Law and Constitution. Oxford: Clarendon Press, 1929 (republished 1956), p. 388.

never progresses beyond the courts of the ward councillors.

A dispute is first reported to the headman or headmen concerned. If it is not resolved there, it is referred to the ward councillor (induna ya silalo). From there it is taken to the court of the Chief where the councillor concerned first makes an attempt to resolve the issue, and only if he fails he reports it to the Ngambela, who, if he regards the case of sufficient importance, takes it before the Chief-in-Council.

All the hearings prior to the hearing of the case by the Chief's Kuta have been informal hearings. This does not mean that the litigants can treat these courts lightly or with disrespect. So for example in the case Peter Katonga vs. Partson Masetta, 8 June 1967, the complainant was fined R5.00 by the Chief's court for showing disrespect to Silalo Induna Sikuli's court, and R10.00 for telling lies in the same court. In Kukangangwa vs. Jackson Kakuwaizi, 25 October 1967, the defendant was fined an additional R4.00 for having previously refused to appear before headman Mapulanga.

There can be no doubt that although these tribunals are informal, the Fwe regard them as courts in the full sense of the word, and thus they cannot be said to be merely a system for pre-trial reconciliation.

b) Procedures

The courtroom at Chief Mamili's headquarters is a rectangular, oblong structure of poles and thatch.

When the court is in session the twelve members of the Chief's council sit along the length of one of the long walls, with the Ngambela and the most senior councillor in the centre of the row.

In front and to the left of the Ngambela the complainant and his retinue are seated, while the defendant and his supporters sit towards the right of and facing the Ngambela.

On the rare occasions that the Chief puts in an appearance, he sits next to the Ngambela.

The rest of the room is occupied by the public, which is restricted to adult males only, everyone of whom is free to give evidence if he so wishes, but only the councillors or with the Ngambela's permission the main witnesses, are allowed to put questions to any of the disputing parties.

The hearing follows roughly the following procedure.

First, the complainant is asked by the Ngambela to state his case. Then the defendant is allowed to reply.

Then the judges begin their cross-examination of the two litigants during the course of which any number of witnesses are requested to corroborate or contradict the evidence before the court.

There are no lawyers or advocates, and the judges have to undertake the task of sifting through the evidence and probing weak links until the truth emerges.

When the Ngambela judges that enough evidence have been placed before the judges in order to come to a just decision, he asks the judges for their opinion, starting from the most junior councillor.

After all the councillors have given their judgments, the Ngambela either summarizes the main points of the court's decision (if it was unanimous) or he sets out his own judgment if he differs from the court or if the court is divided.

The court's decision or lack of one is then conveyed to the Chief who either makes another judgment or confirms the court's judgment.

The ability to deliver a soundly reasoned judgment is highly regarded among the Fwe, and the judgment invariably consists of the following:

- (i) The status and relationship of the litigants with regard to the dispute are defined.
 - (ii) The rights and duties of the litigants, which flow from their respective status and relationships, are expounded.
 - (iii) The actions of both the litigants are measured against what were expected from them as law-abiding, upright members of Fwe society.
 - (iv) Depending on how they measured up against the norms defined by the judge, praise, blame and punishment is meted out.
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PART IIIFAMILY LAW AND SUCCESSION AMONG THE FWECHAPTER IMARRIAGE: THE PRELIMINARIES1. The engagement

Formerly Fwe parents arranged the marriages of their children without necessarily paying heed to the wishes of the couple and often without their knowledge.

It was also a widespread practice for a man to marry a child; even to arrange a marriage with a child still to be born.

Consummation of the marriage when the girl was still very young (around nine or ten years) was generally practised.

At the present time the South African Administration no longer allows marriage without the consent of both parties, and it is now customary for young people to decide for themselves whom they will marry.

When a man decides to marry a certain woman he approaches her, and if she indicates her willingness he reports to his father, who, if he agrees, approaches the woman's guardian and kinfolk for their consent.

2. The duration of the engagement

There is no fixed period of engagement. It may last a year or more, but more generally a shorter period of two or three months passes before the marriage ceremony takes place.

In the old days, if a girl was betrothed during infancy, the marriage usually took place when she was nine or ten years old, so that the engagement can be said to have lasted for very many years.

3. Termination of the engagement

According to Fwe customary law the agreement to marry does not of itself bestow any legal rights or obligations on either of the parties to the agreement.

If either one breaks off the engagement or enters into an intimate relationship with a third person the injured party cannot claim redress.¹⁾

If however a betrothed girl becomes pregnant, then the fiance is held responsible whether or not he had cancelled the agreement. If he admits responsibility or is unable to prove his innocence he has to pay the parents the equivalent of a full dowry ("malobolo") if the girl had been a virgin, otherwise half the amount, as the following cases demonstrate:

(a) In Chombo Mutimani vs. Society Limbo Mapalanga (23 March, 1964), Society was sued by Chombo for being responsible for the pregnancy of Society's betrothed, Sibolile, daughter of Chombo, whom he subsequently did not marry. Sibolile having been a virgin, the court ordered Society to pay Chombo R10 (in 1964 the equivalent of two heads of cattle). Sibolile was fined R5.00, not because of her pregnancy but because it had during the trial become apparent that she had repeatedly disobeyed her mother's instructions with regard to her behaviour with Society and in consequence was fined R5.00 "for breaking the law of her mother." This fine had nothing to do with the fact that the girl had become pregnant before her marriage took place but was imposed solely because of her disregard of her obligation to obey the instructions of her mother.

(b) In Thomas Mabuku vs. Joel Walile (21 October 1963), Joel was ordered to pay Thomas the equivalent of one beast (half the usual dowry) for making his betrothed, Walile, pregnant before deserting her. As she had already had another child the fine was reduced by half.

If, after he had made his betrothed pregnant, the man does not break off the agreement but subsequently marries the girl, he is not liable to pay any damages over and above the marriage payment (malobolo) which had previously been agreed upon when the marriage agreement was concluded.

So, for example, in Liakulu vs. Tusano (11 June 1963), Tusano was accused of making Liakulu's daughter pregnant after becoming engaged to her, and eventually married her. When the agreement to marry was concluded, before the girl had become pregnant, Tusano had agreed to pay

1) No cases to support this ruling could be traced, but the Chief's council's opinion was unanimous.

a marriage payment of R40.00 but subsequently refused to pay more than R6.00. The court ordered Tusano to pay the remaining R34.00. There was thus no question of separate claims i.e. for the seduction and for the marriage.

If an engagement is broken off after malobolo or part thereof had been handed over, such malobolo or part thereof have to be returned, regardless of which party is responsible for the termination of the engagement, according to the Chief's council.

If an engaged girl is made pregnant by a third party, her fiancé cannot claim damages from the person responsible; only her father or guardian can do so. If her fiancé decides to marry her in spite of such a pregnancy her malobolo will be reduced, if before this pregnancy she had been a virgin.²⁾

The amount of damages which the father may claim from the seducer of a daughter who is engaged is the same as for an unattached daughter, the amount being determined not by the fact whether or not the girl is engaged but whether or not she was a virgin.

Generally speaking the amount that can be claimed by the father or guardian for the seduction of his daughter, whether she is engaged or not, is two heads of cattle or its approximate equivalent if she was a virgin, or one head of cattle if she was not a virgin.

Note: In the period 1962 to 1967, the period for which there were records of judgments available, the average price of one head of cattle rose from £6 (R12) to £14 (R28), and this has to be borne in mind when comparing different judgments, as the current money equivalent of one head of cattle is continually adjusted by the Chief's Council in order to keep pace with inflation.

CHAPTER II

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 (MARRIAGE: ~~THE~~ LEGAL REQUIREMENTS)

A. INTRODUCTION

The customs surrounding the Fwe marriage have changed considerably under influence of the Lozi empire, particularly since the time of the Kololo in the nineteenth century.

Formerly a Fwe marriage took place as follows: the "marriage payment" consisted of two hoes which were ceremoniously handed over to the guardian of the bride, during the wedding feast, at the bride's home village.

The newly-married couple were required to live at the village of the bride until at least one, but usually more, children were born. During this time the husband was expected to render services to his in-laws, such as hoeing their gardens. He occupied a lowly status in the village, and was subject to the authority of his father-in-law; he was considered part of his father-in-law's hut unit and had apparently very little say in the running of his own affairs.

After the birth of some children and after a few years had elapsed, the father of the new husband would give his son a beast, which the son had to give to his wife, in recognition of her services in providing her husband with children.

After this beast was handed over, the wife would hand it to her father or guardian and afterwards the man would be free to take his wife to his own village, or to settle in his wife's village but now recognized as the head of a mature household alongside the other hut units making up the local kin group.

The handing over of the beast seems to have been a later development as, according to Gluckman,¹⁾ cattle did not play any role in the marriage arrangements of the matrilineal tribes who had been conquered by the Lozi, until Paramount Chief Lewonika issued a law that two head of cattle should be given for a virgin and one head for other women, a ruling which is still in force today, not only in the Barotse Province, but also in the Caprivi.

1) Cf. Radcliffe-Brown, A.R. & Forde, E. (eds.): African Systems of Kinship and Marriage. London: Oxford University Press, 1965, p. 187.

Among the Fwe there was formerly a clear preference for cross-cousin marriages, thus enabling the kin group to arrange marriages internally and to keep their lineages within the residential unit. More recently there seems to be a distinct tendency away from the cross-cousin marriage reflecting the increasing tendency for younger people to choose their own marriage partners.

The analysis of marriages in Sibinda village in Part II, Chapter I, above, brings out very clearly this contrast in marriage patterns between the older and the younger generations.

As in African customary law generally²⁾ the Fwe marriage is not only a contract between two individuals, but between the kin groups of which the two individuals are members.

Through the union of the two persons, a new social and legal unit comes into being, consisting of the man (the husband and father) and the woman (wife and mother).

Though the process through which this unit comes into being, and the legal essentials are clearly defined, the new family unit's status is dependent on several factors, mainly its ability to produce children, the partners' age, and so forth. The hut unit's status is therefore not static. Every hut unit is a "kin-group-in-embryo", and has thus the potential to improve its status.

If a hut unit breaks away from a kin group and starts a new village, this hut unit becomes the dominant one in the new kin group, which as it develops, in time can become an autonomous social unit.

Regardless of the family unit's status, however, a clearly defined, fixed set of rules determining the rights and obligations of both partners come into force as soon as the unit has been established. These rules do not lapse or change until the newly formed unit is duly terminated.

With regard to the Fwe marriage contract and the establishment of a new hut unit, it should be noted that among the Fwe the ideal marriage has traditionally been the polygamous marriage, i.e. marriages between one man and two or more wives.

Among the Fwe, in the case of a polygamous marriage the husband and his kin group enter into a separate union with each of his wives and their respective kin groups. In other words - each marriage constitutes a

2) OLIVIER, N.J.J.: Die Privaatreg van die S.A. Bantoe. Butterworths, 1969, p. 36-7.

legal institution in its own right and is not affected by disputes involving the other marriages of the husband. Therefore the rules regarding the marriage agreement, the consummation of the marriage, its dissolution, and the marriage payment are the same, whether a man marries his first wife or subsequent wives.

For this reason there is no separate discussion in this study of the polygamous marriage, except where certain special provisions exist, e.g. with regard to the wife's legal obligations toward her co-wives, etc., or with regard to succession.

B. CAPACITY OF THE PARTIES

1. Desirable marriages

Cross-cousin marriages are regarded as highly desirable, probably because they strengthen the relationships within a local kin group and reinforces its cohesion.¹⁾ It is, however, also evident that this type of marriage is becoming increasingly rare. (See Part II, Chapter I, above, for a description of marriage patterns in Sibinda village.)

2. Prohibited or undesirable marriages

Incest ("sindoye") is frowned upon by the Fwe and when a marriage takes place which is regarded as incestuous according to Fwe law, both partners may be fined. It is not clear if any other sanctions would be applied against such a couple.

The rules with regard to "sindoye" are as follows:

- a) Marriages between ascendants and descendants in both the patri- and the matriline are prohibited.
- b) The children of two sisters may not marry.
- c) Children of the same father but of different mothers may not marry, even in the case of the Chief - whereas in neighbouring tribes an exception is made for the Chief, apparently for political reasons.
- d) A man should not marry the (classificatory) sister of his wife.
- e) A man may, however, after the death of his wife, marry her sister.
- f) A man may not marry the widow of his deceased brother.
- g) A man may not marry the divorced wife of his brother.

1) Cf. Bruwer, J.P.: Die gesin by die moederregtelike Acewa. M.A.-thesis, unpublished, Pretoria, 1948, p. 23.

- h) A widow should not marry (a kinsman) of her deceased husband. ✓
- i) A person may not marry a parent of his or her spouse - i.e. marriages with a person's (mother-in-law or father-in-law) are forbidden. The only court case with regard to an incestuous relationship which could be traced revolved around this ruling. In Daniel Muyatwa vs. Joseph Misuha (19 October 1965), Daniel accused Joseph of "sindoye" because Joseph had first married Daniel's elder brother's daughter. Subsequently both the daughter and Daniel's brother died, leaving Joseph a widower and Daniel's elder brother's wife a widow. Joseph then married this widow, i.e. his mother-in-law. The court fined Joseph and the woman R10 each (and apparently, after paying the fine, they continued living together as man and wife).
- j) In a polygamous marriage, after the death of the husband or after she was divorced a woman may not be married by a brother of one of her co-wives.

It should be noted that the following marriages are not regarded as incestuous by the Fwe:

- a) Marriages between people of the same clan ("chilongo").
- b) Marriage between a man and his wife's sister after his wife's death.
- c) (Marriage between a woman and her sister's husband's brother or half-brother.

3. Impotence

A man who is impotent is considered incapable of marriage. A woman is always granted a divorce if her husband is impotent. He is called a "musali" (woman) and therefore not entitled to marry a woman.

C. CONSENSUS

1. The Consent of the bride's father or guardian

The consent of the bride's father to the marriage is essential.

Usually his consent is made explicit by reason of his being one of the parties to the marriage agreement. His consent is also regarded as implicit (if, for example, he subsequently denies it) in his acceptance of the marriage payment ("malobolo"), or part thereof, or if he allows the couple to build a hut in his village and live in it.

If the father has died, the bride's guardian, i.e. one of her male relatives who assumed guardianship over her after the death of her father,

Muyatwa

has to give his consent to the marriage. If the father is absent and cannot be traced, the person acting as guardian of his family in his absence may consent to the marriage.

In practice the question whether the father's or guardian's consent has been obtained is very seldom disputed, apparently because the "malobolo" is relatively small and has to be handed over before the marriage is consummated,²⁾ so that in the event of a dispute the acceptance or non-acceptance of the marriage payment by the father or guardian determines the Court's finding.

Only one dispute involving the consent of the woman's father could be traced:

In Muyeze vs. Induna Kabende (18 June 1963) a young man, Muyeze, alleged that he had lawfully married Induna Kabende's daughter but that Induna Kabende had subsequently taken away his daughter and fined Muyeze £1.10s (~~R3.00~~). Induna Kabende testified that Muyeze had wanted to marry his daughter but when he refused to consent to the marriage because he felt his daughter was much too young, Muyeze had taken her away. Under cross-examination Muyeze alleged that he had paid "malobolo" for his wife but he failed to produce any witnesses while Induna Kabende produced several witnesses who corroborated his evidence that no marriage payment was made. In its judgment the Court rejected Muyeze's evidence, found that the father's consent had not in fact been given, confirmed the silalo court's fine and fined Muyeze a further 10s (R1.00).

The crucial point in this dispute was whether or not Induna Kabende had accepted "malobolo" for his daughter.

There is no legal process by which a father or guardian can be forced to consent to a marriage but if a couple who desires to marry are over 21 years they can overcome the difficulty caused by the woman's father's opposition, by marrying according to civil rites; as far as is known however, this course has never been followed in the Caprivi. If the couple are determined to marry in spite of the girl's father's opposition, the usual custom is simply to leave the father's village and live together as man and wife. When this happens the father can lay a claim against the man for seduction of his daughter. Several such cases were recorded, of which four examples are cited:

2) Cf. James Jack vs. Mabuku (22 July 1963), discussed in Chapter V.

(i) In Isaac Swalelo vs. Aron Balalemo (30 March 1966) Isaac was awarded R36 (i.e. the equivalent of two heads of cattle) damages after Aron was found to be living with Isaac's daughter, a virgin, and had made her pregnant.

(ii) In Thomas Mabuku vs. Joel Walile (21 October 1963), Joel was accused of ignoring a fine imposed by the silalo court on him for making Thomas's daughter pregnant while living with her. Joel alledged that Thomas would not consent to his daughter, not a virgin, marrying Joel. The Court confirmed the lower court's award of R14 damages (i.e. the value of one head of cattle) to Thomas.

(iii) In Tololi vs. Nelson (27 September 1967), Nelson was ordered by the Court to pay Tololi R50 for seducing and making pregnant Tololi's virgin daughter. During the course of the case Nelson testified that he was living with Tololi's daughter because Tololi had refused permission for his daughter to marry Nelson.

(iv) In Sitali vs. Munokolo (26 June 1967) Sitali brought suit against Munokolo for marrying his daughter without permission. Munokolo did not contest Sitali's allegation but stated that Sitali refused to consent to their marriage. Judgment: Munokolo to pay Sitali R50 for marrying his virgin daughter without his permission - the equivalent of two heads of cattle.

The amount of the awards in the above cases does not seem to be influenced by the fact whether or not the girl had become pregnant, and the awards are similar to the amounts usually agreed to in marriage payments. It appears that these cases are not regarded as ordinary seduction cases; there is no record of subsequent actions against the same person, and it appears that with the payment of the amounts fixed by the Chief's court, the unions are regarded as having been confirmed as legal marriages under Fwe law.

2. The Consent of the bride

In terms of Section 11(1) of the Bantu Administration Act of 1927 (Act No. 38 of 1927) the forcing of a party into a customary marriage against his or her will is regarded by the courts as repugnant to public policy and natural justice, and therefore unlawful.³⁾

3) Cf. Olivier, op. cit., pp. 45-48, for a full discussion of the legal grounds for this ruling.

It was however, not a requirement under traditional Fwe law that the consent of the bride should be obtained for a marriage contract to be regarded as legal and valid.

There is no record of marriages which were annulled on the grounds that it had taken place without the girl's consent.

In contrast to the South African tribes, where marriages tend to be more stable and divorces, particularly at the instance of the wife, more difficult to obtain than among the matrilineal tribes of Central Africa,⁴⁾ marriages among the Fwe appear to observers to be more unstable and divorces frequent and easy to obtain, so that the requirement that the consent of the bride should be obtained does not assume the same degree of importance as it does in South Africa.

3. The consent of the bridegroom

Formerly it was the rule rather than the exception that a young man's elders would decide on a suitable partner for him, make the necessary arrangements with the prospective bride's kin group and subsequently inform the man and the woman of the arrangement.

This procedure was usually followed with regard to a man's first marriage only, and a man could choose subsequent wives on his own and even without the consent of his father.

Nowadays the Fwe court only requires the consent of the bridegroom's father if the former is still a minor. The consent of the bridegroom is an essential requirement for the Fwe marriage. There are no known cases where this had been the subject of a dispute.

D. THE MARRIAGE PAYMENT ("MALOBOLO")

1. Introduction

The custom of transferring goods when a marriage takes place, which is practised by all the South African tribes, is also practised by all the tribes of the Caprivi, where it is known in all the languages as "malobolo".

The term ("malobolo") describes the goods (cattle or money) which the bridegroom hands over to the father or guardian of his bride, as counter-

4) Ibid., pp. 161-168, and Radcliffe-Brown, A.R. and Forde, E. (eds.): African systems of kinship and marriage. Oxford University Press, 1965, pp. 161-168.

prestation for the handing over of the bride by her kin group.

It is generally agreed that the marriage payment is not a purchase agreement. It has, however, by no means been established that there is no element of economic exchange in the transaction. So, for instance, Gray¹⁾ argues that with regard to the Sonjo "bride price" can best be understood as a system of economic exchange, rather than as a complex of customs which have the social functions of stabilizing marriage, legitimizing off-spring, and so forth.

The marriage payment is an extremely complex institution in Africa, and shows wide variations from tribe to tribe. Not surprisingly authors differ widely in their interpretations of the meaning and function of the marriage payment in the Bantu law systems. Olivier²⁾ quotes a representative selection of opinions on this issue regarding the tribes of southern Africa, as selected by Van Tromp:³⁾

"It is contended that lobola is a kind of ante-nuptial contract by which the bridegroom gives a number of cattle to the family of the woman for her subsistence ... in case she should become a widow, or when she is in need. This contention cannot be correct for (the woman) has no claim whatsoever ... to any cattle ...

"Another contention is that the lobola cattle are given to the family of the girl for subsistence in case she should become a widow; but this also cannot be correct, for as a widow she has an undisputed right to remain ... at the umzi of her late husband.

"Neither is the ikhazi handed over to the girl's family as a guarantee of good treatment by her husband and his family during his lifetime. For, if she is ill-treated, Xhosa law provides a specific remedy ...

"Perhaps the most common theory is the one of purchase and sale. This theory was rightly discarded as early as the 19th century, inter alia by Shepstone in 1882; and, moreover, by all ethnologists who had studied the subject.

"The substance of a contract of purchase and sale is totally different from that of lobola ... The legal consequences also are totally different...

"The late Dr. A. Kropf ... gives the following about lobola: 'The idea lying at the root of this custom is that the father suffered loss by the marriage of

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- 1) GRAY, Robert F.: "Sonjo bride-price and the question of African 'wife purchase'", in American Anthropologist, 62, pp. 34-57.
- 2) OLIVIER, N.J.J.: Die Privaatreg van die S.A. Bantoe. Butterworths, 1969, pp. 93-96.
- 3) VAN TROMP, J.: Xhosa law of persons. Cape Town: Juta & Co. Ltd., pp. 47-9.

his daughter. He is deprived of her assistance, and has a just claim for compensation.

"To a certain extent this compensation theory ... seems correct, but ... does not cover the whole question or substance of lobola.

"Lobola - in my opinion - may to a large extent be looked upon as a kind of compensation; but the term compensation should not be viewed only in an economic or commercial light, for it also has a religious, magic, a social and legal aspect.

"With regard to the legal aspect of this compensation ... there can be no valid and binding marriage according to Xhosa law if the passing of the bride to the family of the bridegroom has not been counterbalanced or compensated for by the passing of lobola cattle....."

Schapera⁴⁾ mentions the functions of the marriage payment among the Tswana as being a thanksgiving, to the wife's parents, or a bond between the two family-groups, but sees the main function as the transfer of the reproductive power of the woman from her own lineage to that of her husband.

Holleman⁵⁾ sees the marriage payment (rovoro) among the Shona as a "recognized and more or less standardized compensation", which represents a female of normal reproductive capacity. Women and rovororo are therefore exchanged as "equivalent reproductive potentialities".

Oliver's own view of the meaning and function of lobola with regard to its legal consequences is that, "it is probably impossible - and undesirable - to give an exact definition of the meaning and function of the lobola; it serves, or has as a result: (a) to legalize the marriage; (b) to legitimize the children borne by the wife; (c) compensation (prestation and counter-prestation) in a general sense; (d) to place the responsibility for the continued care and maintenance of the woman on the father (of her husband) and his family if it becomes necessary; (e) to stabilize the marriage; (f) to ensure good treatment by the husband and his family group. It does, however, appear as if one of the primary functions of lobolo is to transfer the reproductive capacity of the woman to the family group of her husband; in other words it is clear that there is a close relationship between (a) the transfer of the lobolo cattle and (b) the reproductive capacity of the woman."⁶⁾

4) SCHAPERA, I.: A handbook of Tswana law and custom. London: Oxford University Press, 1959, pp. 138-9.

5) HOLLEMAN, J.F.: Shona customary law. Cape Town: Oxford University Press, 1952, pp. 148-9.

6) OLIVIER, op. cit., p. 96. (Translated by the writer.)

Interpretations of the function and meaning of the marriage payment (lobola) among the South African tribes cannot be applied without qualification to Fwe society.

(a) Fwe society being matrilineal, the woman's reproductive capacity is not transferred to her husband's agnatic lineage. Among the Fwe the marriage payment gives the husband rights over his wife and indicates the children's paternal attachment, generally speaking, but if the genitor of a child is not the legal husband of the mother the marriage payment gives the legal husband no claim to the child who can be claimed by the genitor.

(b) As the Fwe Law requires the physical handing over of the marriage payment as a legal requirement of the marriage, in contrast to the South African tribes where only an agreement to deliver is necessary, the whole concept of the "incomplete" marriage because of non-payment of "malobolo" does not apply to the Fwe.⁷⁾

(c) Whereas among South African tribes the lobolo establishes a marriage which does not dissolve at the death of the husband,⁸⁾ among the Fwe the death of either of the marriage partners dissolves the union, and the marriage payment cannot be returned, even if the wife had failed to bear any children.

(d) Among the Fwe the marriage payment is relatively small and it is fixed: two heads of cattle if the woman is a virgin; one head if she is not.

(e) The marriage payment is a fairly recent innovation, introduced by the Kololo in the nineteenth century.

The main legal function of "malobolo" seems to be, in the light of the above factors, its role as the most important indicator that a valid and legal marriage had taken place. In view of the relative smallness of the payment (especially if it is kept in mind that the Fwe own vast numbers of cattle) it seems clear that commercial considerations play no or a very minor role. Neither does the concept of compensation or the concept of compensatory exchange seem to be as important as among the South African tribes, because the woman's childbearing capacity is not transferred to her husband's lineage.

7) Ibid., pp. 96-7, and Holleman, op. cit., pp. 149-150.

8) SEYMOUR, S.M.: Native Law in South Africa. Second edition. Juta & Co. Ltd., 1960, p. 120.

It seems therefore that among the Fwe the payment of malobolo is linked with the characteristic urge in Bantu law to express important but abstract thoughts or events by means of something more tangible and lasting: a concrete, visible object.⁹⁾ The importance of such a method of "marking" legal contracts in a legal system which consisted entirely of unwritten laws and contracts is self-evident.

2. The nature and amount of malobolo

As described in Part III, Chapter I, above, originally the marriage payment took the form of a ceremonial gift consisting of two hoes, combined with a form of service marriage, the husband residing in the village of his wife's father and rendering services to them at least until the birth of his first child. This system was gradually replaced by the handing over of cattle, fixed by a decree of Paramount Chief Lewanika at two head of cattle for a girl who is a virgin and one head of cattle for a girl who is not a virgin.¹⁰⁾ Nowadays the malobolo may also be paid in money, the amount being equivalent to the cash value of the cows or cow, as periodically fixed by the court.

3. Time and manner of transfer of the malobolo

As the actual delivery of the malobolo is an essential requirement in the Fwe marriage contract, the cattle or the money equivalent thereof is usually taken to the parents of the bride a few days before the marriage. If the "malobolo" is not transferred before the marriage ceremony takes place, the parents may still consent to the marriage, and it may take place, but in the eyes of the court the husband holds no right over the wife or their children until and unless he has paid the malobolo. (For judgments supporting this ruling see the cases cited in Chapter II, 5, above.)

A delay in paying the malobolo can result in the amount payable being increased by the Chief's court:

In France Mupolilo vs. Anderson Mangwaza (11 December 1967), France sued Anderson for the payment of the marriage payment of R18.00 which they

9) Cf. Holleman, op. cit., pp. 135-6.

10) GLUCKMAN, in Radcliffe-Brown, A.R. and Forde, D.: African systems of kinship and marriage. London: Oxford University Press, 1965, p. 186.

had agreed to when Anderson married France's daughter in 1950. The court ordered Anderson to pay R24.00, "because you have been owing this for a long time".

However, in Shita vs. Luzunge Muyenge (3 May 1965), Luzunge was accused of marrying Shita's sister eleven years before and failing to deliver the marriage payment, and the court ordered Luzunge, who pleaded poverty, to pay Shita R11.00; the amount originally agreed upon.

An increase in the marriage payment is therefore apparently not imposed in all cases where payment had been delayed.

4. How malobolo is provided

If the father of the bridegroom-to-be is rich enough he will usually provide the cattle required, but he is under no legal obligation to do so. It is regarded as the responsibility of each man to provide his own malobolo.

5. Ownership of malobolo

The marriage payment is paid to the mother and the father of the bride; the wife has a right to an equal share with her husband in the malobolo received for their daughter or daughters.

If the payment is in the form of cash, they divide the money, each receiving an equal share.

If it is in the form of cattle the following rules apply:

(a) If the daughter is a virgin the marriage payment is two heads of cattle, and they each receive one beast.

(b) If the daughter is not a virgin only one beast is handed over, and the following arrangements are applied:

(i) The beast goes to the father but if it is a cow the first calf has to go to the mother.

(ii) The beast goes to the father but if it is a bull, the father has to give the mother a calf from among his own cattle.

The court frequently has to order the father to share the malobolo with his wife as in the following cases:

(i) In Tiyeho Mukweli vs. Libetwa Mulisa (16 June 1964) Tiyelo claimed R8.00 from her husband Libetwa, being her share of the marriage payment of R16.00 for their daughter which Libetwa refused to give to her. The court ordered Libetwa to pay Tiyeho R8.00.

(ii) In Mbulawaye Mutimani vs. Maundu Matiti (15 July 1964), Mbulawaye claimed from her husband Maundu her share in the malobolo of R32.00 which he had received for their daughter. Maunda was ordered to pay Mbulawaye R16.00.

(iii) In W. Libitwa vs. Shandric Mutabelezi (30 August 1965), Libitwa laid a complaint against Shandric for not handing to Libitwa the share of the "malobolo" of Libitwa's sister for her daughter, Libitwa's sister having been Shandric's wife until her death a few years previously. Shandric was ordered by the court to pay Libitwa R16.00.

(iv) In Mutalike vs. Johani Muzamai (19 February 1966), Mutalile complained that her husband Johani had twice married their daughter off and in both cases refused to give her her share of the "malobolo". She now sued for her share in the "malobolo" for the second marriage, which totalled R28.00. Johani was ordered to pay his wife R14.00.

6. Acceptance of the marriage payment by someone other than the father

The marriage payment is normally made to the father of the bride, who is then required to share it with his wife. If, however, the father has died, or is absent from the country, or has deserted his family and his whereabouts is not known, then the male relative who has been acting as guardian of the daughter - i.e usually either a brother of her father or of her mother or her own brother - is allowed to receive the father of the bride's share of the marriage payment.

When, however, a man never paid the "malobolo" for his wife, then he has no right to any share in the "malobolo" for the daughters out of their marriage, and his share goes to either the guardian of the mother, or if the mother has died, to the male relative who cared for her children after her death:

In Kabolisa vs. Willson Kabanda (15 August 1966), Kabolisa sued Willson for the "malobolo" of Willson's daughter (who was Kabolisa's granddaughter). Kabolisa stated that Willson had married Kabolisa's daughter but did not pay the "malobolo" for her. The daughter died, leaving a little girl, who was brought up by her maternal grandfather, Kabolisa. However, when the girl was married, Willson claimed the entire marriage payment, consisting of one beast. The court ordered Willson to hand the cow over to Kabolisa, as Willson had no right to any part of the

"malobolo" since he had failed to deliver the marriage payment for the girl's mother.

7. The effect of death or dissolution on a claim for marriage payment

a) When the husband dies his heirs have no claim on either the "malobolo" he paid for his wife, or on the "malobolo" paid for his daughters after his death - the paternal share of the latter payment goes, in the event of his death, to the person who acted as guardian for his daughter(s) after his death.

For example in Bulipe Mutinani vs. Chalu Manga (30 November 1963) Chalu had taken the "malobolo" for the daughter of his deceased elder brother, claiming that as his brother's heir he had a claim to it. The court ordered Chalu to give the remainder of the payment to Bulipe, the girl's mother, as he had no right to it. (Bulipe had not claimed the full amount; only the part which Chalu had not yet spent).

The heir of the husband may of course also be the guardian of the latter's daughter. For example, it is customary that if a man leaves the country to go and work elsewhere, that he leaves his wife and children in the care of his brother. In the event of his death his brother will usually assume the guardianship of his widow and children, in which case the brother may claim the paternal share of the marriage payment. The rather involved case of Daniel Chaka vs. Mundia Mubita (15 February 1967) is an example of this rule:

Briefly, a woman, Sivula, had been married to Daniel Chaka's brother. While Daniel's brother was alive Sivula committed adultery with Mundia and they duly paid damages to Daniel's brother, who subsequently died in Rhodesia, having left his wife and daughter under Daniel's protection before leaving for Rhodesia. Subsequently Daniel married Sivula and divorced her, but as guardian of his brother's daughter he brought her up. Meanwhile Mundia had alleged that he (Mundia) was the genitor of Sivula's daughter, and while Daniel was absent, working at Katima Mulilo, he had claimed the paternal share of the malobolo for Sivula's daughter and taken it.

The court's judgment was that in view of the fact that the paternal attachment of the girl to Mundia could not definitely be established, and as Daniel Chaka's guardianship and care for the girl was undisputed,

Mundia had to hand over the paternal share of the "malobolo", one beast, to Daniel Chaka. (If Kundia's paternity could be established he would have been allowed to claim a share of the malobolo).

b) When a wife dies her husband cannot reclaim the marriage payment, even if she died without having borne any children. Neither is her family under any obligation to provide the husband with a substitute; he may marry the deceased's sister but would have to pay the full marriage payment.

If the wife leaves any daughters then the husband has no rights to the maternal portion of the dead woman's daughters' "malobolo"; the mother's own cognates are heirs to her rights - i.e. failing her own son(s) (the brother(s) of the girl in question), her parents, her siblings and their children may claim her portion of the "malobolo".

c) When the husband dissolves a marriage and claims back the "malobolo", he loses his rights in the "malobolo" for his daughters, and his rights pass to the guardian of his daughter.

8. Ownership of "malobolo" with regard to promiscuous children

a) If a man has a daughter by another man's wife or an unmarried girl he gains the right to the paternal share in his daughter's "malobolo" if he pays the prescribed damages to her mother's husband or guardian.

b) If a man has a daughter by another man's wife or an unmarried girl and he fails to deliver the prescribed payment to the woman's husband or guardian, then he forfeits all his rights to any marriage payment or damages for seduction which may in future be sued for with regard to his daughter.

E. HANDING OVER

1. The handing over of the marriage payment "malobolo"

The handing over and acceptance of the marriage payment ("malobolo") is the most important indicator of a legal marriage, in the eyes of the Fwe Courts.

The actual delivery of the payment is essential. It is not sufficient to merely come to an agreement to deliver. If the girl's parents have consented to the marriage, and it is consummated, but the malobolo

is not actually delivered, the bridegroom faces the following serious consequences:

(a) The bride's father may take his daughter back

In Ezekiel vs. Kungano (30 April 1965), Ezekiel sued for the return of his wife who had, he said, deserted him 8 months before and gone back to her father, Kungano, who refused to consent to the return of Ezekiel's wife. Kungano stated that he had told his daughter to return home because her husband had failed to deliver the "malobolo" (two cows) they had agreed on. The court ordered Ezekiel to pay the "malobolo" and Kungano agreed to allow his daughter to return to Ezekiel.

(b) The husband cannot bring a suit against a person who abducts or commits adultery with his wife

In James Jack vs. Mabuku (22 July 1963) James brought a suit against Mabuku for committing adultery with James's wife. Mabuku alleged that the woman was not James's legal wife because he had never delivered the "malobolo", corroborated by the woman's father. James's action was therefore dismissed by the court.

In Sibezo Mlozi vs. Mwinga (7 August 1963) Sibezo accused Mwinga of abducting Sibezo's wife. Mwinga alleged that Sibezo was never legally married to her because he had failed to deliver her "malobolo". The woman's father supported Mwinga's statement and the Court gave judgment against Sibezo.

(c) The husband cannot claim what would normally be his share of the "malobolo" for his daughter(s) when she/they marry

In Mafenyeho Lomu vs. Kabende Masole (18 November 1963) this rule is brought out very clearly: Kabende was sued by Mafenyeho because Kabende had married Mafenyeho's sister but failed to deliver the "malobolo" they had agreed to, namely one cow. Mafenyeho's sister died, leaving a daughter. When this daughter married, Kabende took the entire marriage payment, consisting of two cows, for himself. (Mafenyeho had after the death of his father acted as his sister's guardian). Kabende's argument, which he failed to substantiate in the view of the court, was that Mafenyeho had refused to receive the "malobolo" of one cow for his sister because he had changed his mind and wanted two head of cattle instead.

The court's decision was that Kabende had to pay to Mafenyeho not only the "malobolo" for the latter's sister, and her share of the malobolo for their daughter, but also Kabende's share, because, having failed

to pay malobolo for his wife, Kabende could not claim to have legally married her and could not therefore claim any share in any "malobolo" paid in respect of their offspring.

These decisions make it absolutely clear that if the marriage payment is not actually handed over, then there is no valid marriage and none of the consequences flowing from a valid marriage will apply.

2. The handing over of the bride

There is no valid marriage unless the girl has been handed over to the bridegroom. It is usual for the handing over of the bride to follow the following procedure among the Fwe:

On the appointed day the bridegroom, accompanied by his kinsfolk, approach the village of the bride amid singing and dancing. The arrival of the bridegroom's party marks the beginning of a feast which lasts late into the night.

During the course of the evening the bride is led from the scene of the festivities by her female kin to the new hut which has been built for her, and there prepared to receive the bridegroom. Her relatives then lead the bridegroom to the hut to be received by her and the marriage to be physically consummated. The next morning the feast continues and before it is concluded, presents are given by the guests to the bride's parents. At the end of the festivities the groom presents his wife to her parents and hands them a small gift, usually R1.00. This ceremony is called "sikuti samautu", a gesture of gratitude.

It is not legally required, in Fwe customary law, for the handing over of the bride to follow the above procedure, and there are many variations. The court merely requires that the girl should be allowed to go and live with her husband, i.e. "be handed over".

(Where a girl has been seduced and the fine paid, and the girl's father or guardian allows her to go and live with (or remain with) her suitor, the court apparently also regards the subsequent relationship as a valid marriage.)

In conclusion it should be noted that the physical consummation of the marriage is not a legally essential requirement. A husband has a right to claim damages for adultery if, after the transfer of malobolo and of the bride had taken place, but before the marriage was physically consummated, his wife should commit adultery with a third party.

CHAPTER III

MARRIAGE: THE CONSEQUENCES

Marriage brings about a legal relationship not only between the husband and the wife, but also between their respective kin groups, and between them and their respective kin groups. The consummation of the marriage thus brings into being reciprocal rights and obligations:

1. Between the new hut unit and the two kin groups;
2. Between the two kin groups;
3. Between the husband and the wife.

While some of these rights and obligations are clear-cut (e.g. the right of a family unit to occupy a hut and to cultivate a garden), others are vague and loosely defined. For example it is the husband's duty to "look after his wife", it is the kin groups' duty to "look after" the hut unit, and it is the hut unit's obligation to observe obedience and respect towards the kin groups. In these cases where the norms and standards of behaviour are defined in vague and general terms, the Fwe judges have to consider the circumstances of each case in such a way as to formulate an ad hoc ruling which would be an equitable application of the general norms to the circumstances of each particular case.

1. Reciprocal rights and obligations between the family unit and the kin groups

Each hut unit has the right to build a hut, to cultivate a garden large enough for its needs, and to graze its cattle and other domestic animals on the communal land occupied by the kin group in whose village the hut unit is resident. The kin group in whose village the hut unit is situated has an obligation to make these privileges available to them.

The kin group has a right to a reasonable degree of obedience, co-operation and active participation in communal projects from the hut unit.

The right of the kin group, particularly its older members, e.g. the parents or uncles and aunts of the hut unit, to be shown respect at all times by the husband and wife are meticulously enforced by the Chief's court, and in any case where a member of the kin group is treated disrespectfully the Court is apt to impose severe penalties. E.g. where

a husband is accused of severely beating his wife (see Likeleli Lukulo vs. Eleas Millinga, Nankole vs. Matemwa Kamwi, Mbujana Muwana vs. Dismon Mafale, and Poru Jack vs. Nelson Tembe under: (3) Obligations and Rights of the husband, below) the damages awarded by the court would not exceed R16.00, but in Kukanganywa vs. Jackson Kakuwaizi (25 Oktober 1967), the son-in-law Jackson was ordered to pay his mother-in-law Kukangonywa R24,00, and the Chief's court R6.00, for assaulting his mother-in-law.

In earlier days, the judges say, a man or a woman could be killed for showing disrespect to their elders and it is still regarded as a very serious offence, not only in the case of a married couple and their in-laws but in the tribe generally.

The kin group is also under an obligation to grant the hut unit a large measure of autonomy in its internal affairs. Undue interference by the kin group through its leader (the omfumu oa o munzi) or other members could lead to legal sanctions against such interference. So, for example, in Hope Malumo vs. Sikombwa (24 February 1964), Hope brought a claim for damages against his father-in-law, the headman of the kin group in whose village Hope resided, for interfering in a domestic quarrel between Hope and his wife, Sikombwa's daughter, and for "cursing" Hope while doing so. The Court fined Sikombwa £3 (R6.00) "because he interfered in his daughter's marriage"; the fact that he had "cursed" Hope being considered an aggravating factor. During our discussion of this judgment it was made quite clear that whether or not Sikombwa had used abusive language against Hope, was not considered the main issue. The issue at stake in the opinion of the Court was a hut unit's right to settle an internal dispute - in this case the wife's allegedly negligent attitude to her house and husband - without outside interference.

In our discussion the court members pointed out that the head of a kin group has the right to arbitrate disputes between spouses if he was requested to do so or if the dispute involved parties outside the hut unit. He has, however, no right to interfere of his own volition in a domestic quarrel, and a fortiore he may not curse one of or both the parties to the dispute. In all these respects Sikombwa had failed to adhere to the standards of behaviour Fwe law requires from him as leader of the kin group, in the opinion of the court.

2. Reciprocal rights and obligations between the respective kin groups of the husband and wife

Between the kin group of the husband and the kin group of the wife the consummation of a marriage brings into being a set of reciprocal rights and obligations; by consenting to the marriage each of the two kin groups has implicitly consented to be responsible for the fulfilment of the marriage contract between the two spouses.

Thus the husband's kin group gives the implied undertaking that the wife will be looked after and treated in such a way as to enable her to adequately keep a home and rear children. This undertaking is terminated by the husband's death which dissolves the marriage and if the wife has been staying at her husband's village she is required to return to her kin group after the husband's death. If, however, she has children she will be allowed to stay on in her husband's village and to cultivate a garden there, if she so wishes.

On the other hand the kin group of the wife is held responsible for the wife's obligation to care for and keep a home for her husband and their children.

It should be noted that it is in Fwe law not a legal obligation for the kin group of the wife to provide another wife if the first is unable to produce children, or dies without having produced a child, nor is the group obliged to return the marriage payment. Furthermore, if the husband of a childless woman decides to marry another woman from the same kin group it is regarded as an incestuous marriage, unless he marries the sister of his wife after the latter's death in which case he is required to hand over malobolo in the usual manner.

3. The rights and obligations of the husband

As father and head of the family the Fwe husband has a wide measure of authority over his wife or wives and children, i.e. over the internal affairs of his hut unit, and he is the representative of his family or hut unit when dealing with external matters.

He has to be consulted on all important matters affecting his wife or wives and children, for example with regard to marriage partners for his children, the cultivation of the family's gardens and the care of its cattle, the acquisition of household utensils, furniture and clothes, and so forth.

He has a right to the obedience and loyalty of his wives and children, and to be treated with due respect.

Ownership of the hut unit's property rests in the husband, i.e. the cattle and other domestic animals, household furniture and utensils, clothing, blankets and food, except the crops from the main garden to which the wife has equal proprietary rights, and marriage payments for their daughters to which she has similar rights.

Even with regard to the husband's ownership of other property there are important limitations on his right to dispose of these:

In Sekeleti vs. Ndanla (8 September 1967), the wife, Sekeleti, appealed to the court to restrain her husband from taking their ox which she used for ploughing as marriage payment for a second wife. The court decided in the wife's favour.

In a similar case, Njala vs. Jamus Silika (3 November 1967), Njala asked the court to restrain her husband from selling all their cattle in order to procure the marriage payment for another wife. The court decided in Njala's favour.

In both instances the Court agreed with the wife's claim. In his exposition of the reasons for the judgment the Principal Councillor listed two principles which should guide the husband's management of the property of the hut unit:

Firstly, decisions to dispose of any articles should be taken in consultation with the wife.

Secondly, property which are essential to the well-being of the hut unit - e.g. cattle which are needed for ploughing - may not be disposed of unless the wife's consent has been given or suitable replacements procured.

The husband is required to provide his wife with a hut, to clear enough land so that his wife can cultivate sufficient food for their needs, and to provide a reasonable supply of blankets, clothes, household utensils, etc., and to generally look after the well-being of his family.

The husband is expected to treat his wife with kindness and respect. When he has more than one wife he should treat them equally with regard to the provision of food, clothing and utensils and the upbringing of their children, and he is expected not to show favouritism with regard to the granting of conjugal rights.

If the wife feels the husband failed in any of these obligations - many of which are vaguely formulated - she may, assisted by her father or guardian, claim redress from her husband:

In Maria Litalemo vs. Ezekias Misika (19 January 1967) Maria claimed damages from her husband for not caring for her properly and generally displaying an unfriendly attitude towards her; she alledged in support of her complaint that Ezekias had refused to share with her the meat of an ox which had been killed by a lion, refused to eat the food she cooked for him and had told her she was free to go back to her father if she so wished. Ezekias in his evidence accused his wife of being strong-willed and disobedient, and disrespectful, and cited several instances designed to show that Maria had also failed in her obligations as a wife. The court's judgment was that both parties were to be blamed for the conflict in their marriage. Each of the twelve judges admonished and lectured them on their respective obligations as husband and wife, and after a stern lecture from the Ngambela he dismissed the wife's claim for damages.

(This case also illustrates how flexible many of the norms are which the Fwe court has to apply, and how this flexibility also enables them to reach not merely a legal decision but also to make an attempt at reconciling the disputing parties.)

In Mbiyana Muwana vs. Dismon Mafale (20 February 1967) Mbiyana claimed damages against her husband Dismon for assaulting her because she had given food to her brother's wife without his approval. In his defence Dismon said a man is allowed to punish his wife for disobedience, and she had in spite of his disapproval given food to her sister-in-law, who had a husband whose duty it was to look after her.

In the court's judgment Dismon's attitude to his wife's kin group and to his wife was severely criticized: "A Fwe does not refuse food to neighbours". "It is the law that the husband and the wife must be hospitable to their relatives." Dismon was ordered to pay his wife R5.00 for "causing his wife to be ashamed before her own people". Note: the fact that he had beaten his wife was apparently only regarded as proof of his unbecoming conduct, and not as the reason for the damages, as it is regarded as admissable for a husband to beat his wife under Fwe Law, within reason.

In Poru Jack vs. Nelson Tembe (16 August 1967), Poru Jack claimed damages from her husband for insulting and beating her before the entire

village, and the Court ordered Nelson to pay his wife R10.00 because his conduct was unbecoming for a husband who is expected to keep domestic quarrels within the domain of his own household. The consensus among the judges was that he had publicly humiliated his wife.

Undue cruelty can lead to an action for damages and in extreme cases (although there is no case which can be cited in support of this opinion) to divorce:

In Likeleli Lukulo vs. Eleas Millinga (27 September 1967) Likeleli claimed that Eleas said that he had beaten her because she was pregnant and she had refused to admit that another person was responsible for her pregnancy and who this person was. The court ordered Eleas to pay his wife R16.00 for assaulting her and behaving in an unreasonable manner.

On the same day, in Nankole Matemwa vs. Kamwi the husband Kamwi was ordered to pay R14.00 damages for hitting his wife with an axe. Kamwi's defence was that he had been drinking and did not know what he was doing. This was not accepted as extenuating circumstances by the court and Kamwi was severely reprimanded.

Although the husband's obligations are loosely defined and often expressed in rather vague terms, his failure to fulfil them makes him liable to claims for damages from his wife and may even lead to dissolution of the marriage, which is dealt with in detail in Chapter VI below.

Finally mention should be made of a custom peculiar to the Fwe. The husband is obliged to give each of his children, whether male or female, a cow during his lifetime. If he is poor, he gives a cow to the first child only, and the first heifer from the eldest child's cow goes to the second child, the first heifer from this cow to the third child, etc. Care is taken that each child receives a cow. During the lifetime of the father these cattle may not be disposed of by the children without their father's consent.

4. The rights and obligations of the wife

Regarding the status of the Fwe wife, it can be summarized by describing her as a perpetual minor in the eyes of the law. Before her marriage she is regarded as the ward of her father or guardian, and after her marriage she comes under the guardianship of her husband. At the dissolution of their marriage she returns to the guardianship of her

family - as under the Fwe marriage agreement only her husband acquires rights over her and in the event of his death his kin group hold no rights over her whatsoever.

In a polygamous marriage the first wife is the senior or head wife, but she has no special status. All wives in a polygynous marriage have equal status in the household. The senior wife has no authority over the other wives, and enjoys no special status with regard to property, inheritance, succession, etc.

Each wife has an equal right with her husband with regard to the crops from their garden which she cultivates except for the special field set aside for the husband's exclusive use. She also holds an equal right to the marriage payment received for their daughters, as well as to the damages awarded to them if their daughters are involved in seduction cases.

As noted above, although the husband is the owner of the family's property, the wife has the right to be consulted if he desires to dispose of any animal or object belonging to the family.

Regarding her obligations the wife is required to respect and obey her husband, to grant him conjugal rights, and to care for the children born to them. (Fwe law does, however, not require her to produce children. If she fails to bear children for her husband and he divorces her, he forfeits his "maloholo".)

She is further required to cultivate the family garden, bring in and prepare the crops, gather firewood, fetch water, collect wild plants and fruit and edible insects, prepare the daily meals, keep the hut and its surroundings clean, and in general to be responsible for the domestic chores.

CHAPTER IV

MARRIAGE: DISSOLUTION1. Introduction

It has been pointed out in Part III, Chapter I above, that the marriage contract is agreed to by the woman's father or guardian and the father or guardian of the man, or the man himself; no court is involved in bringing about the marriage. This statement holds true for all the tribes of southern Africa.¹⁾ It is therefore a private contract.²⁾

Because the courts were not involved in the consummation of the contract, the Fwe courts have - except in certain exceptional cases which are discussed at the end of this chapter - no jurisdiction to dissolve the marriage; the dissolution of the marriage is the prerogative of the contracting parties or their representatives.³⁾

It should also be pointed out that in Fwe Law, as is the case also in all South African Bantu Law systems, the wife is not one of the contracting parties in the marriage contract; the marriage payment and the wife being the object(s) of the contract. It follows therefore that the wife cannot be a party to the dissolution of the marriage contract. If she wishes to have the contract dissolved she can only do so through the courts, with the assistance of her guardian.⁴⁾

2. Dissolution by the death of the wife or the husband

The death of either the wife or the husband, terminates the marriage contract among the Fwe: If the woman dies her husband cannot claim back his "malobolo", even if she did not bear him any children, nor can he claim from her kin group a substitute for his deceased wife.

Similarly, if the husband dies, the widow is free to go back to her kin group, and her husband's kin group is under no obligation to care for her or her children, as her children do not belong to her husband's kin group. She may be allowed to stay in her husband's village, especially

1) OLIVIER, N.J.J.: Die Privaatreg van die S.A. Bantoe. Butterworths, 1969, pp. 161-2.

2) SEYMOUR, S.M.: Native Law in South Africa. Second Edition. Juta & Co. Ltd., 1960, p. 118.

3) Cf. Olivier, op. cit., p. 161.

4) Cf. Seymour, op. cit., p. 118. See also Olivier, op. cit., p. 163.

if she has children, and she would be welcomed, but they are under no legal obligation to look after her.

Both the husband and the wife are free to marry again whom they wish after the death of one of them had terminated their marriage.

3. Dissolution by common consent

A marriage contract can be terminated by common consent between the husband and the guardian or father of the wife, and in such a case they are free to reach any acceptable agreement with regard to the division of the property and the marriage payment, and the courts would only be involved in so far as it may be requested to arbitrate if a disagreement re the division of the property, etc., occurs.

4. Dissolution at the instance of the wife and guardian

It has been said above that the wife, not being a party to the marriage contract, cannot initiate the dissolution of the marriage on her own; she needs the assistance of her guardian, and if her husband resists her guardian, has to go to court. However, if the wife is determined not to live with her husband, neither he nor the courts can compel her to do so. E.g. in Kabuwanwa vs. Mayumbo Malosi (20 February 1967), the court at the request of Kabuwonwa ordered his wife Mayumbo, who had run away to her father and refused to return, to return to her husband, and she agreed, but in Kawa Simasiku vs. Nabubuya Makuta (13 September 1963), the wife, Nabubuya, refused to return to her husband, alledging cruelty, in spite of an order from the court to return. In the latter case no further action would be taken by the court, except that in any dispute over property, etc., the court would probably favour the husband, who has been held to be blameless.

(a) Grounds on which the Court would, at the request of the woman and her guardian, grant a divorce

(i) Impotence: A woman is always granted a divorce if her husband is impotent. (See also Chapter II above, Section A(3).)

(ii) If the husband has deserted the woman and not supported her for a certain period - regarding the Lozi Gluckman⁵⁾ mentions a minimum period of three years; among the Fwe I found that in Misozi Kufuna vs. Solomon Nkando (8 June 1966), Solomon was given a very stern warning by

5) In Radcliffe-Brown, A.R. and Forde, D.: African Systems of Kinship and Marriage. London: Oxford University Press, 1965, p. 182.

the Kuta for failing to support his wife Misozi for a period of three years, and the opinion of the Court was that if his wife had requested a divorce, the Court would have granted it; and in Namakanda Matenga vs. Tubasiile (8 January 1965), Namakanda was granted a divorce because her husband Tubasiile had deserted her and failed to support her over the previous four years.

(iii) If the husband behaves cruelly towards his wife. If the husband beats her excessively, or threatens her life, or acts excessively harshly, the wife's request for a divorce will be granted. Although I came across several cases where the wives had laid complaints of assault against their husbands, there was no claim for a divorce based on such an instance. However, in Zita Tabale vs. Samuel Kamwi (22 August 1966), Samuel was accused of treating his wife with great cruelty; having taken all her clothes he chased her away naked and she was forced to walk fifteen miles in this condition through lion-infested country. The court ordered a divorce, and as Samuel had previously appeared before the court on charges of cruelty to his wife, he was warned by the Ngambela not to attempt to marry her again.

(iv) If the husband does not provide his wife with a hut, cooking utensils, and clothes and blankets.

In Isaiah Simbwaye vs. Jimu Mapani (27 May 1966), Isaiah claimed the return of his marriage payment from Jimu Mapani, because Jimu's daughter had run away to her father from her husband Isaiah. Jimu refused and stated that Isaiah had frequently quarreled with his wife until one day he went into her hut and took away all her clothes and blankets. The court dismissed Isaiah's claim and granted Jimu's daughter a divorce.

(v) Poor treatment by her husband's kin can also be a ground for dissolution of the marriage:

In Elison Simukwenga vs. Maria Itwa (16 January 1967), Elison sued his father-in-law for the return of his wife Maria who had left him and gone to her father, who refused to let her go back to Elison. In his response, Maria's father charged Elison for not feeding his daughter properly, and led evidence that Elison's mother had treated Maria very badly, allowing her to go hungry and acting in an antagonistic way towards her. The court turned Elison's claim down and granted Maria a divorce.

(b) Procedures which a wife may follow to obtain a divorce

In both the latter two court cases, the procedure followed by the two dissatisfied women is the usual procedure followed by a woman who wants to force the dissolution of her marriage: they deserted their husbands and returned to their guardians' home, and their guardians then refused to return them to their husbands so that the latter were compelled to ask the court to intervene.

It is not necessary for the woman's guardian to wait for the husband to act; as one of the contracting parties in the marriage contract, the woman's guardian can go to court himself and request that a divorce be granted. In cases where the husband had deserted his wife (as in Namakanda Matenga vs. Tubasiile (8 January 1965, above) this is of course the only procedure the wife can follow.

There is a third procedure available to a wife who desires the dissolution of her marriage: she may desert her husband and go and live with another man, under the threat of an adultery charge, when she and her lover each has to pay one cow or its approximate money equivalent, as determined by the court, to the husband.

(Previously the damages paid by the woman were paid not to the husband but to the court, according to Fwe spokesmen. It was, however, for unknown reasons changed to the present system about thirty years ago.)

When the abductor pays damages to the husband, the latter loses all his rights over the wife and her abductor will be free to marry her.

It should be noted that if a wife deserts her husband and returns to her father or guardian, the latter has an obligation to notify her husband of her whereabouts, otherwise the husband can claim damages from both his wife and her father or guardian: In Kabende Mamili vs. Kungano (23 September 1963), Kabende claimed damages against his wife and her father Kungano for repeated desertions by his wife and the failure of Kungano to notify Kabende that his wife had returned to her father on the last occasion. The court did not allow Kabende's claim for damages against his wife for desertion, as he could not prove that she had gone to another man. The court held that a woman always has the right to return her guardian, but ordered the wife and her father Kungano to pay Kabende R4.00 each because Kungano had failed to notify his son-in-law of the whereabouts of his wife.

(c) Diverse grounds on which the Fwe court will not grant a divorce at the instance of the wife and her guardian

(i) If the husband commits adultery with another woman his wife cannot sue for a divorce, as the marriage contract does not give her sole sexual rights over her husband.

(ii) The death of a child or frequent illnesses in the family often lead to accusations of witchcraft against the husband by the wife. The court, however, does not recognize it as a ground for divorce.

In Morrison Baruzi vs. Ndozi (18 December 1964), Morrison asked the court to order his wife to return to him. She had returned to her parents after the death of their child, accusing Morrison of being responsible for the child's disease. Ndozi acknowledged that she had done so and reiterated her determination to have nothing more to do with Morrison. The court reprimanded Ndozi for her attitude, rejected her accusation against Morrison with the words, "Children always die", (meaning that in a society with a high mortality rate death is a frequent occurrence), and ordered Ndozi to return to Morrison.

(iii) Accusations of neglect against husbands are often turned down as a ground for divorce, because the court needs to be convinced that the husband was indeed guilty of gross negligence with regard to his wife and children's needs. Often such cases are brought to the court on such flimsy grounds that the complainants should have been well aware that the court would not grant a request for divorce. However, (in the opinion of the court members) the women follow this procedure in order to air their grievances in public and to bring the force of public opinion to bear on a husband whose conduct is reprehensible.

So, for example, in Njala Situnda vs. Kwendakwenda (27 August 1965), Njala sued for a divorce because her husband had left her two years before and had not supported her since. In their cross-examination the judges found that Njala did not really want to leave her husband, and after remonstrations and admonishments on the part of the judges, Kwenda agreed to return to his wife and support her.

5. Dissolution at the instance of the husband

In Fwe law it is the right of the husband to dissolve his marriage whenever he wishes to do so, and the father or guardian of his wife cannot resist such a step.

The husband may merely give his wife a letter to her father or guardian stating that he has divorced her and then send her back to her parents or guardian.

Thus a woman has very little security.

However, if the husband dissolves the marriage unilaterally, in the way described above, he forfeits all claims to the return of his marriage payment and if he subsequently regrets his action and wants his wife back, he has to make another marriage payment to her father or guardian.

If the husband wants the return of his marriage payment to be considered, he must discuss the issue with her father or guardian before divorcing his wife. If they cannot come to an agreement they will turn to the courts for a decision, where most cases are settled at the level of the kuta ya silalo (ward courts.) It should be noted that here the courts' role is limited to pronouncing judgment with regard to the ownership of the "malobolo" - i.e. with regard to certain consequences of the dissolution and not with the dissolution itself; the decision whether or not to divorce his wife is the husband's prerogative.

Since the husband has complete freedom to divorce his wife whenever he wishes to do so, the question of whether or not he had "valid grounds" for divorcing his wife does not arise with regard to a divorce at the instance of the husband. It is only when the consequences of the dissolution has to be determined, e.g. whether the husband has a claim to the recovery of the "malobolo", that the reasons for the dissolution comes under scrutiny of the Fwe judges.

6. The consequences of dissolution

a) With regard to the status of the spouses

The dissolution of a Fwe customary marriage restores the antenuptial status of the spouses, except that where a woman had been a virgin⁶⁾ when she was married, and her father could therefore claim two heads of cattle or its equivalent for her marriage payment, in a subsequent marriage, or in the event of a sexual delict, he may now only claim one beast or its equivalent.

6) In the legal sense. Among the Fwe an unmarried woman is regarded as a virgin if she is just past puberty, is unmarried, has not been involved in a claim for seduction, and has not had a baby. An unmarried woman is regarded as not being a virgin if she is a widow, a divorcee, has had a child, has been involved in a sexual delict or has reached an age when she ought not to be a virgin any more; i.e. apparently over approximately 25 years of age.

As Fwe society is a polygamous society the dissolution does not affect the husband's capacity to marry again. The husband's right to cohabitation with the wife ceases, and if he has intercourse with her after the dissolution of their marriage, her guardian or her new husband can claim damages from the former husband.

If the husband disputes the fact that the marriage has been dissolved the letter which informs the wife's guardian that she has been divorced (see (5) above) is accepted by the court as conclusive evidence of the dissolution of the marriage:

In Sabali Ntelamo vs. Kuyowayowa Liwakala (27 August 1965), Sasali claimed adultery damages against Kuyowayowa with whom Sasali's wife was now living in Zambia. Kuyowayowa responded that Sabali had in fact divorced his wife and produced in court the letter from Sasali to his wife's father, stating that Sasali was divorcing her. Sasali's evidence was summarily rejected, and his claim not allowed.

In the case of the wife, dissolution restores her freedom to re-marry, and her guardian's right to claim damages if a man commits a sexual act with her or if he lives with her without the guardian's permission, or if he fails to pay "malobolo" for her.

A divorced woman reverts to the guardianship of her father, or if he has died, one of her brothers, usually the oldest brother.

b) Consequences of dissolution with regard to material rights

The Fwe distinguish between two types of property in the household: those articles which belong to the household, i.e. which were purchased by the husband for the use of the family (utensils, clothes, blankets, etc.) and those articles which each marriage partner had acquired for his or her own use before or during the course of their marriage. This latter category of property is not affected by the dissolution of the marriage.

The category of property which was acquired by the husband for the use of his family - mostly cooking utensils, blankets and clothing - is, however, affected, even though ownership of them rests in the husband:

a) The parties may agree to dividing this property in equal portions, particularly when the marriage ends by mutual consent.

b) If the woman deserts her husband he may take all the household property which she leaves behind. (It is not clear if he has any claim to any property, such as clothes he had bought her, which she took with

her when she left him.) "If the woman breaks the marriage, her husband may take all the goods."

c) If the husband forces his wife to leave he has no right to recover from her goods which had been given to her for her personal use, and he is required to share goods which had been bought for the general use of the family, such as cooking utensils:

In Nanjala Namaka vs. Jeremia Lyamboloma, Nanjala asked the court to restore to her her share of the property. When Jeremia had told her to go home and divorced her, he had taken all their belongings. Because many of the goods were no longer available, Jeremia was ordered to pay R11.00 to Nanjala, this amount being agreed to as the approximate value of Nanjala's share.

If the husband takes all the house property when he tells his wife to leave the house, such an action proves that he had unilaterally dissolved the marriage, and whether or not he returns the woman's share in the family property, he forfeits his marriage payment.

In Isaiah Simbwaye vs. Jimu Mapani (27 May 1966), Isaiah claimed the return of his "malobolo" from Jimu on the grounds of desertion by Jimu's daughter. The defendant disputed the allegation that his daughter had deserted Isaiah and stated that Isaiah had taken away all her clothes and blankets before sending his wife back to her father. After establishing that Jimu's evidence was the truth, the court rejected Isaiah's claim on the grounds that by his action he had unilaterally repudiated his marriage and was therefore not entitled to recovery of his marriage payment.

c) The consequences of dissolution with regard to the crops

When the marriage is dissolved all the crops which have been harvested must be shared equally between the two parties:

In Mwaka Sing'ombe vs. Luboni Simwanga (8 June 1966), Mwaka alleged that her former husband, Luboni, had refused to give her her share of the crops when she left him. The husband, Luboni, responded that they were divorced because his wife had rejected him, and therefore he had no further responsibility for her. The court ordered Luboni to give his former wife one half of the crops, "because you both ploughed in the same land."

It is apparent from this case that the sharing of the crops is not affected by the question of who had been to blame for the dissolution of the marriage.

d) The consequences of dissolution with regard to the marriage payment ("malobolo")

i) If the marriage has been dissolved by common consent

If the marriage has been dissolved by common consent of the parties, this includes an arrangement with regard to the recovery or non-recovery of the "malobolo".

Just as the decision to dissolve the marriage is final and irrevocable so too the arrangement with regard to the "malobolo" is regarded as an integral part of the decision to dissolve the marriage, and is equally final and irrevocable:

This ruling applied in Davidson Mung'ambwa vs. Taezo (9 March 1967), in which Davidson demanded that Taezo should return half the "malobolo" which he had returned to Taezo as part of their agreement that Taezo should divorce Davidson's daughter. After the agreement had been concluded it transpired that his daughter was pregnant, and accordingly Davidson wanted to renegotiate the terms of the divorce. However, the Court ruled that since the malobolo had already been handed over, and the wife returned, the dissolution of the marriage had been completed, and that Taezo could not be forced to renegotiate against his wishes.

ii) If the marriage has been dissolved by the death of one of the parties

As was stated in (2) above, the husband is not able to claim back any part of his "malobolo" if his wife dies, whether she had borne him any children or not.

Likewise, if the husband dies, his kin group cannot claim back the marriage payment which he had made for his wife, whether or not they had had any children.

No such disputes seem to arise in Fwe society.

iii) If the husband had unilaterally dissolved the marriage

If the husband unilaterally dissolves the marriage, he has no claim at law to the marriage payment.

iv) If the court grants an order for divorce at the instance of the wife

If the guardian or the father of the wife successfully applies for a divorce order from the court, the husband has no claim at law to the marriage payment, because the decision of the court implies that in

the judgment of the court the husband has been proved to have failed in his obligations as a husband and made it impossible for his wife to enjoy a normal married life with him, and therefore by his conduct has forfeited any claim to recovery of his marriage payment or part thereof. In the opinion of the court the husband "has spoiled the marriage" and was therefore not entitled to any kind of compensation.

v) If the wife becomes insane and the husband divorces her, he can claim back the "malobolo" he had paid for her.

vi) If the wife refuses her husband conjugal rights and the marriage is dissolved the husband can recover half his malobolo if he had paid two beasts because his wife had been a virgin, or the whole of his malobolo if the wife had been a non-virgin.

Both with regard to insanity of the wife and the refusal of conjugal rights by the woman no actual cases were known by my informants and none occurred during the period the investigation lasted.

vii) If the dissolution of the marriage is caused by the desertion of the wife

If the wife deserts her husband, and unless the court has decided that the wife had had sufficient cause for her act and granted her a divorce (see (4) above for a detailed discussion of this aspect), then the husband can claim his "malobolo" back, always with the proviso that if he had made the marriage payment for a virgin he could only recover half his "malobolo":

In Daimond Mubumbulwa vs. Kasinanzi (4 March 1966), Daimond demanded back his "malobolo" because his wife had deserted him without reasonable cause. His father-in-law Kasinanzi could show no reason why his daughter should have run away from Daimond and was ordered by the court to deliver one beast to Daimond.

In Ezekiel Mikatazo vs. Mazumbabi (1 June 1966), Ezekiel demanded from Mazumbabi that Mazumbabi should either return his wife, Mazumbabi's daughter, or return the "malobolo" to Ezekiel. The wife alledged that Ezekiel had not provided "a good hut", nor "enough" utensils and clothing, and that their garden was "very small", and refused to return to Ezekiel. The court found that the wife's reasons for refusing to return to Ezekiel were insufficient and ordered Mazumbabi to return one beast to Ezekiel.

viii) If dissolution of the marriage is caused by adultery of the wife

The husband can claim his "malobolo" from his wife's guardian or father if his wife is found guilty of adultery.

This claim is so rarely disputed that no record of a claim for repayment of "malobolo" following a case of adultery (of which there were over thirty in the same period, which came before the Chief's court) could be traced.

If the husbands do meet with difficulties in extracting the repayment of "malobolo" in these cases, they seem to be settled at the level of the nduna ya silalo's court.

Adultery and the "suspension" of the marriage contract

It must be noted that when a husband accepts adultery damages from his wife and her suitor, the husband loses his rights over his wife - the payment of the damages "suspends" the marriage contract; if the woman returns to her husband she remains his wife and her abductor will have to pay damages again if he abducts her again; but if she chooses to remain with her abductor her marriage is dissolved and her husband has no further claims over her.

For example, in Sambotela Munukayumbwa vs. Mowa (21 March 1966), Sambotela claimed damages for abduction of his wife in 1965 from Mowa. In addition he sued Mowa for payment of R12.00 damages for the same offence with Sambotela's wife twelve years before in 1954, which Mowa had failed to pay. Mowa agreed with the accusations. The court ordered Sambotela's wife to pay her husband R25 for the 1965 offense (she had paid her fine in 1954) and Mowa was ordered to pay R25 for the 1965 offense as well as the R12 he still owed Sambotela following the 1954 court case.

It is clear therefore that if a wife remains with her husband, she and her suitor can be fined repeatedly for repeated acts of adultery, but if she after having paid damages, chooses to remain with her abductor, or not to return to her husband, her marriage is regarded as having been dissolved.

At the same time it should be noted that having paid damages to a husband, the abductor holds no exclusive rights over the woman either and if he wants to marry her, he has to pay her father or guardian "malobolo" in the usual way.

Proof of adultery

The Fwe courts are somewhat vague in their rules with regard to what constitutes definite proof of adultery, but the following rules are fairly consistently applied.

If a woman deserts her husband and goes to live with another man, it is regarded as self-evident proof of her adultery.

(See Appendix 3 for David Sibunga vs. Alfred Shanamashinda (13 June 1967); Sekeleti Mwiya vs. Kanjinji (8 September 1967); Daniel Muyatwa vs. Cideon Bandule (21 September 1967); Anderson Sambula vs. Muyandulwa (21 January 1966); Erickson Kabende vs. Nelson Pembe (2 December 1965); Sakutiya Matengu vs. Zambezi (12 June 1966); Dickson Chikalila vs. Thomas Monze (13 April 1966); etc.)

If a man sleeps in the same hut as a married woman he is assumed to have committed adultery. For example in Jackson Imanga vs. Taulo Muketela (17 January 1967), Taulo was caught by Jackson sleeping in the same hut as Jackson's wife, and the two adulterers were each ordered to pay Jackson one beast.

Merely being in a hut is regarded as proof of at least attempting adultery: In Webster Libitwa vs. Kalimbwe (16 June 1965), Webster accused Kalimbwe of attempting to seduce his wife because he found him inside the house. There was doubt if he had actually slept there and Webster's wife and Kalimbwe were each ordered to pay Webster R6.00.

If the husband catches his wife and her suitor in flagrante delicto: In Elia Mubiana vs. Dismon Tuhalenda (5 July 1966) and Elia Mubiana vs. Ned Lupalezwi (15 July 1966), the same man on two occasions caught his wife with another man and was awarded adultery damages, Dismon paying R14.00 and Ned R12.00, and the wife ordered to pay R14 in respect of Dismon and only R6.00 in respect of her adultery with Ned "because she was already paying R14.00."

Other grounds for proof of adultery were not found in the court records, but members of the Chief's Council considered that - depending on the circumstances - if a man is found walking along a path with another's wife, or speaks to her with no-one near, or gives her snuff or a drink of beer, or is found in her garden, then there would be a strong suspicion of adultery, which would however have to be substantiated with further evidence. (This view is in sharp contrast with that of the neighbouring Lozi, where all the acts listed above are regarded as conclusive proof

of an adulterous relationship.⁷⁾

The consequences of dissolution of the marriage with regard to claims on the "malobolo" are therefore mainly dependent on which partner is successful in establishing that the other had in the first instance broken the contract, and the cases arising from these disputes make heavy demands on the judicial skill of the Fwe judges.

e) Consequences of dissolution with regard to the children

These are set out in Chapter VII: Children in Mafwe Law.

7. Dissolution of a Marriage at the instance of the Court

Under certain exceptional circumstances the Chief's Court may order a husband and his wife to separate and forbid them to marry again.

If the couple chooses to ignore this order the Court will not physically enforce its decision, but no dispute, claim or complaint from either of the two partners which arises from their relationship will be heard by the Court:

In Namaya Sikatu vs. Charles Kachibonwa (18 December 1967), a middle-aged woman, Namaya, complained to the court that her husband Charles did not care properly for her and had recently deserted her. She requested the court to order Charles to return to her and to award damages to her. She did not specify the amount. Her husband, Charles, alleged that she "drank beer all the time" and "chased after other men."

Having listened to the two parties for a long time, the judges agreed that as these two continually had domestic squabbles and were making a nuisance of themselves at their silalo court as well as at the Court of the Chief, and yet would not agree to a divorce, they were now ordered to separate; thereupon the court divided their property between them, and ordered Namaya's guardian to return half Charles's "malobolo" to him, and told the two partners that they were forbidden to marry again.

7) RADCLIFFE-BROWN, op. cit., p. 179.

CHAPTER V

CHILDREN IN FWE LAW1. Introduction

In Fwe Law the marriage payment does not, as in South African Bantu Law, transfer the children born out of a union to the kin group who had provided the marriage-cattle. "The children belong to both sides", a statement quoted by Gluckman with regard to the Lozi,¹⁾ is also quoted by the Fwe spokesmen. Consequently in Fwe Law disputes over the guardianship and other rights over children, which are a feature of South African Bantu Law and hinge on the question whether and by whom marriage cattle for the mother had been paid, are unknown or very rare among the Fwe.

Apart from the fact that a child traces its affiliation to a clan matrilineally, there seems to be no difference in the relationship between a child and its father's and mother's kin respectively, from the point of view of reciprocal rights and obligation and inheritance.

With regard to succession to a headmanship different rules apply and a man is excluded from succeeding his father to the position of headman. (The relevant rulings are set out in Chapter VIII 4(b) below.)

2. Rights and obligations of childrena) Rights of children in relation to their respective kin groups(i) Residence

Normally children live with their father. If, for a variety of reasons a child does not want to (if his father does not care for him adequately, or he does'nt get on with his father or his father's relatives) he is free to go and live at his mother's home. Or if his parents live at his mother's village he may go and live at his father's village - in both cases this may be the village of either of his grandparents.

A child ought not to be forced to leave his mother's home to go to his father, or vice versa.

Similarly a child has the right to cultivate a garden in either of his parents' villages as well as in the village in which his parents live.

1) RADCLIFFE-BROWN, A.R. and FORDE, E.: African Systems of Kinship and Marriage. Oxford University Press, 1965, p. 171.

(ii) General care

Children have a right to be cared for, fed and clothed if not by their parents, by either or both the kingroups of the parents.

(iii) Death of the parents

If one of the parents die, a marriage is dissolved; the family unit ceases to exist. If the husband dies, his wife and her minor children revert to the guardianship of her father, or her brother, or an adult son; however, the children are free to go and live with their father if they wish to do so.

If the mother dies, the children would normally revert to her parents, or her brother, or to the care of one of her adult children - but they may also be cared for by the paternal kin group.

In both cases the rules are therefore very flexible and the orphaned children have a right to be cared for in relation to both kin groups.

(b) Obligations of children with regard to their respective kin groups

Children are expected to help with domestic chores, be obedient, and respect their elders, i.e. the older members of both kin groups of their parents.

Respect for older relatives is a strict requirement and does not lapse when the children become adults. While they are minors, children can be severely beaten for showing disrespect and when they grow up the Chief's Court can impose heavy fines for showing disrespect to older relatives.

(i) In Kopani vs. Bornwell Mubelo (27 September 1967), Kopani accused his son Bornwell and Bornwell's wife of insulting him and not showing him due respect. Bornwell was ordered to pay Kopani ten bundles of reeds and his wife was ordered to pay Kopani R10, for insulting her father-in-law. In our discussion after judgment was delivered the Ngambela pointed out that according to "the law" i.e. the traditional Fwe Law, a boy who insulted his father or mother was sentenced to be hanged.

(ii) In Benson Muleke vs. Jamuse Munzulile (14 March 1967), Benson and his younger brother Charles accused their uncle Jamuse of killing Benson's two oxen by witchcraft, "because Jamuse sent his lion to eat my cows." (They both accused Jamuse of being a witchdoctor who can

control lions.) During cross-examination it became evident that there was a long history of minor quarrels between Benson and Jamuse, and on several occasions Benson had failed to show proper respect to Jamuse, speaking rudely to him and treating him contemptuously.

The Court dismissed the charge against Jamuse and ordered the complainant and his brother to pay one beast each to their uncle Jamuse for insulting their uncle.

3. Adulterine children

In Fwe Law a husband does not have a right to all a woman's children. If the woman has an adulterine child, the child does not belong to her husband, but to its genitor, the adulterer, even if the adulterer does not pay adultery damages to the mother's husband.

The child can therefore not inherit from his 'legal' father, but can inherit from his natural father. He may go and live with his biological father and cultivate a garden, etc. However, usually the children stay with their mother and are looked after by her husband as if they were his children.

(If an adulterer does not pay damages for an illegitimate daughter he forfeits his claim to the paternal portion of the "malobolo" when the daughter is married, and this portion reverts to the mother.)

The same rules apply mutatis mutandis to children born to an unmarried mother.

4. Children born to a woman when she remarries

If a divorcee or widowed woman marries again, the legal position of children born from this marriage is exactly the same as in the case of her first marriage, because the dissolution of her previous marriage(s) has reverted her to her previous status as a single, unattached woman.

5. Guardianship over children

If children are left fatherless either because of the death of their father or his desertion, we have said above that normally the woman's father, or her brother or an adult son of hers, becomes her guardian, and guardian over the children. The guardian, however, holds no rights over the children except that he may claim the paternal portion of any marriage payment in respect of any of his foster-children.

Sometimes a man before his death asks his brother to look after his wife and children, in which case the brother acts with the full responsibilities and liabilities of the mother's guardian, and can make claims at law in cases arising from his guardianship, e.g. in Daniel Chaka vs. Mundia Mubita (15 February 1967) where Daniel succeeded in his claim for the paternal portion of the "malobolo" for his brother's daughter, on the grounds that before his brother's death, his brother had asked him to look after his daughter and wife and Daniel had done so, acting as their guardian ever since.

6. Children's rights to inherit

When the father or the mother die when the children are young, the parents of the deceased, or his or her kin group, keep the property of the deceased "in trust" for the children. When the children grow up the eldest son divides the inheritance in the normal way. (See Chapter VIII (a) and (b) below.)

INHERITANCE AND SUCCESSION1. Definition of terms

In this chapter we will for reasons of convenience and clarity use the term "legal unit" to denote a person who is acting in the light of his institutional position (i.e. as a headman, husband, father, etc.). The terms "succeed" and "succession" are used to describe the process by which the responsibilities and liabilities of a legal unit is transferred. "Inherit" and "inheritance" denote the process by which a person establishes claims on specific parts of the property (the legacies) of the deceased.¹⁾

2. Introductory remarks regarding Fwe conceptions re inheritance and succession

In most Bantu systems of law the rules regarding inheritance and succession are radically changing.

Change as such, in these systems (nowadays notably as a result of the pressures generated by the infusion of new concepts and new types of property, mainly from the western technological societies) is sometimes incorrectly viewed as a new phenomenon which has only relatively recently entered what was previously a stable, non-changing situation. The situation of kin groups in Africa has been changing constantly and some of the processes of change which we now observe have been operating for a long time.

These remarks also apply to the system of inheritance and succession in Fwe Law.

The Fwe system of inheritance and succession contains different sets of rules with regard to different types of legal units and different categories of goods, so that it cannot be identified as "matrilinial" or "patrilineal" - and, indeed, it would be quite wrong to attempt to do so.

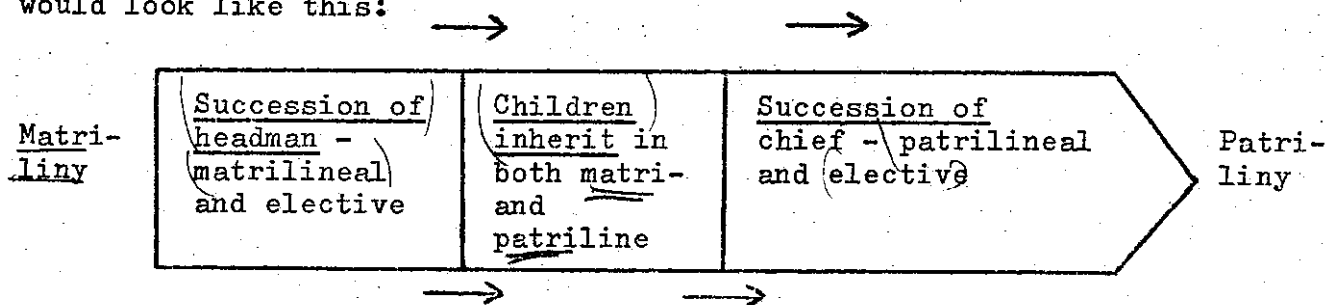
The different processes operating alongside each other in the Fwe Law of inheritance and succession, reflect the continuous process of change which has been at work in Fwe society over a very long period of time, as a result of contacts with other systems of law and other systems

1) Cf. Gluckman, (ed.), op. cit., p. 54.

of social and economic organization.

When a society contains, within its legal and social systems, procedures, etc., of which some are dominantly "matrilineal" and others dominantly "patrilineal", the investigator who is trying to fit the different sets of rules into a single coherent model, may be tempted to explain the array of different principles as being part of a complex system which is in the process of moving from a "matrilineal" system of inheritance and succession, to a "patrilineal" system of inheritance and succession, with different sections being at different stages of the journey, so to speak.

If we used a diagram (limited to only three aspects of succession and inheritance in Fwe law, for reasons of clarity) to illustrate this explanation of the concepts operating in the Fwe system, the diagram would look like this:



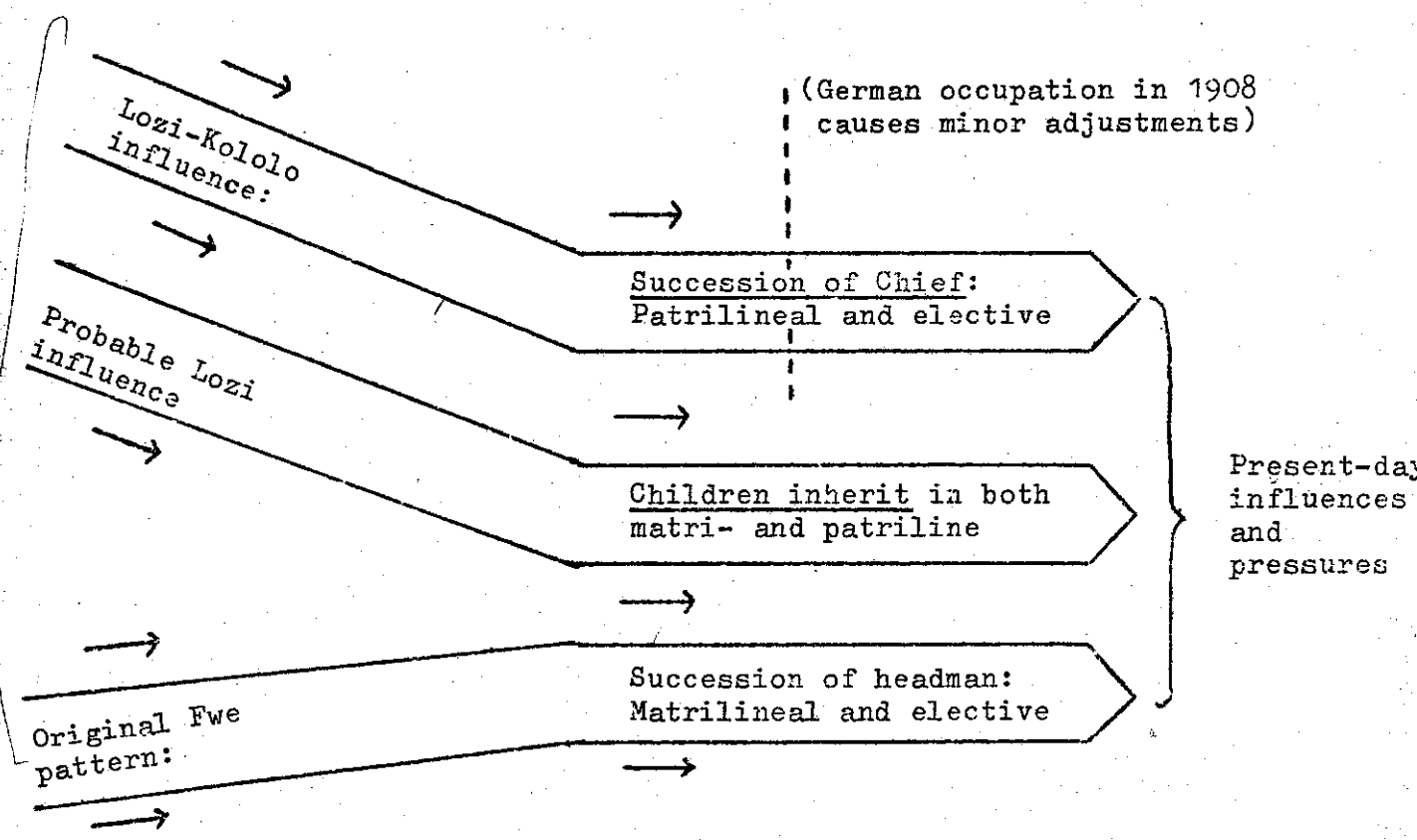
This diagram shows three different types of principles, which are all found in the Fwe law of inheritance and succession, i.e. matrilineal succession, inheritance in both lines, and patrilineal succession in such a way that they can all be interpreted within the context of the development of one dominant mode, i.e. the patrilineal, towards which all the other systems are gradually changing, or to follow the analogy of the above diagram: all the different modes of inheritance and succession are "travelling" towards the patrilineal mode of inheritance and succession.

This explanation is, however, inexact. For example, the movement away from "oblique inheritance" (characteristic of the matrilineal system, where property and status devolves from matrilineal uncle to uterine nephew) to the present Fwe system whereby children inherit in both lines, i.e. from both their father and their mother, is not a movement towards patriliney. In this regard it has been pointed out²⁾ that it is not a movement "from extended matrilineal inheritance to extended patrilineal inheritance, involving the development of new unilineal kinship groups."

2) Ibid., p. 53.

It is, rather, a movement from matrilineal inheritance to the (devolution) of property from a man to his widow and children - in other words, a movement towards ~~conjugal~~ ^{conjugal} and filial inheritance within a cognatic system.

We should therefore not attempt to explain the different sets of rules found in the Fwe law of inheritance and succession in terms of a "universal" tendency to move from one historic or traditional system to another historic, traditional system. Rather we should visualize the Fwe Law of inheritance and succession as a bundle containing distinctly diverse sets of rules, originating historically from diverse sources, operating parallel to one another and moving or changing not in the direction of one of the traditional Bantu systems of inheritance and succession, but moving (or changing) independently of each other, in response to new circumstances, new values, and new demands. A diagram (limited to the same three sections as in the previous diagram) would illustrate this interpretation as follows:



This hypothesis appears to offer a more accurate explanation of the existence of completely different systems within the Fwe law of inheritance and succession, e.g. the patrilineal succession to the chieftainship next to the matrilineal succession to headmanship, etc. As these systems change, it can be expected that they will not in the first place change from an older (matrilineal) system to a patrilineal system of succession and inheritance, but rather from a more community-directed to a more individual-directed system, as for example in the case of inheritance which was mentioned above.

In contrast to the South African tribes, the Fwe law of inheritance and succession is comparatively uncomplicated, in spite of the diverse systems underlying its rules. In South African Bantu law the concept of "house"property, the reciprocal transfer of the child-bearing capacity of the woman and the "lobolo" between kin groups, and the farreaching effects which this has on the status of children and widows, give rise to extremely complicated sets of rules regarding the house property complex, the distribution of marriage-cattle in the agnatic lineage, etc. All this is absent from Fwe law, thereby greatly simplifying the rules of succession and inheritance.³⁾

3. Inheritance

a) (At the death of the husband)

If the husband dies childless, his ^{consorts} affines divide among themselves the share of the property which would normally have gone to his children.

If the dead husband leaves children, the following rules apply:

(i) The crops

The crops are divided equally between the widow on the one hand and her children on the other.

(ii) All the (personal goods of the deceased and the household's general property) except "malobolo"

All these goods go to the children; the widow does not receive anything except that she may retain articles and animals which her husband

3) Cf. Seymour, S.M.: Native Law in South Africa. Second edition. Juta & Co. Ltd., Cape Town, 1960, pp. 141-198; Olivier, N.J.J.: Die Privaatreg van die S.A. Bantoe. Durban, Butterworths, 1969, pp. 430-544. Also: Kerr, A.J.: The Native Common Law of Immovable Property in South Africa. Durban. Butterworths, 1953; ———— : The Native Law of Succession in South Africa. London: Butterworths, 1961; Schapera, I.: A Handbook on Tswana Law and Custom. London: Oxford University Press, second edition reprinted 1969, etc.

had given to her during his lifetime, although it seems that she is frequently deprived even of those by unscrupulous relatives.

(iii) "Malobolo"

The widow retains her share of the marriage-cattle which they had received during her husband's lifetime; the husband's half goes to the children.

(iv) Division of the children's share of the inheritance

The children's share of the deceased's property is handed to the eldest son; i.e. he receives all his father's property except his mother's personal articles, and her share of the crops and "malobolo".

The eldest son then proceeds to divide up the property among the children, with an unstipulated but generous portion having to be distributed among the deceased's brothers and uncles, i.e. among the senior members of his father's kin group.

b) At the death of the wife

At the death of the wife her personal belongings and her share of the "malobolo" are divided among her children and her affines by her eldest son in the same way as he distributes his father's property.

c) If a parent dies while the children are minors

If a parent dies while the children are minors, the parents of the deceased or if they have also died, a brother of the deceased, keep the property "in trust" for the children until the (elder) children have grown up, when the eldest son distributes the property.

d) Illegitimate children

Children born out of wedlock have the same rights to inherit from their biological father as children of the same parents who were born in a legal marriage.

At the same time they have no rights to the property left by their legal father, i.e. the man to whom their mother was wed before or at the time of his death.

Equally, illegitimate children have the same rights to property left by their mother as children of valid marriage.

e) Miscellaneous

(i) Disinherision of a child by a father is not known, except that a member of a kin group can be driven away at the order of the Chief, if he has behaved in a grossly insubordinate or uncooperative or hostile manner, in which case he would lose all his rights.

(ii) If "malobolo" is received for the daughter of a deceased person the deceased's share goes to the guardian of the daughter, and cannot be divided among affines of the deceased:

In Elias Kakena vs. Erickson Kabende (7 February 1966), Elias claimed a share in the paternal portion of their sister's "malobolo", who was married several year's after their father's death. Erickson resisted the claim on the grounds that after his father's death he as eldest son acted as guardian over his younger brothers and sisters, including the sister in question, and, therefore, he claimed the right to his father's portion of the "malobolo". The Court agreed with Erickson and Elias's claim failed.

f) Legal disputes regarding inheritance

It is a feature of Fwe Law that hardly any disputes about rights of inheritance come to court, although wrangling over a deceased person's property is common. For this reason it is almost impossible to study the working of the rules on the basis of specific disputes which had been dealt with by the Court.

4. Succession

The rules with regard to succession in Fwe Law are uncomplicated although they differ widely with regard to the (different legal units.)

a) The head of the unit (or family)

In Fwe Law the hut unit is dissolved completely by the death of the husband, the head of the unit. Consequently, for example, the wife cannot be inherited. At the death of the husband the family ceases to exist, and the wife and her children have no status which persists after the dissolution. For example, if she had been the chief wife of the deceased, she is now no longer regarded as having higher status than the other widows. With the dissolution of the marriage the unit has disappeared and therefore, also, there can be no question of succession to the position of the deceased family head.

(If the widow marries again, a completely new hut unit is formed; if she does not marry, she reverts to the hut unit of her father, or if he has died, the family unit of her brother, etc.)

b) Succession to the village headmanship (leader of the kin group)

When the village headman dies, his own family unit disappears, his widow or widows reverting to her or their guardian(s), but the kin group's existence does not come to an end, and therefore the position of the headman must be filled.

Among the Fwe, this succession takes place matrilineally, although there is an elective element in the process:

After the death of the headman, the senior heads of families and the senior women who are beyond the age of childbearing, meet to choose a successor from among the sons of the deceased's sisters, or if a successor is not available here, they would look to a brother of the deceased. The headmanship of Sibinda village is a good example of this line of succession: Headman Sinemengoma was succeeded by the son of a full sister, Samakunguru. At the death of Samakunguru, no successor from among Samakunguru's sisters' sons was considered suitable, so a younger brother, Sinkosinyana was installed. When the latter grew too old, his younger sister's son, Said Mubyana, was appointed in acting capacity (and there is little doubt that he will be appointed headman when Sinkosinyana dies).

c) Succession to the Chieftainship

The procedure with regard to the election of a new chief is described fully in Part II, Chapter II, above.

Although the process is partially elective, the succession follows strictly the patriline. The eldest son of the deceased chief is first in line for the (succession.) If he is not suitable, the second-eldest son is considered and so on down the line of sons.

If none of the Chief's sons are considered to be suitable, the line of succession jumps back one generation to the brothers of the deceased, and the election of a woman, i.e. a sister of the Chief, is not considered to be out of the question.

The appointments of the Principal Councillor, the Councillors of the Chief and the Ward Councillors are political appointments and therefore outside the scope of this description. It may be mentioned that when a Councillor dies or is replaced (except the Principal Councillor), his

successor is appointed from the same family.

The reasons for the prominence of these families have their roots in the distant past and seem to be linked with the system of administration introduced by the Kololo chief, Sebitwane.

APPENDIX 1a) GENEALOGY OF CHIEF SIMASIKU MAMILI

- (i) Simataa I Mamili, appointed by the Lozi, circa 1860, ruled until 1918.
- (ii) Succeeded by his eldest son Lifasi who ruled from 1918 to 1932.
- (iii) Succeeded by his eldest son Simataa II who ruled from 1932 to 1945 when he was deposed.
- (iv) Succeeded by his uncle, a younger brother of Lifasi, the present Simasiku Mamili.

b) THE CHIEF AND HIS PRINCIPAL COUNCILLOR: THE TIES OF KINSHIP

Traditionally the Chief chooses as his principal councillor (Ngambela) a close relative. Such is also the case with Chief Simasiku Mamili. His Ngambela's mother is the daughter of Simasiku Mamili's mother's sister; i.e. the Ngambela is the Chief's maternal aunt's grandson.

APPENDIX 2MEMBERS OF THE CHIEF'S COUNCIL OF THE FWE, 1968, LISTED IN ORDER OF SENIORITY

Chief: Simasiku Mamili.

Principal Councillor (ngambela): Mr. Dawid Sikuta.

Members of the council in order of seniority:

1. Mr. Jekwa Kwenda, Kanono area.
 2. Mr. Henry Mutelo, Singalamwe area.
 3. Mr. Solomon Nkando, Katima Mulilo area.
 4. Mr. Luzunge Muyenga, Sangwale area.
 5. Mr. Isaiah Msesayani, Linyanti area.
 6. Mr. Tick Chamozo, Makanga area.
 7. Mr. Isaac Swalelo, Lupani area.
 8. Mr. Wilson Lukulu, Mukasa area.
 9. Mr. Kashabati Malambo, Silao area.
 10. Mr. Sam Manga, Batubaja area.
 11. Mr. Pita Mabe, Mosokotwane area.
 12. Mr. Sixpence Mambo, Ingenda area.
-

APPENDIX 3SUMMARIES OF JUDGMENTS IN ABDUCTION CASES(i) Erickson Kabende vs. Nelson Pembe (2 December 1965):

Erickson demanded damages from Nelson and the former's wife because Erickson's wife had left him and was living with Nelson. Not contested. Nelson and Erickson's wife ordered to pay Erickson R17.00 damages each.

(ii) Anderson Sambula vs. Muyandulwa (26 January 1966):

Anderson demanded damages from Muyandulwa because he had enticed Anderson's wife away who was now living with Muyandulwa. Not contested. Muyandulwa and Anderson's wife ordered to pay Anderson R25.00 each.

(iii) Dickson Chikalila vs. Thomas Monze (13 April 1966):

Dickson demanded damages from Thomas for taking Dickson's wife to Thomas's village where she now lived with him. Not contested. Thomas and Dickson's wife ordered to pay Dickson R25.00 damages each.

(iv) Sakutiya Matengu vs. Zambezi (12 June 1966):

Sakutiya demanded damages from Zambezi for taking Sakutiya's wife from him. The defendant alledged he did not know she was Sakutiya's lawful wife. Zambezi and Sakutiya's wife ordered to pay Sakutiya R28.00 damages each.

(v) David Sibunga vs. Alfred Shanamashinda (13 June 1967):

David demanded damages from Alfred for persuading David's wife to go and live with Alfred. Not contested. Alfred and David's wife ordered to pay David R28.00 damages each.

(vi) Sekeleti Mwiya vs. Kanjinji (8 September 1967):

Sekeleti demanded damages from Kanjinji for taking Sekeleti's wife to his village and living with her. Kanjinji's allegation that Sekeleti had chased his wife away and divorced her was dismissed as false by the Court and Kanjinji and Sekeleti's wife ordered to pay R28.00 damages each to Sekeleti.

(vii) Daniel Muyatwa vs. Gidion Bandule (21 September 1967)

Daniel claimed damages from Gidion and Daniel's wife, because Gidion married Daniel's wife several months after she had deserted Daniel. Gidion alledged that he had not realized she was a married woman. Gidion and Daniel's wife ordered to pay Daniel R28.00 damages each.

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