

Justice: Beyond the limits of law and the Namibian Constitution¹

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The quest for justice – An introduction

Providing answers to the quest for justice is the objective of jurisprudence. Modern constitutionalism is the translation of years of debate between legal positivists and those believing in ideals of justice in existence outside the realm of law. Legal anthropologists and sociologists of law have added conclusions from research in different socio-cultural circumstances, and have shown that law is not a monolithic code of rules, but has many faces, even in a given, hence, legally pluralistic society. Work on legal – or, in a wider sense, normative – pluralism has changed the thus far dominant approach to jurisprudence, for which the law of the state was *the* law. The dominant approach of jurisprudence interpreted law as state-centred. Legal pluralism, on the other hand, views law as a complex societal phenomenon to which the state contributes – but so do the people of a society who generate law as an expression of their concepts of *justice*. Whether or not the law by the state and the laws by the people will meet in peaceful coexistence will depend on the circumstances prevailing in a given society. Whether or not the various normative codes in a given society – legal codes in the strict sense of the word or normative codes beyond the world of law – will be able to play their roles as societal orientations complementing each other will depend on how the stakeholders in that given society will interpret *law*, the plurality of laws, and their relationships to the aforementioned other normative codes.

The Constitution of the Republic of Namibia is one of the first constitutions in Africa to take a clear stand on the position of customary law. In Article 66, Sub-article 1, the Constitution confirms the validity of customary law and places it on the same level of recognition as the colonially inherited common law of the country, the Roman–Dutch law. For Namibia, 20 years of independence are also a clear demonstration of the peaceful coexistence of the law of the state and the customary laws under the administration of the various traditional authorities operating in terms of the Traditional Authorities Act.²

1 An earlier version of this paper was presented as the First Antony Allott Memorial Lecture, held at the School of Oriental and African Studies (SOAS), University of London, on 17 January 2006. I wish to express my gratitude to SOAS and, in particular, to my colleague and friend Prof. WF Menski of SOAS for honouring me with the invitation to pay this scholarly tribute to Allott, the promoter of African Law as a distinct member of the families of laws. An amended version of the paper was read on the occasion of my official farewell from the Faculty of Law of the University of Namibia, held on 16 October 2009. It is my special pleasure to extend also my thanks to all my colleagues in the Faculty in the establishment of which I assisted and in which I served since its inception in 1993.

2 No. 25 of 2000.

However, a closer look at the dominant comprehension of the law shows that a deeper appreciation of the concept of *legal and normative pluralism*³ would have led to a discourse on law that would have been more conducive to achieving what law sets out to achieve: justice, more justice.⁴ I will illustrate this in analysing two cases decided by Namibian courts and another that has occupied public debate for some time, without having reached a solution. The analysis of the three cases will focus on one very particular element of the concept of *legal pluralism*: the *limits of law*, as they were introduced into jurisprudence by Antony Allott.

Allott's *The limits of law*

Allott's *The limits of law*⁵ has intrigued me ever since I read it for the first time years ago. Indeed, it offered the concept of *limits* to me as a tool of interpretation in circumstance in which I would never thought of applying it before. I wish to illustrate this experience with a thought-provoking example.

Some time ago, the South African *Business Day* newspaper published a comment by – as the author described himself – a “black gay South African”⁶ about the South African Constitutional Court's decision in the Fourie case⁷ on the legal status of same-sex relationships. The decision, which was handed down some days before the comment was published, was eagerly awaited: it followed an extensive public discussion of what the status of same-sex relationships would be under the Constitution of the Republic of South Africa, which guarantees the right to sexual orientation in its Bill of Rights.⁸ Although the Constitutional Court was clear about the constitutional recognition of same-sex relationships, to the disappointment of many it avoided – in its majority opinion – the immediate translation of this constitutional verdict into an amendment of the South African law that governs marriages. The court's opinion instead held that it was to the legislator to provide for the necessary interventions to remedy the unconstitutional situation with respect to same-sex relationships. For the author of the newspaper comment, however, this was not “far enough”: what he expected from the Constitutional Court was “to simply read the appropriate gender-neutral language” into the existing legal instrument.⁹ In other words, the author held that there was no legal limit that prevented the court from not taking the right to sexual orientation seriously.

Is this reference to the limit of law – or, rather, the alleged non-existence of legal limits – part of a mere general, i.e. socio-political, discourse, or does it also have legal and jurisprudential meanings?

3 Why *normative* has been added to *legal* will be explained below.

4 What will constitute the “more” in justice will be understood after going through the next parts of this article.

5 Allott (1980).

6 *Business Day*, 13 December 2005, p 11.

7 *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (3) BCLR 355 (CC); hereafter *Fourie* case.

8 Section 9(3) of the Constitution of the Republic of South Africa of 1996.

9 *Business Day*, 13 December 2005, p 11.

Scholars of jurisprudence, constitutional law and human rights may feel irritated by this question and ask what makes it worthy of debate. After all, has it not been the sacred obligation of legal philosophy to determine limits to law for the sake of justice? Has it not been the task of human rights to inform us where human rights limit the law? The answer to both questions is “Yes”; but the sociology and anthropology of law will raise their hand to ask, “Have philosophy and human rights delivered what they were expected to?” Responding to this would lead us into controversial fields that we would not be able to plough in this article. We will instead travel into Allott’s *The limits of law* – and beyond.

Allott built the foundation of *The limits of law* over years of work in African law: as a lawyer interested in the application of law, as a researcher of African law, as a legal practitioner involved in law reform, as a legal analyst who eventually had to take note of the confrontations between European law exported to Africa, its (in many cases violent) inroads into the pre-existing African laws, and the manifold reactions of African law to the intervention of imported laws. Allott’s approach to the limits of law has sociological and anthropological facets that have opened up avenues for debate that have not been available in the conventional discourse of legal philosophy and jurisprudence before.

However, acknowledging these avenues is one thing; exploring the landscape beyond the limits defined by Allott is quite another. What is beyond the limited law? Are there other normative orders – not necessarily legal in the strict sense – that have a bearing on law proper?

In my attempt to answer these questions, I will, after giving an account of Allott’s *The limits of law*, briefly enquire what happened to it in the subsequent jurisprudential discourse and from there argue normative expectations beyond the limits of law Allott discussed. I will use the three indicated Namibian cases to enquire about the normative fields that are beyond the law and the field of ethics, and about the extent to which the field of law and fields beyond the usually envisaged sphere of law complement each other.

Allott published *The limits of law* some 25 years ago. James Read commented on Allott’s book in an article written for the 1987 special volume of the *Journal of African Law*, which marked the periodical’s 30th anniversary and, at the same time, celebrated the professional career of its founding editor – Allott. For Read, *The limits of law* presented –¹⁰

... a lively and engaging original survey of the fundamental concepts and nature of law, accessible even to first-year law students, yet authoritative and persuasive in the weight of experience and reflection which informs it.

What was Allott’s aim of investigating the limits of law? His aim was, as he put it in a reply to a critical review of his book, –¹¹

10 Read (1987:13).

11 Allott (1983:147).

... to examine the limiting factors, whether from society, from the form of law-making, the nature of law, or extraneous non-human causes, which restrict the capacity of laws to achieve what they are intended to achieve

In other words, what Allott was primarily interested in were not limits ordered by the natural drive for justice, but the functioning of law as a socially embedded system. In this, he followed Hart; indeed, he refers quite often to Hart's *The concept of law*,¹² from which, as Allott admitted, he "obviously benefited greatly".¹³ Where he deviates from Hart, he does so with a view to amending him, particularly as regards de-Westernising his concepts.¹⁴ Otherwise, following the tradition of positivism, Allott held that the existence of law was not a question of value but of fact. As he put it, –¹⁵

A sentence can be grammatical but be a lie; a law can be valid but unjust.

Therefore, the focus of Allott's *The limits of law* is not on *law* as the general idea or concept of legal institutions, but on *law* as a coherent legal system, and as a rule of a given legal system with factual consequences subject to empirical research.¹⁶ Thus, the effectiveness or ineffectiveness of law is Allott's yardstick in assessing the limits of law. Allott's challenging conclusion is that ineffective law may be ineffective with respect to the designed intention of that particular law, but it will be effective, seen from a broader perspective, ineffective law is to weaken law.¹⁷

Law, being a system of communication has inherent limits because communication has limits.¹⁸ Similarly, the effectiveness of law, being an interactive process between its makers and its recipients, is subject to all possible disturbances that may affect communication. The effectiveness of law is also dependent on the type of society to which a given law is to apply. After discussing the functioning of customary law in what we call *traditional* African societies, Allott comes to conclude that compliance with customary law in traditional societies is higher than compliance with common law in Western societies. Modern societies with legislators that are tempted to impose ambitious legal innovations very often fail to respond positively to these innovations.¹⁹

Social and cultural environments are a further ground for setting limits to the effectiveness of law.²⁰ The colonial and post-colonial projects of translocating Western law to all

12 Hart (1997).

13 Allott (1980:291).

14 I refer here in particular to Allott's chapter entitled "Limits on law from the nature of the society" (Allott 1980:49ff), where he argues three defects identified by Hart as allegedly lacking in what the latter calls "primitive communities" because of the absence of secondary rules in the Hartian sense: the defect of uncertainty, the defect of the static character of rules, and the defect of inefficiency. For the references to Hart, see Hart (1997:78ff, particularly 91ff).

15 Allott (1980:XI).

16 These "three different forms of typography for law" are explained in detail in Allott (1980:1ff).

17 (*ibid.*:159).

18 (*ibid.*:5ff, 73ff).

19 (*ibid.*:66f).

20 (*ibid.*:99ff).

corners of the world have to be assessed with respect to the distinct environmental conditions that developed their specific responses (from various forms of acceptance to resistance) to the translocation of law.

Introducing a further potential limitation of law as a legal system and, in this capacity, excluding it from other normative systems such as religion, morality, societal habits and conventions, Allott notes that —²¹

[/]law is only one normative system among many which compete for the attention and the allegiance of those to whom they are addressed There is not, and never will be, a god-given definition of either ‘law’ or ‘morality’, since each term refers to what is a human construct, the content of which is ever-changing. [Emphasis in original]

Allott, therefore, offers what he calls a “schematic analysis” of normative statements – legal, religious, moral and habitual – which allow at least a structural differentiation of the various systems of norms prevailing in societies²² and, with this, an assessment of the social (socio-religious) limitations that law may have in a given society. If, says Allott,²³ –

... religion, morality or mores succeed in gaining the allegiance of the community in preference to Law, Law is weakened and its norms become frustrate[d]. They do not thereby lose their validity; they merely lose their efficacy. The legal norms cease to describe possible ways of behaving in society. [Emphasis in original]

The many references to findings based on (sociological and anthropological) empirical research cannot deviate from Allott’s practical motivation to translate those findings into statements that are informed by his concept of *democracy* as the constitutional form of general participation in the running of society. The openness to empirical knowledge about the practical working or not working of law is the foundation on which a cosmopolitan view²⁴ of law (*Law* and *law* in Allott’s sense) is built. At the same time, the limits link the interest in the social working of law, in the sense of soft positivism,²⁵ to practical political philosophy. In other words, the never-abandoned, always prevalent question of – and, in jurisprudence, about – what is *good* (or *just*) law returns for Allott in the question about the *effectiveness* of law. Although there is no automatism between *effective* and *good* (or *just*) law, there is some probability that law that respects its limits is indeed good.²⁶

21 (ibid.:121, 122).

22 (ibid.:128ff).

23 (ibid.:140).

24 I use *cosmopolitan* to reflect factually evidenced trends in globalisation which oppose globalisation as a uniformly streamlined process directed by the dominant economic forces in the world economy. Cf. Hinz (2009).

25 Cf. Hart’s use of “soft positivism” in the postscript to Hart (1997:250ff).

26 In pursuing this further, the chapter entitled “The no-law state: Power, dictate and discretion” in *The limits of law* (Allott 1980:237ff, 244) could be analysed. What Allott does in this chapter is [Continued overleaf]

Allott's *The limits of law* has received only limited scholarly recognition.²⁷ An exception is Werner Menski's treatment of the work. In his *Comparative law in a global context*,²⁸ Menski uses Allott's conceptualisation of *law* as one of his gateways into a comparative to law in a globalising context.²⁹ Menski places Allott in the small family of post-modern theorists of legal pluralism alongside Moore, John Griffith and Chiba – the latter being the only non-Western thinker in the ancestry of legal pluralism.³⁰

Why did *The limits of law* not attract more attention? Was the cause the alleged mechanistic conception of legal systems as it that conception was seen to be a major theoretical handicap for Allott to avoid an oversimplified understanding of purpose in law, as suggested by one of the few reviewers of *The limits of law*?³¹ I fail to see the reason for the lack of interest in *The limits of law* lying in its alleged methodological flaws. Epistemological deadlocks have never stopped human beings from engaging in practical philosophy – and rightly so! My understanding, instead, is that the lack of recognition of *The limits of law* has more to do with its topic and the socio-political messages the book offers. Already in *The limits of law*, Allott anticipated that the mainstream jurisprudence would not be in favour of his views on law:³²

When I tried out some of the ideas in this book on colleagues, I was amused to be met with a completely typical and predictable reaction from some of them – this was arrant populism, and only one step from fascism. ... We need not be frightened by this predictable reaction, usually coming from the intellectual elites who would be displaced or cut down to size if account were taken of popular opinion. Why should 'populism' be a rude word in the mouths of the elite, like 'fascist' before it? If 'populism' means *proposing* policies which the people will accept, what is wrong with that? If it means *consulting* people before making decisions or acts which will affect them, what is wrong with that? As I said above, these practices are justifiable, not only on grounds of true democracy, but on the utilitarian or pragmatic ground that they are more likely to be successful.

to look at law and its functioning in the former Soviet Union by, on the one hand, maintaining his positivist approach of law, but, on the other, giving space for questions on the relation between law and power; on the dictate being a source or negation of law; the validity of law (is law what the law says or what people do?); etc.

27 Very obvious proof is that one will hardly find entries on "Allott" or "limits of law" in widely used textbooks on jurisprudence. My special search for reviews of Allott's book (albeit limited, given the constraints in access to sources in a country such as Namibia) did not produce more than what I referred to in this article. Moreover, i.e. on top of no one referring to Allott, they also use 'his' concepts without acknowledging him. Where limits of law – in Allott's sociological/anthropological sense – are discussed, they are without reference to Allott's approach. This statement is not be read as if the concept limits of law was copyrighted to Allott, but to show that publications after Allott's *The limits of law* could have profited from the state of the degree of insight reached by Allott.

28 Menski (2006).

29 (ibid.:108ff).

30 (ibid.:119ff).

31 Woodman (1983:129ff).

32 Allott (1980:289); cf. here also Sanders (1987).

Despite promising developments in Western legal sociology and anthropology since the time of enlightenment, the art of application of law through interpretation has remained at the centre of interest for legal education and research. What the great French philosopher and founder of legal anthropology, Montesquieu, initiated when travelling through Europe, collecting information on the functioning and backgrounds of law and political institutions,³³ was left to anthropology as a subject basically distinct from what law schools have been doing! While the judge is the legal leitmotiv in continental legal systems, in common law systems (including the Roman–Dutch law systems in southern Africa) it is the legal practitioner. Both professions are basically not concerned with the societal side of the law, the perception of law by the people, and the practical consequences of the application or non-application of law.

Looking at law from the societal point of effectiveness is tantamount to legal blasphemy of the dominant approach to law in two ways: it challenges the monopolistic authority over law claimed by lawyers, and it links the search for justice to the aspirations and expectations of the people to whom law applies.

Three Namibian cases

I will now turn to three cases in Namibia as examples of learning about the limits of law in its application.

The first case will highlight problems around the limits of law in the interface between state law and African traditional law. The second case will look at special problems relevant to the limits of law in view of the growing tendency of the Namibian and South African judiciary to extend their scope to what are called *value judgments*. The third case takes the issue of societal values, expectations and aspirations further down the road into the need to promote ethical considerations in a consistent manner, complementing the limited world of law.³⁴

The State v Glaco, or: “To give birth is to dig a mountain”³⁵

This is the case of a young San woman who was approximately 17 or 18 years of age when an incident happened that led to a charge of murder against her. The case *S v Glaco* was decided by the High Court of Namibia in 1993.³⁶

When Glaco learned that her son, who had been sent for medical treatment without her knowledge, was in Windhoek, she decided to go to Windhoek to fetch him. The journey to Windhoek was the first-ever journey Glaco had taken out of an area she had lived in

33 Cf. Stubbe-da Luz (1998:53ff).

34 This case takes special note of Allott’s attempt to determine the place of law with respect to other normative systems.

35 The second part of the heading is a proverb of the *Basotho* of southern Africa.

36 1993 NR 141.

since birth. The area, formerly Eastern Bushmanland and now the Tsumkwe East District in the Otjozondjupa Region, is a remote one.

On her way back, Glaco, who was pregnant, felt that she was about to give birth. The car in which she was travelling stopped and Glaco gave birth to a baby who did not appear to be alive. While some of the people in the car with Glaco suggested burying the baby on the spot, Glaco insisted on taking it along.

Back on the road, the baby suddenly showed signs of life – to the joy of everyone in the car. They decided to take the mother and her child to the nearest hospital. The two were admitted, while the car and its other occupants continued on their way to Tsumkwe. The obviously premature baby was placed in an incubator.

What happened after that could not be fully established. Witnesses testified that they found Glaco in the room where the incubator was, with the baby dead. Glaco, who could not speak a language understood in the hospital, maintained later that she went to the incubator room to clean the baby and that the baby fell while she was carrying it. However, one of the witnesses testified that she saw Glaco twice letting the baby fall to the floor.

A post-mortem of the baby revealed marks on its neck that evidenced the baby must have been throttled. The pathologist's investigation substantiated that the baby's death had been caused by damage to the head as a result of being dropped, and by strangulation.

The court was eventually convinced that Glaco had terminated her baby's life, but recognised the condition—mentally and physically—that Glaco was in after giving birth on the road and then left alone in the hospital without being able to communicate with anyone. The court concluded the case as follows:³⁷

For the rest of her life she must carry in her heart the knowledge that she terminated the life of her little boy. Can there be a greater punishment? ... Her suffering is her deterrent. She needs no sentence to remind her of the horror which she has experienced.

Glaco was sentenced to be detained until the rising of the court (and, of course, the court immediately rose!).

It is open to speculation whether the accused understood the sophisticated logic of the learned judge in delivering a sentence of imprisonment for a second until the court rose. It is less open to speculation whether the accused was aware of the wrath of God that the judge hung over her and her way back home! Whatever the accused might have thought later about what happened at the hospital and in the incubation room, I assume it was certainly not even close to the thoughts of the judge that led to the reasoning of his sentence! As the judge put it, –

[M]y verdict is therefore guilty of murder ...

37 (ibid.:149).

This he conceded after stating that he was relying solely on the cumulative effect of all the evidence submitted to the court for his verdict.³⁸ But although the woman was found guilty of murder, the following were regarded as extenuating circumstances:³⁹

At the hospital ... where she [Glaco, who was otherwise described as “an unsophisticated young Bushman girl”]⁴⁰ was taken to, she was put in a ward, [and] her baby was put into an incubator in another room. She understood that the incubator was intended to help the baby, but this was an alien development in her life. In the hospital no one could talk to her, and she could not talk to no one [sic]. Her language was not understood, and she did not understand any other language. After she was admitted to the hospital, her husband, and those who had brought her to the hospital, left for Bushmanland. Whatever support this young and simple girl had in those most traumatic circumstances, whatever support she had then, was whipped away from her.

The judge also referred to expert evidence according to which women were often “depressed and could do strange things after giving birth, including killing themselves or their babies”,⁴¹ but could not find evidence that Glaco was indeed in such a state of depression.

In other words, the judge of the *Glaco* case had an understanding that he would not do justice to the case by applying his Roman–Dutch criminal law strictly and sentencing the accused accordingly. He understood that the case before him confronted him with the limits of the law applied by him. Not being able to access information on the relevant legal or extra-legal conflict resolution mechanisms of the San, he took recourse to the Christian ethics of guilt underlying Roman–Dutch criminal law. Although this recourse was, at the end, most probably irrelevant to the accused, he could have done more justice by accepting that it was impossible, in the circumstances in which Glaco found herself, for his law to assess the difficulties of “digging a mountain” (in the words of the above-quoted *Basotho* proverb), and more so what constituted the mountain facing her. Trying more justice would have meant accepting the limits of his law by acknowledging them and subsequently closing his book. Not doing this was, indeed, a contribution to making law ineffective law which is to weaken Law, as Allott says.⁴²

38 (ibid.:148).

39 (ibid.:149).

40 (ibid.:148).

41 (ibid.:149).

42 Closing his book would have been a special sign of wisdom, as it was a sign of wisdom by Tatting J to withdraw from the case of the *Speluncean Explorers*, where survivors of an expedition ended up eating one of their fellow explorers in the exceptional circumstances of being confined to a cave without food for a life-endangering period of time. Tatting concluded his judgment as follows: “Since I have been wholly unable to resolve the doubts that beset me about the law in this case, I am with regret announcing a step that is, I believe[,] unprecedented in the history of this tribunal[:] I declare my withdrawal from the decision of this case”. The *Speluncean Explorers* case was invented by Fuller to provoke debate about what *justice* means, and what the challenges are in so-called hard cases (Fuller 1949:616ff). On the Dworkin/Hart controversy as regards the judicial treatment of ‘hard’ cases, see the postscript in Hart (1997:688ff).

Closing the book of Roman–Dutch justice would, nevertheless, not automatically have led to closing the book of justice in total. Should Glaco, in one way or the other, have been responsible for the death of her baby, members of her community would certainly have initiated procedures in accordance with the social and cultural practices of the !Kung San in order to establish what had happened at the hospital, and to determine the appropriate remedy for it. This would most probably have entailed employing their well-known healing methods to get rid of the wounds of the experienced horror.⁴³

Immigration Selection Board v Frank, or: “Even the dead want an increase in their number, how much more the living?”⁴⁴

The *Frank* case, as it is commonly referred to, was decided by the Namibian Supreme Court in 2001.⁴⁵ Frank, a female German national, had applied for a permanent residence permit. Frank’s main reason for the application was that she was living with a Namibian woman in a same-sex relationship, and that the couple had joint responsibility for the Namibian woman’s son. The Supreme Court, hearing the matter on appeal from the High Court, confirmed the refusal of Frank’s application.

In deciding the case, the Supreme Court embarked upon a far-reaching exercise of interpreting the Constitution of the Republic of Namibia in order to determine what the constitutional place of same-sex relationships would be. This was particularly necessary as the Namibian Constitution differs from its South African counterpart in that it does not recognise the right to sexual orientation,⁴⁶ although it recognises the right to freedom from discrimination on the basis of race, gender, etc.⁴⁷

The court recalled a very central statement made in one of the first decisions of the Supreme Court of Namibia where it interpreted *dignity* as guaranteed by the Constitution.⁴⁸ According to this, constitutional interpretation has to start with noting –⁴⁹

... the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as

43 There is literature on the social control and legal norms in !Kung San communities (cf. Marshall 1976:43ff; Thoma & Piek 1997) and on the use and function of healing practices as control mechanisms (cf. e.g. Katz 1982). The Namibian Constitution confirms customary law to be at the same level as common law (Article 66(1)). The Glaco judgment shows no attempt to establish the relevant law of the !Kung San before employing law impregnated with the European-Christian concept of guilt, even though a well-known anthropologist was called to give expert witness in the case. The recognition of San socio-legal concepts could have been taken into account in considering the court’s jurisdiction or the application of the law in terms of the principles the law of conflicts of laws.

44 The second part of the heading is a proverb of the Akan of Ghana.

45 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107.

46 As mentioned in the introduction to this paper.

47 Article 10, Namibian Constitution.

48 *Ex parte Attorney General: In re: Corporal Punishment by Organs of State* 1991 NR 178

49 *Frank* case, pp 136f.

expressed in their national institutions ..., as well as the consensus of values or “emerging consensus of values” in the civilised international community”.

The “national institutions” that are to inform the court about the state of affairs of accepted values include Parliament; the courts; tribal authorities; common law, statute law and tribal law; political parties; news media; trade unions; established Namibian churches; and other relevant community-based organisations.⁵⁰ In order to obtain the necessary information from these institutions, the court is allowed to use all sorts of methods, including “special dossiers compiled by a referee”.⁵¹

However, the court in the *Frank* case did not go that far. Instead, it simply accepted that the President of the Republic of Namibia as well as the Minister of Home Affairs had expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. When this matter of same-sex relationships was raised in Parliament, so the court said, nobody from the ruling party made any comment that opposed what had been quoted from the Head of State and the Minister concerned.⁵²

The *Frank* case represents a trend in Namibian and South African case law. The reasons for the trend to value judgment are apparent.⁵³ The call for value judgments is in response to judgments that, in applying oppressive and discriminatory legislation under apartheid, claimed to follow the rule of law in the very formal sense, i.e. law as it was enacted by the legislator at the time. In correcting this, the courts in Namibia – and later in South Africa – decided to opt for value judgments as an alternative to apartheid positivism.

For the courts to opt for values does not mean there is an automatism between public opinion and court decision. It remains part of the court’s task to decide whether there is, in the words of the Supreme Court, a –⁵⁴

... mere ‘amorphous ebb and flow’ of public opinion or whether it points to a permanent trend, a change in the structure and culture of society.

50 (ibid.:137).

51 (ibid.:138).

52 (ibid.:150f).

53 Referring to values in constitutional jurisprudence in Namibia (and, after the change to democracy, in South Africa) goes back to one of the already mentioned ground-breaking Supreme Court decisions, namely *Ex parte Attorney General: In re: Corporal Punishment by Organs of State* 1991 NR 178. Mahomed AJA, as he then was, refers in this case to the need of a value judgment in interpreting the constitutional concept of dignity in order to establish whether or not corporal punishment violated dignity (ibid.:188). Berker CJ, as he then was, wrote in his separate opinion to the quoted case that “... the one major consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia” (ibid.:197). In addition to this, the court of the *Frank* case refers to a number of subsequent Namibian and South African cases that pursue the concept of value judgment further.

54 *Frank* case, at 138, quoting an earlier High Court decision, namely *S v Vries* 1998 NR 244 at 265.

It is the court's task to evaluate —⁵⁵

... whether the purported public opinion is an informed opinion based on reason and true facts; [or] whether it is artificially induced or instigated by agitators seeking a political power base.

This is a jurisprudential programme of a size that will unavoidably lead us to raise all sorts of concerns prompted by the concept of limits of law!

Indeed, on the one hand, post-apartheid, post-colonial, postmodern jurisprudence has to acknowledge that values and the dealing with values are inevitably part of the business of the lawyer, the lawmaker, and those that apply the law. On the other, jurisprudence has to acknowledge the strong message of *The limits of law* that urges us to test the societal environment in terms of the extent to which the far-reaching employment of controversial values by the judiciary would be conducive to an intended decision, as these intended decisions would otherwise run the risk of becoming ineffective. The fact that Frank was eventually, i.e. after the matter had gone through the courts for some time, granted the desired permit simply by applying for it in accordance with the formal requirements of the law indicates the Supreme Court's de-facto ineffective value judgment.

What would then be the adequate social and political framework for a needed value assessment that would, at the same time, respect the limits of the law?

Judge A Sachs, who wrote the majority of the South African Constitutional Court judgment in the above-mentioned South African same-sex marriage case, was not prepared to close the matter with the stroke of his judicial pen, although the right to sexual orientation – according to his interpretation of constitutional law would have given him safe grounds to do so.⁵⁶ Instead, the court held that it —⁵⁷

... should not undertake what was said to be a far-reaching and radical change without the general public first having an opportunity to have its say.

The court found that there was extensive public consultation over a number of years. Nevertheless, the court did not order the invalidity of the relevant parts of the South African family law, but suspended its invalidity. According to Sachs J, —⁵⁸

[t]his is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered

55 *Frank* case, at 138.

56 In fact, the court reserved this possibility by ordering that, if the South African Parliament failed to correct the Marriage Act, 1961 (No. 25 of 1961) as currently in force, in a given time a judicial amendment of the Act would come into operation that was intended to remedy the unconstitutional situation; see the *Fourie* case at 415).

57 (ibid.:402).

58 (ibid.:406).

that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1⁵⁹ permeate every area of the law.

In other words, although the South African Constitution would, from the point of view of a conventional interpretation, have authorised the court to amend the law in favour of giving same-sex marriages legal status, the court did not do it. Indeed, the court's modest and, thus, self-restricting approach respected the limits of law. The court forced the elected opinion-leaders of the people to work and argue through the possible legislative responses to the need to recognise same-sex marriages. This will also confront those who believe same-sex relations are 'un-African' and, therefore, a 'decadent and immoral Western practice'⁶⁰ with the need to reason their arguments with their opponents. Although it is understood that the quoted Akan proverb "Even the dead want an increase in their number, how much more the living?" emphasises all-African values such as the family, the reproduction of the family, and the continued representation of one's ancestors through the living,⁶¹ the question nevertheless remains how far this family obligation can determine our orientation to life. Judge Sachs responded to this for the court, putting it as follows:⁶²

The Court held ... that however persuasive proactive potential might be in the context of a particular world-view, from a legal point and constitutional point of view, it is not a defining characteristic of conjugal relationships. To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such a relationship or become so at any time thereafter.

The Ovaherero claim for compensation for genocide, or: This is the first time for us to work through what happened to us in 1904⁶³

The case I wish to refer to here is that of members of the *Ovaherero* communities against Germany for reparation for the genocide committed by the German colonial power in the then colony of South West Africa in 1904 and thereafter.⁶⁴

59 The Preamble of the South African Constitution confirms the constitutional foundations for a democratic and open society, while Section 1 defines the principal democratic values such as human dignity, non-discrimination, and the rule of law.

60 This type of argument is found in many political debates in Namibia and South Africa, as well as in other African countries.

61 These values concretise *ubuntu* and its first Grundnorm, *umuntu ngumuntu nga bantu* ("A person is a person because of other persons"). It may be added that the same judge who wrote the majority judgment in the *Fourie* case, A Sachs, employed (together with other judges sitting over the same case) *ubuntu* in his opinion about the unconstitutionality of the death penalty in South Africa; see *S v Makwanyane & Another* 1995 (6) BCLR 665 (CC) at 781ff.

62 *Fourie* case at 388.

63 The second part of the heading represents the words of an *Omuherero* informant interviewed by the author in July 2004.

64 It was only in 2001 that the Herero People's Reparation Corporation, registered in the District of Columbia in the United States, initiated a lawsuit in a US court against German companies [Continued overleaf]

What happened in 1904 in the colony has been assessed by historians and lawyers as genocide against the *OvaHerero* who resisted German colonialism, and the colonial attempt to deprive them of their land. When the *OvaHerero* lost the battle of Ohamakari⁶⁵ (Waterberg), many of them were forced to flee into the Kalahari Desert – where they died. Many of those who survived the battle were put into camps. Of these, the ones that survived the harsh and inhuman conditions in the camps were later released, but they were not allowed to assemble in their political and social structures, possess land, or raise cattle.

Analysed in terms of the Genocide Convention,⁶⁶ what happened in 1904 and the years thereafter would aptly have been defined as the crime of genocide – had genocide been a crime under law at the time. Attempts by representatives of the *OvaHerero* to get a United States court to rule against Germany and make it pay reparations for what happened 100 years ago has not been successful so far.⁶⁷

When the centenary of the battle of Ohamakari and the genocide were commemorated in Namibia in 2004, the German Minister for Economic Cooperation and Development visited Namibia. She addressed the Namibian public on the day of the commemoration and made it clear that, for her, what happened in 1904 would, if it had happened today, qualify as genocide. She asked for forgiveness, expressing this request in the words of the Lord's Prayer. People from the audience did not quite understand the Minister's declaration and shouted "Where is the apology?" The Minister took the floor again and clarified as follows:⁶⁸

All what I have said was an apology for the crime committed in the name of German colonialism.

There are many legal obstacles that have prevented the *OvaHerero* case against Germany from succeeding legally.⁶⁹ However, the apology of the German Minister proves that legal obstacles are not necessarily the end of such cases. Beyond the limits of law is what, for some time now, is being rediscovered in the form of what we may call *morality* or *ethics*.⁷⁰ Reading through the very extended discourse on the *OvaHerero* case,⁷¹ listening

and, later, against the German state for reparations. The text of the submission to the court is published in *Befunde* (2002:3ff). More details on the case made, its social background and its legal basis can be found in Hinz (2004a:375ff; 2004b:148ff); and Patemann & Hinz (2006:471ff).

65 And members of other Namibian communities who fought with them against the Germans.

66 United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (in force since 1951).

67 For details, see my articles quoted above.

68 I have offered a socio-legal evaluation of the speech of the Minister in Hinz (2005:119ff).

69 Refer to my articles above, which also cite opinions that argue in favour of the *OvaHerero* case.

70 Braun's (2001) textbook on legal philosophy bears the subtitle *Die Rückkehr der Gerechtigkeit* ("The return of justice"), indicating a significant turn away from positivism in social and legal philosophy.

71 Particularly as documented in many Namibian newspapers.

in particular to what members of the *OvaHerero* placed on the table, it is obvious that dealing with the German colonial past has an ethical standing: one that cannot be ignored politically. The normative system beyond the limits of law and based on ethical grounds requires recognition and respect. The “Reconciliation Commission” proposed for the settlement of the genocide case in 2004 and tasked with finding a negotiated solution acceptable to all parties concerned⁷² has its foundation here. The fact that, to some extent, politics reacted positively to the proposal⁷³ proves the validity of the approach; the fact that implementation has been delayed proves the difficulty in dealing with demands based on strong ethical grounds.

Conclusion, or: “When a white man wants to give you a hat, look at the one he is wearing before you accept it”⁷⁴

The world is full of unsolved old and new ‘*OvaHerero* cases’, understood in the wider sense. When people plead to close the book on *OvaHerero* cases because of “time that would only be available before God”,⁷⁵ they miss the point that images of God differ as radically as concepts of time do. We know of many court cases that have gone on for years and eventually ended with a limited contribution, if any, to societal restoration. Allott’s argument applies here as well, i.e. that failure to implement law will weaken it. It is, therefore, a challenging task for lawyers to be more aware of the limits of law, and accept proactively the working of non-legal principles and rules beyond the realm of law.

The ground for this has been prepared in many ways. Out-of-court settlements and settlement through arbitration and mediation enjoy increasing support by those who make and those who apply the law in family and labour disputes, but also in other areas of the law. International organisations such as the World Trade Organisation (WTO) have developed their own ways of settling disputes, which – at least in the case of the WTO – is somehow between strict court-like procedures and arbitration. Countries with established criminal law and criminal courts have shown an interest in learning from the administration of justice under customary law, which places restoration of peace

between the shareholders and stakeholders in a case before the interest of following the requirements of rather abstract justice. It follows the similar interest expressed in the United Nations Development Programme’s *Human Resource Report 2004*, which pleads for the recognition of indigenous justice as part of the right to cultural diversity.⁷⁶ The need to strengthen the political and legal recognition of the limits of law behind these trends appears to be of utmost importance, at least if we do not want to give up efforts to contribute to building the human face in globalisation.

72 Cf. Hinz (2010).

73 According to the same German Minister.

74 The second part of the heading is a proverb of the Ewe of Ghana.

75 Meaning that time – like the almost 100 years that had to pass before the claim for the 1904 genocide materialised into a court case – is only exceptionally available on earth, if at all.

76 UNDP (2004).

These concluding remarks must be preliminary as they can only set the framework for further jurisprudential discourses around the limits of law initiated in Allott's pioneering contribution to jurisprudence. Limits of law are becoming increasingly apparent as consequences of the changing role of the (modern or postmodern) state in Africa and elsewhere. In Africa, countries have followed trends of what is called the "new African constitutionalism",⁷⁷ and therefore opted for a constitutional order based on internationally developed human rights, while at the same time, traditional governance and African customary law were kept as part of their legal order in which a very particular potential for resistance is inherent, as expressed in the Ewe proverb quoted at the beginning of this section of the article:

When a white man wants to give you a hat, look at the one he is wearing before you accept it.

The 'hat' to resist could be the rule of law, democracy, human rights, good governance ... !

In more general terms, and taking further my comments on the third case mentioned here, legal (or normative) pluralism has reached a new dimension with the growing trend towards globalisation and the concomitant expectation of cosmopolitanism. The fact that various normative orders of society overlap and meet in a grey area where fora can easily be swapped and, thus, do not produce sharp borders between each other that would allow clear-cut limits of competence is an anthropological discovery of special jurisprudential importance.

Observations of the changing function of the state and of the increasing recognition of the internal dynamics of societies inform us that hitherto ignored limits of the regulatory competence of states are now being acknowledged. In other words, what Allott described in *The limits of law* with respect to African customary law vis-à-vis the law of Western states, by pointing at the higher degree of effectiveness of the African system, is now gaining ground beyond the borders of customary law.

In an article some years ago, Boaventura de Sousa Santos redefined the limits of law (albeit without reference to Allott) in distinguishing three fields in which such limits in the modern/postmodern state will become apparent:⁷⁸

- The change in the quality given to non-state law will set new limits to the law of the state
- The greater participation of formerly excluded social actors will strengthen their position and, thus, contribute to the emergence of more particularistic and complex laws, and
- There are certain complex social phenomena that have shown themselves to be beyond the reach of the law: the Chernobyl nuclear catastrophe and the HIV/AIDS pandemic are two examples.

77 Cf. Hinz (2006:17ff).

78 De Sousa Santos (2001:1308ff).

In view of this, it is striking to see that, apart from the issues related to the third field, i.e. that of complex social phenomena, issues of interpersonal relationships have become prominent in asking for the limits of law. Where, in the concluding part of *The limits of law*, Allott singles out the “house-mate or common law wife” as his focal point,⁷⁹ the similarly embedded difficulty of accommodating same-sex marriages opened this presentation, and was taken up in one of the three exemplifying cases. Was this pure coincidence?

Most probably not: in terms of the changing orientation of the state, the readiness to accept state intervention in organising interpersonal relationships decreases. It decreases because the state’s competence to execute interventions in the interpersonal arena is seen to be outside the scope of the secular state. In some parts of the world at least, states are said to be secular, while in others the closeness between the law of religion and the law in society is maintained and results in peculiar internal problems where people of different orientations meet!

Questions about the limits of law, the limits of the various laws, and the limits between legal and non-legal normative systems need to be placed high on the agenda for legal and legal anthropological scholars. Questions of this kind will go beyond the models Allott had in mind in *The limits of law*, according to which there was a traditional society in which the spheres of law (“Law” in Allott’s writing) and of morality consisted of two concentric circles, with the circle of law fitting completely inside the one for morality. In Allott’s modern society, the circles of law and morality only partly overlap – leaving the larger part of law outside the reach of morality, and the larger part of morality beyond the scope of the law.⁸⁰

Developments around the world have led us to question this simple dichotomy of *traditional* and *modern*. That part of the world that believed it had achieved the last and universal word on modernity is now made to understand that there are modernities or alternative modernities or postmodern human varieties of equal standing:⁸¹ conceptualisations for which we have not found all the necessary models to make us comprehend the complex functioning of normative systems of societies informed by different foundations, i.e. societies that have a modern past and societies the past of which is traditional!

Allott’s *The limits of law* has opened many gateways into this complex blurring of borders. It is left to us, as scholars of African law, jurisprudence and beyond, to continue carrying the torch so that we – and, more so, those who apply the law, i.e. the politicians who refer to law in developing their policies – are better equipped to use law to the limits which it imposes.⁸²

79 At 259ff.

80 Allott (1980:25).

81 As investigated e.g. in Comaroff & Comaroff (1993).

82 Allott (1980:290).

References

- Allott, A. 1980. *The limits of law*. London: Butterworths.
- Allott, A. 1983. "The limits of law: A reply". *Journal of Legal Pluralism*, 21:147–153.
- Befunde. 2002. "Klage der Herero im ehemaligen Deutsch-Südwestafrika – Ein internationaler Präzedenzfall". *Befunde und Berichte zur Deutschen Kolonialgeschichte, Schriftenreihe zur Förderung geschichts-, kultur- und naturwissenschaftlicher Forschung im Bereich der ehemaligen deutschen Einfluss- und Schutzgebiete in Übersee*, Vol. 4. Wuppertal: Ruhr Universität Bochum, pp 1–54.
- Braun, J. 2001. *Rechtsphilosophie im 20. Jahrhundert: Die Rückkehr der Gerechtigkeit*. München: CH Beck.
- Comaroff, J & J Comaroff (Eds). 1993. *Modernity and its malcontents: Ritual and power in postcolonial Africa*. Chicago/London: University of Chicago Press.
- De Sousa Santos, B. 2001. *The postmodern transition: Law and politics, as reproduced in Lloyd's Introduction to Jurisprudence (7th Edition)*. London: Sweet & Maxwell, pp 1308–1316.
- Fuller, LL. 1949. "The case of the Speluncean explorers". *Harvard Law Review*, 62:616–645.
- Hart, HLA. 1997. *The concept of law (Second Edition)*. Oxford: Oxford University Press.
- Hinz, MO. 2004a. "Der Krieg gegen die Herero: Friedensschluss hundert Jahre danach?". In Paech, N, A Rinken, D Schefold & E Weslau (Eds). *Völkerrecht statt Machtpolitik. Beiträge für Gerhard Stuby*. Hamburg: VSA-Verlag, pp 148–171.
- Hinz, MO. 2004b. "One hundred years later – The Herero reparation claim for genocide". In Schöck-Quinteros, E, H Klofft, F Kopitzsch & H-J Steinberg (Eds). *Bürgerliche Gesellschaft – Idee und Wirklichkeit: Festschrift für Manfred Hahn*. Berlin: trafo Verlag, pp 375–390.
- Hinz, MO. 2005. "Vergeben und vergessen? Anmerkungen zu einer Rede, die Geschichte machte". *Recht in Afrika*, 119–127.
- Hinz, MO. 2006. "The project of 'tradition': Constitutionalism in Africa". In Hinz, MO & FT Gatter (Eds). *Global responsibility – Local agenda*. Berlin: LIT Verlag, pp 17–28.
- Hinz, MO. 2009. "The universal in the Universal Declaration of Human Rights: Human rights in legal anthropological perspective and the need for anthropological jurisprudence". In Bösl, A & J Diescho (Eds). *Human rights in Africa: Legal perspectives on their protection and promotion*. Windhoek: Macmillan Education Namibia, pp 3–32.
- Hinz, MO. 2010. "'In view of the difficult legal questions, I beg you to understand ...': Political ethics and the German-Herero war 100 years later". In Hinz, MO (Ed.), in cooperation with C Mapaure. 2010. *In search of justice and peace: Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society.
- Katz, R. 1982. *Boiling energy: Community healing among the Kalahari Kung*. Cambridge, MA/London: Harvard University Press.

- Marshall, L. 1976. *The !Kung of Nyae Nyae*. Cambridge, MA/London: Harvard University Press.
- McKaiser, E. 2005. "Same-sex ruling: Same old doubts". *Business Day*, 13 December 2005.
- Menski, WF. 2006. *Comparing law in a global context: The legal systems of Asia and Africa* (Second Revised Edition). Cambridge: Cambridge University Press.
- Patemann, HK & MO Hinz. 2006. "Okupiona Omahaoze – Wiping the tears: Anthropological and legal anthropological remarks". In Hinz, MO (Ed., in collaboration with HK Patemann). *The shade of new leaves: Governance in traditional authority. A southern African perspective*. Berlin: LIT Verlag, pp 471–488.
- Read, J. 1987. "Tony Allott: A colleague's tribute". *Journal of African Law*, 31:3–14.
- Sanders, AJGM. 1987. "Towards a people's philosophy of law". *Journal of African Law*, 31:37–43.
- Stubbe-da Luz, H. 1998. *Montesquieu*. Reinbek bei Hamburg: Rowohlt.
- Thoma, A & J Piek. 1997. *Customary law and traditional authority of the San*. Windhoek: Centre for Applied Social Sciences.
- UNDP/United Nations Development Programme. 2004. *Human Development Report 2004: Cultural liberty in today's diverse world*. New York: UNDP.
- Woodman, G. 1983. "The limits of *The Limits of Law*". *Journal of Legal Pluralism*, 21:129–146.