

# Human rights in the traditional legal system of the Nkoya people of Zambia<sup>1</sup>

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## ***Introduction and summary***

After a dedication outlining the author's scholarly collaboration with the Dutch Africanist legal scholar Gerti Hesseling (1946-2009) over the years, my argument concentrates on an issue that was particularly central to the latter's work: human rights. Human rights discourse has come to increasingly dominate world politics in our time and age. Such discourse is usually seen as informed, mainly, by the Judaeo-Christian and Graeco-Roman heritage, and more recently by the Enlightenment and the French and American revolutions of the late 18<sup>th</sup> century CE. From a naïve transcontinental perspective, the challenge of human rights would then amount to mediating, and vindicating, a North Atlantic cultural product in socio-political contexts outside the North Atlantic, – contexts that initially appear to be *alien and inimical* to such human rights thinking, and that have to be *converted* to it (much like many similar contexts have been converted, in the course of the last two millennia and especially the last few centuries, to Christianity, biomedicine, and modern, bureaucratic and democratic statehood). However, intercultural philosophy would explode this naïve view as inherently hegemonic, since that view attributes, to the North Atlantic region, the monopoly of what could, alternatively, and with greater justification, be considered an inalienable achievement of humankind as a whole. The naïve view of human rights moreover suggests that only the submissive copying of North Atlantic socio-political thought could bring respect for the human person, life,

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<sup>1</sup> An earlier draft of this argument, in Dutch, was prepared at the request of my sometime colleague, the legal anthropologist Emile van Rouveroy van Nieuwaal, 1996, and was extensively commented upon both by him and by Gerti Hesseling. While I am grateful for this feedback, the responsibility for this text remains entirely my own.

freedom etc. – as if such notions were inherently absent from, and unthinkable in, societies outside the North Atlantic. A naïve, hegemonic approach to human rights is not only disqualifying for the people outside the North Atlantic – it would also make it more difficult for the latter to adopt human rights thinking as potentially universal and as resonating with their own local concepts of personhood, integrity, freedom, etc. The present argument therefore challenges the naïve, hegemonic, North-Atlantic-centred view. On the basis of a detailed inspection of the human rights thinking contained in the traditional legal system of the Nkoya people of Western Central Zambia, an endogenous, local historical basis for many standard human rights will be argued. The application of these rights in Nkoya society is shown to be often subtle and liberating, and by no means inferior to what is commonly found in North Atlantic small-scale communities. Moreover, the Nkoya people turn out to boast a few human rights for which there are not even ready equivalents in standard North Atlantic human rights catalogues. The argument is thus a contribution to current attempts to de-hegemonise human rights thinking; it rests on a number of (potentially contentious) theoretical and methodological assumptions that are set out in the first few sections.

### ***Gerti Hesseling: A dedication***

In anticipation of the, supposedly imminent, completion of her doctoral thesis on the constitutional history of Senegal, Gerti Hesseling joined the African-Studies Centre in the Fall of 1979, to do post-doctoral research on land law and land reform in South Senegal, in a project initiated by Emile van Rouveroy van Nieuwaal. Within days after her appointment, I met her for the first time, inviting her to give a paper for the monthly national Africa Seminar I had convened and chaired since the mid-1970s.<sup>2</sup> This started our period of close cooperation. It turned out that her dissertation project had dramatically stagnated, so I agreed to take on the day-to-day Africanist supervision of her thesis, complementing the jural supervision she was receiving from Lucas Prakke. This arrangement enabled Gerti to depart (still substantially delayed) for the field early 1982, only to return for the public defence of her dissertation in May of that year.<sup>3</sup> On that occasion, in recognition of the actual facts of our division of labour, Lucas Prakke insisted that Gerti should receive her doctoral diploma from my hands, and she did. After her definitive return from the field, and the demise of the African Studies Centre's 'Section on Law',<sup>4</sup> Gerti joined the Department of Political and Historical Studies, which I had initiated and led since the Centre's restructuring in 1980. Here she initially combined the writing-up of her Senegal data<sup>5</sup> with a return to

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<sup>2</sup> This paper, on language and the state in Africa, was subsequently published as: Hesseling 1981 .

<sup>3</sup> Hesseling 1982. I successfully applied for a translation subsidy from the Netherlands Research Foundation (ZWO now NWO), so that the text could soon appear in French as: Hesseling 1985.

<sup>4</sup> van Binsbergen 1984b, 2003c.

<sup>5</sup> Hesseling 1992.

a theme that had also been central in her doctoral dissertation: the study of human rights as enshrined in the national constitutions of African independent states – resulting in major joint papers on French-language independence constitutions.<sup>6</sup> In this period also fell our joint organisation of two conferences on the African state.<sup>7</sup> Soon I was able to persuade the Board of the African Studies Centre to grant Gerti her permanent appointment. Gradually, her interest shifted from Senegal to the whole of West Africa, and from legal scholarship to development and senior management. She came to combine her annual fieldwork supervision of Leiden anthropology students in Senegal, with a senior position within the West-African think-tank *Le Club du Sahel* – an effective, and convincing, preparation for her subsequent directorship of the African Studies Centre (1996-2004). When her appointment as director was in the balance because the Centre had not yet implemented the ministerial preferences for a new, thematic organisation form of its research, I managed to form the first such *Theme Group* at the African Studies Centre, the one on *Globalisation* (1996-2002), largely on the basis of external funding, and thus helped tilt the scales in Gerti's favour. During most of Gerti's directorship I worked closely together with her within the Centre's Management Team, until I was allowed to return to my shelved writing projects in 2002.

Already long before I ever met Gerti, I had engaged in the legal-anthropological study of Africa,<sup>8</sup> on the basis of the combined inspiration of André Köbben's teaching at Amsterdam University, and of my being co-opted into the circles of the Manchester School (whose leader was the great legal anthropologist Max Gluckman), in the course of my appointment as Lecturer of Sociology at the University of Zambia, my affiliation with the Institute of African Studies (the successor to the illustrious Rhodes-Livingstone Institute in Lusaka), and my appointment as Simon Professor at Manchester. Working closely together with Gerti, whose education had been primarily in positive law (and Romance languages), revived this initial inspiration and turned it to the topics in which Gerti was particularly interested: constitutional law, traditional law, their interface in legal pluralism, and the pursuit of human rights as the touch-stone of legal development in modern Africa. Thus Gerti, as my first PhD student, was also to some extent my teacher. I am offering the present study (on whose earlier versions she has extensively commented) in memory of a stimulating Africanist, a uniquely gifted director, and above all a very dear friend.

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<sup>6</sup> Doornbos *et al.* 1984, 1995.

<sup>7</sup> van Binsbergen & Hesseling 1984; van Binsbergen *et al.* 1986.

<sup>8</sup> van Binsbergen 1974, 1977. A fruit from the same research inspiration, although published later, was: van Binsbergen 1988.

## ***Looking for a vantage point from where to consider human rights transculturally***

In the mid-1980s the then (1981-1989) Belgian minister of Foreign Affairs Mr Leo Tindemans was reproached in the media for using a double standard in his contacts with the repressive regime of president Mobutu: Tindemans was emphasising human rights in his own country, but displaying the greatest tolerance for the flagrant and systematic violation of human rights in Zaire / Congo, with which Belgium was entertaining extensive ties of friendship and in fact of 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 twentieth century, the minister explained his policy in more or less the following words: '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), and especially those human rights 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 examples, but also by multifaceted social, economic and military sanctions, especially in the contact of foreign aid, which has been a major source of income of quite a few African countries. With Minister Tindemans, one might pretend that these human rights are 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 might adopt the position that we are witnessing the growth of a global culture, which comprises not only the electronic and new media, the jeans trousers, the Kalashnikov gun and the condom as a form of AIDS prevention, but also the notion of human rights such as explicitly formulated in the North Atlantic region from the end of the 18<sup>th</sup> century CE. From this perspective human rights deserve a more universal characteristic than merely 'North Atlantic'; we might call them 'cosmopolitan', just like in medical anthropology we have adopted the expression 'cosmopolitan medicine' to designate the complex of the hospital, physician, pharmacological and paramedical practices and forms of organisation that since long has outgrown its initial limitation to the North Atlantic region and that moreover has always incorporated elements from outside that region. However, before human rights can be conceived of as 'cosmopolitan', prevailing formations of human rights need to be checked for unintended elements of Eurocentrism and imperialism which they are likely to contain considering the origin and history. How do we develop a transcultural perspective on these matters? The answer to this question must largely come from legal specialists in such fields as constitutional and international law.<sup>9</sup> However, the legal anthropologist

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<sup>9</sup> For a review of the relevant recent literature, cf. Hesselting 2006.

can make a little contribution of her or his own: assess whether the principles enshrined in modern human-rights catalogues may also be found in societies outside the North Atlantic, and 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 is generally assumed; perhaps we may discover some common ground between African and North Atlantic societies that would make it henceforth impossible to justify African violations of human rights under the pretext of respectful cultural relativism. Perhaps human rights, *avant la lettre*, may yet prove to constitute African cultural values.

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

In several ways a human-rights perspective is illuminating when assessing the relations between sub-Saharan Africa and the North Atlantic region in the course of the last two centuries. Towards the end of the eighteenth century, explicit declarations of human rights came to form the backbone of the constitutions of the United States of America and of France. It was to take another century and a half before human rights were universally incorporated in North Atlantic constitutions and in the Universal Declaration of Human Rights of the United Nations (1948). Yet the Scramble for Africa from 1881 onward (only partially regulated by the 1884 Berlin Conference), and as a result the imposition of colonial rule and of capitalist relations of production and extraction over virtually the whole of sub-Saharan Africa, already took place in a context where, in their Southern expansion into the African continent, European states were denying, in Africa, the very human rights that were becoming increasingly institutionalised at home. In the second half of the nineteenth century, it was by reference to an ever more vocal human-rights discourse that European philanthropists, religious leaders and politicians could justify European military, territorial and ideological expansion in Africa by targeting the slave trade as a blatantly inhuman condition violating human rights – ironically, considering the historic prime responsibility of European nations for at least the trans-Atlantic slave trade, which, with the institution of slavery itself, by the middle of the 19<sup>th</sup>-century was still to be abolished by many North Atlantic states, and to be a major bone of contention in the USA Civil War (1861-65). Colonial rule in the first half of the 20<sup>th</sup> century was predicated on denying Africans most of the human rights that European citizens increasingly enjoyed in their homelands. Extensive African participation in the lower ranks of the colonial administrations, in European formal education and in European armies (especially during World War II) drove this contradiction home to African consciousness, and was a major factor in independence movements that ended the

colonial period in Africa. At Independence, most countries of sub-Saharan Africa received formal constitutions after the North Atlantic model, with extensive listing of human rights; much of the subsequent post-colonial history of these new states could be summarised as the uneasy accommodation of these constitutions to the evolving post-colonial African realities – a state of affairs often summarised, by North Atlantic observers, in terms of failed reception, and systematic violation, of human rights.

Meanwhile anthropology came to be established in the North Atlantic region as a major scientific discipline and, more in general, as an epistemological perspective that, although greatly influenced by the colonial situation and often subservient to colonial domination, yet could begin to transcend the hegemonic implications of these connections. The concept of culture (defined by Tylor<sup>10</sup> while David Livingstone was engaged in his last journey into South Central Africa) became the dominant anthropological paradigm after the first third of the 20<sup>th</sup> century. This gave rise to cultural relativism as an explicit basis for respectful recognition of African cultural forms and their owners, and therefore as a corrective of the racist contempt of African conditions and expressions typical of colonial thinking.

However, although at the time a liberating and empowering force, the cultural relativism that came to be typical of North Atlantic scientific and political thinking about Africa in the middle of the twentieth century also had a great disadvantage. It shunned all consideration of universals and universalism, and therefore was disinclined to search for unifying cross-cultural and transcultural themes underneath the fragmentation of myriad ethnic groups and cultures supposedly making up the social map of Africa, and of the world. As a result, human rights were unlikely to be perceived as principles potentially underlying and governing the socio-legal life of Anatomically Modern Humans whenever and wherever – with the possible implication that their codification by the hands of specific North Atlantic legislators of the Modern Era merely formalised and explicitised patterns of a much wider geographical and historical distribution. On the contrary, given the paradigm of cultural relativism, human rights could only be considered as the specific and recent invention, as a specific formal cultural institution, of just one cluster of cultures in the North Atlantic region; by the same token, the spread these institutions to other parts of the world including sub-Saharan Africa could only be seen as a form of cultural transmission comparable to that of North Atlantic forms of clothing, the railways, the internal combustion engine, Christianity, the institution of the modern bureaucratic state based on representative democracy, and, in the last few decades, the computer and the internet.

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<sup>10</sup> Tylor 1871.

Unintentionally, cultural relativism thus risks to become a major instrument of condescending North Atlantic hegemony. It is as if the representatives of the North Atlantic region are saying

‘Of course, we are enlightened enough to recognise Africans’ capability of appropriating and learning to use all the North Atlantic inventions, and thus to gain intercultural respectability and income. Yet, since these inventions are originally and essentially ours, they can only be partially and defectively adopted, and will only weigh down awkwardly like alien bodies on the African realities where they are circulating. After all, Africans did not invent them any more than they did the wheel.’

Elsewhere I have critically considered such covert hegemonism in connection with the African use of computers and the internet.<sup>11</sup> While not denying the possibility that some of the formatting of computer/user interface may reflect specifically North Atlantic cultural orientations, I argue that by and large the North Atlantic claim to unique ownership of these technologies is unfounded:

- as a recent technological innovation they cannot be seen as an integral, historic part of North Atlantic culture,
- but appear as the incidental and fortuitous creation
- by an (increasingly transcontinental, global) intellectual and technological elite
- which was transcending instead of implementing their regional culture,
- producing an invention that was initially alien, awkward and potentially destructive not just to African cultures but also in the North Atlantic life itself,
- and that amounted to an achievement of universal humankind as a whole rather than as something specifically North Atlantic
- as is testified by the amazing ease and speed with which that technology has globally spread outside the North Atlantic, also to Africa.

Our time and age has been agreed to be one of globalisation. Clearly, one cannot have globalisation without an effective breakdown of older identities and geopolitical distinctions. Under conditions of initial globalisation such older identities and geopolitical distinctions tend to affirm themselves in a manner that is obsolescent and no longer reflect current global power relations, but that yet may be ideologically attractive to those previously privileged by these geopolitical distinctions.

Nor should such ideological claims be flatly dismissed as totally unfounded and totally irrelevant, merely because they go against the grain of the political correctness of the day. The essential feature of transcontinental and transcultural relations is that

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<sup>11</sup> van Binsbergen 2002, 2004.

they cannot be adequately rendered unless in terms of a contradiction. Any boundary is at the same time (a) a thinking device cast in the conceptual terms of absolute difference (between that which is on either side of the boundary), and (b) the denial of such absolute difference in the sense that a boundary is always a locus of transmission across that boundary. To the extent to which culture is constitutive of a meaningful and truthful life world, strictly speaking we cannot produce and share truth and meaning transculturally – despite anthropology’s long-standing and naïve claims to the contrary. Therefore,<sup>12</sup> interculturality is only possible once we dare take a relative view of the Aristotelian logic of the excluded middle that has been taken for granted throughout the North Atlantic intellectual tradition, and adopt the logic of *wisdom* by which one is, essentially, allowed to have one’s cake and eat it – so that one can make scientific pronouncements about the other’s culture whilst admitting that these pronouncements are predicated on the assumption of the paramount validity of one’s own culture and therefore at the same time affirm and represent, as well as deny and destroy, the other culture. Needless to say that the same play of affirmation and denial exists, not only between groups, but also between human individuals in their dyadic interaction.

In the present paper I will apply these tentative (and admittedly counter-paradigmatic) insights to the specific problematic of human rights in Africa. I feel prompted to do so, not only because human rights have played an increasingly central role in Gerti Hesseling’s academic career<sup>13</sup> (culminating in her appointment in the Utrecht chair of peace studies, 2006) and in the work we did together over the years, but also because in her 2006 inaugural she explicitly thanked me for incessantly reminding her, throughout her career, of the intercultural dimension of her work on African law.

I will even go further than the assertion (to be expected on the basis of my above introduction) that human rights in Africa, far from being merely imposed alien institutions that cannot be expected to be at home in African situations, are capable of being adopted there because they form part of the universal heritage of humankind, and may be recognised by Africans to do so. I will put myself on the standpoint of the traditional legal system of one African group, that of the Nkoya people of Western Central Zambia, who have featured prominently in my research and

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<sup>12</sup> Cf. van Binsbergen 2003, 2009. Of course the same contradiction attends the present argument, which is the main reason why its commission to print was postponed for over a decade, while I was coming to terms with the epistemology of interculturality. I have now resigned myself that as long as ethnography does not file absolute truth claims and brings in feedbacks from among the people it claims to depict, it may become a sympathetic and potentially counter-hegemonic force in the modern world. Moreover, for the time being we lack of a strikingly more convincing and valid solution to the problem of transcultural knowledge construction. By the same token, Valentin Mudimbe (1988), caustic critic of the ‘colonial library’, in his more recent work seems to have resigned himself to taking its contents seriously and irreplaceable.

<sup>13</sup> Cf. Hesseling 1982, 1985, 1996, 2006; Doornbos *et al.*, 1984, 1985.



publications ever since 1972, and on whom I can speak with authority as someone who, over the years, has mastered and internalised their language and culture, and who eventually became the adopted son of one of the major Nkoya kings and hence an insider at Nkoya royal courts – the principal context of legal matters. My claim is that many of the codified human rights that have found their way to North Atlantic constitutions, and subsequently to post-Independence African constitutions, may be detected to have parallels in Nkoya legal concepts. As a my detailed discussion below will indicate, we can rule out the possibility that these parallels are primarily due to recent borrowing from the North Atlantic region, even though the colonial state of Northwestern, subsequently Northern Rhodesia (1900-1964) and its post-colonial successor the independent state of Zambia, have had a considerable hand in maintaining and controlling Local Courts in the Nkoya region.<sup>14</sup> Unmistakably, the Nkoya human rights I will discuss, in great majority spring from an precolonial tradition.

### ***Method and nature of our reconstruction***

In principle, our point of reference is the second half of the nineteenth 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 concrete and extensive oral-historical and documentary data. The remainder we must reconstruct from the legal practice which I studied in the region only a century later, from 1972 on. 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.<sup>15</sup> The concept calls 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. Several legal systems exist side by side, each with specific systematics, principles and history of each own that cannot be reduced to those of the rival legal systems involved; incessantly local actors move from one such system to another, but each system retains more or less 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 now is that a local legal tradition, grounded local culture and legal institutions, constitutes a semi-autonomous field which may be subject to constant change and adaptation in concrete application, but that the system yet continues to form a semi-autonomous field whose internal systematics and fundamental principles have a tendency to persist across the decades, perhaps even centuries. If the regional society as a whole undergoes massive changes in the domain of law, these changes will in the first place affect not so much the specific contents of

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<sup>14</sup> On Zambian Local Courts, cf.: Coldham 1990; Hoover et al., 1970a, 1970b; Spalding 1970; Spalding et al. 1970.

<sup>15</sup> Moore 1978, ch. 2: ‘Law and social change: THE semi-autonomous social field as an appropriate field of study’, p. 54-81.

the various constituent legal systems, but the interrelations between these systems: system A, which is initially alien to the local legal tradition, may be increasingly applied by persons, and in situations, that in the past relied mainly on the pre-existing, local legal system B. By the time system A is reasonably well-known to many actors and if these in a plurality of situations have a choice between A and B, then there is a chance that A and B interpenetrate and become contaminated. If this process is in an advanced stage, then any resemblance between A and B may be explained from transmission, which may have been conscious or unconscious. Here we are referring to the two systems such as they presented themselves at time T, i.e. a number of t years after the first contact between the systems A and B. With inevitable degrees of uncertainty it will be possible to reconstruct the original local system B' (at time T'; T'=T-t). Usually this will remain a reconstruction and nothing more, because the original local system as in force in the period before the penetration of the alien system will have been defectively documented or not at all – for the simple reason that the penetration of an alien legal system is often an aspect of the same cultural and political incorporation which has also brought the colonial state, world religions and writing to societies which hitherto had been entirely or largely aloof from these globalising items of culture.<sup>16</sup> Admittedly, this line of reasoning implies the risk that, in the absence of adequate documentation, the fundamental identity between B and B' (separated in time by period t) is merely a hypothesis. However, if the forms of B which we find at time t and which at that time we can adequately study, ethnographically, in their cultural and social context, can be argued to fit that context well, and if we have no reason to postulate dramatic changes during period t in this connection, our hypothesis may become slightly less risky.

What this amounts to is a reflection on the nature of 'time' and 'the past' in the context of the study of socio-cultural systems. I tend to the view that time does not really come in (may not even exist) at the level of the abstract description of a system of relationships, such as the elements and connections constituting a kinship system, a legal system, a ritual, a myth. We might opt to introduce 'time' explicitly as a variable in our analysis, but then time turns out to largely boil down to a specification of the speed, action radius, and impact, with which various systems interact with each other – each system having a history of its own, but none containing 'time' as an element in its own right. In principle, this means that it is the wrong question to ask whether we do capture the local legal system as it presented itself in the second half of the nineteenth century CE (i.e. B'), or whether, alternatively, considering the nature of our sources we are only justified to make valid pronouncements concerning the second half of the 20<sup>th</sup> century (B). In fact we do not describe any real system but we reconstruct an abstract and even virtual system, which at no moment of time occurred in purity, but which we impute to have systematically governed actual legal practice for a century or more as if such a system did actually exist; and that reconstruction is

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<sup>16</sup> Goody 1968, 1986.

the product of ethnographic introspection fed by local cultural and linguistic competence, fragmentary concrete evidence (of a documentary and oral-historical nature) concerning the 19<sup>th</sup> and 20<sup>th</sup> century, and especially rich ethnographic based on participant observation from 1972 on.

Let us take a concrete example: local legal rules concerning the respect of the body and the personality of the young child, such as we shall see below to have been in force in Western Central Zambia in the 1970s. These rules perfectly fit the prevailing kinship and demographic context, in which children are relatively scarce, are considered the incarnations of powerful ancestors still operating the world of the living, and in which control over each specific child is constantly claimed and contested by a plurality of loosely formed and constantly shifting kinship clusters, against the background of a bilateral descent system. There is plenty of historical evidence<sup>17</sup> to project this entire, overall structural context at least one or two centuries back into the past, even though there are hardly any concrete data on legal rules concerning children in this region in the 19<sup>th</sup> century.<sup>18</sup> In this way I convince myself 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 19<sup>th</sup> century.

In order to structure our 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 many academic reflections to which these constitutions have been subjected by constitutionalists and political scientists. In the past I have intensively looked at these comparative data, along with my colleagues Martin Doornbos and Gerti Hesseling. However, we were so fascinated by the symbolic riches and the remarkably unpractical abstraction of the preambles with which all these constitutions presented themselves that in fact we never progressed beyond the analysis of these preambles.<sup>19</sup> Moreover, the Universal Declaration of the Rights of Man (1948) constitutes an obvious and systematic point of departure for our present discussion. Because I, as an anthropologist / historian / intercultural philosopher, can hardly be expected to offer an original contribution to the systematics of constitutional law, I shall simply follow the classification which

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<sup>17</sup> van Binsbergen 1981.

<sup>18</sup> There are a few indications to that effect (van Binsbergen 1992). A similar respect 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 when Prince Munangisha through magical means (*malele*, a prerogative of royals) has escaped the Kololo army which however has captured his junior kin, he returns and surrenders, despite his superior weapons (poisoned arrows) which inspire great fear in the Kololo. Munangisha's argument is:

‘I 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 1992: 401).

<sup>19</sup> Doornbos *et al.* 1984, 1985.

Hesseling (1982, o.c.: 165f) offers in connection with the independence constitution of Senegal.

In the first place, then, we distinguished so-called classic human rights:

- the principle of equality of each individual before the law
- freedom of expression
- freedom of association and of meeting
- privacy of letters
- freedom of movement
- inviolability of the dwelling
- 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
- the freedom to organise in a trade union and to strike

To this we may 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 of inhuman treatment

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

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

At length Hesseling discusses the legal possibilities of limiting human rights, either through national legislation or through the rulings of lower-level bodies of local government. It is difficult to find equivalents on this point in our data, because the Nkoya human rights are not exclusively administered by the precolonial state (the royal court with its dignitaries and institutions), but also (often in defiance of the court and its officers) in the general culture and in everyday life, in forms that are neither formal, nor explicit, let alone constitutional.

Under reference to the Federal German constitution after World War II, and to the Senegalese constitution, Hesseling (already in 1982, a quarter of a century before her Utrecht appointment!) discusses human rights as a basis for society and peace. This

again seems to presuppose the framework of the formal constitutional legal tradition of the North Atlantic region in the 20<sup>th</sup> century. Far less than human rights in that specific tradition, do the Nkoya human rights stand out as a separate category among the total complex of norms, values, rules, representations and symbols constituting the entire local world-view. Nkoya human rights should not be considered primary and autonomous principles of law, but must always be considered in dynamic dependence from the total culture and world-view. Thus these Nkoya human rights may not be able to claim the same fundamental significance for society and peace which has been attributed (rightly or wrongly) to cosmopolitan human rights.

Are we not running the risk of gross distortion, of errors both of a methodological and an empirical-analytical nature, if from Nkoya legal sources we reconstruct more or less equivalents of the human rights in the cosmopolitan tradition? In order 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. For, since the middle of the 19<sup>th</sup> century Nkoya society and its legal system has developed in the periphery of, and (as we come closer to the 20<sup>th</sup> century) under the increasing hegemony of, Lozi political and judicial structures – even though 20<sup>th</sup>-century Nkoya sources<sup>20</sup> claim a decisive Nkoya influence upon Lozi royal culture, both before and after the Kololo invasion from South Africa, that reshaped Lozi political organisation in the middle of the 19<sup>th</sup> century, and (except for court matters) replaced the Central Bantu Luyana language (very close to Nkoya) by the South Bantu Kololo, today known as Lozi. An attempt to situate my approach in relation to the unrivalled work of the founder of the Manchester School<sup>21</sup> may illuminate both the limitations and the modest possibilities of my approach in the present argument.

### **Gluckman's work**

The concept of explicit human rights *per se* is alien to the legal traditions of Western Zambia, which have been studied in such detail and with great comparative and theoretical insight by Gluckman. Such a concept springs from the West European or North Atlantic legal tradition, and only materialises in its present form by the end of the 18<sup>th</sup> century CE, in the context of the 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, clearly marked in the consciousness of the local actors. Admittedly, Gluckman shows (1968: 165f) that

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<sup>20</sup> van Binsbergen 1988, 1992; Anonymous [J.M. Shimunika], n.d.

<sup>21</sup> van Binsbergen 2007, and extensive references cited there; cf. my earlier assessment of Gluckman's legal work on the Lozi: van Binsbergen 1977.

Lozi society knows ‘rights of mankind’ (*milao ya butu*,<sup>22</sup> 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. These are rules of a very different order than the North Atlantic or cosmopolitan human rights, for the latter obviously belong to the technical juridical domain in the narrower sense. Justifiably Gluckman does not make use of the possibility of translating the Lozi term *milao ya butu* with ‘human right’.

Unmistakably an approach like the one in the present argument, seeking to describe a historic local legal situation in terms of the alien, North Atlantic term of ‘human rights’, takes a distance from an essential strategy in Gluckman’s path-breaking studies: 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 get acquainted with that legal system from the insight, from the 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 which is beyond conscious Lozi legal thought – 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 that perspective may yet be illuminating for that society, in a bid to highlight not so much the uniqueness but the wider correspondences, not the specifically local categories but the partial applicability of cosmopolitan, alien categories.

Meanwhile Gluckman’s work has made it emphatically clear that the Lozi legal system knows certain general principles, formulated in indigenous terms and

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<sup>22</sup> Here, *butu* is the Lozi abstract nominal form of the root  $-(n)tu$ , which is so widespread among the massive South Eastern branch of the Niger-Congo linguistic macrophylum, that that branch was named ‘Bantu’ after the plural personal nominal form of that root (Bleek 1851). In *milao*, *mi-* is the plural abstract nominal prefix, so that (like in Nkoya) the Lozi root *lao*, ‘law’, is strikingly similar to its English equivalent. I have for decades been puzzled by this apparent coincidence. The same root occurs in other Southern African languages, e.g. Tswana *mulao* (e.g. Matumo 1993) but it is rather isolated (already in Shona a different root obtains: *mutemo* (Hannan 1974); Lozi / Sotho / Tswana  $-lao$  ‘law’ does not conspicuously go back to proto-Bantu (Guthrie 1967-1971; Meeussen 1980), and might be a direct borrowing from English – an interesting corrective for our argument on North-South parallels (instead of borrowings) in legal matters. However, also the etymology of the English word *law* is somewhat puzzling: not occurring in other West Germanic languages, *law* is considered to mean ‘that which lies’ (Skeat 1888: 324, s.v.), and thus to go back, not to the proto-Indo-European root  $*oiw-o-$ , ‘law, custom’ but to  $*legh-$ , ‘to lie (down)’ > proto-Germanic  $*lig-ja-$ ,  $*lagj-a-$ , etc. (Pokorny 1959-69: I, 102 f, and II, 424 f). It is not impossible that the Lozi / Sotho / Tswana root goes back to a similar meaning (cf. proto-Bantu  $-dáád-$  ‘to lie down and sleep’,  $-gàdam-$  ‘to lie on the back’ (proto-Bantu  $-d-$  often surfaces as  $-l-$  or  $-r-$  in current Bantu), so that the similarity of the English and the Lozi word for ‘law’ may not be caused by recent North-South transcontinental borrowing but may have long-range causes going back to a common origin in macro-Nostratic (of which both Indo-European and Niger-Congo have been claimed, by authoritative comparative-historical linguists, to be branches, Kaiser, M., & Shevoroshkin 1988).

systematically governing legal life in Western Zambia: the principle of ‘the reasonable man’, and the principle that ‘property rights flow directly from social status and hierarchical relationships’. However, it is equally clear that these principles cannot be compared with cosmopolitan human rights. My aim in this argument is not (as with Gluckman) to demonstrate how and why local law comes into being and reaches effectiveness, but to demonstrate that local African law<sup>23</sup> tallies with the cosmopolitan tradition to a much greater extent than we would suspect from current zealous propagation of human rights by North Atlantic politicians – a zeal that is not without imperialist, hegemonic and condescending overtones. As a contribution to anthropology as a self-contained field of study, Gluckman’s approach is to be preferred; however, one of the missions of anthropology is to represent (to the point of vindication)<sup>24</sup> peripheral societies before the dominant global society, and in that respect my own approach may be justified, as complementary to Gluckman’s, but aiming at goals that are so different that we cannot apply the same criteria of judgment. On the other hand, Gluckman may depart from the representations, concepts and distinctions of the local (legal-specialist) actors themselves, but also he is not satisfied before he has gained a hold on the Lozi legal system in abstract, theoretical and transculturally generalisable technical-legal, often Latin, terms. This suggests that Gluckman, by an emphatically ethnographic detour, yet ends 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-cult whose orientation is largely North Atlantic.

There are other differences, springing 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. Gluckman positioned himself as a researcher at the very centre of the indigenous Lozi administrative and judicial process such as was effectively underpinned by the colonial state. I, on the contrary, worked in remote villages at the very periphery of that indigenous legal system, and moreover I did so at a time when the power of traditional leaders had been greatly 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 (as in my case) the day-to-day social process in villages. The frequent and often vicious conflicts at the village level (even though illustrative of local legal principles) were only relatively rarely adjudicated in formal courts of law; most were contained by informal social control or by the intercession of village elders and village headmen, while some conflict even after passing that stage turned out not to be resolved, only to linger on as suspicions, accusations, sorcery accusations, and downright sorcery. Gluckman has relatively little insight in these non-adjudicated conflicts, despite their

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<sup>23</sup> 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.

<sup>24</sup> A position unmistakable in Gluckman’s own work, especially: Gluckman 1955.

frequency, importance and vehemence. As I argued in a study of Nkoya family law (van Binsbergen 1977), informed by the tangled complexities of day-to-day village life over many years, and situated outside the sheltered, formalised 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 may be compensated 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; my own fragmentary, peripheral, every-day vision is that of the non-specialist villager and of the 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**

Meanwhile our legal sources with regard of Nkoya human rights are less scarce than one would suspect. They comprise oral-historical and documentary data from the 18<sup>th</sup> century on, the results of participant observation in Nkoya daily life, intermittently over a period from 1972 to 1995, my personal presence as a researcher in a great many cases of conflict regulation at all levels, and finally the legal files of the Local Courts in the region, and of the Magistrate's Court at the district centre of Kaoma (the district on which my Nkoya research has concentrated).

We cannot discuss Nkoya human rights without some initial insight in the institutions of formal and more informal legal process: from the head of a household via the village headman and valley chief to the traditional king / traditional leader (*Mwene*). Under postcolonial conditions (after 1964) this structure was revised by the establishment of Local Courts that, functioning directly under the national administration, were to be *de iure* (but not *de facto*) independent from the *Mwene*. After a few decades this structure was revised again by the re-instatement (albeit informally), under the name *Mawombola* ('arbitration') Court, of the traditional court of law attached to the *Mwene*'s royal court; however, the *Mawombola* Court lacks the sanctioning prerogatives of the Local Court, and therefore has to refer the more complex cases to the latter. Incidentally, it is striking that Nkoya human rights find expression in the extra-judicial and informal-judicial dynamics of everyday village life, at least as much as they are expressed within formal adjudication of conflicts. This may be illustrated by the Nkoya human rights concerning children (see below).

The legal power of Nkoya human rights constitutes a problem which cannot be meaningfully discussed without an extensive, theoretically underlined, comparison of the constitutional structure of traditional Nkoya states with modern national state systems with their formal and explicitly formulated constitutional law. Such a comparison is outside our present scope. One of the central questions here is: What is the locus where Nkoya human rights are enshrined, if this is not (of course) in the



form of a formal, written constitution? In fact, what we are dealing with here are legal rules that are not systematically attuned vis-à-vis each other, and that in part have been stored in standardised, collectively administered language expressions (notably in proverbs and in such legal principles as are explicitly cited in situations of conflict regulation); moreover, these legal rules may be especially derived from concrete events involving the violation of human rights, such as murder, rape, accusations of political arbitrariness, the punishment of slaves, etc.

In Western Zambia by the middle of the 19<sup>th</sup> century, at the *eve* of Lozi hegemony, 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 – somewhat comparable with the European Convention, or adoption of the Universal Declaration of Human Rights of 1948, which regulates the trans-statal enforcing of human rights between 20<sup>th</sup>-century states. For instance, cruel tyranny by the Nkoya king Liyoka was a reason for intervention by a Kololo king (the Kololo occupied Barotseland from c. 1840 to 1864, usurping and transforming the Lozi state but, in the process, consolidating the latter). By the same token, a murder committed c. 1885 by Shangambo (the later Mwene Kahare Shamamano), outside the territory and the direct jurisdiction of the Lumbu king Kayingu was yet reason for the latter king to force the offender to pay a substantial fine. Mwene Shiyenge's appalling violation of marriage law (he forced 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 Kololo headman residing at the court of the Nkoya king Shiyenge abducted a woman from the realm of the Nkoya king Shikanda this was no reason Shiyenge to press charges against that headman.<sup>25</sup>

These examples suggest that the human rights which we are discussing here under the ethnonym Nkoya in fact may have had a much wider distribution than the Nkoya language and the Nkoya ethnic identity (the latter, incidentally, only began to be articulated in the nineteenth century). To some extent these rights appear to be enshrined in a region culture that has a much wider distribution than the respective states or kingdoms where they were demonstrably applied.

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<sup>25</sup> For these cases, cf. van Binsbergen 1992. I realise that the mounting hegemony of Kololo, subsequently Lozi, over the Nkoya, make 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 upon the autonomy of Nkoya states. With Lozi claims of Lozi overlordship over the Nkoya since the very foundation of the Lozi state in the middle of the second millennium CE, and Nkoya claims denying such overlordship and stressing Nkoya contributions to Lozi court culture and royal legitimation, it is difficult to determine where the truth lies. However, such complex and contradictory dynamics do not attend the Kayingu case – the latter's upholding of an international, regional legal order seems straightforward.

The same examples, however, also indicate that a precise demarcation of human rights as against other types of legal rules, such 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 clearly intersect and can only be separated by analytical sleight of hand of an artificial nature.

I lack both the data, and the space, to ascertain here whether these two observations have a wide applicability in the African continent, but such appear to be quite likely.

### **Specific human rights in the Nkoya context**

For the traditional Nkoya legal system, we will not systematically discuss all the human rights listed above. Some have been clearly conceived within the societal forms of the North Atlantic industrial society of the twentieth century: the human rights concerning trade unions, education, and concerning the right and the obligation to work. The latter right can hardly mean anything else but the right to wage labour in a monetarised labour market, such has existed only for the last few decades in Nkoyaland; likewise, formal education and trade unions imply formal organisations which had no equivalents in precolonial Western Zambia. By the same token, the privacy of letters has little relevance in an illiterate society, such as that of our region until 1900. The scarce data on diplomatic contacts between royal courts in the 19<sup>th</sup> century (van Binsbergen 1992) 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 the other human rights, in part also because migrant labour and urbanisation 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 has already extensively pointed out 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.

### **the principle of equality: equality of all citizens before the law**

Precolonial Nkoya society knew an hierarchical ordering of kings, freemen and slaves. Slaves<sup>26</sup> in fact constituted a complex category, comprising on the one hand pawned freeborn individuals, on the other hand individuals who has been acquired as property

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<sup>26</sup> In the 19<sup>th</sup> century cultural and political boundaries between the Ila and the Nkoya, especially the Mashasha, identity were vague; hence Tuden's (1958) study of slavery among the Ila is also relevant for our present goal; also cf. van Binsbergen 1992: *passim*; and Smith & Dale 1920.

by birth, as war captives, or through purchase. The children of slaves were under a social stigma and often continued to be designated as slaves, but their status was not entirely identical to that of their parents. In fact many children of slaves were marginal figures because one of their parents may have been a slave, while the other parent 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) to chose 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; for the slave was legally incompetent, and was considered to be completely devoid of kin who could champion his rights.

The category of kings was not clearly demarcated and the same applied to the category of freeborn men. The state of king (Mwene) was acquired through individual election from among the entire clan owning a royal title. Therefore, outside his official role, every ruling king remained the close consanguineal kinsman or affine of non-royal freeborn men, and largely subject to the normal overall legal rules. We can discern a dynamic process in the course of which kings, in the 18<sup>th</sup> and 19<sup>th</sup> century, sought to differentiate their position fundamentally from that of their freeborn subjects. Thus these kings sought to introduce legal inequality for themselves. However, many cases of the abandonment and impeachment of kings, even of regicide, make it clear that the kings did not succeed in their attempts to create a permanent, different legal category for themselves. They remained largely subjected to the general legal order.

However, within that overall order the king occupied a special place. The king (until well into the 19<sup>th</sup> century the incumbent of the kingship was often a woman) had certain unique, inalienable rights, for instance over all sorts of royal regalia, animal species, game,<sup>27</sup> fishing pools, luxury goods, the royal spouses, etc. The standard punishment for infringement upon these rights was death, or else the most gruesome mutilation. How much the royal law differed from that attending non-royals may be gauged from the fact that 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 only at the installation of Mwene Kahare Kubama in 1994 was no longer followed.

The extent to which the king remained subjected to the more general legal order is clear from the following example. C. 1850 Mwene Shiyenge, male, attempted to place himself outside the general legal order by revised Nkoya family law in such a way that court cases about adultery was no longer be admissible, and he himself in his capacity of king would have unlimited sexual liberties vis-à-vis the women at this court. As an expression of the absolute rejection of his piece of legislation by his followers,

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<sup>27</sup> Cf. Gluckman 1943.

Mwene Shiyenge was denied the tribute on which he entirely depended for his livelihood: kings cannot perform productive labour. Having died of hunger he even was denied a decent burial, 'he was buried by the ants' (Ivan Binsbergen 1992, where also the other cases are to be found).

Among the category of the freeborn also status differences were to be found. A very low status had the court musicians, even though they were clearly distinguished from slaves. The daily performance of the court musicians twice a day at dawn and sunset was the most obvious symbol of the presence of the king at the court, and of his good health; not only was the king saturated with solar symbolism, also 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. In the final years of the 19<sup>th</sup> century Mwene Kahare Shamamano<sup>28</sup> when in his cups killed his musicians on the accusation of adultery with his queens. When the case was reported to Lewanika (whose very own court musicians were Nkoya, like all over Western Zambia), he denied the Kahare kingship the right to a royal orchestra, and only in the 1930s this punishment was revoked.

Slaves however did not share in such protection from the general legal order. Their status was characterised by the lack of a number of human rights, including that of the integrity of their person and their life. The owner could beat a slave, even put to death, without such behaviour counting as a crime and being punished. Moreover the slave did not have the human right of freedom of movement: the essence of being a slave or a pawned person was that he or she had no residential alternative besides the master's home. This is a very fundamental form of legal inequality in a society where the entire social life of the freeborn consisted in successively playing out, in the course of one's life and career, the various residential alternatives at hand: through moving to a different village (often when social relations in one current village had become unbearably conflictuous) one gained access to a new kin patron, and to new, effectively solidary 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 in the 1910s and its actual social manifestations slowly disappeared in the course of the first half of the twentieth century. However, to this day the villagers, especially in the near vicinity of royal courts, can point out individuals, families and villages that are claimed to descend from slaves and that therefore are accorded lesser actual rights to total participation within 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, objections to courtship and marriage, etc.

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<sup>28</sup> A decade earlier he had inherited the Kahare royal title at the intercession of the Lozi king Lewanika Lubosi, partly in recognition of Shamamano's outstanding performance during Lewanika's Ila campaign.

### **freedom of expression**

The basic idea underlying Nkoya notions of sociability and of (informal or formal) adjudication is the open negotiation between equals, the free exchange of ideas and words, as expressed in the central concept of *ku-ambóla*, ‘to have social conversation, to dialogue’. In this context freedom of expression counts as a fundamental right of every free man. Also mature women could share in this right and as such could speak in communal meetings and court cases, albeit clearly not at the same footing as men. I have no indications whatsoever for some freedom of expression on the part of slaves.

We have already mentioned the Nkoya court musicians. In this connection they take a special place. Their songs<sup>29</sup> contain stereotyped praises 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 the musicians themselves addresses the king about their miserable conditions of life and praises the king for the way in which he quenches their hunger and thirst. The Nkoya consider this clearly as a form of freedom of expression. For people in subaltern roles it is impossible to express his grievances and wishes directly in an interview with the king (protocol prescribes that all official conversation with the king takes place via the Prime Minister – an elected commoner). However the song (an optional element in a repertoire of court songs which are sounded every morning and every even in the inner yard of the royal palace, while the king listens to them inside) is the form *par excellence* in which petitions may be uttered without the high-ranking addressee being allowed to take offence. Now we understand why Nkoya musical culture is pressed into service for political goals under the post-colonial state, in the form of the annual Kazanga festival,<sup>30</sup> a traditional royal harvest festival to be revived in the early 1980s. In the Kazanga festival a representative repertoire of Nkoya music, song and dance is packed into a two-days’ formal programme and performed before a massive audience at the Kazanga festival grounds in the centre of Kaoma district. Here the superior addressee is no longer the king (whose presence at the festival has been relegated to a piece of folklore itself), but a national state’s minister or junior minister, whilst the entire Nkoya people takes on the role of musician-underdog in this connection. In this very different context, again, one prefers to use music instead of verbal petitions and mass demonstrations, confident that music is the time-honoured means for the person in a subaltern role to express his opinion and needs.

Criticising the king openly and frankly was a generally recognised and used right of free villagers, especially of members of the royal council consisting of hereditary village headmen – often close kinsmen of the king anyway.

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<sup>29</sup> A collection is offered by Brown 1984; also cf. Kawanga 1978.

<sup>30</sup> Cf. van Binsbergen 1992, 1995, 1999, 2000, 2003.

Having focussed so far on freedom of expression in a constitutional context set by the state and its highest officer, the right to freedom of expression also existed explicitly 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 (girl’s puberty rites, name-inheriting rites, funerary rites) it was, and still is, usual for particular individuals to expose the shortcomings of others present in improvised mockery songs, addressing adultery, laziness, defective bodily hygiene (especially a woman’s failure to keep her own body, and that of her male partner, free from visible hair in the armpits and pubic range), defective discharge of marital and kinship obligations, excessive boasting. In the ceremonial context of such public festivals, the victim is not allowed to take offence – even though in most contexts outside such festivals criticism between equals would easily lead to court cases on the ground of insult. But even though the victim may not take openly take offence, the publicly sung mockery often results in resentment, fights, and even in the victim’s suicide.

Unmitigated freedom of expression, finally, occurs in the specific context of joking relations, such as exist between the members of paired clans, e.g. between the Smoke clan (*Wishe*) and the Firewood clan (*Mukuni*), whose complementarity becomes manifest once one realises that it is the destruction (burning) of firewood for the production of smoke, which enables the honey-hunter to smoke out bees from their nests and appropriate their honey.<sup>31</sup> 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 explicit permission, but with impunity: such appropriation is not admissible for persecution as theft. The also can say anything to each other, including (what would otherwise have been)insults, and far-reaching sexual allusions, even touch each other’s body in the most private and intrusive manner, without offence. Paired clanship also makes the joking partners in question into classificatory grandparents and grandchildren, realising that few generations ago the one group has given a wife to the other group – often after an episode of intergroup violence. Such joking relations are not limited to the Nkoya but are found all over Zambia, even in modern contexts of urban ethnicity – where for instance Lozi and Tonga, and Bemba and Nsenga, are each other’s joking partners / grandparents.<sup>32</sup>

### **right to association and meeting**

In many situations (festivals, court cases, rituals, funerals) to which the human right of association and meeting could be more or less applicable, people could assemble at

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<sup>31</sup> Thus Smoke acts as a catalyst linking the firewood clan with the clan associated with 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; clan systems with a remarkably convergent nomenclature are found all over Bantu-speaking Africa), but also elsewhere in the Old World, from Japan to the Aegean region; cf. van Binsbergen 2009; also cf. van Binsbergen 1992.

<sup>32</sup> Cf. Stefaniszyn 1950, 1964; Tew 1951.

the initiative and in the presence of the village headman, valley chief or king. Under those conditions it is difficult to assess whether their meeting would also have been possible without the explicit approval of such dignitaries of the precolonial Nkoya state.

However, there were also situations in which a section of the populated assembled without formal authorities present, for instance: the ritual assemblies of the hunters' guild; of cults of affliction venerating supernatural beings different from the local ancestors and thus outside the control of village headman and king;<sup>33</sup> and from the 1920s on also Christian churches and syncretistic cults. All these groups displayed a non-communal model of organisation, in the sense that they brought together people who in everyday life were not each others' neighbours, close kin, or fellow-villagers. In other words, these groups formed 'congregations that did not reflect everyday social organisation but that cut across, even denied and challenged, that organisation.'<sup>34</sup> Sometimes kings and headmen participated in these groups and tried to bring them under their control. In some cases and in certain clearly defined periods the hunters' guild and the organisation of boys' puberty rites (now extinct among the Nkoya) were clearly instruments of power for the king,<sup>35</sup> and as late as the 1930s king Mwene Kahare Timuna sought to use healing cults<sup>36</sup> and anti-sorcery movements for the same purpose. 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 organisations and their meetings. This makes it probable that certain notions of this human right forms part of the traditional Nkoya legal order.

### **freedom of movement**

Above we have already pointed out the fundamental significance of freedom of movement for Nkoya social organisation, and the difference between slaves and freeborn people in this respect. Yet also for freeborn people the freedom of movement knew significant limitations. A freeborn person has a number of residential alternatives on the ground of her or his belonging to the mother's kin, the father's kin, the grandparent's kin, their joking partners' kin, etc. To effect any specific one of these alternatives, by taking up residence in a different village within the territory of the same valley chief and the same king, did not pose a problem but usually did require specific permission with a view on access to new agricultural fields in the new place of residence; such permission was hardly ever refused, but it did amount to a recognition of the valley chief and the king as roles in which (in the popular view) the communal land had been entrusted, or (from the perspective of these high-ranking office-holders themselves) as *Owners of the Land* – a category of the greatest politico-

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<sup>33</sup> Cf. van Binsbergen 1981.

<sup>34</sup> Cf. van Binsbergen 1981.

<sup>35</sup> van Binsbergen 1992, 1993.

<sup>36</sup> van Binsbergen, 1981, 1972.

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 on the power and authority of these dignitaries. For, as in many other parts of sub-Saharan Africa, among the Nkoya, too, power was primarily perceived in terms of the number 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 ended up not exactly as a slave at the court of an alien king, but at least as a suppliant. We see that even for freeborn persons the freedom of movement was limited by the precolonial, indigenous state. In the first few decades of the post-colonial state<sup>37</sup> this principle still obtained: whoever wishes to move to the territory of a different traditional leader (chief, king), still needed a formal letter of introduction from one's original traditional leader – and such a letter could only be obtained as a result of a formal interview, in which the reasons for the move had to be explained and justified.<sup>38</sup> Also royal permission was required for establishing a new village in a unoccupied space, even if the move did not take those involved outside the territory of their original king.

My very detailed biographical data since the end of the 19<sup>th</sup> century, on many hundreds of adults displaying an enormous volume of individual residential moves, and more cursorily my oral-historical data on the 19<sup>th</sup> and 18<sup>th</sup> century, make it clear that these limitations were only of a relative nature, and easily overcome. Moreover, part of these residential moves in the precolonial past have to be explained not from individual motives of maximising (of access to hunting grounds, fields, and a more attractive array of nearest neighbours and close kin) but from the mandatory displacement of a royal court after the demise of a previous incumbent of the throne.

Next to residential movement, the freedom of movement for the sake of trade was of considerable importance. The kings had no effective trade monopoly on local produce (except for royal things such as leopard skins), but they did aspire to control over the long-distance trade with Portuguese, Ovimbundu and Swahili. It remains a matter of further research whether itinerant individual local petty traders dealing in local

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<sup>37</sup> My ethnographic data on this point only reach until 1995. There are indications that since, this regime has considerably relaxed.

<sup>38</sup> Throughout the 20<sup>th</sup> century including the period of colonial rule (1900-1964), the management of the Village Book (a register recording, in detail, the population of a village for purposes of taxation) was one of the headman's main prerogatives, and accorded him official status with the colonial state; co-ordinating this interface between the village and the state was, moreover, one of the kings' (now demoted to be called *chiefs*) main claims to authority and recognition. Quite possibly, the rigid settlement pattern associated with the requirement of formal permission from one's traditional leader for nearly every residential move, was in the first place a colonial pattern, projected back into the precolonial past in ways that cannot be ascertained without more specifically focussed further research.



produce (e.g. beeswax, tobacco, ironware)<sup>39</sup> 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 greatly developed among the Nkoya: reed fences and reed mats protect the personal space (especially sleeping rooms, toilets and bathrooms), paths are conducted at some distance from the village yard, and a strong sense of etiquette makes it inappropriate to enter a yard without first having stopped at its boundary, having called for permission to enter, and having waited for that permission.

The human right of the inviolability of the dwelling on the one hand regulates the 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 the relations between citizens: the state and its legal instruments are to protect the dwelling of one citizen from intrusion by another citizen. I would not know of any cases from which we could derive local historic views concerning the access of traditional Nkoya state officers to Nkoya citizens. However, numerous court cases among the Nkoya involving theft, adultery, premarital sexual intercourse, are juridically admissible also on the grounds that they amount to a violation of the privacy of the home. An example from c. 1860 is the following:

'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.'<sup>40</sup>

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

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

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<sup>39</sup> In addition to the Zambia National Archives (some relevant files listed in van Binsbergen 1981: 399f), information on the extensive volume of local trade in the 18th and 19th century can be gleaned from the following publications: Miracle 1959; Flint 1970; Gann 1954; Guiggin 1974; Roberts 1971; Sutherland-Harris 1970; Tabler, 1963; Vansina 1962; von Oppen 1993.

<sup>40</sup> *Likota Iya Bankoya*, ch. 44: 3f; see van Binsbergen 1992, italics added.

Nkoya state could develop, in the course of the last few centuries, because of the rise of a violent, male-centred ideology. This denied and eroded the principles of the pre-state world-view in Western Zambia: an harmonic and beneficial interplay – with great female contributions – 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, provided humans refrained from murder, incest and sorcery. With the new ideology the state appeared as the main institution of violence, saturated with contempt for the human person and for human life.<sup>41</sup> An executioner’s axe and executioner’s sword still belong to the regalia of Nkoya kinds, and in these respect they are at a par with their Lunda en Luvale neighbours among whom the major royal regalia consists of the horrible *Lukano*: a bracelet woven from human penises. Among the Nkoya, executioners (*Tupondwa*) make part of the formal organisation of the royal court, and their task was not only to execute criminals after due process (a task now reserved to the central administration), but especially imprinting the population with a sense of royal terror – and the latter task they have continued to discharge throughout the 20<sup>th</sup> 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 – which makes the king an ogre and a witch in the eyes of his subjects. The executioners also guaranteed the populations’ preparedness to pay tribute to the kind, and to supply corvée labour for the upkeep of the palace. Important events in the life cycle of the royal court demanded human sacrifice, such as completing the royal fence or the palace itself, or the interment of a king. Also the royal drums required human sacrifices, like among the Lozi. Nothing indicates that these practices are entirely things of the past, on the contrary.

Especially for the 19<sup>th</sup>-century, male Nkoya kings there are plenty of reports concerning their arbitrary, blood-thirsty violation of the human right of the unassailability of the human person. These reports, however, at the same time indicate that such state action was clearly seen, by the general population, as the violation of a human right.

For, against the ostentatious contempt for the person and human life on the part of the Nkoya state, we should mention the very strong emphasis on these values in daily life among the Nkoya villagers. Violence and sexuality constitute the two obvious conditions to test the existence and application of this human right. Towards the end of my argument we will see how the human right of the dignity and of personal and bodily integrity, from a Nkoya perspective may be seen not as isolated values, but as the specific application of a more general fundamental right: the right to ‘the good life’. Also another cosmopolitan human right, that on the freedom from inhuman treatment, may also be accommodated in this place. If we may then juxtapose the

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<sup>41</sup> van Binsbergen 1992; also 1993, 2003b.

village and the royal court, we can only conclude that the village offers a much more ideal situation for the enactment of this human right, than does the royal court. Hence my emphasis, in other studies, on the cultural discontinuity between royal court and village in this part of Africa – as an important aspect of state formation in the precolonial period.

In regard of violence in village situations today, outside the context of kingship, we may say that such violence occurs only very rarely, while even the mere threat of violence is actionable in court, and *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 accepted to avoid a provocation to violence, even to flee from it), result in a situation where intra-village violence is limited to situations of extreme provocation, to drunkenness, or to a crisis psychosis (notably in cases of sorcery accusation and of bereavement – which tend to go hand in hand, since the notion of natural death has remained alien to the Nkoya life world).

In regard of sexuality, we should in the first place mention that the domain of personal integrity does not coincide with what is understood by this concept in urban North Atlantic society today. Among the Nkoya, merely looking at, or even touching, whatever part of the body (except the sexual organs in the narrower sense), regardless of whether it 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 between unequals, regardless of gender and age, and thus appears to constitute a neutral lightning conductor for social and erotic tension. As a result, a much larger part of Nkoya society is immune from the sexualisation and erotisation than is the case in North Atlantic society today. For instance, until deeply into the twentieth century female breasts constitutes body parts that could be freely displayed in public; only the last few decades this view has changed. Even the sexual organs are not beyond the view or touch of recognised joking partners, and with impunity. However, a totally different matter is sexuality (which among the Nkoya is almost exclusively conceived as heterosexual genital coitus). Coitus clearly falls outside what is permissible in joking relations. On the one hand, a married woman's sexuality is the exclusive prerogative of her husband – as a result, violation, by another man, of this right acquired from marriage, is a private-law offence, and as such admissible for adjudication. The only traditional exception to this rule is the recognised sibling equivalence i.e. the mutual interchangeability (from a point of view of permissible sexual access) of sisters, and of brothers – provided it is applied with discretion.<sup>42</sup> On the other hand, a man, even a

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<sup>42</sup> Therefore the quarrel between Mwene Shikongi and his younger brother the then Prince Munangisha must probably be interpreted as an offence against things royal (in this case: the Queen) rather than as brother-in-law / sister-in-law adultery *tout court*. For in Nkoya society, the latter form of transgression is very far from exceptional given the principle of sibling equivalence, and under certain conditions (prolonged absence of the lawful husband) even openly tolerated.

male spouse, must ask his female partner's explicit permission for every new coitus, regardless of the existence of a permanent sexual relationship between those involved, regardless even of marriage. A man's coitus with his own wife while she is asleep is an actionable offence, even a recognised ground 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 do it with a corpse' – witches are reputed to engage in necrophyllic sexuality.

The principle of the integrity of the human person and dignity is also clearly reflected in Nkoya views on children. Children are greatly beloved and receive plenty of affection, they are seen as scarce (which is justified by the strikingly low reproduction record of the Nkoya), and there is great competition between kin group over the actual control over specific children. This must be seen against the background of a bilateral kinship system where each child effectively belongs, with equal strength, both to the mother's and to the father's kin. Kinsmen from all sides constantly scrutinise each other's behaviour as parents and educators in order to catch each other committing recognised offences, which are then vocally exposed. The reason for such criticism is not only the hope of taking over the control (hence *de facto* the custody) over the child from rival kin, but also the more principled point of view that a child is vulnerable and may easily be forced to do things beyond his age and capabilities. If a mother allows her small child to burn its finger when making the kitchen fire, or to sustain other light injuries, then immediately her sisters-in-law will rush to her and demand a compensatory payment of a few pence (the price of one helping of home-brew village beer), which will then be made in the best of spirits. More serious is the case when one of the parents or care-takers imposes upon the child beyond the accepted limits of its age and capabilities. Whosoever tells a toddler to fetch a bucket of water that is clearly too heavy for the child, not only invites general ridicule, but also risks that all women of the village burden the offender with accusations, threats of pressing charges, and terrible insults. Such punishment is already invited by such an apparently minimal offence as letting a baby bounce and dance on one's knee. In such a case it is far from imaginary that all women of the village, to the offender's dismay and humiliation, take off all their clothes on the spot, and throw themselves naked upon the offender, shouting:

'Very well, you wanted us to dance? Now we shall dance!'

Note the complete identification of the adult women with the wronged child. What is in fact involved here is that disrespect for the child's natural limitations is symbolically reduced to a reference to uninvited sexuality as (after murder) the most blatant violation of bodily integrity imaginable; lack of respect for the child is transformed into rape, and the group of village women, in their formidable expression of vocal gender identity (all the more reinforced by the extensive puberty rites which they have all undergone) becomes some sort of anti-rape brigade. Meanwhile there is here also an element of sacred nudity: the protesting, nude women also invoke the

power and identity of the ancestors, the ultimate defenders of every child (and every human being in general).

This respect for the human dignity of the tiniest members of human society has a profound background: the circle of generations is closer time and time again, and the youngest generations are considered to be reincarnations of the elders who passed away long ago. They bear their names (given to them during elaborate and breathtaking name-inheritance ceremonies),<sup>43</sup> and therefore they are often addressed by their very parents by the kinship terms that are normally reserved to address parents and grandparents. Little children not only represent the, demographically so vulnerable, hopes of the kin group, but also its past and hence its normative order.

The public humiliation just described 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, to which we shall come back below. Instances of such humiliation are rare (people avoid to risk its administration at all costs), and this distinguishes them sharply from the most characteristic forms of social control among the Nkoya people: singing of improved mocking songs at festivals, as discussed above.

### **freedom of religion**

This appears to be a value which hardly resonates with precolonial 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 considerable role. The dynastic branches which, after a few centuries, would produce the current dynasties among the Nkoya people, left their Lunda overlord Mwaat Yaamv in Southern Congo after several humiliation (they are allegedly housed at the capital's pigsties), and the Nkoya rejection of the male puberty rites (*Mukanda*, involving male genetic mutilation) which were controlled by the Mwaat Yaamv.<sup>44</sup> The tradition of the Humbu war (which present-day informants would situate somewhere in the second half of the 18<sup>th</sup> century CE) is interpreted as the Lunda king's attempt to impose these male puberty rites once again. In fact the history of the Nkoya's relation to 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 re-introduce *Mukanda* – but it is significant that he did not succeed.<sup>45</sup>

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<sup>43</sup> van Binsbergen 1981, 1990.

<sup>44</sup> van Binsbergen 1992, 1993.

<sup>45</sup> This is the version of Nkoya history are presented by my numerous oral-historical informants since 1972, and as rendered in my extensive study of Nkoya precolonial state formation, *Tears of Rain* (1992). That book was predicated on a literalist, more or less presentist reading of Nkoya oral traditions: as if these dealt predominantly with real events taking place in South Central Africa in the last few centuries before the imposition of colonial rule. My subsequent, extensive exposure to global comparative mythology and to the texts and traditions of the Ancient Near East, West Asia and South

The nineteenth century in Nkoyaland saw the rise of cults of affliction, imported from elsewhere (especially from the East). This diversified the range of religious expression in Western Zambia – until that time ancestral and royal ritual has been paramount. In the twentieth century this diversification proceeded further with the arrival of a variety of Christian missions and of syncretistic cults. Traditional leaders did give selective and partial support to these developments, but they did not jeopardise 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 human right is certainly relevant in the Nkoya context, as is manifest from an enormous emphasis on litigation, from the enormous amount of time reserved for litigation, the care with which recognised procedures are considered and applied, the opportunity which all adults have (including women) to participate in the legal process, etc. Of course, this does not at all imply that the rules of legal proof and of sentencing are parallel to those applied in North Atlantic courts of law. Of 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 may apply all over the world.

The human right to due process was not always effectively applied. Kings have a considerable freedom in the imposition of punishment, including capital punishment. However, the case of Mwene Shamamano's musicians demonstrate that this freedom was not unlimited. Another form of defective legal course, or even its absence, is that

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Asia, brought me to consider an alternative reading of Nkoya traditions: as the greatly reworked and localised versions of fragmented mythical material circulating all over the Old World, and in part hailing from Ancient Egypt and the Ancient Near Age. The Nkoya traditions about the exodus from Mwaat Yaamv capital, the arrival in present-day Nkoyaland, and the selective renunciation of male puberty rites, can be argued to contain parallels with the Exodus (now considered to be largely mythical as well, by specialists in Biblical studies) of the Ancient Israelites from Egypt to the Promised Land (not necessarily mediated through Christian or Islamic teaching – also flood stories similar to that of Noah are found in South Central Africa, as a result of precolonial and pre-world religion continuities), – and with the Gypsies from South Asia, fleeing a brutal Muslim king seeking to impose circumcision. Nkoya traditions associate the earliest kings with ironworking and music, the very specialties in which Gypsies have excelled throughout the Old World; the alternative name of the Kahare kingship is Kale, which throughout the Old World serves as a Gypsy personal name meaning 'Black One'; Mwaat Yaav, although the name of a recognised major kingship in Southern Congo, in fact means 'Lord Death', and the traditions surrounding this kingship merge with mythical themes, throughout the Old World, of the king of the underworld. Cf. van Binsbergen 2010. For our present argument, it is immaterial which interpretation of the Humbu war etc. 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 as recorded in the early 20<sup>th</sup> century, and therefore indicates the existence of some parallel to the human right to freedom of religion.

of so-called *instance justice*, which was still found in South Central and Southern Africa in recent decades. In these cases a crowd, which mass-psychological processes have easily convinced of the guilt of a particular individual in their midst, and keen of having satisfaction, proceeds to physical violence onto the targeted perpetrator, even to the point of killing (lunching), without a trace of objective due course. Today, the perpetrators are usually suspected of theft in public urban situations such as the street, the market, and the bus station. In 19<sup>th</sup>- and early 20<sup>th</sup>-century Nkoyaland sporadic cases occurred of lynching of fellow-villagers suspected of sorcery.

This already demonstrates that the human right asserting someone's innocence until guilt has been proven, does not lie deeply anchored in the Nkoya legal consciousness. Or perhaps we should say that, in addition to due process, one allows other procedures in order to demonstrate guilt. Her divination, rumour and personal intuition came and come often in the place of due process. This is already clear from the constant stream of sorcery accusations, which have continued to constitute an important aspect of the social process among the Nkoya, and most of which remain without formal adjudication.

Outside the context of family law I have no indications of specific and deliberate innovations of local traditional law, and hence I have no means of ascertaining whether there could have been a local human right preventing the retrospective application of new legislation.

### **freedom from slavery and forced labour**

We have already seen that this human right has certainly no equivalent in the traditional Nkoya situation: slavery and corvée labour for kings (also by freeborn persons) have belonged to the realities of Nkoya life right up to 1930, and traces of these institutions can still be found. Meanwhile the polarisation of Nkoya ethnic consciousness in the face of Lozi hegemony has led to a situation where, for Nkoya after 1950, slavery and forced labour are seen in the first place, and in a very negative sense, as associated with the high-handed practices with which Lozi rules imposed on Nkoyaland from the late 19<sup>th</sup> century. However, the Nkoya kings' own practices did not differ markedly from those attributed to their more powerful Lozi colleagues. Therefore we seem justified to see, in these Nkoya remonstrations, not so much the indications of a deep-seated local human right against slavery, but merely the selective application of a cosmopolitan, modern anti-slavery idiom.

It is somewhat remarkable that, to the best of my knowledge, notions of slavery and forced labour were hardly ever applied to the experiences of many Nkoya labour migrants, since the 1860s, as mineworkers and farmhands in Zimbabwe and especially South Africa. Over the decades nearly all of my Nkoya informants, and especially those having themselves worked, (often for decades) as labour migrants in the South, seemed to lack all awareness of the despicable nature of colonial and capitalist

exploitative production relations. The colonial period was, in retrospect, euphonized as a period of plenty and unlimited movement, sharply contrasted with the miserable conditions that came to prevail in the countryside of 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 from 1965. Lest the reader may think that I am merely imputing my own prejudices to my informants: the latter's assessment of the colonial and capitalist situations they had lived, never failed to shock me. I undertook my fieldwork in Nkoyaland from an increasingly Marxist point of view, greatly influenced by the radical, anti-capitalist and anti-colonial overtones in the work of Max Gluckman, Jaap van Velsen and H. Jack Simons, who were major influences on my work as a young anthropologist in Zambia. I suppose my informants' surprising acceptance of their experiences under colonialism and capitalism sprang from their own historical contradiction on this point. The racist humiliation, segregation, extensive limitation of their freedom of movement and their being forced to live a bachelor life abroad regardless of their actual age and family circumstances, were probably compensated, in their consciousness, by the much-coveted opportunity to earn, as a labour migrant, cash for hut tax, head tax, clothing, bride wealth, a gun, as well as the opportunity to get away from the local village society, which especially for young males was often conflict-ridden, oppressive and exploitative.<sup>46</sup>

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

### ***Nkoya human rights that do not seem to have equivalents in the usual cosmopolitan catalogues of human rights***

I have already indicated the artificial element involved in the approach we have followed: the demarcation and serial treatment of a distinct category of human rights within the ensemble of Nkoya culture and society. Although to some extent inspiring and illuminating, this is not an approach which does full justice to the specifically unique nature of Nkoya culture and of its legal system. Not only do we make distinctions which are not, or were not, made by the local actors themselves; also our departing from existing, cosmopolitan categories of human rights imply the risk of overlooking that which Nkoya participants themselves would prefer to see as their most central human rights.

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<sup>46</sup> Cf. van Binsbergen 1975, a.



This central human right lies in the ideal of ‘the good life’, *ku-ikāla shīwáhe*, ‘to dwell, to life, to reside, in well-being, in good will’. This means freedom from illness and hunger, from unnecessary conflict and fear, and especially, freedom from sorcery.

For centuries now, every Nkoya individual has played a part in a remarkable musical chairs: born in a particular village, she or he reshapes, through residential moves, (a) his or 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 (b) the composition of the cluster of co-residing kinsmen (fellow-villagers), in such a way that in the result the central Nkoya life’s ideal finds optimal realisation. The ideal kin patron is the one who enables his follower/fellow-villager to enjoy ‘the good life’; the bad kin patron is the one who fails in this obligation – who, because of his own conflictuous, ambitious and sorcery-ridden behaviour, threatens the stability and integration of his village, and fails to satisfy his junior followers, but instead exploits them for his own material and mystical power ambitions. Every residential move of an individual or a family is inspired by the hope of finally landing in the ideal, beneficial kin environment; and every case of illness, death, crop failure or misfortune destroys that hope again, and confirms the suspicion (always lingering deep down anyway) that it is precisely the senior members of the village who, despite their heavy obligations and their adjurations to the contrary, abuse these juniors, frustrate their life’s ideal, and turn them (literally) into mystical sacrifices to unseen evil forces. Because of the tendency to virilocal residential rules, and the very small average size of villages, also for most women marriage means a residential move to a different village, and in her contracting a marriage (most women are married rather more than once in succession) she too is primarily guided by the hope of finally securing ‘the good life’ – the new spouse represents a package of new and hopefully more positive affinal relations.

Nkoya dependents ‘*vote with their feet*’, they express their opinion in the first place by moving away; the latter, rather than litigation, is the obvious response in the (almost inevitable) case that after a few years a particular kin patron turns out to be disappointing. 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 realising the ideal of the ‘good life’; for his dependents. This may serve to attribute to this ideal the status of a central human right, in the Nkoya context.

The opposite of ‘the good life’ is sorcery, the calculating manipulation of persons and relationships with total contempt for the personal dignity and integrity, sacrificing the property, health and even the life of these others for the benefit of the witches’ own power ambitions.<sup>47</sup> Freedom from sorcery is an explicit human right within Nkoya

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<sup>47</sup> On sorcery among the Nkoya, cf. van Binsbergen 1981, and 2001.

society, albeit one that has hardly been admissible for formal adjudication within, or even at the periphery, of the national legal system, given the specific nature of colonial and post-colonial national legislation, which sees not witchcraft – for that ‘does not exist’ – but the accusation of witchcraft as an actionable offence.<sup>48</sup> Contrary to other parts of South Central Africa, also for the precolonial period we have hardly any data on formal legal procedures in which Nkoya state officials confront sorcery activities. This may perhaps be understood because these officials tended to be structurally perceived as sorcerers themselves (because they effected the explosion of the traditional world order into violence and power ambitions, largely forced to do so because of their mutual rivalry). The only sorcery court case which I myself attended in all those years among the Nkoya, in 1973, 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; hence the court had the format and the rhetoric, but not the prerogatives of an Nkoya Local Court of Chief’s court (van Binsbergen 1975). In the course of the 20th century the battle against sorcery was in the hand, not so much of traditional leaders and of Local Courts, but of religious leaders (van Binsbergen 1981, 1992). This leads us to pose the question whether a human right that is not, 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 1930-50s 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* ordeal:<sup>49</sup> the accused was forced to drink an alkaloid poison prepared from the bark of the *mwave* tree – if he or she vomited the poison he would live, and in the other case the poison would kill the accused.<sup>50</sup> From the late 1980s to the mid-1990s Nkoyaland was the scene of the activities of a witch hunter called Tetangimbu, hailing from Kalabo west of the Zambezi, and identifying as Luvale. With minimum admixture of Christian elements, and operating his own private grave yard of exposed witches, Mr Tetangimbu had modernised the *mwave* model by the exclusive use of agricultural

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<sup>48</sup> The situation which 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. Witchfinders such as Mupumani (1913) were prosecuted for vagrancy and breach of the peace (van Binsbergen 1981); and while the 1950s saw an enormous increase of 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 get access to the process documents in question (see below), suggest that this situation is changing in recent decades.

<sup>49</sup> For identification of the tree, cf. Gilges 1974.

<sup>50</sup> On witchcraft eradication movements in South Central Africa, cf. van Binsbergen 1981, van Dijk 1992, Geschiere 1994, and extensive references cited there.

pesticides, which in 100% of the cases led to the accused's death. 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 greatly applauded Mr Tetangimbu's actions as an extremely effective enactment of their most dear human right, the freedom from sorcery.

## **Conclusion**

Our last example demonstrates that the situation of human rights in a traditional African environment does certainly not entirely coincide with the human rights circulating within the 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 – not clean 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 – despite recognised exceptions such as Botswana. It is rather surprising to conclude that our judgment as to the arbitrariness and terror exercised by many African states would have been scarcely less negative if our assessment would have been based, not on North Atlantic . cosmopolitan human rights catalogues, but on the human rights which already articulated themselves in a small part of Africa, Nkoyaland, on the eve of the colonial period – while we have reason to believe that Nkoyaland was no great exception in pre-colonial Africa. Such insight prompts North Atlantic humanity, and brings us all to further reflection. Much further research on human rights within the African traditions is needed, not only from a desire (now somewhat dated) to vindicate Africa and Africans, but also because here may lie sources of inspiration which could help us in our attempts to formulate cosmopolitan catalogues of human rights which, cleansed from North Atlantic / Western ethnocentrism, could have a truly global appeal. Little would be more in line with Gerti Hesselings's Africanist research over the years.

If a South Central African people on the basis of established ethnographic authority can be demonstrated to have extensive, time-honoured parallels to North Atlantic formal human rights catalogues, this has considerable consequences. 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,<sup>51</sup> even though their accounts are not specifically organised 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

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<sup>51</sup> Cf. Gluckman 1967 (1957), 1965, 1969; Holleman 1952.

may not even be unique in sub-Saharan Africa. This insight may help us to better understand the African response to colonisation 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 somewhat reconsider the facile (essentially cultural-relativist, condescending, and hegemonic) schemes popular in studies of the reception of allegedly alien North Atlantic constitutional law in the, allegedly pristine, African constitutional context: perhaps it was not absence of the idea of human rights, but popular perception of the cynical, ethnocentric and class-ridden, selective *application* of *familiar* human rights that led to the specific popular political responses recorded by modern historians. 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 both 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 citizen's rights (despite the prevalence of slavery!) throughout West Asia, both shores of the Mediterranean, and Europe, from the Bronze Age on. The throbbing pulse of ancient and medieval history, in these regions, is seldom considered to have been continuous with pre-Modern sub-Saharan Africa – the latter is usually considered to have been largely isolated, and largely aloof from global developments. However, my recent work (exploring on very different topics than human rights: comparative mythology, comparative linguistics, and the comparative ethnography of what I have called 'the Pelasgian realm' ranging from West Asia to the Central Mediterranean) suggest far greater continuity throughout the Old World, and would make it thinkable that the Nkoya human rights tradition, and that of the North Atlantic region, ultimately hails from the same prehistoric or protohistoric epicentre.<sup>52</sup>

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<sup>52</sup> Ten years ago my support for Afrocentrism including the Bernal variety would have made me assert that this ancient epicentre was to be found inside the African continent, but in the meantime I have learned to appreciate the great and largely independent contribution from West Asia – linked to sub-Saharan Africa primarily through the Out-of-Africa Exodus (60,000 before present) and the Back-into-Africa (from 15,000 before present on, but intensified in the Bronze Age). Cf. Asante 1990, 1992; Diop 1987, 1955; Bernal 1987; van Binsbergen 1997, 2000, 2010a, 2010b; van Binsbergen & Woudhuizen, in press. Extensive references to genetic studies supporting the Out-of-Africa and the Back-into-Africa hypotheses may also be found in my recent publications cited here.

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