Law, Religion and the Environment in Africa

Edited by
M. Christian Green
Muhammed Haron

ACLARS

AFRICAN CONSORTIUM FOR
LAW AND RELIGION STUDIES

FOREWORD: INTRODUCING JUDGE NAVI PILLAY¹

Johan D. van der Vyver²

Our keynote speaker, The Honourable Judge Navanethem (“Navi”) Pillay, and I have something in common: we both come from the city of Durban, in the province of KwaZulu-Natal in South Africa (or *eThekwinini* – meaning a “bay” or “lagoon” – as the Zulu people prefer to call the city of Durban). That is where Judge Pillay was born and bred and where I grew up and spent my childhood. I did not know Judge Pillay at that time, but I did get to know her – and to deeply respect her – in my later years.

Judge Pillay was born in Clairwood, a suburb of Durban, and being of Indian (Tamil) extraction experienced the discriminatory practices under the rules of apartheid that prevailed in South Africa throughout the better part of her life. She, nevertheless, enrolled as a student at the University of Natal, where she received the bachelor of arts degree and a bachelor of law degree. Following her basic legal training in South Africa, Pillay qualified as an attorney (called “a solicitor” in England) and in 1967 became the very first woman of colour to open her own law practice in the Natal Province, as it was then called. In later years, she continued her academic studies at Harvard University in the United States in the 1980s, obtaining the master of law and doctor of juridical science degrees. Pillay was the first South African to receive a doctorate in law from the Harvard Law School.

Following political change in South Africa in 1994, Pillay was appointed in 1995 as a “limited-term Judge” in the Supreme Court of Natal, Durban and Coastal Regions Local Division (the “Supreme Court” is now referred to as the “High Court”). Here, too, Pillay was a unique pioneer. It was common practice in South Africa to appoint judges from the senior ranks of advocates, referred to in England as “barristers” and in the United States as “trial lawyers”. At the time, Pillay had been practising as an attorney and not as a barrister. However, she was appointed by President Nelson Mandela as a judge to reward her for a courageous act in 1973, when she successfully brought suit on behalf of political prisoners for them to have access to legal counsel. President Mandela was at the time serving a life sentence at Robben Island off the coast of Cape Town because of his involvement in efforts to dismantle apartheid, and Pillay’s courageous intervention in the interest of anti-apartheid political prisoners, which placed her own safety at risk, did not go unnoticed.

-
- 1 Introduction of Judge Navanethem Pillay as keynote speaker at the Seventh Annual Law and Religion in Africa Conference of the African Consortium for Law and Religion Studies (ACLARS), held in Gaborone, Botswana, on 19-21 May 2019, with the conference theme, “Law, Religion and Environment in Africa”.
  - 2 IT Cohen Professor of International Law and Human Rights, Emory University School of Law; Extraordinary Professor in the Department of Private Law, University of Pretoria, South Africa.

Her appointment as a judge by the newly elected President Nelson Mandela was presumably to be valid for a limited term only, because appointing an attorney as a judge was at the time not in conformity with the traditional practice in the country.

When in the early 1990s the United Nations established international criminal tribunals to deal with serious violations of international law committed in the former Yugoslavia and in Rwanda, Judge Pillay entered the international arena. When the Security Council invited nominations of persons to serve as judges in the International Criminal Tribunal for Rwanda (ICTR), the name of Judge Pillay was forwarded by South Africa. The South African delegation probably did not know her at the time, but they saw her name on the list of South African judges and realised that she was not only a woman, but also a woman of colour. That rendered her nomination quite unique, and she was elected to serve as a judge in the ICTR.

Judge Pillay served as a judge in the ICTR from 1995 to 2003, and as president of that body from 1999 to 2003. On 30 November 2002, the South African government nominated her to become a judge in the International Criminal Court (ICC) in The Hague in The Netherlands, and she served in the Appeals Chamber of the ICC from 2003 to 2008. Judge Pillay resigned from the ICC Appeals Chamber before her term of office expired to accept her nomination as High Commissioner for Human Rights at the United Nations. She was nominated for this office by the then Secretary General of the United Nations, Ban Ki-Moon, on 24 July 2008, and her four-year term commenced on 1 September 2008. In 2012, she became the very first person to be appointed in this office for a second term, which came to an end in 2014. During her tenure at the Office of the High Commissioner for Human Rights, Judge Pillay noted that the high commissioner is “the voice of the victim everywhere” and in that capacity signed a document titled “Born Free and Equal”, addressing issues, such as sexual orientation and gender identity, in international human rights law.³

I have always regarded Judge Pillay’s judgment as President of the ICTR in the case of *Prosecutor v. Jean Paul Akayesu*,⁴ as one of her greatest contributions to the refinement of international criminal law. It was the very first conviction ever for the crime of genocide.⁵

The crime of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, and the Statute of the International Criminal Court, comprises certain criminal conduct “committed with intent to destroy, in whole or in part,

3 United Nations Office of the High Commissioner for Human Rights. 2012. *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*. New York and Geneva: OHCHR. Online at: <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>

4 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (2 Sept. 1998).

5 Earlier, Jean Kambanda pleaded guilty of, and was sentenced to life imprisonment for, acts of genocide committed in Rwanda. *Prosecutor v. Jean Bemba*, Case No. ICTR-97-23-S (4 Sept. 1998).

a national, ethnical, racial or religious group, as such”.⁶ The judgment of the ICTR in the case against *Akayesu* is instructive in two respects: (a) it defines with precision each one of these group entities that are singled out as victims of the crime of genocide, and (b) it lays the foundation for extension of the target groups by means of analogical interpretation.

It appears from the judgment in *Akayesu* that a national group comprises “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties” (para 511); ethnicity is a cultural concept denoting “a group whose members share a common language and culture” (para 512); a racial group is conventionally defined on the basis of “the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors” (para 513); and a religious group is “one whose members share the same religion, denomination or mode of worship” (para 514).

A very special problem based on these distinctive criteria confronted the court in *Akayesu*. The court was here dealing with acts of genocide committed by the Hutu against the Tutsi population groups in Rwanda, and the distinction between these two population groups falls between the cracks. Those two factions of the Rwandan population shared the same nationality and race, and even by and large the same religion. Nor could they be classified as distinct ethnic groups, since they share the same language and culture. The divide is one based on material means, especially cattle owners and others, and social status in the community.

Although the ICTR proceeded on the assumption that the Hutu and Tutsi constituted different ethnic groups, it must have been conscious of the fact that this assumption was contradicted by its own definition of ethnicity. It perhaps for that reason considered the question of whether the four categories mentioned in the definition of genocide constituted a *numerus clausus*, and it answered this question in the negative (para 514).

The Tribunal came to this conclusion in deference to the *travaux préparatoires* of the Genocide Convention. The reasoning of the tribunal, however, also bears out general principles of law pertaining to the extension of the reach of a statutory enactment by means of analogical interpretation. Based on the language denoting the crime of aggression, the ICTR in *Akayesu* confined the extended reach of the Convention’s protection to “‘stable’ groups, constituting in a permanent fashion

6 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, art 1; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), art 4(1); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), art 2; Statute of the International Tribunal, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993), art 6.

and membership ... which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups" (para 510). The key conception here is that persons belonging to the group do so on an involuntary basis, or – in the words of the judgment – "automatically, by birth, in a continuous and often irremediable manner" (para 510).

In the vernacular of the Dutch legal philosopher, Herman Dooyeweerd (1894-1977), the common denominator of the four group entities mentioned in the definition of genocide is that they all represent "institutional communities ... which by their inner nature are destined to encompass their members to an intensive degree, continuously or at least for a considerable part of their life, and such in a way independent of their will".⁷ *Prosecutor v. Akayesu* is authority for the proposition that action of the kind mentioned in the definition of genocide, which is intended to destroy a group of people not expressly mentioned in the definition but which shares this attribute of being "institutional",⁸ as defined by Dooyeweerd, will indeed constitute genocide.

Persons who know me will be aware of the fact that I truly love South Africa, the country of my birth and nationality. It is fellow South Africans, such as Navi Pillay, who stimulate that love of, and respect for, my home country. Over the years, I have encountered many South Africans, like Navi Pillay, who grew up in difficult circumstances of deprivation based on the cultural, ethnic, linguistic, religious and racial diversities in the country, who could identify the social and political prejudices on which such deprivations were based and who spent much of their time on disclosing and counteracting the absence of good governance of the *status quo*. And let it not pass unnoticed that the discriminatory laws and practices that came under fire also applied to the natural environment to which the disadvantaged population groups had been consigned and exposed in their daily lives. These protagonists of justice and equity, such as Judge Pillay, are the ones who have brought honour to our troubled land and its people.

---

7 Dooyeweerd H. 1984. *A New Critique of Theoretical Thought*, vol. III. Ontario: Paideia Press Ltd, 187.

8 Dooyeweerd, *A New Critique of Theoretical Thought*, 187.