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Human rights in the traditional legal system of the Nkoya people of Zambia¹

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From a naive transcontinental perspective, the challenge surrounding human rights amounts to mediating and vindicating a North-Atlantic cultural product outside the North Atlantic in contexts that initially appear to be alien and inimical. From this perspective, human rights in Africa are part of the wider problematic of the continent's reception of North-Atlantic constitutional law. However, intercultural philosophy exposes this naive view as inherently hegemonic for attributing the monopoly of something that could, alternatively, be considered an inalienable achievement of humankind as a whole to the North-Atlantic region. This approach is disqualifying for persons outside the North Atlantic as it makes it more difficult for them to adopt human-rights thinking as potentially universal and as resonating with their own local concepts of personhood, integrity and freedom. The present argument challenges the hegemonic approach to human rights. On the basis of a study of the human-rights thinking in the traditional legal system of the Nkoya people of Western Central Zambia, I argue an endogenous, local historical basis for many of their human-rights concepts and that the application of these rights in Nkoya society is often subtle and liberating. In addition, the Nkoya peo-

Fieldwork among the Nkoya people has been conducted at regular intervals between 1972 and 2011. I am particularly indebted to the inhabitants of the valleys of Njonjolo and Kazo for their hospitality, friendship and trust over all these years. An earlier (Dutch) draft of the present argument was prepared at the request of my former colleague, the legal anthropologist Emile van Rouveroy van Nieuwaal in 1996 and was extensively commented on by him and Gerti Hesselings. While I am grateful for this feedback, the responsibility for this text remains entirely my own. For a personal tribute to Gerti Hesselings, see van Binsbergen (2011).

pie even boast a few human rights for which there are no ready equivalents in standard North-Atlantic human-rights catalogues.

Looking for a vantage point from which to consider human rights transculturally

In the mid-1980s the then Belgian Minister of Foreign Affairs, Leo Tindemans, was reproached in the media for having double standards in his contacts with the repressive regime of President Mobutu. While he was emphasizing human rights in his own country, he was allegedly displaying the greatest tolerance of the flagrant and systematic violation of human rights in Zaire/Congo, with which Belgium was entertaining extensive ties of friendship and neo-colonial relations. The Minister's self-defence was remarkable. Pressing into political service a cultural relativism that had been one of anthropology's main products in the 20th century, he explained his policy as follows: 'Well, Sir, you must not look at this through our Western spectacles. These people in Africa have their own culture, also in the field of human rights, and we must respect that.'

For several decades now, an important export product of the North-Atlantic region has been formed by human rights (also called fundamental rights), especially those that are closely associated with the nature and functioning of Western democracy. The export of human rights has not only been furthered by persuasive action and setting the right example but also by multifaceted social, economic and military sanctions, particularly in the context of foreign aid, which for decades was a major source of income for many African countries. With Minister Tindemans, one could have pretended that these human rights were nothing but the accidental, historic products of one particular culture, the North Atlantic one, and, with strategic humility, apply the idea of cultural relativism to the diffusion of human rights. Alternatively, one could adopt the position that we are witnessing the growth of a global culture, which comprises not only electronic and new media, jeans, the Kalashnikov and the condom (as a form of AIDS prevention), but also the notion of human rights as explicitly formulated in the North-Atlantic region since the end of the 18th century. From this perspective, human rights deserve a more universal characteristic than merely 'North Atlantic' and we could even call them 'cosmopolitan'. However, before human rights can be conceived of as being cosmopolitan, prevailing formations of human rights need to be checked for unintended elements of Eurocentrism and imperialism in view of their origins and history. How do we develop a transcultural perspective on these matters? The answer must largely come from legal specialists in such fields as constitutional and international

law.² However, the legal anthropologist can make some contribution here: by assessing whether the principles enshrined in modern human-rights catalogues can also be found in societies outside the North Atlantic, and through empirical accounts of how these societies handle the safeguarding and the limitation of human freedom. Perhaps human rights will turn out to be less exclusively North Atlantic than generally assumed. And we may discover some common ground between African and North-Atlantic societies that would make it impossible to justify African violations of human rights under the pretext of respectful cultural relativism. Human rights, *avant la lettre*, may yet prove to constitute African cultural values and it is even possible that we may find African human rights going beyond the common North-Atlantic catalogues in protecting human vulnerability.

Since the discussion on human rights in Africa has largely taken place in the context of the reception of cosmopolitan law in the context of colonization and decolonization, often highlighting the defective application of the received law in specific African situations, little has been written on the nature and implementation of human rights in traditional African societies. The present argument seeks to sketch how human rights present themselves within the traditional legal system of one particular African society, namely the Nkoya of Western Central Zambia.

Method and nature of our reconstruction

Our temporal point of reference is the second half of the 19th century, before the imposition of the colonial state in 1900. In part we can base our pronouncements on the law in force at the time, on extensive, concrete, oral-historical and documentary data. The remainder has to be reconstructed from the legal practice that I studied in the region a century later, from 1972 onwards. Part of the theoretical basis for such a reconstruction lies in the concept of the 'semi-autonomous field' as introduced by the legal anthropologist Sally Falk Moore (1978: 54-81). The concept draws our attention to a situation that typically occurs in the context of legal pluralism and, according to current insights, such pluralism is the rule rather than the exception in the modern world (von Benda Beckman 2001; van Rouveroy van Nieuwaal 1998; Tamanaha 2000). Several legal systems exist side by side, each with specific systematics, principles and their own history that cannot be reduced to those of rival legal systems. Local actors move incessantly from one such system to another but each system retains its own identity and continues to constitute a semi-autonomous field, even if that system is not the dominant one in the local and regional context at

hand. My assumption is that a local legal tradition, grounded in local culture and legal institutions, constitutes a semi-autonomous field that may be subject to constant change and adaptation in its concrete application but, as a semi-autonomous field, displays a tendency for its internal systematics and fundamental principles to persist across decades or even centuries. If the regional society as a whole undergoes massive changes in the domain of law, these will initially affect the interrelations between these systems and not so much the specific content of the various constituent legal systems. As a result, their later forms may be extrapolated back into the past.

Let us take the concrete example of local legal rules concerning respect for the body and the personality of the young child that were in force in Western Central Zambia in the 1970s (van Binsbergen 1979). These rules perfectly fitted the prevailing kinship and demographic context where, due to a combination of socio-economic conditions and bodily practices that resulted in a strikingly low reproduction rate, children were relatively scarce and were considered the incarnation of powerful ancestors that hold sway over the world of the living, and where control over each specific child was contested by a plurality of loosely formed and constantly shifting, yet rival, kinship clusters, against the background of a bilateral descent system. There is plenty of historical evidence (van Binsbergen 1981) to allow us to project this overall structural context at least one or two centuries back into the past, even though there are few concrete data on legal rules concerning children in this region in the 19th century.¹ In this way, I am convinced that also the specific legal rules concerning young children, such as I found in the 1970s, may be projected back to at least the second half of the 19th century.

Our sources on Nkoya human rights comprise oral-historical and documentary data apparently evoking local conditions in the 19th or even 18th centuries; the results of participant observation in Nkoya daily life between 1972 and 1995; my personal presence as a researcher in cases of conflict regulation at all levels; and the legal files of the region's Local Courts and the Magistrate's Court at the district centre of Kaoma where my Nkoya research was concentrated.

There are a few indications to this effect. A similar respect for children is manifested in the way Mwene Kayambila solemnly welcomes his grandson at birth. The grandson was a very old man in the early 1900s and an informant of J. Shimunika who committed this tradition to writing (van Binsbergen 1992a: 247). And when Prince Munangisha through magical means (*malele*, a prerogative of royals) escapes the Kololo army that captured his junior kin, he returns and surrenders despite his superior weapons (poisoned arrows) that inspire great fear in the Kololo. Munangisha's argument is: 'T for one shall not use my weapons, but since you have captured my children, let us all go together with my children, for I cannot remain here without them' (van Binsbergen 1992a: 401).

To structure the data, it seems wise to depart from an existing catalogue of human rights, of which many examples are available in the various modern constitutions of African states and in the academic reflections to which these constitutions have been subjected by constitutionalists and political scientists. In the past I studied these comparative data with my colleagues Martin Doornbos and Gerti Hesselning (Doornbos *et al.* 1984, 1985). In addition, the Universal Declaration of the Rights of Man (1948) constitutes an obvious and systematic point of departure for our present discussion. As an anthropologist/historian/intercultural philosopher, I can hardly be expected to offer an original contribution to the systematics of constitutional law so I will simply follow the classification that Hesselning (1982: 165f; *cf.* 1985) offered in connection with Senegal's independence constitution.

First, we distinguish the so-called classic human rights:

- the principle of equality of each individual before the law
- freedom of expression
- freedom of association and of meeting
- the privacy of letters
- freedom of movement
- the inviolability of the dwelling
- the unassailability of human dignity and of the human person, including the integrity of the personal body
- freedom of religion
- the right to individual and possibly also collective ownership

To this we can add the following human rights:

- the right to due legal process
- innocence unless the opposite has been proven
- no persecution under retrospective legislation
- freedom from slavery and forced labour
- freedom from inhuman treatment

And finally there is a category of human rights that we could all social rights: positive rules that stipulate not so much what the state must refrain from but what the state should further, namely:

- human rights concerning marriage and the family
- the right to education
- the right to work, but also the obligation to work

Hesselning (1982) discussed at length the legal possibilities of limiting human rights either through national legislation or the rulings of lower-level bodies of local government. It is difficult to find equivalents to this in our data because

Nkoya human rights are not exclusively administered by the pre-colonial state (the royal court with its dignitaries and institutions) but also, often in defiance of the court and its officers, in general culture and everyday life in forms that are neither formal nor explicit, let alone constitutional.

Are we not running the risk of a gross distortion, of errors both of a methodological and an empirical-analytical nature, if we reconstruct more or less equivalents of the human rights in the cosmopolitan tradition from Nkoya legal sources? To answer this fundamental question, it seems appropriate to consider what the great legal anthropologist Max Gluckman has to say about the constitutional aspects of the Lozi (Barotse) kingdom. Since the middle of the 19th century, Nkoya society and its legal system developed in the periphery and under the increasing hegemony of Lozi political and judicial structures.⁴ An attempt to situate my approach in relation to the unrivalled work of the founder of the Manchester School⁵ may illuminate the limitations and the modest possibilities of my approach in the present argument.

Gluckman's work highlighting further methodological implications for the present argument

The concept of explicit human rights *per se* is alien to the legal traditions of Western Zambia, which have been studied in detail and with comparative and theoretical insight by Gluckman. Such a concept springs from the West-European or North-Atlantic legal tradition and only materialized in its present form towards the end of the 18th century in the context of North American independence and the French Revolution. There are no strict parallels to such principles in the surface phenomena of demonstrable legal rights and legal practices, in the sense of principles that are clearly marked in the consciousness of the local Nkoya actors. Admittedly, Gluckman showed (1968: 165f) that Lozi society knows the 'rights of mankind' (*milao ya butu*, in Lozi), but these are rather general moral, ethical and even aesthetic principles of social life, such as shame regarding nakedness or the rules of avoidance that exist between affines of different generations and genders. These are rules of a very different order than the North-Atlantic or cosmopolitan human rights, for the latter obviously belong

⁴ Even though 20th-century Nkoya sources (cf. van Binsbergen 1988, 1992; Anonymous [J.M. Shimunika] n.d.) claim a decisive Nkoya influence on Lozi royal culture, both before and after the Kololo invasion from South Africa that reshaped Lozi political organization in the middle of the 19th century and (except for court matters) replaced the Central Bantu Luyana language with the South Bantu Kololo, which is today known as Lozi.

⁵ See van Binsbergen (2007) and my earlier assessment of Gluckman's legal work on the Lozi (van Binsbergen 1977).

to the technical juridical domain in the narrower sense. Justifiably, Gluckman did not make use of the obvious linguistic possibility of simply translating the Lozi term *milao ya butu* as 'human right'.

An approach like this, seeking to describe an historic local legal situation in terms of the alien, North-Atlantic term of 'human rights', takes considerable distance from Gluckman's path-breaking studies. The latter's approach was to describe the local legal system in the first instance in its own terminology and systematics. Gluckman's books on Lozi law enable the reader to become acquainted with that legal system from the insight and perspective of the local actors who consciously, in their own language, use certain concepts and make certain connections. Only after laying that basis does Gluckman proceed to a meta-analysis that is beyond conscious Lozi legal thought. In other words, he proceeds to an analysis in terms of legal anthropology, positive law and comparative law. My argument here does the opposite, departing from a legal perspective that is alien to the society under study. I seek to assess whether this perspective may yet be illuminating for this society in a bid to highlight not so much the uniqueness but the wider correspondences, and not the specifically local categories but the partial applicability of cosmopolitan, alien categories.

Gluckman's work has made it emphatically clear that the Lozi legal system knows certain general principles, which are formulated in indigenous terms and systematically govern legal life in Western Zambia: the famous principle of the 'reasonable man' and the equally seminal principle that 'property rights flow directly from social status and hierarchical relationships'. However these principles cannot be identified with cosmopolitan human rights. My aim here is not to demonstrate how and why local law comes into being and reaches effectiveness, but to demonstrate that local African law⁶ tallies with cosmopolitan tradition to a much greater extent than we would suspect. As a contribution to anthropology as a self-contained field of study, Gluckman's approach is to be preferred but one of the missions of anthropology is to represent (to the point of vindication)⁷ peripheral societies before the dominant global society, and in this respect my own approach may be justified. It is complementary to Gluckman's but aims at goals that are so different from his that we cannot apply the same criteria of judgment. On the other hand, Gluckman may have started out from the representations, concepts and distinctions of the local (legal-specialist) actors themselves, yet he too was not satisfied before gaining a hold on the Lozi legal system in abstract, theoretical and transculturally generalizable technical-legal and often Latin terms. This suggests that Gluckman, by an emphatically

⁶ At least in its Nkoya form but there is no reason to assume *a priori* that Nkoya law differs significantly in this respect from other African legal forms.

⁷ A position unmistakable in Gluckman's own work, especially in Gluckman (1955).

ethnographic detour, ended up where I, with a different aim in mind, am beginning: to translate a local African system into the general analytical terms of a legal professional sub-culture whose orientation is largely North Atlantic.

There are other differences that spring from a difference in fieldwork strategy. Gluckman's brilliant analyses were achieved in a situation that had at least two striking characteristics: centralism and a judicial perspective. He positioned himself as a researcher at the very centre of the indigenous Lozi administrative and judicial process, effectively underpinned by the colonial state. I, on the contrary, also worked in remote villages on the periphery of the indigenous legal system and did so at a time when the power of traditional leaders had been significantly eroded by the colonial state. Moreover, Gluckman's point of departure in the study of local law was the strictly formal, judicial adjudication of conflicts rather than the day-to-day social process in villages. The frequent and often vicious conflicts at village level, even though they were illustrative of local legal principles, were only rarely adjudicated in formal courts of law. Most were contained by informal social control or by the intercession of village elders and headmen, while some conflicts even after formal or informal adjudication turned out not to be resolved but were to linger on as suspicions, (sorcery) accusations and downright sorcery. Gluckman had relatively little insight into these ineffectively adjudicated conflicts despite their frequency, importance and vehemence. As I argued in a study of Nkoya family law (van Binsbergen 1977), which was informed by the tangled complexities of day-to-day village life over many years and situated outside the sheltered, formalized and systematic framework of the court of law, my alternative perspective does admittedly offer less insight into the structure of the judicial process in itself but this is compensated for by a somewhat broader insight into the mainstream of social life in the village. Gluckman's vision is the specialist perspective of a legal scientist, whether Lozi or cosmopolitan, or both, while my own fragmentary, peripheral, every-day vision is that of the non-specialist villager and of an anthropological generalist. In the best case, these two positions complement each other but they also serve the respective shortcomings of the alternative perspective.

Background to human rights among the Nkoya

We cannot discuss Nkoya human rights without some initial insight into the institutions of formal and more informal legal process: from the head of a household via the village headman and valley chief to the king/traditional leader (*Mwene*), the latter being associated with a contiguous land area of between roughly 5,000 km² and 10,000 km². After independence in 1964, this structure

was revised by the setting up of Local Courts⁸ that, functioning directly under the national administration, were to be *de iure* (but not *de facto*) independent from the *Mwene*, which would no longer adjudicate cases. After a few decades, this structure was again revised by re-instating, albeit informally, the traditional court of law attached to the *Mwene*'s royal court under the name of *Mawombola* (arbitration) Court. However, the *Mawombola* Court lacks the sanctioning prerogatives of the Local Court and therefore has to refer more complex cases to it.

In Western Zambia by the middle of the 19th century, before effective Lozi dominance was established in the wake of the Kololo conquest,⁹ some situations suggest that the application of traditional human rights transcended the various individual Nkoya states and extended from one Nkoya kingdom into a neighbouring one. This is almost suggestive of an international legal order acknowledging and enforcing the exercise of human rights in neighbouring states, and is somewhat comparable with the European Convention on Human Rights or the adoption of the Universal Declaration of Human Rights of 1948, which regulates the trans-statal enforcement of human rights between 20th-century states. For instance, cruel tyranny by the Nkoya King Liyoka was a reason for intervention by a Kololo king. By the same token, a murder committed in about 1885 by Prince Shangambo (later Mwene Kahare Shamamano) outside the territory and the direct jurisdiction of the Lumbu King Kayingu was reason enough for the latter to force the offender to pay a substantial fine. Mwene Shiyenge's violation of marriage law (he forced the married women among his subjects to have sexual intercourse with him) has been likewise presented in oral traditions as reason for a Kololo king to intervene. On the other hand, when the Kololo headman Munyama, who was residing at the court of the Nkoya King Shiyenge, abducted a woman from the realm of the Nkoya King Kahare, this was no reason for Shiyenge to press charges against the headman.¹⁰

⁸ On Zambian Local Courts, cf. Coldham (1990); Hoover *et al.* (1970a, 1970b); Spalding (1970) and Spalding *et al.* (1970).

⁹ The Sotho-speaking Kololo from South Africa occupied Barotseland from c. 1840 to 1864, usurping and transforming the Lozi state but, in the process, consolidating the latter.

¹⁰ For these cases, cf. van Binsbergen (1992a: 144 (Liyoka), 152 (Shambango), 138, 145 (Shiyenge), 406 (Munyama)). I realize that the mounting hegemony of Kololo, subsequently Lozi, over the Nkoya makes it in principle possible to read some of these cases as an expression, not of an international legal order comprising several independent states including the Nkoya states at the time, but as an expression of a regional Kololo/Lozi legal order infringing on the autonomy of Nkoya states. Since the late 19th century there have been Lozi claims that Lozi overlordship over the Nkoya dated back to the very foundation of the Lozi state in about 1500 and there were also Nkoya claims denying such overlordship and stressing Nkoya contribu-

These examples suggest that the human rights being discussed here under the ethnonym Nkoya may, in fact, have had a much wider distribution than the Nkoya language and the Nkoya ethnic identity (which only began to be articulated under this explicit ethnonym in the late 19th century). These rights appear to some extent to be enshrined in a regional culture encompassing a number of kingdoms.

The same examples, however, also indicate that a precise demarcation of human rights, as opposed to other types of legal rules as is possible in the cosmopolitan legal tradition, is far less obvious in the Nkoya traditional context: human rights, constitutional law, family law and penal law do intersect and can only be separated by analytical sleight of hand.

Specific human rights in the Nkoya context

We will not systematically discuss all the human rights listed above for the traditional Nkoya legal system. Some have been clearly conceived within the societal forms of the North-Atlantic industrialized society of the 20th century: human rights concerning trade unions, education and the right and obligation to work. The latter can hardly mean anything other than the right to wage labour in a monetarized labour market, which has only existed in Nkoyaland for the last few decades. Likewise, formal education and trade unions imply formal organizations that had no equivalents in pre-colonial Western Zambia. By the same token, the privacy of letters has little relevance in an illiterate society, such as that of this region until 1900. The scarce data on diplomatic contacts between royal courts in the 19th century (van Binsbergen 1992a: 23If) do not contain any suggestion that much value was attached to diplomatic secrecy. Nor will we specifically treat human rights concerning marriage and the family, in part because these will be discussed in passing when treating other human rights and because migrant labour and urbanization in the course of the last 150 years have resulted in so many changes, also in the formal adjudication of family law, that we can no longer confidently apply our method of reconstruction. This applies *a fortiori* for property law, where we encounter an additional reason not to devote a specific discussion to human rights concerning property. Gluckman already discussed the specific problematic of property rights in Western Zambia, where property is not regulated in its own right but is merely an aspect of someone's specific social status and hierarchical position. With these restrictions, let us now work down the list of traditional Nkoya human rights.

tions to Lozi court culture and royal legitimation. It is difficult to determine where the truth lies but such complex and contradictory dynamics do not surround the Kayingu case as its upholding of an international, regional legal order seems straightforward.

The principle of equality: Equality of all citizens before the law

Pre-colonial Nkoya society knew a hierarchical ordering of kings, freemen and slaves. Slaves constituted a complex category, comprising, on the one hand, pawned freeborn individuals and, on the other, individuals who had been acquired as property by birth, as war captives or through purchase. The children of slaves felt social stigma and often continued to be designated as slaves but their status was not identical to that of their parents. In fact, many children of slaves were marginal figures because while one of their parents may have been a slave, the other was of royal blood. At royal courts it was a conscious strategy for princesses (whose unrestricted love life was only limited by the incest taboo on the extensive category of classificatory brothers and fathers) to choose their lovers from among slaves. As a result, the children from these, typically short-lived, relationships were entirely at the disposal of the power ambitions of their royal mother's brothers, without any interference from their slave father's side. The slave was legally incompetent and was considered to be completely devoid of kin to champion his rights.

The category of kings was not clearly demarcated and the same applied to the category of freeborn men. The status of king (*Mwene*) was acquired through individual election from among the entire clan with a royal title. Therefore, outside his official role, every ruling king remained the close consanguineal kinsman or affine of non-royal freeborn men, and was largely subject to the normal overall legal rules. We can discern a dynamic process in the course of which kings in the 18th and 19th centuries, if not much earlier too, sought to fundamentally differentiate their position from that of their freeborn subjects. These kings thus sought to introduce legal immunity for themselves but the many cases of abandonment and impeachment of kings, even of regicide, make it clear that they did not succeed in their attempts to create a permanent and different legal category for themselves. They remained largely subject to the general legal order.

The king did, however, occupy a special place in this overall order. The king - and until well into the 19th century the incumbent of the kingship was often a woman - had certain unique, inalienable rights, for example over all sorts of royal regalia, animal species, game (cf. Gluckman 1943), fishing pools, luxury goods and royal spouses. The standard punishment for infringement of these rights was death or the most gruesome mutilation. How far royal law differed from that prevailing in non-royal Nkoya life can be gauged from the fact that,

" In the 19th century, cultural and political boundaries between the Ha and the Nkoya, especially the Mashasha identity, were vague. Tuden's (1958) study on slavery among the Ila is therefore also relevant here. Cf. van Binsbergen (1992) and Smith & Dale (1920).

on the eve of a pretender's accession to the throne, he had to commit ritual (yet very factual) incest with one of his (classificatory) sisters, a custom that was only abandoned, reputedly for the first time, on the installation of Mwene Kahare Kubama in 1994.

The extent to which the king remained subjected to the more general legal order is clear from the following example. Around 1850, the male Mwene Shiyenge attempted to place himself outside this order by revising Nkoya family law in such a way that court cases regarding adultery would no longer be admissible, and that he himself, as king, would have unlimited sexual liberties *vis-a-vis* the women at this court. As an expression of the absolute rejection of this legislation by his followers, Mwene Shiyenge was denied the tribute on which he depended for his livelihood (kings cannot perform productive labour). And after dying of hunger, he was even denied a decent burial: 'he was buried by the ants' (van Binsbergen 1992a: 211).

Among the category of the freeborn, status differences were also to be found. A very low status was accorded to court musicians, even though they were clearly distinguished from slaves. Performances by court musicians at dawn and sunset were the most obvious symbol of the presence of the king at the court and of his good health. The kingship had solar connotations and the good health of the king was considered essential for the fertility of the land. Despite their low status, court musicians were protected by the general legal order. At the end of the 19th century, Mwene Kahare Shamamano, when drunk, killed his musicians following accusations of adultery with his queens. When the case was reported to the Lozi King Lubosi Lewanika (whose own court musicians were Nkoya as they were all over Western Zambia), he denied the Kahare kingship the right to a royal orchestra and this punishment was only revoked in the 1930s. Yet Lewanika was Shamamano's benefactor and a decade earlier the latter had inherited the Kahare royal title at the intercession of the very same Lewanika, partly in recognition of Shamamano's outstanding performance during Lewanika's Ila campaign.

Unlike court musicians, slaves did not enjoy such protection from the general legal order. Their status was characterized by a lack of human rights, including that of the integrity of their person and their life. An owner could beat, or even kill, a slave without his behaviour being considered a punishable crime. Moreover, a slave did not have the human right of freedom of movement: the very essence of being a slave or a pawned person was that s/he had no residential alternative to his/her master's home. This was a very fundamental legal restriction in a society where the entire social life of the freeborn consisted of successively playing out, in the course of one's life and career, the various residential alternatives at hand. From moving to a different village (often when social relations in one current village had become unbearably conflictive), one

gained access to a new kin patron and to new, effectively solitary clusters of co-residing kinsmen until such time when, having grown older, one could establish oneself as kin patron for junior kinsmen on the move.

Slavery was formally abolished by the British in the 1910s and its social manifestations slowly disappeared during the first half of the 20th century. However to this day, Nkoya villagers, especially those close to the royal courts, can point out individuals, families and villages that claim to be descendants of slaves, and who are still accorded lesser rights in the local social and judicial system. Formal exclusion from the judicial process is no longer possible but informal sanctions are unmistakable in such forms as gossip, insults and objections to courtship and marriage.

Freedom of expression

The basic idea underlying Nkoya notions of sociability and (informal and formal) adjudication is the open negotiation between equals and the free exchange of ideas and words, as expressed in the central concept of *ku-ambola* (to have social conversation/dialogue). Freedom of expression counts as a fundamental right of every free man. And mature women were allowed to share in this right and speak during communal meetings and court cases. The memory that once all kings were female may have contributed to this but there is no indication that freedom of expression was permitted among slaves.

We have already mentioned the Nkoya court musicians but they have a special place in this connection. Their songs¹² contain stereotypical praise of the king, in which the singers speak on behalf of the entire kingdom. However, songs of this type are usually combined in a manner reminiscent of West African bards (*jeli*, griots) with a very different genre in which the specific professional group of musicians addresses the king in their own right about their miserable conditions and praises the king for quenching their hunger and thirst. The Nkoya consider this a form of freedom of expression. Normally, it is impossible for people in subaltern roles to express personal grievances and wishes directly *vis-a-vis* the king. Protocol dictates that all official conversation with the king take place through the Prime Minister, who is an elected commoner. However, the song (belonging to a repertoire of court songs that are performed twice a day in the royal palace's inner yard while the king fondly listens inside) is the form *par excellence* in which petitions may be uttered without the high-ranking addressee taking offence. Now we understand why Nkoya musical culture is pressed into service for political goals under the post-colonial state. The present-day annual Kazanga festival (van Binsbergen 1992, 1995, 1999, 2000, 2003) is an ancient royal harvest festival from the early

1980s that has been revived. During the festival, a representative repertoire of Nkoya music, song and dance is packed into a formal two-day programme and performed in front of a massive audience at the Kazanga festival grounds in Kaoma District. The most important addressee is no longer the king (whose presence at the festival has been relegated to folklore) but a national or junior minister, while the Nkoya people all take on the role of musician underdog. In this very different context, music is again used instead of verbal petitions and mass demonstrations, as music is considered the time-honoured means for a person in a subaltern role to express his opinion and needs.

Criticizing the king openly and frankly was a generally recognized right employed by free villagers, especially members of the royal council of hereditary village headmen, who are often close kinsmen of the king.

So far we have focused on freedom of expression in a constitutional context set by the (indigenous) state and its highest officer but the right to freedom of expression also existed among and between non-office-bearing members of Nkoya society, albeit in a more limited form but again linked to music and dance. At public festivals (girls' puberty rites, name-inheriting rites, funerary rites), it has always been common for certain individuals to expose the shortcomings of others in improvised mocking songs, addressing adultery, laziness, defective bodily hygiene, the poor discharge of marital and kinship obligations and excessive boasting. In the ceremonial context of such public festivals, the victim is not allowed to take offence - even though in most other contexts, criticism between equals can quickly lead to court cases on the grounds of insult or slander. But even though the victim may not openly take offence, the publicly sung mockery often results in resentment, fighting, sorcery attacks and even suicide.

Unmitigated freedom of expression occurs in the specific context of joking relations, such as those between members of paired clans, e.g. between the Smoke clan (*Wishe*) and the Firewood clan (*Mukuni*), whose complementarity becomes obvious once one realizes that it is the destruction (burning) of firewood for the production of smoke that enables the honey hunter to smoke out bees from their nests and appropriate the honey.¹³ In the most literal sense, joking partners have a right to demand the very shift from each other's body and even to appropriate each other's possession without an explicit request and/or permission, but with impunity. Such appropriation is not considered as

¹³ Smoke thus acts as a catalyst linking the Firewood clan with that of Bees and Honey. Underlying this and other Nkoya clan nomenclature is a cyclical system of elemental transformation, which has parallels elsewhere in Africa (e.g. among the Tswana and clan systems with the same, rather narrow range of clan names that are found all over Bantu-speaking Africa) but also elsewhere in the Old World from Japan to the Aegean, cf. van Binsbergen (2009).

theft. Apart from appropriating material objects, joking partners also have a right to say anything to each other, including (what would otherwise have been) insults and far-reaching sexual allusions. And they may even touch each other's bodies in the most private and intrusive manner without offence. Paired clanship not only imposes funerary obligations but also turns the joking partners into classificatory grandparents and grandchildren, realizing that a few generations ago the one group gave a wife to the other group, often after an episode of inter-group violence. Such joking relations are not limited to the Nkoya but are found all over Zambia, even in the modern context of urban ethnicity where, for instance, the paired ethnic groups of Lozi and Tonga, and Bemba and Nsenga, are each other's joking partners/grandparents, and on this basis may be appealed to for assistance when one is facing difficulties in urban life (cf. Stefaniszyn 1950, 1964; Tew 1951).

Right to association and meeting

In many situations such as festivals, court cases, rituals and funerals where a human right of association and meeting would be more or less applicable, people used to assemble at the initiative and in the presence of the village headman, valley chief or king. Under these conditions, it is difficult to assess whether their meeting would also have been possible without the explicit approval of such dignitaries of the pre-colonial Nkoya state.

However, there were also situations in which a section of the population assembled without any formal authorities present, for instance, the ritual assemblies of the hunters' guild and cults of affliction venerating supernatural beings different from the local ancestors and thus outside the control of village headman and the king (cf. van Binsbergen 1981) and, from the 1920s onwards, Christian churches and syncretistic cults too. All these groups displayed a non-communal model of organization in the sense that they brought together people who in everyday life were not each other's neighbours, close kin or fellow villagers. In other words, these groups formed 'congregations' that did not reflect everyday social organization but that cut across, or even denied and challenged, such organization (van Binsbergen 1981). Sometimes kings and headmen participated in these groups and tried to bring them under their control. The Bituma cult and anti-sorcery movements in the first half of the 20th century are examples of this, involving Mwene Kahare Timuna (van Binsbergen 1972, 1981). In some cases and in certain clearly defined periods, the hunters' guild and the organization of boys' puberty rites, which are now extinct among the Nkoya, were clearly instruments of power for the king (van Binsbergen 1992a, 1993). But apart from the request for permission to establish the first Christian churches in the region, I have no information on any requirement of royal permission for these organizations and their meetings. This makes it probable

that a certain notion of this human right forms part of the traditional Nkoya legal order.

Freedom of movement

Having seen the importance of freedom of movement for Nkoya social organization and the differences between slaves and freeborn people in this respect, we now consider the significant limitations in movement that freeborn people experienced. A freeborn person has a number of residential alternatives on the grounds of belonging to his/her mother's kin, father's kin, grandparent's kin or joking partners' kin. One had the right to effect any one of these alternatives in the sense of moving to a different village within the territory of the same valley chief and the same king, but this usually required specific permission to gain access to agricultural fields in the new place of residence. Such permission was hardly ever refused but did amount to recognition of the valley chief and the king as positions in which (in the popular view) the communal land had been entrusted or (from the perspective of high-ranking office-holders themselves) as 'Owners of the Land', a category of the greatest politico-legal significance throughout Central and West Africa. Meanwhile, taking up permanent residence outside the territory of one's original valley chief and king was seen as a serious infringement of the power and authority of these dignitaries. For, as in many other parts of Sub-Saharan Africa and among the Nkoya too, power was primarily perceived in terms of numbers of adult male followers. Hence specific formal permission was required for such permanent departure, and if it was conflict ridden (as was usually the case), one could end up not as a slave at the court of an alien king but at least as a suppliant.

Thus freedom of movement was, even for freeborn persons, limited by the pre-colonial, indigenous state. In the first few decades of the post-colonial state this principle still remained: if one wished to move to the territory of a different traditional leader (chief, king), one still needed a formal letter of introduction from one's original traditional leader - and such a letter could only be obtained after a formal interview in which the reasons for the move were explained and justified.¹⁴ Royal permission was also required for establishing a new village on

¹⁴ Throughout the 20th century and including the period of colonial rule (1900-1964), the management of the Village Book (a register recording the population of a village for taxation purposes) was one of the headman's main prerogatives and accorded him official status with the colonial state. Coordinating this interface between the village and the state was one of the kings' (now *chiefs*) main claims to authority and recognition. It is possible that the rigid settlement pattern associated with the requirement of formal permission from one's traditional leader for nearly every residential move was a colonial pattern, projected back by my informants into the pre-colonial past, in ways that cannot be ascertained without further research.

unoccupied land, even if the move did not take those involved outside the territory of their original king.

Detailed biographical data since the end of the 19th century¹⁵ on hundreds of adults and their individual residential moves and my oral-historical data on the 18th and 19th centuries make it clear that these limitations were only of a limited nature and could easily be overcome. Moreover, some of these residential moves in the pre-colonial past have to be explained not from individual motives of maximizing (access to hunting grounds, fields and more attractive nearest neighbours and close kin) but from the mandatory displacement of a royal court after the demise of a previous incumbent of the throne or of a village on the death of its headman.

In addition to residential movement, movement for the sake of trade was of considerable importance. The kings had no effective trade monopoly on local produce (except for royal items such as leopard skins) but they did aspire to control over long-distance trade with the Portuguese, Ovimbundu and Swahili. It remains a matter of further research whether itinerant individual local petty traders dealing in local produce (e.g. beeswax, tobacco, ironware) with the region needed special permission from their king and had to cede part of their income to the latter.

Inviolability of the dwelling

Among the Nkoya there is a clear notion of the inviolability of the dwelling. As in most cultures, this relates to an entire complex of the symbolic structuring of the human space, which has cosmological, kinship and gender aspects that are not in the first place legal. There are plenty of indications that the sense of the privacy of the living space is well developed among the Nkoya: reed fences and mats protect the personal space (especially sleeping areas and bathrooms), paths are at some distance and a strong sense of etiquette makes it inappropriate to go into a yard without first stopping at the entrance, calling for permission to enter and ostentatiously waiting for a response.

The human right of the inviolability of the dwelling on the one hand regulates relations between the citizen and the state: freedom from visitation, from military intrusion into one's house, etc. On the other hand, this right regulates relations between citizens: the state and its legal instruments are to protect the dwelling of one citizen from intrusion by another. I do not know of any cases where we could derive local historic views on the access of traditional Nkoya state officers to Nkoya citizens. However, numerous court cases among the Nkoya involving theft, adultery and premarital sexual intercourse are juridically

admissible on the grounds that they amount to a violation of the privacy of the home. An example from c. 1860 is as follows:

The daughter of Kancende (...) became the Lihano (Queen) of (Mwene Munangisha's) elder brother Shikongi. Mwene Shikongi had a conflict with his younger brother Munangisha because the latter *trespassed in his elder brother's house*. Then Mwene Shikongi said to his younger brother: 'You committed incest/broke a taboo! Just pay me a slave and marry her (Kancende's daughter) so that she shall be your wife'.¹⁶

The unassailability of human dignity and of the human person, including the integrity of the personal body

For this human right too, we must distinguish between the aspect that regulates relations between citizens and the state, and the aspect that regulates relations between citizens, with the state acting as arbiter.

Indigenous Nkoya states may have developed over the last few centuries before colonial rule because of the rise of a violent, male-centred ideology.¹⁷ This denied and eroded the principles of the pre-state worldview in Western Zambia: an harmonic and beneficial interplay, with a major role for women, of human society, nature and the supernatural, where the indispensable rain (featuring as the demiurge Mvula, 'Rain', the connection between Heaven and Earth) would fall in adequate quantities as long as humans refrained from murder, incest and sorcery. With the new, violent, male ideology, the state appeared as the main institution of violence, saturated with contempt for the human person and human life. An executioner's axe and sword still form part of the regalia of Nkoya kings, and in this respect they are on a par with their Lunda and Luvale neighbours among whom the major royal regalia consists of the horrific *Lukano* (a bracelet woven from human penises). Among the Nkoya, executioners (*Tupondwa*) make up part of the formal organization of the royal court and their task was not only to execute criminals after due process (today the central administration has the monopoly over criminal law), but especially to imprint the population with a sense of royal terror. The latter task they continued to discharge throughout the 20th century. It is the executioners who guarantee the unimpeded availability of specific medicine (prepared from parts of the human body, especially the brain) that is deemed to be indispensable for the survival of the king, and makes the king an ogre and a witch in the eyes of his subjects. Executioners also guaranteed the populations' preparedness to pay

tribute to the king and supply labour for the upkeep of the palace. Important events in the lifecycle of the royal court demanded human sacrifice, such as the completion of the royal fence or of the palace itself, and the burial of a king. The royal drums required human sacrifices too, as among the Lozi. There is, however, little to suggest that these practices are entirely things of the past.

Especially in the 19th century, there are reports of male Nkoya kings' arbitrary, bloodthirsty violation of the human right of the unassailability of the human person. These traditions however indicate that such state action was clearly seen by the general population as violating a human right.

Against the ostentatious contempt for the person and human life on the part of the Nkoya state and kings, we should mention (cf. van Binsbergen 2003) the strong emphasis placed on these values in daily life among Nkoya villagers. Violence and sexuality constitute the two obvious conditions to test the application of this human right. Below we will see how the human right of dignity and of personal and bodily integrity, from a Nkoya perspective, may be viewed not as isolated values but as the specific application of a more general fundamental right: the right to a 'good life'. Another cosmopolitan human right, that of freedom from inhuman treatment, might also be accommodated here. If we then juxtapose the village and the royal court, we can only conclude that the village offers a better situation for the enactment of this human right than the royal court. Hence my emphasis in other studies on the real or apparent cultural discontinuity between the royal court and the village in this part of Africa as an important aspect of state formation in the pre-colonial period.

Outside the context of kingship, violence in village situations rarely occurs. Even the mere threat of violence is actionable in court as is, *a fortiori*, actual physical violence. Various social mechanisms (the bodily isolation and containment of the fighter by third parties present; and the fact that it is socially acceptable to avoid, or even to flee, provocation to violence) result in a situation where intra-village violence is limited to situations of extreme provocation, to drunkenness or a psychotic crisis (the latter notably in cases of sorcery accusation and bereavement, which tend to go hand in hand, since the notion of natural death is alien to the Nkoya worldview).

Regarding sexuality, it should be stressed that the domain of personal integrity does not coincide with what is understood by the same concept in urban North-Atlantic society today. Among the Nkoya, merely looking at or touching whatever part of the body (except the sexual organs) regardless of whether this part is covered by clothing or not is not seen as a violation of the human right in question, and is not admissible for adjudication. Touching is here a normal and constant aspect of any social interaction between equals and unequals regardless of gender and age, and thus appears to constitute a neutral lightning conductor for social and erotic tensions. A large section of Nkoya social life has perhaps

¹⁶ *Likota Iya Bankoya*, Ch. 44: 3f. See also van Binsbergen (1992).

¹⁷ This was argued in van Binsbergen (1992a, 1993, 2003) and stresses the essentially endogenous dynamics of intrasocietal contradictions from around 1500 onwards. Further comparative research has suggested a transcontinental, exogenous element of kingships coming from across the Indian Ocean, bringing new ideologies and new regalia on a timescale that may go further back in history.

remained, until recently, relatively impervious to the commodification-driven sexualization and erotization that it has come to dominate the public culture and media of North-Atlantic society. Until well into the 20th century, female breasts constituted body parts that could be freely displayed in public and it is only in the last few decades that this has changed. Even people's sexual organs are not beyond the view or touch of recognized joking partners, and with impunity. But like any society, Nkoya society has also recognized a distinct realm of sexuality and this is almost exclusively conceived as heterosexual genital coitus. Coitus clearly falls outside what is permissible in joking relations but, on the one hand, a married woman's sexuality is the exclusive prerogative of her husband and violation, by another man, is a private-law offence and, as such, is admissible evidence. The only traditional exception to this rule is the recognized sibling equivalence i.e. the mutual inter-changeability (from a point of view of permissible sexual access) of sisters and brothers, provided it is done with discretion. The above-mentioned quarrel between Mwene Shikongi and his younger brother Prince Munangisha might thus be interpreted as an offence against things royal (in this case: the Queen) rather than as brother-in-law/sister-in-law adultery. In Nkoya society, the latter form of transgression is far from exceptional given the principle of sibling equivalence, and under certain conditions (prolonged absence of the lawful husband) even openly tolerated. On the other hand, a man, even a male spouse, must ask his female partner's explicit permission for coitus, regardless of the existence of a permanent sexual relationship between those involved and regardless even of marriage. A man's coitus with his own wife while she is asleep is an actionable offence, and is recognized as grounds for divorce. The justification of this rule and its heavy sanctioning lies both in its violation of bodily integrity and in the fact that such behaviour reveals the man as a factual or potential witch, as one 'who might as well have intercourse with a corpse' as witches are reputed to engage in necrophiliac sex.

The principle of the integrity of the human person and dignity is also reflected in Nkoya views on children. Children are much loved and receive plenty of affection. They are relatively scarce, and there is competition between kin groups regarding control over specific children. This must be seen against the background of a bilateral kinship system where each child effectively belongs equally to both the mother's and the father's kin. Kinsmen from all sides constantly scrutinize each other's behaviour as parents and educators to catch each other out committing offences, which are then exposed vocally. The reason for such criticism is not only the hope of taking over custody of the child from rival kin but also the more principled point that a child is vulnerable and can easily be forced to do things beyond his age and capabilities. If a mother allows her young child to burn its fingers when making the kitchen fire or sustain other

injuries, then her sisters-in-law will rush to demand a compensatory payment of a few pence (the price of one helping of home-brew village beer) and the offender will pay up without taking offence. More serious is the case when one of the parents makes demands on a child beyond the accepted limits of its age and abilities. Whosoever tells a toddler to fetch a heavy bucket of water not only invites ridicule but also risks the women of the village burdening the offender with accusations, threats of charges and insults. Such punishment can even be expected in response to such an apparently minimal offence such as letting a baby bounce and dance on one's knee. In such a case it is not unimaginable that the village women, to the offender's dismay and humiliation, will take off all their clothes on the spot and throw themselves naked on the offender shouting: 'Very well, you wanted us to dance? Now we shall dance!'.

Note the identification of the adult women with the wronged child. Disrespect for a child's natural limitations is symbolically reduced to a reference to uninvited sexuality as, after murder which is the most blatant violation of bodily integrity imaginable, lack of respect for the child is metonymically transformed into rape, and the group of village women, in their formidable expression of vocal gender identity (reinforced all the more by their puberty rites), becomes a sort of anti-rape brigade. Meanwhile there is here also an element of sacred nudity: the protesting, nude women invoke the power and identity of the ancestors, the ultimate defenders of every child (and every human being in general). And ultimately, overburdening a child is an act of sacrilege. Respect for the human dignity of the youngest members of society has a profound religious background: the circle of generations is closed time and again, and the youngest are considered to be the reincarnation of elders who passed away long ago. They bear their names (given at elaborate name-inheritance ceremonies) and are therefore often addressed even by their parents by the kinship terms that are normally reserved for addressing parents and grandparents. Little children not only represent the demographically vulnerable hopes of the kin group but also its past and its normative order.

The public humiliation described here constitutes one the most powerful informal sanctions that Nkoya society has at its disposal in its private-law relationships. In this respect, it is only surpassed by the lynching of a witch. Instances of such humiliation are rare (people avoid risking its administration at all costs) and this distinguishes them sharply from the most characteristic forms of social control among the Nkoya people: the singing of improvised mocking songs at festivals.

Freedom of religion

This might appear to be a value which hardly resonates with pre-colonial African societies. Nonetheless, in the formation of the Nkoya as a distinct ethnic

group, an attitude akin to the human right to freedom of religion is reputed to have played a role.

According to Nkoya oral tradition, the dynastic branches that would produce the current dynasties of the Nkoya people left their Lunda overlord Mwaat Yaamv in southern Congo after cases of humiliation (they were allegedly housed in the capital's pigsties) and after the Nkoya's rejection of the male puberty rites (*Mukanda*, involving male genital mutilation) that were controlled by the Mwaat Yaamv. The tradition of the Humbu War (in the second half of the 18th century) is interpreted as the Lunda king's attempt to re-impose these male puberty rites. In fact, the history of the Nkoya's relationship with male puberty rites shows complex oscillation between rejection and re-installment, and only a century ago Mwene Munangisha, who himself had a partially Lunda background, sought to reintroduce *Mukanda* even though it is significant that he did not succeed.

For the present argument, it is immaterial as to which interpretation of the Humbu war is closer to the historical truth. What is important and remains unaffected by these interpretational alternatives is that the right to denounce a central socio-politico-religious institution, such as male puberty rites, is affirmed in Nkoya traditions in the early 20th century, indicating the existence of parallels to the human right to freedom of religion.

Nineteenth-century Nkoyaland saw the rise of cults of affliction, imported from outside, from the East, the Indian Ocean coast and maybe even beyond. This diversified the range of religious expression in Western Zambia as until that time ancestral and royal ritual had been paramount. This diversification proceeded with the arrival of a variety of Christian missions and syncretistic cults in the 20th century. Traditional leaders gave selective and partial support to these developments but they did not jeopardize the growth of other expressions than those favoured by themselves. Freedom of religion appears to be a human right that is not without significance within the traditional Nkoya legal order.

The right to due process

This right is very relevant in the Nkoya context. Litigation plays an important role in Nkoya life, recognized procedures are considered and applied with great care, and nearly all adults (including women but formerly not slaves) have the opportunity to participate in the legal process. Of course, this does not imply that the rules of legal proof and sentencing are parallel to those applied in North-Atlantic courts of law or that the administration of justice, interwoven as it is with interests and power relations in everyday life and at the royal courts, could ever be absolutely objective. But these reservations apply all over the world.

The human right to due process was not always effectively applied. Kings had a considerable freedom in the imposition of punishment, including capital punishment. However, the case of Mwene Shamamano's musicians demonstrates that this freedom was not unlimited. Another form of defective legal course, or even its absence, is that of so-called instant justice, which was still found in South Central and Southern Africa in recent decades. In these cases, a crowd, convinced by mass-psychological mechanisms of the guilt of a particular individual in their midst and keen to have satisfaction, proceeds to inflict physical violence on the perpetrator, even to the point of death and without any trace of objective. Today, perpetrators are usually suspected of theft in public urban locations such as the street, the market or the bus station. In 19th- and early 20th-century Nkoyaland, sporadic incidents of lynching of fellow villagers suspected of sorcery were carried out.

This demonstrates that the common human right of asserting someone's innocence until proven guilty does not lie deeply anchored in the Nkoya legal consciousness. Or perhaps we should say that, in addition to due process, other procedures are allowed in order to demonstrate guilt. Here divination, rumour and personal intuition have often taken the place of due process. This is clear from the constant stream of sorcery accusations that have continued to constitute an important aspect of the social process among the Nkoya, mostly without formal adjudication.

Outside the context of family law I have no indication of deliberate innovations of local traditional law, and hence have no means of ascertaining whether there could have been a local human right preventing the retrospective application of new legislation, which is a standard principle in North-Atlantic positive law.

Freedom from slavery and forced labour

This human right has no equivalent in the traditional Nkoya situation: slavery and *corvee* labour for kings (by freeborn persons too) were realities in Nkoya hfe right up until 1930, and traces of these institutions can still be found. Meanwhile the polarization of Nkoya ethnic consciousness in the face of Lozi hegemony has led to a situation where, for Nkoya after 1950, slavery and forced labour were seen firstly, and in a very negative sense, as being associated with practices through which Lozi rule was imposed on Nkoyaland after the late 19th century. However, the Nkoya kings' own practices did not differ markedly from those attributed to their Lozi colleagues. Therefore we seem justified in seeing not so much the indications of a deep-seated local human right against slavery •n these Nkoya remonstrations, but merely the selective application of a cosmopolitan, modern anti-slavery idiom coupled with a militant anti-Lozi sentiment during the last fifty years.

Remarkably, notions of slavery and forced labour were hardly ever applied to the experiences of Nkoya labour migrants as miners and farmhands in Zimbabwe and especially South Africa even in the 1860s. Over the last few decades, nearly all my Nkoya informants and especially those who had themselves worked as labour migrants seemed to lack any awareness of the nature of exploitative colonial and capitalist production relations. The colonial period was, in retrospect, held up as a period of plenty and unlimited movement, in sharp contrast to the miserable conditions that came to prevail in the countryside in Western Zambia when, after a century of extensive dependence on labour migration, the borders were closed for outgoing labour migrants to Zimbabwe and South Africa in 1965. Lest the reader think that I am merely imputing my own prejudices on my informants, the latter's assessment of the colonial and capitalist situations they lived in never failed to shock me. I started my fieldwork in Nkoyaland with a Marxist point of view influenced by the radical, anti-capitalist and anti-colonial overtones in the work of Max Gluckman, Jaap van Velsen and H. Jack Simons. I suppose my informants' surprising acceptance of their experiences under colonialism and capitalism sprang from their own historical contradictions on this point. Racist humiliation, segregation, extensive limitations of their freedom of movement and being forced to live a bachelor life abroad regardless of their age and family circumstances were probably compensated for, in their minds, by the much-coveted opportunity to earn cash as a labour migrant to pay for their hut tax, head tax, clothing, bride wealth, a gun as well as the opportunity to get away from the local village society that, especially for young males, was often conflict ridden, oppressive and exploitative (cf. van Binsbergen 1975a).

This concludes our exploration of cosmopolitan human rights in the traditional Nkoya context but the data still have a surprise in store for us.

Nkoya human rights that do not have equivalents in the usual cosmopolitan catalogue of human rights

I have already indicated the artificial element involved in the approach followed here: the demarcation and serial treatment of a distinct category of human rights within Nkoya culture and society. Although to some extent inspiring and illuminating, this approach does not do full justice to the historic specificity of Nkoya culture and its legal system. Not only do we make distinctions that are not, or were not, made by the local actors themselves, but our departure from existing, cosmopolitan categories of human rights implies the risk of overlooking that which the Nkoya themselves would prefer to see as their most central human rights. This lies in the ideal of the 'good life' (*ku-ikala shTwdhe*) or 'to dwell, to live, to reside, in well-being, in good will'. This means freedom

from illness and hunger, from unnecessary conflict and fear and, above all, freedom from sorcery.

For centuries now, every Nkoya individual has played his/her part in a remarkable musical chairs: born in a particular village, s/he reshapes, through residential moves, (i) his/her main kin patron and protector (elder kinsman, mother's brother, and especially village head, who often combines the previous two qualities in his person), and (ii) the composition of the cluster of co-residing kinsmen (fellow-villagers), in such a way that the resulting situation, for some time at least, gives that individual the subjective impression of *ku-ikala shTwdhe*, of 'staying well'.

The ideal kin patron is one who enables his follower/fellow-villager to enjoy the 'good life', while a bad kin patron is one who fails in this obligation and who, because of his own conflictive, ambitious and sorcery-ridden behaviour, threatens the stability and integration of his village, and fails to satisfy his junior followers, instead exploiting them for his own material and mystical power ambitions as a sorcerer. Every residential move of an individual or a family is inspired by the hope of finally finding the ideal, beneficial kin environment, and every case of illness, death, crop failure or misfortune destroys that hope again and confirms the lingering deep suspicion that it is precisely the senior members of the village who, despite their obligations and their adjurations to the contrary, abuse these juniors, frustrate their ideals and turn them (literally) into mystical sacrifices to unseen evil forces. Because of the tendency to viri-local residential rules and the small average size of villages, marriage for most women means a move to a different village, and in contracting a marriage (most women marry more than once in succession) she too is primarily guided by the hope of finally securing the 'good life'. A different spouse represents a package of new and hopefully more positive affinal relations.

Nkoya dependents 'vote with their feet', expressing their opinion in the first place by moving away, with this, rather than litigation, being the obvious response in the (almost inevitable) case that after a few years a particular kin patron turns out to be disappointing or even a sorcerer. Yet from my own fieldwork, and from oral-historical sources, I have known a few cases in which the senior kinsman, the village headman, valley chief or king was explicitly, and in a formal judicial context, reproached for failing to realize the ideal of the 'good life' for his dependents. This may serve to attribute the status of a central human right in the Nkoya context to this ideal.

The opposite of the 'good life' is sorcery, i.e. the calculating manipulation of persons and relationships with total contempt for personal dignity and integrity, sacrificing the property, health and even the life of others for the benefit of the witches' own power ambitions (cf. van Binsbergen 1981, 2001). Freedom from sorcery is an explicit human right within Nkoya society, albeit one that has

hardly been admissible for formal adjudication within, or even at the periphery, of the national legal system.¹⁸ Contrary to other parts of South Central Africa, we have hardly any data for the pre-colonial period on formal legal procedures in which Nkoya indigenous state officials confronted sorcery activities. This was perhaps because these officials themselves tended to be structurally perceived as sorcerers. As Big Men rather than legitimate kings they effected the explosion of the traditional world order into violence and power ambitions. The only sorcery court case that I myself attended in all my years among the Nkoya was in 1973. It turned out to be one in which youth belonging to the United National Independence Party (UNIP) acted as self-appointed prosecutors, while the defendants were the king and his court dignitaries. For this reason, the court had the format and the rhetoric but not the prerogatives of a Nkoya Local Court or Chiefs Court (van Binsbergen 1975). In the course of the 20th century, the battle against sorcery was in the hands not so much of traditional leaders and the Local Courts but of religious leaders. This leads us to question whether a human right that is not, and perhaps cannot be, enforced by judicial means does not cease, by that very fact, to be a human right in the technical, legal sense.

These witch-hunters of the 1930-1950s¹⁹ primarily legitimated their actions by reference to a Southern African variant of the sect of Jehovah's Witnesses, often in combination with an older Southern African tradition of identifying witches because a specialist 'smells them out' (in an idiom borrowed from hunting) or through the *mwave* poison ordeal whereby the accused was forced to drink an alkaloid poison prepared from the bark of the *mwave* tree²⁰ and if s/he vomited, s/he would live, and in the other case the poison would kill the accused. From the late 1980s to the mid-1990s Nkoyaland was the scene of the

¹⁸ Given the specific nature of colonial and post-colonial national legislation in former British Central Africa, which sees not witchcraft - for that 'does not exist' - but the accusation of witchcraft as an actionable offence. The situation that Geschiere with Fisiy (1995) describe as standard for post-colonial Cameroon and elsewhere of state courts actively confronting witches as if their existence in the light of the law was self-evident and their mystical actions actionable has long been avoided in Zambia. Witch-finders such as Mupumani (1913) were merely prosecuted for vagrancy and breach of the peace (van Binsbergen 1981); and while the 1950s saw an enormous increase in witchcraft accusations and self-accusations in Western Zambia (cf. Reynolds 1963), the legal action taken against these alleged or self-proclaimed witches was again in such terms that the courts could refrain from attributing any factuality to the idea of witchcraft. However, the sympathy of Kaoma District officials for Tetangimbu and my failure to gain access to the process documents in question suggest that this situation has been changing in recent decades.

¹⁹ On witchcraft eradication movements in South Central Africa, cf. van Binsbergen (1981), van Dijk (1992), Geschiere (1994) and the extensive references cited there.

²⁰ For taxonomic identification of the *mwave* tree, cf. Gilges (1974).

activities of a witch-hunter of Luvalé ethnicity called Tetangimbu, hailing from Kalabo west of the Zambezi. With minimum admixture of Christian elements and operating his own private graveyard of exposed witches, Mr Tetangimbu modernized the *mwave* model with the exclusive use of agricultural pesticides, which in 100% of cases led to the death of the accused. The district authorities were hesitant and only intervened (and then only half-heartedly and ineffectively) after dozens of such murders, probably because the local population applauded Mr Tetangimbu's actions as an extremely effective enactment of the human right they held most dear: freedom from sorcery.

Conclusion

Our last example demonstrates that the situation regarding human rights in a traditional African environment does not entirely coincide with the human rights circulating within cosmopolitan legal practice and theory. On the other hand, the inventory in the present argument demonstrates that Africa is not exactly *tabula rasa* when it comes to human rights. It does not have an empty slate that has to be filled with apparently incomparably better, North-Atlantic insights in the usual condescending manner. There is no denial that the human-rights situation in many African states is deplorable although there are recognized exceptions, such as Botswana. It is rather surprising to conclude that our judgment regarding the arbitrariness and terror exercised by many post-colonial African states would have been scarcely less negative if our assessment had been based not on North-Atlantic, cosmopolitan human-rights catalogues but on the human rights that were being articulated in a small part of Africa, Nkoyaland, on the eve of the colonial period. Much more research on human rights within African traditions is needed because here may lie sources of inspiration that could help us in our attempts to formulate cosmopolitan catalogues of human rights which, freed from North-Atlantic/Western ethnocentrism, could have truly global appeal. Little would be more in line with Gerti Hesselings's Africanist research on the constitutional state over the years.

If a South Central African people can be demonstrated to have extensive, time-honoured parallels to formal, North-Atlantic, human-rights catalogues, this has considerable implications. There is no reason to assume that the Nkoya situation differs strikingly from that found in neighbouring ethnic groups in South Central Africa, including those of the Lozi/Barotse and the Shona whose legal institutions have been studied in great detail by famous ethnographers such as Max Gluckman and Hans Holleman (cf. Gluckman 1967 (1957), 1965, 1969; Holleman 1952). Even though their accounts are not specifically organized to highlight human rights. So we are tempted to surmise that South Central Africa has an endogenous tradition of human-rights thinking of its own

and that in this respect the South Central African region may not even be unique in Sub-Saharan Africa. This insight may help us to better understand the African response to colonization and to the state, and to appreciate the socio-cultural sources, both of anti-colonial protest and of post-colonial protest against state failure. It also means that we have to reconsider the facile schemes popular in studies of the reception of allegedly alien North-Atlantic constitutional law in the allegedly pristine African constitutional context. Perhaps popular political and religious action in colonial Africa was prompted not by the absence of the idea of human rights but by Africans' perceptions of the cynical, ethnocentric, class-ridden and selective application of familiar human rights on the part of colonial governments and their local allies. Finally, there is a puzzle here concerning long-range historical relationships. If North-Atlantic human-rights catalogues can be argued to have parallels in South Central African societies and if we cannot attribute those parallels to recent North-South borrowing during the Modern Era, we have to look at European and at global constitutional history with fresh eyes. In the face of these parallels, it is unlikely that North Atlantic concepts of human rights were primarily the product of the Early Modern Era - of the intellectual climate of the Enlightenment, of the transformation of statehood according to the Westphalian model after 1648 and of the seething of class relations in the same period. Much older, much less elitist and much more cultural and communal roots need to be reconsidered, probably not unrelated to the institutions of free citizens' rights (despite the prevalence of slavery!) throughout West Asia, both shores of the Mediterranean and Europe from the Bronze Age onwards. The throbbing pulse of ancient and medieval history in these regions is seldom considered to have been continuous with pre-Modern Sub-Saharan Africa, which is usually considered to have been isolated and aloof from global developments. Some rethinking is needed here.

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