



THE TRIAL OF BEYERS NAUDÉ

Christian witness
and the rule of law

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Dr Beyers Naudé

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and the rule of law

Edited by the International
Commission of Jurists, Geneva

Foreword by Rev. Dr Theo Kotze

Preface by Lord Ramsey of
Canterbury

Introduction by Sir Robert Birley

Legal background by
Professor A. N. Allott

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Editorial note

Two considerations led the International Commission of Jurists to undertake editing this book.

First and foremost, the evidence given by Dr Beyers Naudé at his trial is a remarkable account by an outstanding Christian leader of the way in which he was led by deep religious convictions into conflict with the *Apartheid* policies of the South African Government.

Secondly, the trial has considerable legal interest which we hope will, with the assistance of Professor Allott's lucid introduction, be readily comprehensible to the ordinary reader. It shows how, in the *Apartheid* system of South Africa, a careful and impressive judicial system is able to exist side by side with a system of detention without trial, banning orders, and secret inquisitions, over which the judiciary has little or no power or control. It also illustrates how, as in other countries, legal decisions often depend upon the importance which judges attach respectively to the rights of the individual and to the powers and prerogatives of the executive.

The International Commission of Jurists wishes to record its gratitude to the Christian Institute of South Africa for supplying an English translation of the trial and judgments in Afrikaans, and to Lord Ramsey, Sir Robert Birley and Professor Allott for their invaluable contributions to the text.

Geneva
May 1975

NIALL MACDERMOT
Secretary-General

Foreword

by the Rev. Dr Theo Kotze

On 19 October 1977, the Christian Institute of Southern Africa and seventeen black organizations (including the Black Peoples' Convention, the Black Community Programmes and the South African Students Organization) were declared unlawful organizations by the South African government.

Senior staff members of all these organizations were banned or detained without trial and, in the case of the Christian Institute, banning orders were served on the Director, Dr Beyers Naudé; the Cape Director, the Rev. Dr Theo Kotze; the Administrative Director, the Rev. Brian Brown; the Director of Ravan Press, Mr Peter Randall; and the editor of Pro Veritate, Mr Cedric Mayson.

It is an extraordinary feeling to be able to add a tribute to Beyers Naudé for the new edition of this book, since, as a banned person

- I may not be quoted in South Africa,
- I may not in any way communicate with another banned person (and therefore with Beyers),
- I may not quote him.

A banned person may not 'prepare, collate, print, publish, distribute or dispatch any document including any book, pamphlet, record list, placard, poster, drawing, photo or picture'.

Therefore what I write would be illegal in South Africa and this in itself would prevent any distribution of the book in that country. But of course, the book itself is in any event banned.

Many readers may not be aware of the restrictions that a banning order imposes on Beyers Naudé and hundreds of other banned people. I have already mentioned some of these but wish to add that:

- a banned person may meet with only one person at a time. Legal

opinion differs as to whether this includes members of the immediate family but there are instances of people being prosecuted for this 'offence'.

Other restrictions include:

- Having social intercourse with other persons;
- meeting with another (that is, one person) for a 'common purpose', whether such a purpose be lawful or unlawful; presumably a conversation is a common purpose - certainly a walk in the forest or a shopping expedition would be a common purpose!
- attending any political gathering - understood as a gathering where any principle or policy of *any State* is propagated, defended, attacked or discussed;
- attending any gathering of scholars or students for the purpose of teaching or addressing them;
- giving any instruction to any person of whom he/she is not the parent: which means being prohibited from teaching grandchildren to count or to read.

A banned person is restricted to a particular magisterial district (in size that of a London borough). He/she may not enter nor travel through any area set aside for a racial group other than his/her own.

Anyone who has met and talked with Beyers Naudé knows him to be a gregarious person for whom such restrictions create an intolerable burden.

Yet, from all the reports I have received, he is not in the least intimidated and in his own inscrutable way transcends these restrictions.

I have, of course, since 19 October 1977, had no contact with him but my wife, Helen and so many others who have visited him speak of his powerful Christian witness. He remains serene, confident and, above all, devoid of bitterness.

Even a superficial reading of the facts revealed in this book and particularly the tributes of Lord Ramsey and Sir Robert Birley indicate that this is a man whose historical stature is assured.

I write now of the man I knew before the banning of 19 October 1977.

We worked in the closest relationship for over ten years, staying from time to time in each other's homes, meeting under situations of joy and stress, striving with our colleagues to find a meaningful rôle as individuals and for the Christian Institute as a community in the tumultuous South African situation.

The deep Christian convictions which motivate Beyers Naudé are so clearly evident throughout this book that I do not need to delineate them. I want therefore to tell of his very human qualities and limitations (he would not object to the latter!)

Beyers Naudé is a man of exceptional gifts. He is able to converse (and preach!) eloquently in four languages: Afrikaans, Dutch, English and German.

Indeed it would be difficult to say which is his home language as all four are used freely. I have known him to be deep in serious conversation or in the chair of a meeting where the medium is either Afrikaans or English, when the strident ringing of the telephone interrupts the whole process. In a moment he is responding in German or Dutch to most difficult and intricate questions from some European journalist. He must surely be one of the most frequently quoted South Africans, and in spite of his banning he remains an outspoken and courageous critic of the evils inherent in that society.

Beyers has a boundless, caring energy which is exercised in so many ways. It is virtually impossible for him to turn down any request and he will respond to another's needs at any hour of the day or night. His pastoral ministry to all who are in distress is a byword.

His weakness is that he tries to be 'all things to all men' and, as a result, he has at times made errors of judgement, but this only proves that, like all of us, he is a fallible human being.

Ilse Naudé, his wife and companion for over forty years, has played a very significant part in the making of Beyers Naudé. She has stayed by his side through thick and thin whilst herself suffering deeply from the ostracism imposed on them both by African society. Her unflinching courage, steadfast loyalty and gracious hospitality remain powerful factors in enabling them both to bear the continuing and unceasing Trial of Beyers Naudé.

Note

The decision to refuse to give evidence before the Schlebusch (later Le Grange) Commission was originally taken jointly by five members of staff – Beyers Naudé, Oshadi Phakathi, Theo Kotze, Brian Brown and Roelf Meyer.

Subsequently all those people in close association with the Christian Institute who were called to give evidence, took the same stand.

The names of these people and the sentences imposed upon them are, for the sake of historical record, as follows:

The Revd Brian Brown – charges withdrawn;

Mrs Dorothy Clemishaw – ten days imprisonment or a fine of R20.
In addition two months imprisonment suspended for three years;

Mr Horst Kleinschmidt – mis-trial due to technicality;

Mrs Flore Kleinschmidt – twenty-five days imprisonment or a fine of R50. The fine was paid by 'an anonymous Bantu male';

The Revd Dr Theo Kotze – four months imprisonment without the option of a fine, suspended for three years;

The Revd Roelf Meyer – charges withdrawn;

Dr James Moulder – R50 fine or twenty-five days. A further two months imprisonment suspended for three years;

The Revd. Dr. Beyers Naudé – imprisonment for 30 days, or alternative of R 50. After a day in prison the fine was paid by his local minister;

Mr. Peter Randall – two months imprisonment without option of fine, suspended for 3 years;

The Revd. Danie van Zyl – charges withdrawn;

Mrs. Oshadi Phakathi – not charged; later imprisoned on other grounds;

Preface

by Lord Ramsey of Canterbury
former Archbishop of Canterbury

This book deals with legal and ethical questions which concern the character of civilization. It also has much to tell of a remarkable Christian personality. Dr Beyers Naudé, whom I first met in Johannesburg in 1970, is too modest a man to realize what he himself means to so many who love him as a man of Christian goodness, courage and integrity. There has been a striking spontaneity in the admiration felt for him in many countries as well as his own.

He is a gentleman, one to whom violence or demagoguery are quite alien. Hence, not surprisingly, he has taken a leading part in the Christian Institute, a body devoted to reconciliation, to peaceful change and to the repudiation of violent solutions. Through his leadership the Institute has been a force which works against racial conflict and a beacon of Christian progress.

It is easy to understand that those who dislike criticism of their policies prefer to think that those who have other policies are 'subversive' or 'communist' or 'dangerous'. Beyers Naudé has said that if there are allegations about the role of the Christian Institute he is ready to face any allegations in an open court where all the facilities of justice are available. Readers of this book will see how this issue is viewed in the perspective of jurisprudence in the world. They will also learn much about the ideal of non-violent progress and the ways in which it may be pursued. Above all they will feel themselves to be in touch with a remarkable personality. For my own part, when I think of the men who have shown me what it means to be a Christian my thoughts will always go quickly to Beyers Naudé.

MICHAEL RAMSEY

Introduction

by Sir Robert Birley

In December 1960 a Consultation was held at Cottesloe, a district of Johannesburg, convened by the World Council of Churches, at which a number of resolutions were passed, among them one that no one who believes in Jesus Christ should be excluded from any Church on the grounds of his colour or race, and another that the right to own land where he is domiciled and to participate in the government of the country is part of the dignity of all men. The two main Dutch Reformed Churches who had representatives at the Conference immediately repudiated these resolutions.¹ However, some members of these Churches were prepared to support them and they conferred with members of other Churches in South Africa. Out of these discussions came the establishment in August 1963 of the Christian Institute of Southern Africa. An inter-racial and inter-church management board was elected. The aim of the Institute was stated to be to unite Christians and to make Christianity more of a living force in society. The position of Director of the Institute was offered to the Reverend C. F. Beyers Naudé and he accepted it.²

Rather more than ten years later Dr Naudé was brought to trial for having refused to give evidence to a Commission set up by the South African Executive 'to inquire into certain organizations', among them the Christian Institute. The trial raised issues of the very greatest importance for Christians in all countries. This book gives a full report of it. Some account of the background may be useful for readers from countries outside South Africa.

Dr Naudé's father was a minister of the Nederduits

Gereformeerde Kerk (NGK). After studying at the University of Stellenbosch Dr Naudé himself became a minister of the Church in 1939. From 1949 to 1954 he worked among the students of the University of Pretoria and it was then that he began to question, as a Christian, the attitude of the Afrikaner people, and his own Church in particular, towards the Africans of their country.

He became the editor of *Pro Veritate*, a Christian journal which had an inter-racial and inter-denominational editorial board. In spite of this he was in April 1963 elected Moderator of the Southern Transvaal Synod of the NGK. When offered the post of the Director of the newly formed Christian Institute he sought the permission of his Church to accept, but a body styled the 'Examining Commission of the Northern and Southern Transvaal Synods' refused his application. He relinquished his status as minister and accepted the invitation. He said that he saw his Church undergoing a 'purposeful and fear-ridden process of isolation'. He had to make the choice, he declared, between obedience to God and obedience to men. In the report of his statement at his trial and during his examination and cross-examination this choice stands out as the essential question.

Before considering the work of the Christian Institute and what it stands for, it would be right to refer shortly to the remarkable story of Dr Naudé's relationship with his Church since he became Director of the Institute. He appealed against the decision of the Examining Commission to the Southern Transvaal Synod Commission, but lost his appeal. He was then elected an Elder by a majority vote of an NGK congregation in Johannesburg. Some of the members appealed against this to the Johannesburg Ring of the Church and their appeal was upheld. Six ministers then appealed on his behalf to the Synodal Commission, who referred the question back to the Ring. In 1965 the General Synod of the Church decided that all members should withdraw from the Christian Institute. However, the congregation of the church attended by Dr Naudé in Johannesburg decided 'to draw a distinction between church law and the law of the Gospel' and not to take disciplinary action against him and three other members of the Institute, one of them his wife. In 1970 the next General Synod decided to set up a special Commission to examine whether scriptural grounds existed for their rejection of the Institute and the Institute's opposition to racial discrimination.

The Christian Institute has only a few thousand members. Its basis consists of small groups, of all races and all denominations,

who meet privately to discuss the problems of their time in the light of the Bible. Dr Naudé defined it in 1965 as 'a fellowship of Christians who seek individually and together to be used by God to give practical expression to a growing desire for fellowship and understanding between Christians in our country'. Before long this comparatively small body had begun to exercise a remarkable influence. Somehow it forced the Churches and then many not closely connected with them to face the essential problems of their country. An Afrikaner writer once said that his people throughout their history had escaped from political and social problems by moving away from them, especially with the Great Trek. Now they could move no longer, so what could they do? They moved the problem.³ That is what Apartheid essentially is, a desperate attempt to push the racial problem of South Africa out of sight. The Christian Institute has forced South Africans to look at the problem.

Perhaps its most important work will seem in the future to be its relations with the African Separatist or Independent Churches. About a quarter of the African population of the country belong to them and they number over 2,500. In 1965 a few of these Churches decided to form some kind of an association. Their first step was to ask the Institute to help them. They did and as a result there was formed the African Independent Churches Association. Their first step was to ask the Institute to appoint two members to serve on their committee. The Institute has done most valuable work in helping these Churches, organizing education for the ministers, running 'refresher courses' for them and founding for them a theological college. In 1972 the Institute itself decided that the time had come for the Association to manage its affairs without the two members on the Committee, but the Institute continues to work for the Independent Churches generally. The relationship between them and the Christian Churches is the one really significant bridge between the races in South Africa in the last ten years.

During these ten years the Christian Institute has become more and more resolute in its opposition to the Government's racial policies and Dr Naudé has been its very obvious leader in this. He has always made clear his rejection of violence. He has constantly drawn attention to the wrongs suffered by 'non-Whites'. But his attitude and that of the Christian Institute have always been constructive. He has aimed at bringing Whites and Blacks together to consider the problems of their country in common. In conjunction with the South

African Council of Churches, the Christian Institute sponsored a 'Study Project on Christianity in Apartheid Society' (known as Spro-cas), which has produced over ten reports on various aspects of South African society, some of which have had an undoubted impact on popular opinion (they were referred to at the trial). For the first time there has been a positive effort: Blacks and Whites working together to consider the appallingly difficult problems of South African society.

As a result the Christian Institute has come more and more under attack. In order to understand why there has been this opposition, leading up to the appointment of the Schlebusch Commission and the trial of Dr Naudé, it is necessary to consider why the Dutch Reformed Churches and the South African Government have shown such hatred of it. The NGK has always supported the policy of *Apartheid* in its official pronouncements. There are a good many signs to show that some of its members, including some leading figures, are uneasy about it. This is, perhaps, the main reason why the Church has been so hostile to the Institute. But there is another reason which should not be forgotten. The traditional hostility of the Dutch Reformed Churches towards the Roman Catholic Church is still a most potent force. In 1964 the *Kerkbode*, the official journal of the NGK, said that faithful members of the Church would never be able to reconcile themselves to the fact that there was a Roman Catholic on the Board of the Christian Institute. In 1972 the Northern Transvaal Synod decided to do what it could to prevent any rapprochement between the Afrikaans and Roman Catholic Churches and to take disciplinary action against its members who made use of Catholic schools or nursing homes. It should not be forgotten that the Christian Institute is not only inter-racial, but inter-denominational.

When we come to consider the hostility of the Government we must remember that when they say that *Apartheid* means separate development they mean what they say. Any attempt to bring the races together, whether by means of discussions in small groups or the publication of a Spro-cas Report on, for instance, education, is to them a direct attempt to sabotage national policy. In addition one must remember the extraordinary Afrikaner Nationalist dread of Liberalism, sometimes regarded as a policy opening the door to Communism, sometimes as practically synonymous with it. As early as August 1948, with the Nationalist Government only just in power,

Dr Diedrichs, now State President, said in the Assembly: 'The fight in South Africa is between Nationalism and Liberalism—this doctrine of Liberalism that stands for equal rights for all civilized human beings is almost the same as the ideal of Communism.' When in 1968 twelve leading members of the Council of Churches and the Institute sent an open letter to the Prime Minister saying that the policy of *Apartheid* was not in accordance with the intention of God as revealed by him in his Word and that they could not allow themselves to be silenced when they believed themselves to speak in the name of Christ, Mr Vorster replied that they were simply making propaganda attacks on the Government under the cloak of religion: 'That you should attack separate development does not surprise me. All liberalists and leftists do it.'

There is one other issue which cannot be excluded. It was referred to at one point in the trial. Dr Naudé's father had been one of the founders of the *Afrikaner Broederbond* in 1918 and he himself had become a member when a young man. It is inevitably difficult to write at all fully on this secret society which has had so profound an influence in South African politics for the last fifty years and since 1948 on the Government. It has supported the supremacy of the *Afrikaner* nation and the policy of *Apartheid*. Dr Naudé inevitably broke with it, and this has never been forgiven him.

For some years the Government has shown its hostility to the Christian Institute. In 1965 it was accused by the Security Police of publishing in the journal *Pro Veritate* an article in which a banned book was mentioned by name. It was pointed out this was an oversight; the issue was withdrawn from the bookshops and the article cut out before it was re-distributed. There followed immediately two police raids on the offices of the Institute and one on Dr Naudé's house. They removed as suspicious publications two copies of the issue from which the offending article had been already removed and two copies of a report of the British Council of Churches. Police raids since then have been frequent. In 1971 came a new difficulty. The Institute was given notice to quit the offices it had rented for eight years. One reason was that other tenants in the building had complained that 'non-White' visitors to the Institute had been using the 'White' toilets.

In 1965 Dr Naudé and Professor Geysler, then Chairman of the Institute, had sued Professor Pont of Pretoria University for libel in allegations made against them in articles he had written in an

official journal of the NHK. They had won their case and been awarded damages of R10,000 (£5,000) and costs, the highest amount ever awarded for libel in a South African court. An appeal by Professor Pont had failed. It was very probably the memory of this disconcerting judgment which led the Government to attempt to deal with the Institute and curtail other organizations which it disapproved of not by legal means, but by setting up a most extraordinary Parliamentary Commission, named after its first Chairman the Schlebusch Commission.⁴ After the nature of the Commission and its workings had been fully exposed by its treatment of the first organization it investigated, the National Union of South African Students, some members of the Christian Institute refused to give evidence before it. The nature of the Commission and the reasons given by the individuals are dealt with in the report of the trial and especially in the statement, *Divine or Civil Obedience?*, made by Dr Naudé and four other leading members, which is printed here as an Appendix.

As one looks back through history one notices every now and then some trials when the roles of the participants seem to be reversed; the man in the dock becomes the prosecutor, the prosecutor is in the dock. The trial of Socrates is an obvious instance. The trial of Joan of Arc is another. Coming to more recent times I should cite the trial in 1944 of the students of Munich University, calling themselves the White Rose, who had resisted the Nazis. I feel that the same change is seen in this trial of Dr Beyers Naudé. It was not done by any kind of histrionics. The tone is quiet, almost gentle. Those who knew him will recognize the man as they read his evidence. Slowly the tables are turned; it is the South African Government and, to Dr Naudé's obvious deep sorrow, his own Church, who have to answer the charges.

As a member of the Christian Institute myself—and the only word I can find to describe the little group to which I belonged is 'oasis'—I was asked once by Dr Naudé to a small gathering at his house to meet Pastor Niemöller who was then visiting South Africa. We asked his advice after his experiences in Germany under the Nazis. In some ways it all seemed very relevant, but I became aware of a profound difference and this difference is apparent in Dr Naudé's statement at the trial, for Pastor Niemöller and his friends had been opposed by the devil incarnate. We are not unaccustomed these days to reading of Christians under persecution by rulers who reject God altogether. But here we have something very different. The South African

Government regards itself as being a convinced Christian government. That it should be one is deeply rooted in the philosophy of Afrikaner Nationalism. Dr Naudé's other opponent was a Christian Church, of which he is still a most loyal member. This gives the struggle a quite peculiar poignancy. One might have expected perhaps to find an element of bitterness in Dr Naudé's defence, or, perhaps, the opposite, an embarrassed hesitancy. One finds neither. A most difficult personal position is faced with complete honesty and courage.

In the course of his evidence Dr Naudé quoted the whole of a sermon which he had preached to his own congregation in December 1963, when he knew that he was going to be expelled from his ministry. This is indeed memorable and one may expect that it will go down to history. In it comes a passage which shows most clearly what the issue was for him, an issue faced by many in South Africa. He explains why 'the choice before me is not firstly a choice between pastoral work and other Christian work, not between the Church and *Pro Veritate* or the Church and the Christian Institute. No, the choice goes much deeper. It is a choice between religious conviction and submission to ecclesiastical authority; by obeying the latter unconditionally I would save my face but lose my soul.'

The full implications of the stands made by Dr Naudé are now becoming evident. The South African Council of Churches has passed a resolution supporting conscientious objection in South Africa on the grounds that the theological definition of a 'just war' excludes war in defence of a basically unjust society such as South Africa now is. It commends the courage of those who as conscientious objectors are 'willing to go to jail in protest against the unjust laws and policies in our land'. The resolution was seconded by Dr Beyers Naudé and he has said that he is prepared to face imprisonment if the Government decide to prosecute him.

ROBERT BIRLEY

NOTES

¹ There are three Dutch Reformed Churches in South Africa and a note on them may be useful. Much the largest is called the Nederduits Gereformeerde Kerk, often styled NGK. In 1960 it had over 1,300,000 White members, over 550,000 Africans and over 440,000 Coloureds. Dr Naudé was a minister of this Church. The Nederduits Hervormde Kerk van Afrika (NHK) had in 1960 about

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190,000 White members, and a few thousand Africans. The Gereformeerde Kerk in Suid-Afrika has only about 100,000 Whites, but it has considerable influence.

² In the report of the trial he is referred to as Mr Naudé. But in October 1972, he had received an honorary doctorate in theology from the Free University of Amsterdam. In 1974, after the trial reported in this book, he was awarded an honorary doctorate of the University of the Witwatersrand, when a particular tribute was paid to his work as Director of the Christian Institute.

³ P. V. Pistorius, *No Further Trek* (1957).

⁴ In 1974 Mr Schibusch was succeeded by Mr Louis le Grange MP as Chairman of the Commission.

The legal background

by Professor A. N. Allott

An overcrowded magistrate's court in Pretoria might seem an unusual setting for a fundamental debate about just and unjust laws and the duty of a citizen to obey the one and disobey the other, and even less usual for a re-examination of the Christian Gospel in its contemporary South African context. Even the boldest author of moralizing fiction would hesitate to include, in the proceedings of such a court, the preaching of a full-length sermon on the Christian conscience face to face with the racial situation in South Africa. All this¹ and more, however, is to be found in the trial of the Rev. Dr Beyers Naudé before the Pretoria Magistrate's Court during the month of November 1973.

The charge was a simple one: that on a day in September 1973, Dr Naudé had been summoned, along with others involved in the work of the Christian Institute of Southern Africa (of which he is Director), to give evidence before the Schlebusch Commission (or, to give it its full title, the 'Commission of Inquiry into Certain Organizations', of which Mr A. L. Schlebusch, MP, had been appointed chairman); and that, when the chairman asked him to take the oath preparatory to answering questions, Dr Naudé had refused to do so; and that this was an offence under section 6 of the Commissions Act, 1947;² and that consequently Dr Naudé was liable to a fine or imprisonment for up to six months.

The defence to what might appear merely a technical or relatively uncomplicated charge was by no means simple. The refusal to take the oath (and the consequent refusal to give evidence) was admitted; but it was argued that in the circumstances the refusal was justified,

and indeed required, on grounds of conscience. To explain the refusal the defendant wished to sustain this justification, both in conscience and in law. So his beliefs, the principles of the Gospel, the attitudes of the Christian Churches in South Africa, the nature of the legislation constituting the Commission, the manner of proceeding of the Commission, the penal consequences for a witness or a suspect of participating in or being arraigned by the Commission, the principles of South African law in regard to such procedures and to the defence of conscience—all became relevant and were discussed in court.

The evidence in the case itself sets out in detail Dr Naudé's beliefs, his attempts over the years to waken the consciences of his countrymen, his personal history and prophetic role, and the activity of the Christian Churches inside and outside South Africa: this Introduction is rather concerned with the legal issues raised in the case, which it discusses against the background of South African law.

Part I of the Introduction outlines the South African constitutional and parliamentary system. It shows that a system of parliamentary absolutism ('the Westminster model') was imported from Britain, and that protection of fundamental rights and freedoms rests not on a written code of fundamental rights, but on the guiding principles of the common law, so far as they have not been superseded by legislation. It shows that the South African system of criminal law and procedure owes much to the law of England, though it has diverged from it recently as regards style and content. Part II describes the legislation which preceded the setting up of the Schibusch Commission, of which a keystone was the Suppression of Communism Act, 1950, and which explains some of the fears that witnesses before the Commission entertained, notably about the making of 'banning orders' under the Act. It discusses the legal and personal consequences of the making of a banning order, and the legal protection, if any, offered to the individual threatened by such an order. Part III explains the Commissions Act, under which the Schibusch Commission was constituted, and narrates the history of the Commission and the legal events leading up to the charge against Dr Naudé. Part IV briefly analyzes the main legal points at issue in the trial, and the arguments of counsel on either side. Part V chronicles the fate of Dr Naudé on appeal from the magistrate's court.

I. THE CONSTITUTIONAL BACKGROUND

The South African Constitution,³ made when the Union became a republic, poses starkly the problems of legality and constitutionalism. The main product of the contact with Britain leading to the formation of the Union was a system of parliamentary government, in which the absolute power of Parliament, sovereign within its powers, to make laws as it chose was limited only by the terms of the Constitution itself, and such residual authority as was retained—more in theory than in practice—by the Crown and the imperial legislature. Now the entrenched clauses are dead; the reserve powers of the Crown are gone; and, as was said in the highest appeal court (in *Sachs v. Minister of Justice* 1934 AD 11, at p. 37), Parliament 'may make any encroachment it pleases upon the life, liberty or property of any individual subject to its sway'.

This unmitigated parliamentary absolutism is matched by the ambit of executive discretion. The Government, acting through the State President or his ministers, has a large discretion within the terms of the prerogative; this it can enlarge through the initiation of legislation, which can give the executive whatever powers it seeks. To these arbitrary and limitless powers the principles of the common law and the presumptions of statutory interpretation (that, for instance, a penal statute should be strictly construed in favour of the subject) offer but a frail obstacle, easily surmounted.

And so it has been with the recent history of legislation in South Africa, notably with the key statute, the Suppression of Communism Act, 1950, and with the large power given to Commissions of Inquiry under the Commissions Act. As is shown below,⁴ vast powers are conceded under the Suppression of Communism Act to the executive to 'ban' a person, to deem him a 'communist' and the like, without prior procedure or justification and without subsequent appeal or review.

As has been succinctly put by two distinguished lawyers, Professors Hahlo and Kahn, 'South Africa has no fundamental law guaranteeing legal equality between different races or classes'.⁵

The courts, especially the superior courts, may do what they can with presumptions that the laws are not to be applied differentially; but at the end of the day Parliament has the last word, and if Parliament chooses to enact discriminatory legislation, it is the duty, however reluctantly taken up, of the courts to apply it. The history

of 'separate development' and the *Apartheid* structure, which has been brought into being and is now administered through statute, exemplifies this point. For the reader not familiar with the legal bones of the *Apartheid* system, it may be helpful to set them out here, since they explain what the South African Government is seeking to achieve, and what were the grounds for the anxieties and hopes of the defendants in the cases reported here.

1 *The Apartheid system*

Laws embodying racial discrimination preceded the formation of the Union in 1910, but there is no space to discuss them here. The ethnic mixture in South Africa is a complicated one, which divides at its crudest into 'White' (or 'European') and 'non-White'; but the Whites include two distinct peoples: those of Afrikaner stock, who are in the majority and of whom Dr Naudé himself is a prominent member, along with the members of the present Nationalist government; and those mostly of English ancestry. The non-Whites, if we exclude the Coloured and Asian minorities, are mostly Africans (who may be referred to in the legislation without great ethnographic accuracy as 'Bantus'). The Africans themselves are sub-divided into a number of distinct ethnic groups, such as the Zulu and the Xhosa; and it is these groupings which are now being used by the Government to promote its establishment of 'Bantu homelands' or Bantustans, as they are often called.

Latest available population figures show the distribution of the races as follows: 'Whites': 3·8 million or 18 per cent of the population; 'non-Whites': 17·7 million or 82 per cent of the population; with a total for the country as a whole of about 21·5 million.⁶ The first thing that may strike the visitor will be the total absence of any non-White in the main organs of government of the State: there are no non-White members of Parliament, judges or magistrates, army officers or police officers. Those who make the laws and those who apply them belong to the White minority group.

But to be a non-White in South Africa does not merely mean that one is excluded from Parliament, the judiciary and other organs of government; the franchise excludes non-Whites, and a long list of activities is prohibited for one belonging to the African section of the community. An African worker cannot belong to a legally recognised trade union; he is excluded from residence and ownership over vast areas of the land. Basically he is confined to African reserved areas,

with severe restrictions on movement and employment in 'White' areas. Even within the African areas he cannot organize a public meeting without a permit, and he will be subject to a long list of regulations designed to prevent anything being said or done that might challenge the authority of the State, Bantu Commissioners, a local chief or headman.

Under the Bantu (Urban Areas) Consolidation Act, 1945, an African is a temporary labourer at best in White areas, subject to removal to an African area which he may never have seen. He can only live in an approved hostel or location. An urban local authority can make a removal order against an urban African, and against that order there is no appeal. This system of exclusion and control is supported by the provision of passes or internal passports for Africans only.

2 The State President's prerogative

The State President took over the role of the Governor-General on the declaration of a republic in 1961; the Governor-General was himself the agent of and in the shoes of the monarch, in her capacity of Queen of South Africa. The State President is thus the direct inheritor of the powers, prerogatives and status of the Kings and Queens of England, as they were elaborated in the Middle Ages, defined by the common law, and cut down by the growth of parliamentary democracy from the sixteenth century onwards.

The 'Royal Prerogative' is the term used in English law to define the (in theory) sovereign rights of the Crown, subject to no legal restriction or interference. In practice, the formal prerogatives of the Crown have been considerably reduced as a result of the constitutional struggles between the Crown and Parliament. Although circumscribed, the precise scope of these prerogatives in English law remains undefined. It would, however, be fair to say that the citizens of Britain would be reluctant today to concede that the Crown could create offences, provide a procedure for their trial, and impose punishments, without enabling legislation being passed by the Lords and Commons. But that position, unfamiliar in England since the days of the Stuarts and the Star Chamber, would seem to obtain in South Africa today, if one accepts the arguments deployed by the State and some of the magistrates and judges in the Naudé and Cleminshaw cases which are outlined below.

It was and is common ground that the power to appoint a commission of inquiry is part of the prerogative; that the South African Parliament had in 1947 enacted the Commissions Act, and that this Act enables the State President to apply its provisions to any commission appointed by him. Furthermore, he can make the Act applicable to a commission with such modifications or exceptions as he thinks fit, and can make regulations defining the powers and procedure of a commission. It was under this Act, as applied by the State President to the Schlebusch Commission, and under the special procedures imposed by the State President (notably those prescribing secrecy) in respect of that Commission, that Dr Naudé and his co-defendants were accused.

The Bench of the Transvaal Provincial Division of the Supreme Court of South Africa, hearing the appeal of Mrs Cleminshaw on her conviction for the same offence as that charged against Dr Naudé, put the matter of the prerogative as starkly as it could be put: 'The State President's power to appoint the Commission is inherent in his Prerogative and it is clear that he acted in terms of that Prerogative in appointing the Commission . . . It cannot be doubted that the purpose of the Commissions Act is to amplify, clarify and even to extend the State President's power when exercising his Prerogative; and not in any way to limit or restrict it. It is in this light that the Commissions Act must be seen.' It seems to be suggested in this passage that Parliament need not have enacted the Commissions Act and that the State President would have been able to create offences and punish persons for them even if that Act had not been passed.

We say 'the State President', the legislation says 'the State President', the courts say 'the State President'; but the State President is not a Stuart monarch, he is a constitutional head of state, and hence in this case stripped of personal discretion. As a matter of law he must conform to the advice of the Cabinet.⁷ The prerogative, then, is in reality the unrestricted power of the Prime Minister and his colleagues in the Cabinet to inquire, prescribe and punish. Small wonder if the power is exercised to crush political opposition to the policies and structures which the government party support and impose.

3 *The criminal law*

So much for the constitutional law in South Africa today; now we must look at the criminal law and procedure which the courts are

called upon to apply under the Constitution. Put shortly and in essence the procedure in criminal cases in South Africa follows that of England. In South Africa, as in England, the basis of criminal justice is accusatorial, not inquisitorial (as in some non-common law jurisdictions); the prosecutor must prove his case beyond a reasonable doubt, and it is not for the accused to show his innocence. The court is meant to hold the scales of justice fairly as between State and citizen. The rules of evidence are similar to those in England, and reject hearsay and other inferior forms of proof which might prejudice an accused.

The substantive criminal law, too, though not as closely linked to that of England as the procedure is, nevertheless has been strongly influenced by English law. The necessity of intention, that one must have a guilty mind to be convicted of a crime, and the defences of criminal liability (like insanity, intoxication and mistake), are parallel to the English requirements.

But South African criminal law has diverged more and more sharply from the English pattern in recent years, notably by (a) the sheer weight of legislation creating administrative offences; (b) the imposition of criminal liability on non-Whites for a large number of acts which are not criminal if committed by Whites; and (c) the use of the criminal law to bolster up the *Apartheid* system by ever more stringent measures creating crimes of a type completely unknown in England, such as the outlawing of organizations of a political nature, and the 'unpersoning' of persons banned under the Suppression of Communism Act, so much so that any reference to the speeches, writings or statements of banned persons, let alone their publication, becomes an offence. Worst of all, though, has been the tendency to short-circuit the processes of criminal justice altogether, and to provide for the imposition of the harshest penalties upon persons not shown to the satisfaction of any court to be guilty of any offence, merely by unfettered administrative act. Persons may lose their jobs, may be prevented from entering or restricted to a certain area, may be legally disabled from meeting more than one other person at a time, even for social purposes, and may be kept in custody under a variety of laws without either charge or inquiry.

4 *The courts*

Although the general structure of the courts, the way they work, and the qualifications of those who preside in them are reminiscent of

those in England and other common-law jurisdictions, there are one or two differences which are of the utmost significance. Less serious criminal cases are tried in a magistrate's court (it was the Pretoria Magistrate's Court—a 'regional court'—in which Dr Naudé was tried), the regional courts having a larger jurisdiction than the district magistrates' courts. Unlike in England, where the vast bulk of minor criminal cases is tried by courts of justices of the peace advised by professionally qualified clerks, and like many of the black African states to the north, magistrates' courts in South Africa are staffed by career magistrates, who sit alone. But (again unlike stipendiary magistrates in England, and indeed unlike some magistrates in black Africa) there is no requirement that a magistrate should be professionally qualified as a legal practitioner before appointment, and he does not even need to be the holder of a degree in law. What is more, magistrates are normally appointed from the ranks of the public prosecutors, who as their name implies handle cases on behalf of the state, and indeed magistrates and prosecutors may have offices in the same court building. As Professors Hahlo and Kahn say in their leading work,⁸ 'Criticism of the magistracy for years has centred on alleged inadequacy of training for judicial work and the vesting of judicial and administrative functions in one person.' And they refer to 'misgivings of unconscious leaning by magistrates in favour of the Government'.

From a decision of a regional magistrate's court appeal lies to the Supreme Court (Provincial Division); in Dr Naudé's case this was the Transvaal Provincial Division. When hearing a criminal appeal, the quorum of the court is two judges. Judges in the Supreme Court are normally appointed from the senior ranks of the practising bar. There is thus a fundamental difference in training, attitude and experience as between the magistrates on the one hand, and the judges of the superior courts on the other.

A further appeal lies to the Appellate Division, which is the highest court in the Republic, the quorum consisting of three judges.

II. THE SUPPRESSION OF COMMUNISM ACT

It is a characteristic of South African legislation that words do not always have the same meaning in a South African Act as they have elsewhere; the Extension of University Education Act, 1959, which restricted the right of Africans to go to university, is a case in point.

And so it is with the various laws by which the Government has sought over the last two decades to prevent the opponents of *Apartheid* from making their voice heard publicly. The keystone of this legislation is the Suppression of Communism Act 1950,⁹ under which 'Communism' has a broader meaning than Karl Marx could have dreamed of, since even an anti-Communist, such as Dr Naudé himself, can be deemed to be a Communist propagating Communism under the Act. Under the Act (a) organizations, apart from the Communist Party itself, can be declared unlawful and dissolved; (b) publications can be banned, and specifically the reproduction or dissemination of writings of persons subject to banning orders under the Act is prohibited; and (c) a person can be 'banned', that is subject to various severe restrictions on his liberty, by administrative act and without explanation or appeal.

Apart from organizations which exist for the promotion of Communism, the State President can declare an organization unlawful if it engages in activities which in his opinion are calculated to further the achievement of any of the aims of Communism, as defined in the Act; since the definition is of the widest, almost every politically conscious person in South Africa must run the risk of being in breach of the provision. Specifically, the Act, by section 1 (1) defines 'Communism' to include '... any doctrine or scheme ... (d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Republic the consequences of which are calculated to further the achievement of any object referred to in paragraph (a) or (b) [which define Communism in more conventional terms]'. Those who point out racial inequalities in regard to income, political rights, rights in land and the like thus run the risk of being deemed to have promoted 'Communism'.

The other main thrust of the Act, apart from its suppression of organizations and all the attendant penal provisions which fall on those who are their members or supporters, is to provide unrestricted power to the executive to 'ban' individuals. The Act gives power to the Minister of Justice to restrict an individual: in exercising his powers the Minister is substantially uncontrolled by the courts. The Minister does not have to give reasons to the person restricted in this fashion, if in the Minister's opinion it would be contrary to public policy to give reasons.

In his banning notice the Minister has a wide choice of restrictions which he may impose. One of the most grievous of the powers is to

ban the person from attending any gathering, or any particular kind of gathering. Often 'social' as well as political or religious gatherings are covered by banning. A bridge party thus becomes a criminal affair. A banned person was refused permission to attend his own child's birthday party!

Attendance at church might be criminal. If one attends a gathering when banned therefrom, the penalty is imprisonment for a term not exceeding three years. Meeting a fellow-student to discuss 'any form of state or any principle or policy of government', whether or not the principle or policy was supported or opposed, would be a crime for a banned person restricted from attending 'political gatherings'.

A banned person is normally restricted to living in one fixed area, and may frequently be confined to a particular flat or house, which he may not leave at all, or only for stated periods. He may be prohibited from receiving any visitor. At best he is subject to a kind of open imprisonment—at worst he is under solitary confinement—always, it must be remembered, without his having ever committed a crime or been charged before any court.

What the South African Government has achieved through its banning provisions is a new form of social death, the effects of which are contagious, in that a person who meets a banned person may himself be committing a crime. This form of isolation enforced by law makes the banned person his own jailor, anxious not to inflict his disease on others. Many of those banned under the Act are communicators—writers, teachers, politically, socially or religiously active; it is this kind of person who is hit hardest by a banning order, since automatically no speech, writing or statement of a banned person may be published or disseminated without the permission of the Minister. The banned persons are written out of the record, their books and writings rendered criminal objects. Teachers are subject to a further restriction, since banned persons are usually restricted from attending gatherings of students. The university teacher, the writer, the scientist in his laboratory, will all be out of a job, and will become virtually unemployable, as the result of a banning order being made against them.

No explanation; no justification; no control by the courts; no limit of time; incalculable personal and psychological damage; loss of job, work-mates, social contacts—these are just a few of the features and effects of a banning order on an individual. It is little wonder that active and concerned persons in South Africa should

fear the imposition of a banning order on them if they actively show their concern; were this to occur in the United States of America, banning would undoubtedly be held to be a 'cruel and unusual punishment': as *Black's Law Dictionary* puts it: 'Such punishment as would amount to torture or barbarity, and any cruel and degrading punishment not known to the common law, and also any punishment so disproportionate to the offence as to shock the moral sense of the community.' But, as we have seen, the South African constitution contains no protected fundamental rights and permits the executive an unlimited power to create new laws and new crimes.

To understand the Naudé case, one must understand that what Dr Naudé and his fellow members of the Christian Institute feared was that the inquiry under the Schlebusch Commission into them and their affairs was but a preliminary to the banning of the Institute, and the imposition on its officers and members of the penalties of banning orders under the Suppression of Communism Act.

The next Part shows among other things what happened to the NUSAS leaders after NUSAS was investigated by the Schlebusch Commission.

III. THE COMMISSIONS ACT AND THE SCHLEBUSCH COMMISSION

The Commissions Act was enacted in 1947,¹⁰ that is before the present Nationalist Government took power, though it has been amended by them in 1964 and 1967; and these amendments were crucially relevant in the Naudé case. In itself the Act was innocuous, its main purpose being 'to make provision for conferring certain powers on commissions appointed by the Governor-General [now the State President] for the purpose of investigating matters of public concern, and to provide for matters incidental thereto' (to quote the long title of the Act). As we have already seen, the power to appoint commissions of inquiry is a power inherent in the prerogative of the State President. Under section 1(1) of the Act, when a commission has been so appointed, the State President may by Proclamation in the *Gazette*: '(a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and; (b) make regulations with reference to such commission—(i) conferring additional powers on the commission; (ii) providing for the manner of holding or the procedure to be

followed at the investigation or for the preservation of secrecy; (iii) which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated; (iv) . . .’

And subsection (2) of section 1 of the Act imposes a penalty of up to 100 rand or six months’ imprisonment for breach of a regulation made under subsection (1). It is worth noting that these provisions are due to amendments made in 1964, as further amended in 1967. Considerable use was made by the State President of his power to prescribe and modify the procedure specified under the Act, as we shall see shortly, in regard to the proceedings of the Schlebusch Commission, and this was one of the main contentious points in issue in the Naudé trial.

Section 3 of the Act sets out a commission’s power as to witnesses; and specifically provides by subsection (3) that: ‘If required to do so by the chairman of a commission a witness shall before giving evidence, take an oath or make an affirmation, which oath or affirmation shall be administered by the chairman of the commission or such official of the commission as the chairman may designate.’

Dr Naudé was, of course, accused of having refused to take the oath when so required by the chairman under this section. This refusal is made an offence by section 6 of the Act, which provides in part that: ‘6. Offences by witnesses. (1) Any person summoned to attend and give evidence . . . who, *without sufficient cause (the onus of proof whereof shall rest upon him)* . . . having attended, refuses to be sworn or to make affirmation as a witness after he has been required by the chairman of the commission to do so . . . shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.’

The words which I have italicized here—‘without sufficient cause (the onus of proof whereof shall rest upon him)’—were the main plank upon which Dr Naudé rested his defence, as he sought to show, by an examination of the mode of proceeding of the Schlebusch Commission and a look at what had happened to other persons and organizations investigated by the Commission, that there was sufficient cause for his apprehension of the consequences of his par-

icipating in the proceedings of the Commission as a witness. A difficulty for the presentation of Dr Beyers Naudé's defence lay in the provisions of regulation 14 of the State President's regulations. In a sense, to voice the anxiety that the Commission might find, on unrevealed evidence of unknown witnesses, that there was something undesirable about the Christian Institute or its members, would be at the least to anticipate its findings; and comment on the Commission and its mode of procedure might (though the risk was minimal) influence its proceedings. To point out that the MPs who sat on the Commission were not judges with minds professionally trained to weigh evidence, to have regard for the principle that a man is innocent until he is proved guilty, and so on, was not to belittle them, as it was in no sense their fault; but one had to avoid the risk of seeming to disparage them or their Commission in making this point.

On 14 July 1972, the State President (which we must continue to remind ourselves means in fact the Prime Minister and his ministerial colleagues, whatever the form of the matter) made Regulations modifying the Commissions Act in its application to the Schlebusch Commission (and here again we must remind ourselves that the majority of the members of that Commission are members drawn from the government party), he made use of the power to modify the Commissions Act in its application to the Schlebusch Commission. The Act itself, by section 4, provides that: '*Sittings to be public.*—All evidence and addresses by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable.'

The admirable principle that justice is not only to be done but seen to be done, as expressed in section 6 (though reduced by the chairman's discretion to exclude the public in some instances), is entirely excluded by the special Regulations controlling the Schlebusch Commission. These Regulations make the proceedings themselves private and restricts the attendance of the public at them; but they go further than this in making it an offence for anyone to publish anything done at or said to the Commission. The Regulations in question, so all-embracing in their terms, are as follows: '5. No person whose presence at the inquiry is, in the view of the Chairman,

not necessary for the performance of the functions of the Commission or is not authorised by these regulations may be present at the inquiry.' '10. No person shall publish in any manner whatsoever or communicate to any other person any proceedings of the Commission or any information furnished to the Commission or any part of any such proceedings or information, or suffer or permit any other person to have any access to any records in the possession or custody of the Commission . . .'

It was the secrecy, the anomalous secrecy, enforced on the workings of the Schlebusch Commission that was one of the principal grounds of criticism and anxiety on the part of Dr Naudé. As he said in his evidence, such secrecy offended his Christian conscience. A person summoned as a witness before the Commission commits an offence if he divulges what he said to the Commission, or documents that he may have submitted to justify his stand, either generally or in regard to the Commission itself. It was one of the minor victories of the Naudé trial that Dr Naudé was enabled to override this secrecy in regard to the Commission and the document he had submitted to it, evidence of which was tendered to the court and is now reprinted in Appendix 1.

Counsel for Dr Naudé developed the legal point that, to the extent that the special Regulations made by the State President for the Schlebusch Commission provided that the proceedings should be secret and that it should be an offence to publish anything about them, the Regulations were in conflict with the parent Act, the Commissions Act, section 4 of which provides, as we have seen, that sittings of commissions are to be in public. That there should be *in camera* hearings, whether of a court or a tribunal or a commission, when matters directly affecting the security of the state—such as the disposition of the armed forces—are being referred to, is clearly right and acceptable; it is less easy to see why the fact that Dr Naudé is director of the Christian Institute, or any other facts of a similarly public or innocuous nature, should not be divulged when presented in evidence to the Schlebusch Commission. In framing his defence and in giving his evidence, Dr Naudé had to walk a legal tight-rope; he had to show, without impugning the honesty or sense of justice of individual members of the Schlebusch Commission, that he could legitimately fear injustice from the proceedings of the Commission. The members of the Commission were all parliamentarians, and it

was one of Dr Naudé's contentions that, from the nature of the case, parliamentarians could not be expected to co-operate with the same set of judicial attitudes as would be expected from professional judges or magistrates. The reason why this defence had to be put forward gingerly was the provision already cited above from the Commissions Act, and the Regulations duly made by the State President by Proclamation on 14 July 1972 in regard to the proceedings of the Schlebusch Commission. These regulations provided by regulation 14 that: 'No person may insult, disparage or belittle a member of the Commission or prejudice, influence or anticipate the proceedings or findings of the Commission.'

The history of the Schlebusch Commission

Having briefly set out the Commissions Act and its terms, under which the Schlebusch Commission was appointed, and mentioned some of the features of the special Regulations made to control its proceedings, we must now narrate the history of the establishment of the Commission, and the events which immediately led up to the summons directed to Dr Naudé and his fellow members of the Christian Institute to appear before the Commission and give evidence to it.

The 'Commission of Inquiry into Certain Organizations' was notified as having been set up by the State President on 14 July 1972.¹¹ Its original chairman, Mr J. T. Kruger, MP, was soon replaced as chairman by another of its members, Mr A. L. Schlebusch, MP, from whom the Commission now informally takes its name. The terms of reference of the Commission were set out in the Government Notice No. 1238 of 14 July 1972. They are of sufficient interest to quote in full: 'The Commission's terms of reference are as follows: (1) To inquire into and, taking into account the evidence, memoranda and exhibits which were submitted to the Parliamentary Select Committee on Certain Organizations, report on—(a) the objects, organization and financing of the National Union of South African Students, the South African Institute of Race Relations, the University Christian Movement, the Christian Institute of Southern Africa and any related organizations, bodies, committees or groups of persons; (b) the activities of the aforementioned organizations, bodies, committees or groups of persons and the direct or indirect results or the possible results of these activities; (c) the activities of persons in or in connexion with the aforementioned organizations,

bodies, committees or groups of persons and the direct or indirect results or possible results of those activities; and (d) any related matter which comes to the notice of the Commission and which in its view calls for inquiry. (2) To make recommendations if, in view of the Commission's findings, it appears to be necessary to do so.'

These terms of reference bring out several important matters for the understanding of the Schlebusch Commission. The first is that it started life as a Parliamentary Select Committee and took new form as a commission of inquiry under the Commissions Act; but the Commission, entirely composed of members of Parliament, still bears the traces of its origins. The second is that the 'certain organizations' under investigation, though different in composition, methods of action and philosophy, all spring from the humanistic liberal side of modern society and have all been critical, though in different ways, of the fundamentals and consequences of the present *apartheid* society. The third point to note is the very wide remit given to the Commission: not only is it to investigate the named organizations, but any 'related' body or group, and individual persons connected with such organizations or groups. But para (d) allows the Commission to investigate 'any related matter' whatever which in the Commission's view calls for inquiry; in effect this is a blank cheque to the Commission to look at anything it considers relevant. Thus *Spro-cas* ('Special Project for Christian Action in Society') has come under investigation, as has the Wilgespruit Fellowship Centre, which was investigated and discussed in the third interim report of the Commission; Mr E. O'Leary, director of Wilgespruit, was later ordered to leave the country.

And lastly, we note that the National Union of South African Students (NUSAS) was one of the first organizations named to be investigated and reported on, in the Commission's first interim report. The report, which recommended urgent action in connexion with NUSAS, and, in particular, eight named student leaders, was tabled in Parliament on Friday 27 February 1973; the same evening the Government issued banning orders under the Suppression of Communism Act against the eight student leaders named in the report. It thus became an immediate crime to publish any remarks or statements made by the banned students; and it was for an alleged breach of this prohibition, by allegedly publishing after the banning a short statement made by Paul Pretorius, one of the eight, quite

legally *before* the banning, that the Ravan Press, an enterprise associated with the Christian Institute, was later tried. An account of the trial will be found in Appendix 3.

IV. THE LEGAL POINTS AT ISSUE IN THE BEYERS NAUDÉ TRIAL

Many of the points which came up in the course of the proceedings in the Pretoria Regional Court have already been touched on in the introduction so far; but it may be useful to recall them, at the same time putting them in systematic order. We shall also have to deal with one point, which was taken on appeal and proved successful there, though not raised in the court of trial.

(i) Was the Schlebusch Commission legally constituted, and was the mode of proceedings prescribed for it valid, or was it beyond the powers of the State President?

(ii) Did Dr Naudé have 'sufficient cause' for refusing to take the oath and give evidence to the Schlebusch Commission?

1 *The legal validity of the Schlebusch Commission and its procedures*

The Regulations made by the State President for the Schlebusch Commission were in part invalid, argued Mr Kriegler, Dr Naudé's counsel, in so far as they imposed secrecy on the Commission and its workings. Specifically regulation 10, taken with regulations 3 (2), 5 and 12, were void because they conflicted with the fundamental principle laid down in the Commissions Act, section 4, that proceedings of a commission should be in public. The State President, it was argued, had power to make the regulations, not through the prerogative, but through the power which Parliament had given him in the Commissions Act itself; and so his exercise of the power would be circumscribed by the general requirements of the Act.

In respect of a principle, said Mr Kriegler, which deeply touched the status and rights of every citizen (to have his affairs and charges against him investigated in public), the courts should be slow to conclude that secrecy was legally enforceable, and the statute so providing should be strictly construed in favour of the subject.

The trial magistrate, Mr L. M. Kotze, rejected this submission in his judgment. He thought that Parliament had not restricted the State President's power to make regulations under the Commissions Act, and cited a leading case, *S. v. Hertzog* 1970 (2) SA 578, Transvaal, at p 588D, in support of his view.

2 *Sufficient cause and the refusal to testify*

This was the meat of the case for the defence before the Magistrate. Even if duly summoned to take the oath and give evidence, said the defence, a witness could legally refuse to do so, if there was 'sufficient cause' for his doing so. What is 'sufficient cause' under the Commissions Act, section 6, and how is its existence to be determined? Broadly there are two lines of approach that the courts could follow. Either they could see whether the particular person called as a witness, given his background, beliefs and fears, had sufficient cause to refuse—this is the *subjective* test, and implies that an accused person can escape punishment if he did not have a guilty mind, because in his own mind he was justified in refusing. Or the courts can follow the *objective* test, disregard the actual state of the defendant's mind, and lay down general categories of excuse; if the defendant can bring himself within one of these categories, he escapes punishment.

Counsel for Dr Naudé naturally argued for the former, the subjective approach, or more precisely for a mixed objective/subjective approach: if a reasonable man, possessing the actual beliefs and anxieties of the defendant, would be justified in refusal, that would be sufficient. The prosecution said that the excuse must be objectively justified, and that Dr Naudé's apprehensions were irrelevant in determining whether there was 'sufficient cause' for not testifying. In arguing the point, counsel on both sides referred to a number of important cases, mostly not decided on this particular phrase in this particular Act, but on similar phrases, such as 'without just excuse', in other Acts. Thus *S. v. Weinberg*¹² 1966 (4) SA 660 AD involved the question whether defendant had 'just excuse' under section 212 of the Criminal Procedure Act, 1955,¹³ for her refusal to testify: in that case she had alleged that an incriminating statement had been extracted from her by 'highly reprehensible third degree methods'; but this was not a just excuse sufficient to allow her not to give evidence in court. In the Appellate Division, the highest court in the land, Chief Justice Steyn in the course of his judgment in the *Weinberg* case said (at page 665): 'The Court below proceeded on the basis that "just excuse" in this section means "legal excuse". It is arguable that this phrase has a wider connotation, comprising more than compellability as a witness or the admissibility of evidence, that a witness may find himself in circumstances, not within the legal

limits demarcated by these concepts, in which it would be humanly intolerable to have to testify, and that the Legislature could not have intended to exclude such circumstances from the ambit of a just excuse.¹⁴

The special interest of the *Weinberg* case was that it directly related to refusal to give evidence at a trial of two persons under the Suppression of Communism Act; and counsel for Dr Naudé not surprisingly relied strongly on this dictum of Steyn, CJ, arguing that in the special circumstances of the present case it would have been 'humanly intolerable' for Dr Naudé to give evidence. It is the reasons put forward by Dr Naudé and argued by his counsel on his behalf, which make this trial one of unusual significance and interest. The defence challenged the composition and procedures of the Commission, and the secrecy under which it operated, and showed how Dr Naudé was unable, consistently with his Christian beliefs, to give evidence before it.

Against the broad view put forward by the defence, the prosecutor put the narrow legal view. A witness's objections to the mode of procedure and composition of the Commission could not be a legal defence or excuse for refusal to testify. Were Dr Naudé's point of view accepted, it would stultify the whole working of the Commission. The learned magistrate in his judgment totally rejected the defence's argument. Not one of the excuses offered by the defendant could stand. Persons should not accuse those in high authority, such as Parliament or the State President, of *mala fides* or unjust motives without sufficient basis for such criticism. The Parliament is chosen by and is responsible to the voter. Dr Naudé was guilty as charged.

V. CONVICTION AND APPEAL

So Mr Kotze, the Pretoria Regional Magistrate, found Dr Naudé guilty of refusing to give evidence to the Schlebusch Commission. He imposed a fine of R50 or one month's imprisonment in lieu, together with a suspended sentence of three months' imprisonment, which would come into effect if in the next three years Dr Naudé was convicted of a further offence against section 6 of the Commissions Act.

Counsel for Dr Naudé immediately gave notice of appeal. The appeal went to the Transvaal Provincial Division of the Supreme Court, constituted by S. Bekker and A. S. Botha, JJ. After prolonged

argument, the court gave its judgment on 12 March 1974. Before the Provincial Division Mr Kriegler, as counsel for the appellant, argued three main grounds for the appeal against conviction. They were: (i) that the body before which Dr Naudé had been summoned to appear on 24 September 1973 was not 'a commission' within section 6 of the Commissions Act, because only four members of the Commission, including Mr Schlebusch the chairman, had sat when Dr Naudé appeared; (ii) that the regulations made by the State President for the Schlebusch Commission were invalid and *ultra vires* because they conflicted with section 4 of the Act; and (iii) that there had been 'sufficient cause' for the defendant to refuse to take the oath and give evidence under section 6 of the Act.

As matters proceeded, the appeal court did not explore the second and third grounds of appeal, so that the merits of the defence of Dr Naudé were not gone into. The reason for this was that the court accepted the defence argument, on the face of it a very technical argument, that the four members of the Commission did not in fact constitute the Commission, and hence Dr Naudé had not been validly summoned and convicted. Their Lordships held that the expression 'a commission' in the Commissions Act meant 'a commission comprising all of its members'; a sub-committee of the Commission was not the Commission. So far as criminal liability for offences against section 6 (1) of the Act was concerned, 'we have already found that the legislature intended that the particular conduct set out in section 6 (1) is only punishable if the particular refusal to give evidence takes place before a full commission'. The conviction of the appellant was therefore wrong, and it, together with the sentence imposed upon him by the magistrate, was discharged.

The outcome to the appeal came as a surprise; indeed, it surprised the judges sitting in another subsequent appeal before a differently constituted bench of the Transvaal Provincial Division; this appeal involved Mrs Dorothy Cleminshaw, convicted of an offence similar to that alleged against Dr Naudé. She was convicted in the Pretoria Regional Court, fined R20 (or ten days in lieu), together with two months' imprisonment suspended for three years. In his argument to the court Mr Kriegler, who appeared for Mrs Cleminshaw, naturally reiterated the argument which had been successful in the Naudé appeal, namely, that the Commission had not been properly constituted when Mrs Cleminshaw was summoned to appear before it. But Snyman and Viljoen, JJ, in their judgment dated 20 May 1974

categorically and emphatically rejected both the conclusion of their brothers in the Naudé appeal, and the several grounds upon which it had been based. In their view, the Commission was the creature of the State President, who could, acting upon the Prerogative, give it what powers he chose. This would include the power, in his absolute discretion, to allow the commission to appoint, or to sit in, committees.

They concluded that the Commission could validly sit even if not all of its members were always present at its sittings. This would apply also to any sub-committees constituted by the Commission. The fact that the Chairman and three other members of the committee (out of the six appointed) sat in the present case did not affect the validity of the committee's work.

'... we have come to the conclusion, with great respect, that the judgment in Naudé's case is clearly wrong.' Thus Snyman and Viljoen, JJ, in the Cleminshaw appeal.

Now two benches of the Provincial Division are of equal authority, and this result creates a piquant situation affecting the authority of each of the decisions. One bench may refuse to follow a previous decision by another bench of co-ordinate authority if satisfied that the earlier decision was clearly wrong. 'We are therefore not obliged to follow [the decision in Naudé's case],' said the court in the Cleminshaw appeal. This conclusion left open the issue of 'sufficient cause', which had not been considered by the court in the *Naudé* case. Snyman and Viljoen, JJ, needed few words to dispose of this defence: it had not been argued by either counsel, and their Lordships did not consider the reasons alleged for not testifying were 'sufficient cause' within the Act. 'Broadly stated [Mrs Cleminshaw's] reasons are of a political nature. They have no merit in law.'

As is reported at p 147 of this book, the Appellate Division duly heard the State's appeal from Dr Naudé's acquittal on 2 December 1974 and by a majority determined that the Provincial Division had been wrong on the technical point (about the meaning of the word 'Commission' in the Commissions Act) which it had decided in favour of Dr Naudé. This still leaves open, however, the more substantial question regarding the secrecy of the Commission's procedure, and the broader issue of justification for refusal to testify based on the ground of 'sufficient cause'; and these points are now remitted for decision by the Transvaal Provincial Division. But Parliament and the Executive have not been idle meanwhile; and the newly introduced

Affected Organizations Act (passed in February 1974) is apparently intended to provide an alternative road to the suppression of the Christian Institute and its independent voice, one not trammelled by the legal impediments discovered by the industry of Counsel in the wording of the Commissions Act, and the regulations for the Schlebusch Commission.

NOTES

¹ See pp 107-8 for Dr Naudé on just and unjust laws; pp 59-60; 73 for the discussion of the Gospel; pp 68 *et seq.*, for Dr Naudé's sermon in court.

² No. 8 of 1947, as amended.

³ Republic of South Africa Constitution Act, 1961; Act No. 32 of 1961. For a full account, see H. R. Hahlo and E. Kahn, *The Union of South Africa*; Stevens and Juta, 1960.

⁴ See pp 24 *et seq.*

⁵ In their *The South African legal system and its background*, Juta, 1968, at p 55.

⁶ Based on the 1970 Census; since then, the non-White population has increased substantially faster than the White population.

⁷ Constitution Act, 1961, s.16 (2): '... any reference in this Act to the State President shall be deemed to be a reference to the State President acting on the advice of the Executive Council' [= the Ministers for the time being holding office].

⁸ *Union of South Africa*, pp 274-5.

⁹ No. 44 of 1950.

¹⁰ No. 8 of 1947.

¹¹ Govt. Notice No. 1238.

¹² 1966 (4) SA 660, AD.

¹³ No. 56 of 1955.

¹⁴ At p 665.

The trial

On Tuesday, 13 November 1973, Beyers Naudé stood before the Magistrate, Mr L. M. Kotze, in the centre of a small courtroom, and listened while his attorney, Mr J. C. Kriegler sc, addressed the Magistrate in Afrikaans. The proceedings were recorded on tape. The transcript opens formally.

Mr Kriegler: As it pleases you, Your Worship, I appear on behalf of the accused with my learned friend, Mr Joubert, instructed by the firm Bowman, Gilfillan and Blacklock.

The Court: Yes. The court wishes to point out that the plea has not been recorded on the machine.

Mr Kriegler: I will repeat it on the machine. The accused pleads not guilty, Your Worship. Your Worship, I think the case will continue for quite a while, may the accused sit?

The Court: Certainly.

When Beyers Naudé had taken a seat, the Prosecutor for the State, Mr S. J. Rossouw, began to lay the groundwork for his case by putting in evidence various official Government Gazettes, Notices and Proclamations. These documents showed that a Commission of Inquiry into Certain Organizations had been appointed by the State President; that rules for its proceedings had been established; and that penalties had been assessed for anyone who without Court authorization, published or communicated in any manner any of the proceedings of the Commission.

The Prosecutor quickly called his first and only witness, Christoffel Petrus Jochemus Prinsloo, Secretary of the Commission of Inquiry.

The Prosecutor reminded the Court that Regulation 10 of the Proclamation establishing the Commission prohibited Mr Prinsloo from answering questions concerning any specific proceedings in that Commission. The Prosecutor thus made clear from the start that he intended to rely on Regulation 10 to keep the scope of Mr Prinsloo's statements very narrow. He would simply affirm that Beyers Naudé had appeared before the Commission as the result of a valid summons and that he had refused to testify. Regulation 10, the prosecution hoped, would prevent the defence from probing Mr Prinsloo deeply about the recent secret proceedings of the Commission. But Mr Kriegler, anticipating the prosecution's manoeuvre, pointed out that the Court could and must order the witness to answer all questions concerning the Commission proceedings which were relevant to the defence of the accused.

Mr Prinsloo told the court that Beyers Naudé had been summonsed to appear before the Commission of Inquiry on 24 September 1973, in the Old Raadsaal on Church Square in Pretoria. Mr Prinsloo was present when the accused appeared:

Prosecutor: Can you tell the Court what happened there?

Mr Prinsloo: Well, the accused appeared and when the Chairman asked him to make the affirmation or to take the oath to give evidence, he refused either to take the oath or to make the affirmation.

— And he did not give evidence?

— No, he did not give evidence.

— I want to ask you to look at the document which will be handed in as Exhibit D. (The Prosecutor showed the document, a transcript of the relevant proceedings before the Commission, to the witness.) Did you read through it?

— Yes.

— Does this accord with your own recollection of the event?

— That is according to my memory a correct account of what happened there.

* * *

— The reference to 'Dr Naudé'; to whom does this refer?

— To the accused now before the Court.

* * *

— I have no further questions, Your Worship.
The prosecution's examination of its sole witness had ended.

But the cross-examination of Mr Prinsloo by Defence Counsel was not to be so cursory. Mr Kriegler began by establishing that Exhibit D was a transcript of the proceedings of the Inquiry Commission during the time when Beyers Naudé appeared before it. Mr Kriegler then asked:

Now, Mr Prinsloo, you . . . say that the accused refused to take the oath. Is that the whole truth? Or did much more happen?

Mr Prinsloo: No, that is the truth in so far as he refused to take the oath to give evidence before the Commission. There was a reservation later.

— You now speak the whole truth? . . .

— That is the whole truth.

— Were no reasons given for this? . . .

— No, the witness said he refused to take the oath and to give evidence before the Commission.

— And he gave no reasons for this? . . .

— Not as far as I can remember.

— Come now, Mr Prinsloo, a little earlier you saw this document. I just want to read to you from it, from Exhibit D—'*Dr Naudé*: Mr Chairman, I would like, in case there is any misunderstanding in connexion with the answer which I have given on the question of whether I am willing to take the oath or make affirmation to give evidence, just to make clear that by that I mean I am willing at any time to take it at any inquiry which fulfils the requirements which we made in the document'.

— Did he say that? . . .

— He said that. That is correct, that is what I said—there was a reservation later.

— And what was that document? . . .

— That is a document that was later handed in to the Commission.

— And where is that document today? . . .

— It is in the file of the Commission.

— And in that document the whole motivation for the accused's attitude is set out? . . .

— That is so.

- Did you hand over that document to my learned friend the Prosecutor? . . .
- I am not sure.
- I just want you to look through this document—look through carefully.

Mr Kriegler submitted the document, a statement signed by Dr Naudé, the Rev. Theo Kotze and the Rev. Roelf Meyer, fully explaining their theological and other reasons for refusing to testify before the Schlebusch Commission. It had been handed to the Commission when they appeared before it. It was put in evidence in this trial as Exhibit E and is reproduced in full in Appendix 1. Mr Kriegler asked Mr Prinsloo to read the document to the Court, which he proceeded to do.

After reading out the Table of Contents of the document in full Mr Prinsloo then read the first sentences:

'A witness in the name of Jesus Christ to the Commission of Inquiry into Certain Organizations concerning the refusal to co-operate because of Obedience to God as the highest authority. As believers in Jesus Christ we wish to give account before our fatherland, before the Commission and above all before God, of why we cannot co-operate with the Commission and why we regard our refusal to testify as a Christian deed (1 Peter 3:15). The reasons for our viewpoint are set out here.'

There followed in full the rest of the document setting out, among others, the following reasons for the refusal to testify:

- The Prime Minister had himself prejudiced the Commission by his statements in Parliament and placed the Commission under pressure to prove a case against the Christian Institute.
- The National and United Parties (from which the Commission Members were drawn) had made similar statements about the organizations to be investigated.
- There was nothing about the Christian Institute (which operates in the open) which the Government does not know already.
- The Commission was composed of politicians and was not a judicial commission.
- The purpose of the Commission was to silence the Christian

Institute in its witness against the un-Christian policy of *Apartheid*.

- The Christian Institute was being examined with other organizations to establish guilt by association.
- As the arbitrary banning order against eight NUSAS leaders showed, the investigation by the Commission could result in people being persecuted in an un-Christian and unfair manner without the control of normal legal process.
- A Christian should not co-operate with such a procedure; if he did he also would be guilty before God because he participated in the process of punishing people in an un-Christian manner and persecuting them.
- There was supposed to be a *prima facie* case against the Christian Institute (as the Prime Minister had stated in Parliament) but they did not even know the nature of the charge or who the accusers, if any, were to be.
- As no information about accusations against any person is made known, no right to defence or denial exists and the accusers can never be confronted, challenged or subjected to cross-examination.
- As witnesses are sworn to secrecy, they are silenced in spite of any distortion or untruth or false conclusions of which they may be aware.
- The Commission deviates from the normal, acknowledged legal procedures of democracy and it is not true to the Rule of Law or the separation of the legislative, judicial and executive functions.

The aims and method of operation of the Commission were then questioned in depth in terms of the Gospel.

The document concluded as follows: 'We wish to repeat that we have nothing to hide and that, if an inquiry is necessary (which we do not believe), we are willing to give evidence before a public, impartial, judicial tribunal and to co-operate. We do not wish to make ourselves heroes or martyrs as the Afrikaans press has implied, but to us it is not a matter of martyrdom or heroism but a matter of obedience to Christ, the highest authority. Through the Grace of God, we only want to remain obedient to Christ, the Word of God, because: *Verbum Dei manet in aeternum* [the Word of God is everlasting].

Signed by Theo Kotze, Roelf Meyer, Beyers Naudé'

Mr Kriegler: Now Mr Prinsloo, was that document read out before the Commission?

Mr Prinsloo: It was only handed in for record purposes. It was not read out.

Q: Up to now, as far as you know, not read?

A: It was read by members of the Commission.

Q: By certain members of the Commission?

A: By Commission members concerned, yes.

Q: By that do you mean all members or some members?

A: As far as I know, all members who have an interest in it.

Q: Now, Mr Prinsloo, this then was the point of view taken by the accused before the Commission, that he was ready at any time to give evidence under oath or on affirmation, provided that the demands of the document just handed in, Exhibit E, were met?

A: That is correct.

Q: There was thus no total refusal to give evidence?

A: No, I stand by my answer. When he was asked to take the oath to give evidence he refused to take the oath or to make the affirmation that he should speak the truth.

Q: Yes, and then the reasons were given and the requirements laid down?

A: That is correct.

Mr Kriegler next asked the witness if he was familiar with a statement made by Mr Vorster, the Prime Minister of South Africa, at the start of the 1972 Parliamentary session, in which he asked for a Commission to be set up to investigate subversive groups in South Africa. Mr Kriegler quoted the Prime Minister as his words appeared in the weekly edition of *Hansard*: 'I think that our Parliament should keep an eye on all organizations and should keep an eye on all trends which may possibly in this connexion be giving rise to subversion. I emphasize the word "possibly" for in this connexion we cannot afford to make a mistake. If we should make a mistake with the potentially explosive situation we have in South Africa, we will have to pay dearly for it.

'I have mentioned Parliament deliberately because in my humble opinion Parliament can rightly play a role in regard to this matter and I do not for one moment doubt that Parliament will play its role in this regard. I believe that Parliament should take cognizance of four organizations which exist in South Africa, four organizations

with wide-spread subsidiaries and ramifications. I believe that Parliament, as the chief guardian of our liberty, should acquaint itself with the objectives and activities of these organizations and their subsidiaries, their contacts and their financing. For that reason I intend proposing as soon as possible that a Select Committee of this Parliament be appointed to investigate the objectives, activities, etc., which I have mentioned here of the following four organizations: The University Christian Movement, NUSAS, Christian Institute and the Institute of Race Relations.

'Sir, I do not want to pronounce any judgment on these people at the present moment, I do not want to place them in the dock in anticipation, but in view of the information at my disposal I would be neglecting my duty if I did not tell Parliament that the information indicates that there is a *prima facie* case here which needs to be investigated. I believe that Parliament, as the guardian of liberty, should undertake that investigation by means of a Select Committee, consisting of members of both parties, and once Parliament has done that, Parliament will have acted in the interests of society.'

Mr Prinsloo accepted that this was an accurate version of the Prime Minister's statement, explaining that his only knowledge of it came from what he had read in the press. He also remembered having read that Mr A. L. Schlebusch, Chairman of the Commission, had said, prior to the inquiry into the activities of the Christian Institute, that the public could expect the Commission to uncover some further shocks. Mr Prinsloo claimed that he could not remember accounts of a similar statement made by Mr Marais Steyn, another member of the Commission.

It was becoming clear that Mr Kriegler was skilfully using Mr Prinsloo's testimony to point out that the Commission of Inquiry was hardly the impartial kind of legislative committee normally assigned to investigations. In spite of the witness' evasiveness, Mr Kriegler succeeded in making a number of telling points.

Mr Kriegler: Now, Mr Prinsloo, without commenting on its erudition or otherwise, would it be right to say that the accused's attitude before the Commission was: Before this Commission in its present form and with its present procedures, I will not take the oath?

Mr Prinsloo: Well, I can't give evidence about his attitude, but . . .

Q: As revealed in the document, Exhibit E.

A: Yes, he did say that day that he would not take the oath or make the affirmation that he would speak the truth.

Q: Yes, but on the grounds of certain reservations, not so?

A: Yes, the composition of the Commission.

Q: Firstly, the composition of the Commission as politicians and not judicial officers?

A: Well, he did not enlarge as such orally . . .

Q: Is it indeed true?

A: Well, it is contained in the document.

Q: No, but is it indeed so?

A: I cannot give evidence about that.

Q: Do you not know that the members of the Commission are professional politicians and not judicial officers?

A: That is so, yes.

Q: The second objection was the secrecy surrounding the inquiry. Correct? That was an objection made by the accused?

A: If you could only ask the question more clearly. Do you mean it was an objection which he made there orally?

Q: No, in the document?

A: In the document, correct.

Q: Is it in fact true, the Commission worked in secret?

A: There are regulations which stipulate that, yes.

Q: No, in fact it works in secret?

A: If you put it that way.

Q: No, I want to know how you would put it.

A: That is a matter of opinion. I will not say that it works in secret, there are regulations and it functions according to the regulations.

Q: And according to those regulations it must work in secret, not so, Mr Prinsloo? Don't let us lead each other around the bush.

A: If you put it in that way, then it is so.

Q: It is so. The accused also objected before the Commission that the Rule of Law was being violated, on grounds of certain considerations?

A: That is correct.

Q: Is it indeed true that a person who appears before the Commission has no charge sheet in which it is specified what the charge against him is?

A: I cannot give evidence on that.

Q: Do you really not know?

A: No, I only do the secretarial work at the Commission, I am not involved in the working of the Commission in this instance.

Q: Mr Prinsloo, do you not sit in on the work of the Commission?

A: I do sit in.

Q: Have you ever seen that a formulated charge sheet was handed to a single person appearing before it?

A: I can really not give evidence on this, Your Worship, it is not my function to note that.

Q: You say it is possible, but you did not notice it?

A: If you want to put it that way, yes.

Q: You keep the official documents of the Commission?

A: That is correct.

Q: Have you in any one of these documents which you hold seen a single charge sheet against any persons being questioned?

A: No.

Q: Can we than not accept that there is indeed no charge sheet? Is that not the only conclusion, Mr Prinsloo?

A: That is the correct conclusion.

Q: Very well, Mr Prinsloo, there was also an objection against the principle that the person questioned does not know what information is being used against him, not so?

A: Could you please repeat the question?

Q: There was also an objection as an aspect of the violation of the Rule of Law, that the person being questioned does not know what information is being used against him?

A: That is correct.

Q: That is indeed true, not so? Isn't that so, Mr Prinsloo?

A: That is a difficult question to answer.

Q: Mr Prinsloo, in all the time that you have been secretary to the Commission, has there been one person questioned to whom it has been said: We have the following information against you and we want to have an explanation or an answer from you on this?

A: Your Worship, with respect, I do not know whether I can answer this kind of question, I now go beyond my duty.

Q: Mr Prinsloo, you have been ordered to give evidence according to Regulation 10.

A: Regulation 10 specifically protects me from making public the proceedings of the Commission.

Mr Kriegler: Your Worship, I will then have to ask you to make a ruling on this.

There then followed a lengthy legal argument. The defence sought to have the Court rule on what sorts of questions the witness would be required to answer. The Prosecutor and Mr Kriegler agreed with the Court that the witness should be ordered to respond to any question relevant to the defence of the accused. But what sort of evidence would be relevant to Beyers Naudé's defence? Mr Kriegler said that since the defence which he would present was a very broad-based one, the Court should be liberal in its determination of what evidence was relevant to that defence and what was not.

Mr Kriegler explained that the defence would base its case on the language of Article 6 of the Commissions Act under which Beyers Naudé was charged. According to that article an individual may be punished for refusing to testify before a Commission when his refusal is 'without sufficient cause'. The burden of proving that his refusal was based on 'sufficient cause', however, was specifically placed on the defendant. In other words, the defendant must prove he had a lawful motive for not testifying, otherwise he would be convicted. The prosecution in such a case, unlike the normal practice in criminal law, need not prove that the defendant had an unlawful motive for his actions. It is enough that the defendant cannot prove that it was lawful. 'A refusal to give evidence is in itself not misconduct,' noted Mr Kriegler, 'the misconduct is the refusal without sufficient cause.' The defence, he said, would show that Beyers Naudé had sufficient cause for not testifying. Since sufficient cause was a wider concept than the other legal terms often used such as 'just excuse' or 'sufficient reason', the range of evidence which the Court should permit the defence to submit should accordingly be broader. Furthermore, Mr Kriegler added, the range of permissible evidence should be all the greater since the common law practice was to interpret punitive clauses as liberally as possible in favour of the accused. This was especially true where the burden of proof lay on the accused, as was the case here. A liberal reading of 'sufficient cause' would necessarily require liberality in deciding whether evidence submitted by the defence tended to prove 'sufficient cause' and whether it should, therefore, be admitted.

The case *State v Weinberg*, 1966 (4), SF, 660, Mr Kriegler argued, stood for the proposition that the Court should take into account 'all

the circumstances' of the case in deciding whether Mr Naudé had had sufficient cause to refuse to testify. In the *Weinberg* case Chief Justice Steyn of the Appeal Court of South Africa said: 'It is arguable that . . . a witness may find himself in circumstances not within the legal limits demarcated . . . in which it would be humanly intolerable to have to testify, and that the legislature could not have intended to exclude such circumstances.'

Mr. Kriegler: Your Worship, the accused, who carries the onus of proof, will in due course present evidence to you in discharge of that onus, and that evidence will be aimed at convincing you that here indeed [there were such] circumstances . . . The questions now put to this witness [Mr Prinsloo] are specifically intended to serve as a factual test of the evidence which I intend in the duration of the accused's case to lay before you . . . It is for this reason that we make this cross-examination and it is for this reason that we make the submission to you that even should the first part of Regulation 10 not relieve the witness of his duty of secrecy, it nevertheless falls directly in the framework of the *facta probanda* in this case, and that it will then be covered by an order from you to the witness to answer all relevant questions . . . Your Worship, this then is our submission.

* * *

The Court: As I see the matter . . . it is the intention of the defence to present evidence before this court, and your argument means specifically that you wish to ask questions of this witness, to confirm the evidence which you intend to place on the record. This is how I understand you.

Mr Kriegler: Yes.

The Court: Now it may be completely in order . . . if you want to ask questions which have direct relevance to the proceedings concerning the accused when he appeared before the Commission, but when it comes to an occasion when the accused was not directly involved but possibly only indirectly, then problems may be created . . . The Court has discretion to give the witness permission to answer a question. As I read the different articles of these regulations, the intention [in setting up the Commission] was that the sitting should be in secret.

Mr Kriegler: That is correct.

The Court: And I think that you must agree with the court that it is the prerogative of the State President . . . to order how such a Commission should sit, in secret or in public . . . the Court cannot . . . allow this witness to negate the intention of the State President by giving him permission or compelling him to give information which is not directly relevant to the defence of the accused . . . The Court decides that the witness may only give evidence in connexion with the activities of the Commission regarding documents which were presented to the Commission by the accused and which form part of his defence in this case. I do not think that I can go further at this stage . . .

Mr Kriegler: As it pleases the Court.

The Court's ruling was a narrow one and meant that Mr Prinsloo would be free not to answer any questions put to him by Defence Counsel which did not pertain directly to the written statement which Beyers Naudé had submitted to the Commission. Above all, he would not have to state whether reports adverse to the defendant had been placed before the Commission in secret session by the notorious Bureau of State Security (BOSS).

Mr Kriegler resumed his questioning.

Q: Mr Prinsloo, is it correct that no information of an accusation against the accused was given to him by the Commission. Yes or No?

A: That is correct because as far as I know it is a fact-finding commission and not a court which makes accusations against anyone.

Q: And even had the accused given evidence, even then he would not have had any knowledge about accusations made against him?

A: Because there was no accusation *de facto* against him.

Q: Similarly, concerning the Christian Institute, of which the accused is Director, there was also no knowledge of accusation, correct?

A: Well, the Christian Institute as an organization never appeared before the Commission as a witness, so I will not be able to answer this.

Q: But it is nevertheless one of the four organizations whose actions the Commission is investigating?

A: That is correct, but we are dealing with the day when a person appeared before the Commission, and not with what the Prime

Minister supposedly said or what the accusations were in a *prima facie* case.

Q: But Mr Prinsloo, let us be realistic. The Commission's work is *inter alia* to investigate the work of the Christian Institute?

A: That is correct.

Q: It is because of this that the accused was subpoenaed?

A: That is correct.

Q: And that body in question has received no notification from the Commission regarding the nature, range or extent of the accusations against it?

A: No.

Q: And never would have?

A: No, because there was no accusation against it.

Q: We then continue with the next phrase. The accused said to the Commission in Exhibit E in writing—'. . . therefore no right to defence or denial exists . . .' Let us consider this for a moment. Is this a factually correct statement?

A: No, I do not believe that it is factually correct because the regulations do provide for legal representation for witnesses.

Q: To do what, Mr Prinsloo? To examine witnesses on behalf of the accused?

A: No. I do not know what the exact wording of the regulation is, but I do know that it makes provision for legal representation.

Q: Mr Prinsloo, let us look at these regulations and would you please tell His Worship what the nature of that legal representation is? I think it is Regulation 9 to which you refer—'9. Any witness who appears before the Commission may be assisted by an advocate or an attorney only to the extent to which the chairman permits it.'

Q: Is this the regulation to which you refer?

A: That is the one which I had in mind.

Q: The right to legal representation is in the discretion of the chairman?

A: It is in the discretion of the chairman, that is correct.

Q: Now His Worship will eventually have to determine what the real content of that legal representation is. Further, I want to ask you, would the accused or the Christian Institute, have been allowed to be led by such a legal representative at the Commission?

The Court: Is that not a legal question, Mr Kriegler?

There then followed another legal argument at the conclusion of which the Court ruled that the witness need not answer the question, nor even the question whether he knew of a single case before the Commission in which a witness was led by his legal representative. Mr Krieger then resumed his cross-examination.

Q: We come then to the next one, Mr Prinsloo. There was no prosecutor was there?

A: No, because it was not, as His Worship correctly remarked, because it was not a trial.

Q: There was no plaintiff in the sense in which we understand it in law?

A: That is correct.

Q: There was no right to cross-examine any witness, who gave evidence prejudicial to the accused?

A: That is correct.

Q: Or even to know what he had said?

A: No, because the proceedings of the Commission were not made public.

Q: Not even ever to the witness being questioned?

A: That is correct.

Q: Then on page 4 the accused expresses his objection to the fact that the Christian Institute is linked to other organizations and so guilt by association can be conveyed. The fact is that four organizations are being investigated, not so?

A: That is correct.

Q: Four organizations and a host of people, affiliates and associated organizations, which surround these four organizations?

A: That is so.

Q: Then the point is also made by the accused on page 4 of Exhibit E, that there was a request for a judicial commission. That is true, not so?

A: I am not aware of that.

Q: Do you have no knowledge of this?

A: No.

Q: Really not, Mr Prinsloo?

A: The only knowledge that I have of a judicial commission is when the case was debated in Parliament and members of the United Party said that a judicial commission would be more in keeping in this matter, That is the only knowledge which I have of it.

Q: And, Mr Prinsloo, in the published report of the Commission, over which we need draw no blanket of secrecy, there was a recommendation regarding members of other organizations, not so?

A: To which report of the Commission do you refer?

Q: That concerning NUSAS.

A: That is correct.

Q: Urgent action was recommended against them, not so?

A: If I remember correctly that is the way it is in the report, then it is correct.

Q: And eight members of the executive of NUSAS were actually banned afterwards?

A: Of that I only have knowledge as a member of the public, what I have read in the press, etc.

Q: Within a day of the recommendation being published?

A: I cannot remember the exact time lapse.

Q: I just want to confirm one point and get it clearly on record, Mr Prinsloo, the question which I asked you this morning on the right of legal representation and to be led by your legal representative, His Worship ruled that you need not answer unless you want to. You do not want to answer the question, is that correct?

The Court: No, that is not correct—not in connexion with the accused, in connexion with other cases.

Mr Kriegler: Yes, in connexion with others, Your Worship. This is correct. You do not wish to answer the question?

Mr Prinsloo: That is correct.

Mr Kriegler: That is all, thank you, Your Worship.

When the Defence Counsel sat down, the Prosecutor indicated that he would not exercise his right to re-examination. He asked instead for a short adjournment, which was granted, and the witness, Christoffel Prinsloo, was released. The prosecution case had ended.

When the Court resumed, the defence was called upon to present its case. Already the first faint rumblings of an advancing storm could be heard echoing through the Court. Mr Kriegler called Beyers Naudé to the stand, and the Defence Counsel began to question the witness carefully about the development of his spiritual and religious convictions from the time of his youth until his decision not to testify before the Schibusch Commission. The Defence Counsel brought out the strength, sincerity, and faith of those convictions

which evolved only over years of meditation, prayer and self-sacrifice. The road which Beyers Naudé had travelled was a long one, and difficult, and Mr Kriegler asked the witness to recall it. He began by tracing Beyers Naudé's family background and Christian upbringing, his ultimate decision to accept the directorship of the Christian Institute, which came only after his participation in the Protestant ecumenical movements of the 1950s, and his activities as Acting Moderator of the Transvaal Church.

Examination by Mr Kriegler:

Q: Mr Naudé, where were you born?

A: I was born in Roodepoort, Transvaal.

Q: What kind of home?

A: I was one of eight children living in a manse of the Nederduits Gereformeerde Kerk; my father was a minister of the same Church.

Q: Afrikaans-speaking?

A: Afrikaans-speaking, yes.

Q: Now, Mr Naudé, did you also enter the ministry when you reached adulthood?

A: Yes.

Q: When was that?

A: I completed my theological studies at Stellenbosch at the end of 1939 and entered the ministry in December 1939 as assistant minister at Wellington.

Q: And after that how long were you a minister of the NG Kerk?

A: I was a minister of the NG Kerk up to November 1963; then I accepted the directorship of the Christian Institute and my status as minister was taken from me as a result of the fact that I accepted the directorship of the Christian Institute.

Q: Did you at the time, i.e., in 1963, make an application to retain your status as ordained minister in the NG Kerk?

A: Yes, when the post of the director of the Christian Institute was offered to me, I replied that I would first place the matter before the relevant committee of the NG Kerk as I wished to remain a minister of the NG Kerk in the service of the Christian Institute. The application was made but without giving reasons the application was rejected.

Q: Now, Mr Naudé, you are at this time still director of the Christian Institute?

A: That is correct.

Mr Kriegler now asked the witness to describe the Christian Institute.

Mr Naudé: The Christian Institute is an organization of individual Christians from all Churches in South Africa, with four main aims and objectives. In the first place, to give a more visible expression to the biblical truth of the unity of all Christians, all believers. In the second place, to relate the truth of the Gospel more immediately to the questions of our daily existence and to make its meaning more clear to its members and to all who wish to know it. In the third place, to act as a group of Christians who wish to help bring about reconciliation between the widely divergent, divided and conflicting groups of Christians of different Churches and colours in our country. And in the fourth place, to offer the services of our members to any Church or group of Churches who wish to make use of them to give a better expression to the Kingdom of God in South Africa.

Mr Kriegler: Mr Naudé, is any of these four aims which you have mentioned secular in origin?

A: No, each of these aims is grounded in Holy Scripture, in the Word and Message of Jesus Christ.

Q: We will come back to the activities of the Christian Institute later. At this stage in broad principles only, does the Christian Institute also move on a secular plane?

A: The Christian Institute has the conviction which we believe also to be the conviction of the Old and New Testament, Your Worship, that a Christian has the right and the duty to witness in all areas of life, and that such a witness must also be clearly formulated and given by an organization like the Christian Institute. In this sense the Christian Institute also gives its witness in that area.

Q: And is this a secular witness or is this the witness of believers?

A: No, this is the witness of believers and not secular.

Beyers Naudé noted that he was one of the founders of the Christian Institute and Mr Kriegler asked him if he would describe for the

court the events which took place in his life, in the activities of the Church, and events in South Africa which resulted in the founding of the Christian Institute

Mr Naudé: I will do my best to answer the question, Your Worship. I was born and brought up in a home where the reverence for the authority of the Bible served as foundation for our life and upbringing. In my upbringing as son in the home, my father constantly emphasized the biblical and reformed truth of the sovereignty of God in all areas of human life, as also the necessity that the Christian should act correctly and justly, that these should be the foundation stones of the Christian's life. To the best of my ability in the upbringing which I was privileged to have, I tried to understand these convictions and truths and to live accordingly. After I matriculated I went to Stellenbosch University where I first completed my ordinary university studies and then my theological studies and after that began as a minister in the service of the NG Kerk. As a young minister I served a number of congregations, first in Wellington, then in Loxton, then in Pretoria South, after which I was called as a student pastor of the NG Kerk at the University of Pretoria. It was during my ministry among the students that for the first time, in discussions and through the questions which students asked, questions which originated in the racial problems of Southern Africa forced me to serious reflection and theological studies.

Mr Kriegler: Roughly, when was this?

Mr Naudé: I was student pastor from 1949 to 1954, when I accepted a call to the congregation at Potchefstroom. As a result of these numerous questions, and also as a result of developments which took place in Africa after the Second World War, I realized that for the following ten and even possibly twenty years the racial problem would be the central problem, also for the Church of Christ in our country, and I therefore decided in spite of a busy ministry to acquaint myself fully with this, in so far as it was possible through independent study. This I did also after I left Potchefstroom. A decisive event in the development of my studies was the Reformed Ecumenical Synod which took place in Potchefstroom in 1957. I should possibly explain, Your Worship, that the Reformed Ecumenical Synod is described as an ecumen-

ical body of a number of Reformed Churches throughout the world, to which among others the Nederduits Gereformeerde Kerk van Suid-Afrika, the Gereformeerde Kerk van Suid-Afrika, the Reformed Church of Holland and other Reformed Churches belong. This Synod took place in Potchefstroom in 1957, and although I was not a delegate, I attended because of my intense interest in the theological problem which was developing around the Church and race. I attended a number of open meetings and took serious cognizance of the report and the decisions of that Synod.

Mr Kriegler asked Beyers Naudé to define what he meant by the concepts 'ecumenical' and 'ekumene'. The word 'ekumene', Mr Naudé said, had a Greek origin, *Oikumene*, which meant the whole inhabited world. More than sixty years ago a number of Protestant Churches across the world became aware that the Church, which had always stood for the one body of Christ, had become painfully divided and broken into numerous separate denominations and church groups. This division was particularly distressing in the mission field, since non-Christians were confused by the numbers of church groups all supposedly offering the same message of salvation in Jesus Christ. 'The Churches were compelled to ask themselves, what is wrong with our witness, that we cannot bring the message of unity to the world?' Beyers Naudé explained. The movement towards greater unity grew out of an attempt by various church groups around the world to co-operate in finding a solution to the problem.

In the context of the synod of the Reformed Churches the word 'ecumenical' took on a more limited meaning, Beyers Naudé continued. *Mr Naudé*: Here the word has a confined and limited meaning because here only Churches of the Reformed Confession met together, but they judged that they had the right to use this word because there were in fact different emphases in the various approaches to the Reformed message and interpretation of the Gospel, and also because it represented Churches from all parts of the inhabited world who joined in debate and in discussion, in dialogue and prayer about the word of God.

Mr Kriegler: It is therefore a meeting of Reformed Churches across church denominational barriers?

Mr Naudé: That is correct.

Beyers Naudé explained that the Reformed Ecumenical Synod of 1957 was only one of several such gatherings in South Africa during the 1950s. The representatives of almost all Churches in South Africa had met at least four times during the decade to consult with each other on questions of communal, social, theological and ecclesiastical concern. The leadership of these conferences was taken by the Dutch Reformed Church and the Reformed Church in South Africa. It was during the same time that the *predikante broederkring*, the ministers' fraternals, grew up in Pretoria and other parts of the country. These were groups of ministers of all South African Churches which met regularly to discuss questions of common concern.

Mr Kriegler asked Beyers Naudé how these meetings of the ministers of different Churches fitted into the ecumenical movement.

Mr Naudé: All these meetings and conferences and ministers' fraternals, all these are in accordance with the accepted truth of the Gospel, namely the necessity that Christians who confess their belief in Jesus Christ as Lord and Saviour should live, should work, should witness and should serve together as brothers and sisters in Christ Jesus.

Mr Kriegler: Can you remember the specific theme of any of the conferences held at the time?

A: I speak under correction, Your Worship, when I say that one of the conferences dealt with, I think the theme was 'God's Kingdom in Multi-Racial South Africa'; the conference held in, I think it was 1954 or 1955, dealt with the need for literacy, that is to say the development of literacy among the Black community of South Africa and with those who did not have that opportunity. The conference of 1959 had as theme, 'The Task of the Church in Areas of Rapid Social Change'.

Q: Mr Naudé, in those church conferences or inter-church conferences which dealt with these subjects, was a voice ever heard that the Church or Churches were now moving in a sphere with which the Church had nothing to do?

A: To the best of my knowledge there was no objection of any kind made during that time. If there had been then I would surely have known because I was actively interested, but to the best of my knowledge there was never any objection of this kind.

Q: According to your opinion was it in fact correct that inter-church

conferences should concern themselves with such social problems? And should reflect on them?

A: Definitely.

Q: And did any social resolutions result from these conferences?

A: Each conference, as I remember, made a number of resolutions, with recommendations which were sent to the institutions concerned for their consideration and if necessary decision.

Q: When you say 'institutions concerned' what do you refer to?

A: I mean the participating Churches or where persons were present in their personal capacity. It was requested that they should submit them to their particular Churches for consideration.

Now the Defence Counsel returned to the subject of the 1957 Synod.

Q: I interrupted you while you were speaking about your personal experience at the 1957 Reformed Ecumenical Synod in Pretoria . . .

A: Your Worship, at this Synod in discussions which took place and also in the personal discussions which I had with delegates, many of the convictions which had become clearer to me during my previous years of theological study now crystallized. I should possibly mention that it was particularly in four different areas where I sought for light, based on the light of the Gospel. Firstly, the whole question of the unity and diversity of the human race; secondly, on the unity and diversity of the Church on earth; thirdly, the responsibility of the Church in the different areas of human society, and, fourthly, the necessity for the Church to play the role of reconciler in situations of serious tension. Concerning the first, it became clear to me through this theological study that the traditional approach in some church circles, particularly that held by the three Afrikaans Churches, namely that the division of the human race is of primary concern, i.e., decisive, and that the unity is of secondary concern, i.e., subsidiary, that this was contrary to the insight of the Bible. I discovered that the truth of the Bible conveyed to us clearly that God created all the nations of the world in one blood, and that the fact of the different residential areas was not a fixed premiss, a pre-destination, an unchangeable pre-destination of God, but a historical development and therefore that the unity of the human race is fundamental for the calling of man on earth.

Concerning the Church, and this is very important for me, keeping in mind what happened afterwards, this theological study brought me to the conviction that the Church of Christ is one—Jesus Christ founded his Church, his one Church here on earth, and nowhere in the New Testament is there any ground for the existence of different separate fragmented church communities. Certainly separate congregations, certainly, if necessary also separate services because of different languages, but in essence the Church of Christ is one. It is his body. This has tremendous implications for the ecclesiastical, the political, the social and the educational questions of our country. In the third place I discovered that the Church, or rather it was confirmed that the Church has a definite calling and responsibility to witness in every sphere of human life, not only in the personal but also in the social sphere, political, economic, education, yes, every aspect. And in the fourth place it became clearer to me than ever before that the central message of the Gospel and the central task and responsibility of the Christian on earth is to act in the name of God as reconciler between those who live in tension, in hatred and bitterness over against each other. But I was afraid to proclaim the full implication of this message, because I realized something of what it would entail for my position and my future.

A number of events contributed to force me to a decision which at the time I was not willing to take, because I did not have the courage to do so. The first time was the fact that I was acting Moderator of the Transvaal Church, as Actuary of the Transvaal Synod, and in a position where the younger ministers of our Church, especially during the years of 1958 and 1959, looked to me for advice and guidance concerning the problems which they had to face in connexion with their work among our different, at that time known as non-White, communities. Here I think by name of young missionaries of our Church—if it is necessary I will mention their names—who were working here on the Reef, one in the compounds, one among the Coloured community, and one among the Indian community, who shared their concern with me, because they said that there was an increasing tension developing between White and Black in South Africa; and for the first time in my life they brought to my attention a number of situations of injustice of the non-White, partly because of our legisla-

tion and our policy of *Apartheid*, causing them serious problems in their ministry, and in their preaching of the Gospel.

Because I could hardly believe this I asked them to arrange a number of meetings with leaders, Coloured and African, but also in a number of cases one or two Indian leaders, where I could meet them to hear from them personally what the position was and on what their objections were based. This happened and it made me realize that here in our country we live in a situation where the Whites on the one hand live their secure, secluded and in many respects closed lives, where an immensely large section, if not the largest section of our White population are not aware of the feelings, the experiences, the pain and the tension in the hearts and the lives of our Black communities. At that time, however, I did not take the matter any further, although I knew that at some time or other an answer would have to be given. Then I received a call to the Aasvoëlkop congregation in Johannesburg and accepted it, and in November 1959 I commenced my ministry in Aasvoëlkop in Johannesburg. At the beginning of 1960 a number of ministers and missionaries of our Church met to consider these situations and these tensions which some of us felt, and which were building up among our Black communities, particularly here on the Reef. We held a number of smaller informal meetings as ministers of the three Dutch Reformed Churches with a few missionaries and representatives of our Coloured NG Sending Kerk. Then came Sharpeville in March 1960.

In the aftermath of the Sharpeville massacre, Mr Naudé explained, the World Council of Churches, acting on an appeal by Archbishop de Blank of the Church of the Province of South Africa called a conference of its eight member Churches in South Africa to consider the problem of racial unrest in South Africa. This Conference, which became known as the Cottesloe Consultation, was held during December 1960, and brought together many leading senior theologians, ministers and laymen from among the largest Churches in South Africa, including the NG Churches of the Cape and Transvaal and the Nederduits Hervormde Kerk. Each of the participating Churches was asked to prepare a study document concerning the problem which was created by the tension in human relationships across the colour barrier. Beyers Naudé, who was at the time vice-chairman of the Transvaal

Synod, co-operated in the study undertaken by the Transvaal Church.

A number of resolutions emerged out of the studies produced by the various Churches, especially those of the two NG Churches. Seventeen resolutions were adopted and approved by the Conference. Mr Kriegler handed in the resolutions (Exhibit G) which Beyers Naudé then read in full to the Court:

'1 We recognize that all racial groups who permanently inhabit our country are a part of our total population, and we regard them as indigenous. Members of all these groups have an equal right to make their contribution towards the enrichment of the life of their country and to share in the ensuing responsibilities, rewards and privileges.

'2 The present tension in South Africa is the result of a long historical development and all groups bear responsibility for it. This must also be seen in relation to events in other parts of the world. The South African scene is radically affected by the decline of the power of the West and by the desire for self-determination among the peoples of the African continent.

'3 The Church has a duty to bear witness to the hope which is in Christianity both to White South Africans in their uncertainty and to non-White South Africans in their frustration.

'4 In a period of rapid social change the Church has a special responsibility for fearless witness within society.

'5 The Church as the Body of Christ is a unity and within this unity the natural diversity among men is not annulled but sanctified.

'6 No one who believes in Jesus Christ may be excluded from any Church on the grounds of his colour or race. The spiritual unity among all men who are in Christ must find visible expression in acts of common worship and witness, and in fellowship and consultation on matters of common concern.

'7 We regard with deep concern the revival in many areas of African society of heathen tribal customs incompatible with Christian beliefs and practice. We believe this reaction is partly the result of a deep sense of frustration and a loss of faith in Western civilization.

'8 The whole Church must participate in the tremendous missionary task which has to be done in South Africa, and which demands a common strategy.

'9 Our discussions have revealed that there is not sufficient con-

sultation and communication between the various racial groups which make up our population. There is a special need that a more effective consultation between the Government and leaders accepted by the non-White people of South Africa should be devised. The segregation of racial groups carried through without effective consultation and involving discrimination leads to hardship for members of the groups affected.

'10 There are no Scriptural grounds for the prohibition of mixed marriages. The well-being of the community and pastoral responsibility require, however, that due consideration should be given to certain factors which may make such marriages inadvisable.

'11 We call attention once again to the disintegrating effects of migrant labour on African life. No stable society is possible unless the cardinal importance of family life is recognized, and, from the Christian standpoint, it is imperative that the integrity of the family be safeguarded.

'12 It is now widely recognized that the wages received by the vast majority of the non-White people oblige them to exist well below the generally accepted minimum standard for healthy living. Concerted action is required to remedy this grave situation.

'13 The present system of job reservation must give way to a more equitable system of labour which safeguards the interest of all concerned.

'14 Opportunities must be provided for the inhabitants of the Bantu areas to live in conformity with human dignity.

'15 It is our conviction that the right to own land wherever he is domiciled, and to participate in the government of his country, is part of the dignity of the adult man, and for this reason a policy which permanently denies to non-White people the right of collaboration in the government of the country of which they are citizens cannot be justified.

'16 (a) It is our conviction that there can be no objection in principle to the direct representation of Coloured people in Parliament.

(b) We express the hope that consideration will be given to the application of this principle in the foreseeable future.

'17 In so far as nationalism grows out of a desire for self-realization, Christians should understand and respect it. The danger of nationalism is, however, that it may seek to fulfil its aim at the expense of the interests of others and that it can make the nation an absolute

value which takes the place of God. The role of the Church must therefore be to help to direct national movements towards just and worthy ends.'

Beyers Naudé emphasized the fact that some of the most senior members of the Dutch Reformed Churches were present and voted for the resolutions adopted by the Cottesloe Consultation. Only the second smallest of the Dutch Reformed Churches, the Nederduits Hervormde Kerk, refused to approve the resolutions.

Mr Kriegler: Mr Naudé, what then happened to the Cottesloe resolutions?

A: Originally it was not the intention to formulate any resolutions, this was not the proposed aim of the consultation but during the discussion it became a conviction, a spontaneous conviction of the majority of the delegates that it was essential, because of the unity of conviction and feelings which developed, that such a declaration should be issued. That was then done, in the form of resolutions formulated for submission to and, for consideration by the Synods concerned. It was debated at length whether it would not be better for these resolutions to be provisionally kept confidential until the Synods could consider them, but in the light of the fact that the Synod of the Bantu Presbyterian Church would hold its Synod in January of the following year, it was decided to make these known immediately. The reaction was tremendous. From the Afrikaans church circles, and the Afrikaans political press in particular, there was soon a very sharp and vehement negative reaction against these resolutions because it was shown that these resolutions touched the very roots of the policy of *Apartheid*. Early the next year a number of protest meetings were organized from, I think, the end of January in Brits, Silverton and other places, in which among others Professor A. B. du Preez also took part in support of the protest, even though he had supported the resolutions together with the other delegates.

Q: You say in support of the protest. Were the meetings held in protest against . . . ?

A: Against the resolutions of Cottesloe. The first Synod to consider these resolutions was the Synod of the Hervormde Kerk, I think early in April . . . end of March or early April—no, I think it was

at the end of March 1961. After a heated discussion the Synod rejected all the resolutions, and decided to withdraw from the World Council of Churches. The second Synod to consider these resolutions was the NG Kerk of the Transvaal in April 1961, where in the same way, after a long and heated debate, all the resolutions were rejected and the Synod decided to withdraw from the World Council. At that Synod delegates were given the opportunity to justify their participation and their point of view. Possibly I should use the word, to defend themselves, because the spirit and the atmosphere at the Synod concerning the resolutions were sharply against, yes, even hostile towards the resolutions. The opportunity was given to each delegate at the end to make a statement, if he wished to do so, about his personal stand, his point of view and his participation. The majority of the delegates expressed either their regret at the fact that it had become clear to them that they had embarrassed the NG Kerk by accepting these resolutions, or their willingness to abide by the viewpoint of the Church as interpreted in the discussions at the Synod. For me it was a turning-point in my life, because the night before the final decision was made at the Synod, I had to decide—would I because of pressure, political pressure and other pressures which were being exercised, give in and accept, or would I stand by my convictions which over a period of years had become rooted in me as firm and holy Christian convictions. I decided on the latter course and put it clearly to the Synod that with all the respect which I have for the highest assembly of my Church, in obedience to God and my conscience I could not see my way clear to giving way on a single one of those resolutions, because I was convinced that those resolutions were in accordance with the truth of the Gospel. With that the Synod was dissolved. In October of the same year the resolutions were considered by the Cape Synod, where a more moderate decision was taken and where some of the resolutions were referred to study commissions in the future, but the Cape Synod also decided to withdraw as member of the World Council of Churches.

Q: Mr Naudé, what did you do as a result of, or after the Synod made its decision as you have stated in your evidence?

A: I accepted that an event of great historical significance had taken place in our Church, which in a certain sense came as a great psychological shock to our whole church community and our

Afrikaner nation, and it became clear to me that it would be many years before the Dutch Reformed Church, as an official church institution, would again see its way clear to debate and discuss and make decisions concerning these questions in church meetings in public. This brought to my mind a very important question about the responsibility of the individual minister and member, who was convinced that the opportunity for study, for making contact, for discussion among members and ministers of the various Churches who saw the need for this more than ever before, that the question came to mind—what could we do to maintain contact on an informal, personal level? Perhaps I should mention, Your Worship, that a number of ecumenical study circles had already started at the beginning of 1960, in which I also took a leading role. These study circles consisted mainly of ministers and missionaries of the three Dutch Afrikaans Churches.

After the decisions of the Synod the membership of these ecumenical study circles dropped sharply, but a number of the ministers and missionaries continued to meet regularly, sometimes monthly, bi-monthly, to discuss these questions. But it was clear that from the official side little could be expected by way of any lead that the Church would give, at inter-church level, to maintain this contact and to extend it. Those of us who were convinced that this should be done, maintained contact and sought to continue with the discussions in these ecumenical study circles

Q: What were these discussions about?

A: I cannot remember all the different subjects but I do know that some of the discussions dealt with the mission task of the Church, with the call to evangelize, with the stumbling blocks in the way of progress in mission and so on . . .

Q: Sorry, I have interrupted you, please go on . . .

A: Those of us who continued in these study circles, realized that it was essential that we should put into writing the different biblical points of view and considerations, and so in April 1962 it was decided to establish a monthly journal, named *Pro Veritate*, an ecumenical monthly journal, that is, of individual representatives of the different Churches. I was the first editor of this journal. With the founding of the monthly journal and the reaction which came from the Dutch Reformed Church, it was clear how fierce and vehement the opposition was against such biblical witness in the sphere of the sensitive area of race relations. So it went on to

the beginning of 1963. As early as the end of 1962 there was consideration of the founding of some or other ecumenical body by individual Christians of different Churches who had the need to meet with each other to discuss these questions. But the matter was raised and then left there, because we all hoped that in the Synods of the NG Kerk in October 1962 and April 1963, a new voice would be heard and more room would be given to these ideas and the possibility of inter-church contact. When it was clear that this was not to be the case after the Synod in April 1963, a group of ministers and laymen eventually met in June 1963 to consider the founding of such a body, and so it was that on 15 August 1963 the Christian Institute was founded in Johannesburg. I do not know whether this answers your question.

Q: Mr Naudé, between Cottesloe in December 1960 and 15 August 1963 when the Christian Institute was founded, were there any inter-church conferences or consultations like those which took place during the 1950s?

A: No.

Q: Since the founding of the Christian Institute in August 1963 until today have there been any inter-church conferences of the kind which took place in the 1950s and in which the NG Kerk participated?

A: No.

Q: What has happened to the ecumenicity which there was in the NG Kerk in the 1950s?

A: Your Worship, for all practical purposes that ecumenicity is dead.

Q: In your opinion, Mr Naudé, why?

A: I am convinced that it is because these inter-church conferences and discussions touched on the sensitive areas of human relationships in South Africa which affect our political policy of Apartheid, in which the pressure exercised on the NG Kerk and the other Afrikaans Churches was such that they no longer felt themselves free to give the pure and simple biblical witness concerning these questions to the people of South Africa.

Q: Mr Naudé, you have already explained to His Worship that the directorship of the Christian Institute was offered to you and how you applied to retain your status and that was refused?

A: That is correct.

Q: Was it an easy decision for you to end the years of your ministry as minister of the NG Kerk?

A: This was the most difficult decision which I have had to make in my life.

In September of 1963, Beyers Naudé announced his decision to accept the directorship of the Christian Institute, even at the loss of his ministry, to the members of his congregation. In a sermon inspired by the teaching in the Acts that a man's first duty is to God, Beyers Naudé explained to his congregation how he had come to make his decision.

Mr Kriegler asked Beyers Naudé to explain his decision to the Magistrate by reading in full that sermon. Beyers Naudé began:

'We bring you this morning the word of God from Acts 5 : 29, which reads as follows: "We must obey God rather than men" and to understand what these words mean for the Church and for society, but also for you and me . . .'

At this point the storm at last burst and dramatically silenced the trial. Beyers Naudé had to stop reading for a short while before he could be heard. Then he resumed:

'Possibly the worst of the storm is now over . . . I will try again
Your Worship: We bring you this morning the word of God from Acts 5 : 29, which reads as follows: "We must obey God rather than men" and to understand what these words mean for the Church and society, but also for you and me, we must first have a clear understanding of all that happened here.

'Here we have a group of men and women proclaiming Jesus Christ as he revealed himself to them through the pouring out of the Holy Spirit. Their proclamation is not just a retelling of history, it is history, yes, resurrection history, but it is also much more. It is firstly a witness of Jesus Christ as risen Lord, that is to say as the Living Being in their midst, and because he lives they experience his life within them; they feel how their total existence is transformed and renewed. Their message is that of Easter and Whitsuntide, of the gift of new divine life which affects all of human life and changes all human relationships. Is it no wonder that this message brings so many people to total acceptance, but also just as many to vehement resistance?

'By experience the Apostles now understand the truth of Scripture more intimately and manifestly, that the Gospel is a sign that will be contradicted—an experience of life into life and of death to death, a word that is alive and powerful and sharper than any two-edged sword. That this sword cuts on both sides is clearly seen when the opposition becomes apparent, and this from the side of the High Priest and the party of Sadducees who called together the Sanhedrin, an ecclesiastical conference before which Peter and the Apostles had to answer for themselves, the same council that condemned Jesus. The High Priest is alarmed that the Apostles have ignored the previous order no longer to teach in the name of Jesus Christ. This was precisely the expectation of the council that they could silence the Apostles in this pleasant way, now they accuse the Apostles of disturbing the peace in Jerusalem, the peace in the Church: "You have filled Jerusalem with your teaching," a teaching which they regarded as wilful, "your teaching", and they reproached the Apostles with wanting to bring the blood of that man upon them. Have they then forgotten so soon that just recently this was precisely the wish expressed by the people before Pilate—"let his blood be upon us and upon our children". What should Peter and the Apostles now present as their defence? Obviously the accusation is valid and they are being disobedient. What can Peter say against this? It is rather strange, he does not really defend himself at all. He could, if he wanted to, have referred to the miraculous healing which had been taking place, and the equally miraculous release from prison the previous night, but he does not mention this. But what he does is this—he leads them clearly to God as they had come to know him in and through Jesus Christ. Peter speaks forcefully and to the point: "If God asks anything all other things must give way." This does not mean that a person should not obey human power and authority. On the contrary, "Let every person submit himself to those powers which have been put over him," says Paul. When however the will and way of man comes into conflict with the will and the way of God, then man must know: Now I must obey God rather than man.

'But how does the person know that it is God who speaks? Through our conscience? And how do we know that our conscience is always right? How did Peter know this? How could he prove it? The fact is he could not, he stands defenceless before his judges and before the people. All that he has as anchor is that inner assurance of faith which God has given him through his Spirit, and which he gives

to all who after much agonizing are willing to stand in complete dependence before God, completely willing to be convinced by God concerning the obedience he expects from us. And it is this glorious certainty that the Apostles now offer in the name of the Living Jesus—conversion and forgiveness of sins—to their Church and people. Their message to the Jewish Council is: Christ is willing to begin anew with the people of Israel, the door is still open, his mercy is still there (verses 30–32). And they, what do they make of this offer? The council's reaction is immediate and sharp (verse 33). The words cut them to the heart, but in a directly opposite way from what happened among the crowds at Pentecost, arousing animosity and wrath, resistance and resentment.

'But among them is Gamaliel, the well-known Jewish theologian, who was held in high regard by his people, the man we usually point out as the wise man of the Jewish Council. In a certain sense this is true; much of what Gamaliel says is true and wise. But if we look more closely we see that he is not concerned about Christ, the truth and the wisdom of God. His true concern is not with the Apostles, that is to say with Jesus, but with the Sanhedrin, with the Jews. He speaks a word of warning: for if this idea of theirs or its execution is of human origin, it will collapse; but if it is from God, you will never be able to put them down, and you risk finding yourselves at war with God. The prophetic truth and dimension which he himself does not realize—just like Caiaphas, unwittingly used by God prophetically when he speaks about Jesus—it is in the interest of the people that one man should die rather than that a whole nation should die.

'What does Gamaliel's advice in effect mean? Do you know? Put off the decision, do not act now, it is not the time now. I believe Gamaliel recognized the Apostles' sincerity. I believe that he was deeply distressed about the course of events in the Sanhedrin, but in his advice he shuns a decision and leads his people past Jesus by a detour. And the outcome of the events? The Apostles rejoice that they have been considered worthy also to suffer for their Master and they continue with their teaching, disobedient and yet profoundly obedient. Disloyal, yet profoundly loyal. Thus far the exposition.

'Now the question—what has all this to do with us? With you, with me, with the situation in our Church, among our people, in South Africa and in Africa? I know some will say—is it not presumptuous to make an analogy between this history and the situation in which we find ourselves today? Brothers and sisters, only the

Holy Spirit can convince each of you to what extent Acts 5 is relevant to our situation. In so far as I am concerned I sought for light for my decision in other parts of the Scriptures; I also tried to find reasons why I could cut my ties with *Pro Veritate* and the Christian Institute, to continue comfortably and happily in my work in the congregation. But time and time again, at times with great agonizing, fear and resistance in my heart, the Lord brought me back to this part of the Scripture, as if he wanted to say: Whatever this text may mean to others this is my answer to you: obey God rather than man.

'And now I bring you the light as God gave it to me during the past few days through many events, sometimes with resistance and resentment on my side. The various decisions of the Synod, District Councils and Church Councils, and the reactions that followed showed me very clearly that although the Synod did not state in so many words that it had placed a ban on all comment which was not in accordance with the policy of the Church and its viewpoint of the past, it nevertheless means in spirit and in practice that the God-given right and freedom of the minister and layman to witness prophetically and true to reformation principles to the truth of God's word is now so restricted and curtailed that the minister of the Gospel is no longer in principle given the freedom to express his deepest Christian convictions and to express them at such a place and time as God reveals to him through his Word and Spirit. This is why the choice before me is not firstly a choice between pastoral work and other Christian work, not between the Church and *Pro Veritate* or the Church and the Christian Institute. No, the choice goes much deeper. It is a choice between religious conviction and submission to ecclesiastical authority. By obeying the latter unconditionally I would save face but lose my soul. By entering the Christian Institute I, however, do not leave the Church; on the contrary I specifically wish to serve my Church in a wider ecumenical context in and through the Institute even though today my Church officially does not see it in this light and does not wish it so. Neither do I give up the ministry of the Gospel, that is precisely why I made an application to retain my status and in so doing to show my Church that I do not wish to be anything but a servant of God's Word. I do not want to say anything more about the examination commission except that I regard their decision as unjust and unreasonable, a decision which can be vindicated neither in church law nor in previous precedents. And therefore I pray that the day will soon come when this decision will be revoked. But in the

meanwhile for me there is only one way, to be obedient to God. Thus for me God's Word and God's Way, therefore I must go.

'But this text also has a meaning for the congregation, because by my action you have become involved although neither you nor I wanted this to happen. You also are called to choose, to make a decision. You cannot avoid it or escape it, and please note, the decision does not primarily concern my person or convictions, my remaining in or my leaving the congregation, or what views you hold about *Pro Veritate* or the Christian Institute—in its deepest sense it concerns Christ, it concerns this question: is his Word the highest authority, the final word for you? If so, do you obey his Word? Do you live according to his Word? God will not let you go until you have made your choice.

'But our text this morning also has meaning for our Nederduits Gereformeerde Kerk. We are in the particularly privileged and therefore responsible position, that a voice of our Church can reach afar and exercise great influence. As a Church tied closely to the people, the Nederduits Gereformeerde Kerk is also living intensely close to the people during this time when the future existence of our people is threatened, and every true Afrikaner feels very close to his people during this time of anxiety, and I consider myself an Afrikaner who wishes to serve his people with the same love and loyalty as in the past.

'Now I know, there are many who would say today, that now is not the time to speak out, even though there are many things that are unjust and morally indefensible, now is the time to remain silent and to stand by your people.

'Brothers and sisters, however well-meant such a viewpoint may be, do not we as Christians understand that such an attitude is born of fear and that fear is a sign of unbelief? Do we not confess and believe that if we obey God in everything, according to his Word, we can also leave our future and the future of our people safely in his hands? Whose kingdom comes first, the Kingdom of God or that of our people? What is more important, that we will all stand together or that we will stand with God? And what does it mean, to stand with God, except that we should claim the kingship of Jesus Christ over all people, thus also over our people, also as it concerns our ecumenical and race relations. And when we as Nederduits Gereformeerde Kerk fear or refuse to do this boldly, then we fail our people, then we commit treason against our people.

If the NG Kerk does not understand and exercise more deeply this

obedience demanded by God, then we will suffer endless loss and sorrow. Not only will we lose or frustrate the best intellectual and spiritual forces in the ranks of our ministry; not only will we lose the trust of thousands of our members who are seeking biblical light on the controversial questions of Church and state, kingdom and nation, colour and race, and not finding it now in their Church. But even more than this, our Church is in the process of irrevocably alienating the hearts of our daughter Churches and is closing the way for her witness to the Churches of Africa. If our Church continues with this deliberate and fear-inspired process of isolation, with its tragic withdrawal from the Holy Catholic Church in South Africa, in Africa, we will spiritually wither and die.

'Oh, my Church, I call this morning in all sincerity from my soul—awake before it is too late. Stand up and give the hand of Christian brotherhood to all who sincerely stretch out the hand to you. There is still time, but the time is short, very short.

'But also for us, as ministers of the Gospel, this word of Acts 5:29 has meaning. Many, many ministers of the Gospel are deeply concerned about the way things are going in our Church. Many are concerned because it appears as if the Church is not free to act on the basis of God's Word alone, because other powers and influences play an overriding role. Many are convinced that great changes on many different levels will have to be made in our church and race relations, but these convictions are kept back for many reasons—a fear that it may harm the Church if they speak out, a fear that our members are not yet ready to receive these truths, the possible repercussions that this may have in our congregations. In such a situation we are all called to act with the greatest responsibility, but surely not by remaining silent. Speaking the truth of the Gospel can surely not harm the Church of Jesus Christ, and if our members are not influenced by all sorts of powers, but informed fearlessly and fully about what the Word of God demands from each man, White as well as non-White, will the Spirit of God himself then not lead them into the truth? Why then do we fear? Has the time not come that we should call out clearly and joyfully—thus speaks the Lord.

'In closing, this text also has meaning for other Churches in South Africa and for the Christians in those Churches, White as well as non-White. You who together with us confess loyalty to Christ and his Word, is your primary obedience and loyalty to Christ? Are you willing to call your people and your racial group to seek and to put

this obedience above all other things? Even where this clashes with their deepest human sentiments? Are you willing to recognize injustice where injustice is committed, even against the Afrikaner? To give love and express it where needed and to be the least so that Christ can be the greatest? To all Christians of all Churches and races and languages and peoples who sincerely seek this obedience to God, and pray, comes his glorious assurance also for the uncertain future—if God is for us, who can be against us. Amen.’

* * *

Mr Kriegler: Now, Mr Naudé, in the ten years since you preached that sermon have you had any reason to change your opinion in any way?

A: No. In the past ten years that opinion has only been deepened, broadened and confirmed.

Q: You then left the ministry?

A: Yes.

Beyers Naudé’s decision to accept the directorship of the Christian Institute cost him not only his position as a minister but his status as an elder, as well. A minister in another congregation had objected to his election as an elder by the congregation in which he lived. Even though both the local and regional church councils rejected the objection, the matter was appealed to the synodical commission who upheld the objection, and so Beyers Naudé was not allowed to serve as an elder. No reasons were given for that decision. Nor was any explanation offered for depriving Beyers Naudé of his ministry.

Mr Kriegler: Until this day have you received an answer why as minister you had to be silenced in the Church, or why as an elder you had to be silenced?

A: No, this is precisely the point of conflict between the Christian Institute and the NG Kerk which remains unresolved in negotiations which have been proceeding all these years and which are still proceeding this year and on which we are still awaiting a reply.

Q: What is the effective result of the NG Kerk’s attitude towards the Christian Institute and its members who are members of the NG Kerk?

A: In 1966—in October 1966 the General Synod of the NG Kerk

made a long condemnatory decision about the Christian Institute which in practice brands the Christian Institute as a heresy, that is giving false direction, and the reasons for this, or the so-called reasons were given, and all members and ministers of the NG Kerk were called to withdraw from the Christian Institute. In the case of ministers who were members of the Christian Institute, it happened over a period of time, so that today no ministers of the NG Kerk—of the Mother Church—are any longer members of the Institute.

Q: Mr Naudé, are you still waiting today to be disciplined for your so-called heresy?

A: Your Worship, I do not like church discipline, I mean, I would prefer it not to be the case, but the fact is that this is the essential question in the debate and in our discussion with the Nederduits Gereformeerde Kerk, on which we cannot get a reply, to what extent members of the NG Kerk who are members of the Christian Institute need to be disciplined. In some congregations a form of discipline was exercised, as in my case, where my eldership had to be withdrawn, as a result of an objection. In the case of the editor of *Pro Veritate*, Ds Roelf Meyer, for example, in the congregation into which he moved a decision was taken that he would have no opportunity of any kind to speak in the congregation because of his connexion with the Christian Institute. There are also other cases where similar forms of action against members—members of the Christian Institute, were taken. There are however other congregations in which members of the Christian Institute serve as members of the church council with the full knowledge of the church council that they are members of the Christian Institute.

Mr Kriegler then questioned Beyers Naudé on the procedure prescribed by the Church for depriving an individual of eldership.

Q: Mr Naudé, according to the law of the NG Kerk on what grounds can a confessing member be denied eldership?

A: Only if it can be proved that either in doctrine or in behaviour he erred, that is to say, he misbehaved, and that in his public behaviour he gives cause of offence in the congregation.

Q: Is he then found guilty without being heard, or what does the church law lay down?

A: No, the NG Kerk has a long and honoured tradition in connexion with the way in which discipline in the Church is exercised in accordance with the Word of God and that tradition and those rules require that such discipline can only be exercised after there has been a proper hearing with sufficient opportunity for defence before such a person is found guilty.

Q: Has such a case ever been brought against you?

A: No.

Q: Has a charge against your life or action ever been laid?

A: No.

Q: Have any scriptural grounds ever been given by the Church as to why you may not hold the holy office of elder?

A: No.

Q: Does this silence you in the congregation.

A: Yes.

Q: Now, Mr. Naudé, did you accept this attitude of the NG Kerk or does the conflict and your desire for information continue up till now?

A: It is still going on, because I am not willing to accept it, because I am convinced that in this particular case my Church has acted in conflict with the Word of God and with the precept of the Gospel, and because I work and pray and trust that my Church will see their mistake and correct it, and I do this because I have this deep and inner warm love for my Church as part of the Church of Christ in South Africa.

Mr Kriegler pressed Beyers Naudé to explain the reasons why the NG Kerk had imposed sanctions against him and condemned the Christian Institute.

Q: Mr Naudé, have you ever been presented from the side of the Church with criticism against you, on scriptural grounds? When I say against you then I mean you personally or the Christian Institute . . .

A: Concerning myself, never. As far as the Christian Institute is concerned, in 1966 there were indirect references in the condemnatory decision, but the Christian Institute replied to this in a detailed document and pointed out in that document that no well-founded scriptural reasons were given for the decision taken by the Synod.

Q: Are the Christian Institute and you being criticized from the side of the Church, the side of the NG Kerk, because of the ecumenical activities of the Christian Institute and yourself?

A: Yes, I think this is the heart of the matter in the disagreement between the NG Kerk and the Christian Institute, that the NG Kerk's point of departure is that there should be a separate church organization, that is to say a church group, for people of different languages and different ethnic groups. That is why the structure of the NG Kerk is one Church for Whites, one for Coloureds, one for Indians and one for Blacks, while the Christian Institute on the grounds of its insights into God's Word takes the point of view that such division is not scriptural. The NG Kerk also asserts that the Christian Institute pretends to do the work of the Church better than the Church does itself. The Institute denies this and has always denied it, because we have said that we are nothing more than servants of the Church. The NG Kerk also condemns the Christian Institute because in our membership we have members of the Roman Catholic Church, who also serve on our Board of Management, and it regards this as one of the most serious stumbling-blocks and points of criticism against the Christian Institute.

In the light of the NG Kerk's criticism of the Christian Institute for pretending to do the work of the Church better than the Church itself, Mr Kriegler asked Beyers Naudé what ecumenical work the Church had in fact done during the past thirteen years. The Defence Counsel asked for a specific listing of the inter-church conferences and meetings that the NG Kerk had attended or organized. Before Beyers Naudé could answer, the Court interjected that since Mr Naudé's answer could be expected to be a long one, it was now a convenient time to adjourn the court for the day. Indeed, it had already been a long afternoon.

Beyers Naudé left the witness box marked 'Whites' (there is a separate witness box for 'non-Whites') and promised to appear the next day.

When he resumed his evidence next morning, he answered the question his Counsel had put to him the previous day about the ecumenical activities of the Afrikaans Churches since the Cottesloe

Consultation at the end of 1960. As far as he knew, Beyers Naudé said, until 1972 no inter-church conference or official consultations took place which were reported publicly and in which the three Afrikaans Churches were involved together with other Churches in South Africa. In March 1972, the Reformed Ecumenical Synod met to prepare themselves for the Ecumenical Synod Conference scheduled to take place in Sydney, Australia, in October of that year. However, the proceedings of the March conference were not reported in public for some time afterwards.

Mr Kriegler asked Beyers Naudé why he emphasized the words 'in public':

A: I emphasize this because it is of basic importance to realize that the Church of Jesus Christ has received a commission and a message to proclaim in public. It is part of the essence of the Church that all that the Church is and proclaims should happen in public. This does not mean that confidential meetings cannot take place, but the Church's calling and duty towards Christ, its head and its members, is to make public as soon as is practical all information, because this is the essence of the Church and the calling which has been entrusted to it, to proclaim the Gospel to all nations and languages and people. Christ himself said: 'I am the light of the world.' He said to us as Christians: 'Let your light so shine that they can understand and honour your Father who is in Heaven.' This is why it is of utmost importance that the Church makes its message heard, and in particular in public.

Q: Can the ecumenical mission in particular, as you understand it, be promoted behind closed doors without making it public according to the commission given by the Lord?

A: No. When a Church does that it is disloyal to the commission of Jesus Christ, its head, and it does great injustice to its members who are then kept in the dark about that which should be heard and be proclaimed in public.

The Dutch Reformed Church participated in two international ecumenical conferences after 1968 which took place outside South Africa. The results of the conferences were published in the form of resolutions adopted by the conferences, Mr Naudé said. The first of these ecumenical conferences was held in Lunteren, Holland, in 1968.

Senior theologians and officials of the Dutch Reformed Church attended the conference. They joined church leaders from all over the world in unanimously adopting fifteen resolutions, several of which concerned the question of race relations.

Beyers Naudé singled out six of the Lunteren resolutions as being 'relevant to our situation here concerning the evidence which we wish to give'. They were:

'9 In a pastoral ministry the Church should strive to eradicate attitudes of racial superiority and racial prejudice by leading her members who feel Christian maturity in race relations. This must be done urgently, persistently and patiently.

'10 In obedience to the mission mandate of Christ the Church must bring the Gospel to all nations regardless of their race. The principle of love for the neighbour requires that this mission respect the character and culture of the recipients of the Gospel so that new Churches may come to self-expression in harmony with Scripture.

'11 The unity of the body of Christ should come to expression in common worship including the Lord's Supper among Christians regardless of race. It may be that linguistic or cultural differences make the formation of separate congregations often with their own type of preaching and worshipping advisable. In these cases it is wise not to force an outward and therefore artificial form of unity, but to recognize the differentiation within the circle of God's people. The worshipping of people together of different races is a sign of the unity of the Church and the communion of saints and can be a Christian witness to the world.

'12 The Holy Scripture contains no pronouncement on marriages between members of different races. Marrying is in the first place a personal and family matter. Church and State should refrain from prohibiting marriages between members of different races since they have no right to limit the free choice of a partner in marriage.

'14 With a view to the great tensions in the sphere of race relations in the world today, Synod strongly urges the member Churches to test conditions in their Churches and countries by the norms set forth in these resolutions, to hold regional conferences in which the aforementioned decisions may be put into effect, and to report back to the next Synod.

'15 In recognition of the fact that among the member Churches of the Reformed Ecumenical Synod the problem of race relations is not so much in the area of acceptance of these principles, but in the

area of applying them, the Synod urges member Churches: (a) to renew attempts to live totally in accordance with the biblical norms; (b) to reject every form of racial discrimination and racism; (c) to reject every attempt to maintain racial supremacy through military, economic or any other means; and (d) to reject subtle forms of racial discrimination as found in housing, employment, education, legal coercion, and so on, found in many countries today; (e) to pray for themselves and each other that God's wisdom and faithfulness will support them in all circumstances.'

Mr Kriegler asked Beyers Naudé about the reactions of the Christian Institute and the South Africa Churches to the Lunteren resolutions. Behind the questions stood the issue alluded to earlier: was the Christian Institute performing a role already adequately filled by the Afrikaans Churches?

Q: Now, Mr Naudé, are there any of these fifteen resolutions taken at Lunteren which the Christian Institute does not support?

A: No.

Q: Are there any resolutions taken at Lunteren which the Christian Institute in accordance with the resolution number 15 is not trying to apply?

A: According to my opinion, no, Your Worship, although we realize that in many respects we fall short in the application of this.

Q: Was there, in so far as you know, that is to say in so far as it was done publicly, any district conference that was held by any of the three Afrikaans—of the two Afrikaans—member Churches of the Reformed Ecumenical Synod in accordance with resolution 14, to implement the implied resolutions?

A: Not to my knowledge . . . no, except I did hear that in another context in which the NG Kerk and the Hervormde Church are member Churches of the World Alliance of Presbyterian Churches, such district conferences are taking place in South Africa at present, but I have not seen this reported anywhere.

* * *

Q: Mr Naudé, do you keep yourself informed about the publications of the Afrikaans Churches?

A: Yes, in so far as this is possible.

Q: Since 1968, when the resolutions were taken at Lunteren, has there been any official pronouncement or standpoint taken by

either of the two Afrikaans Churches, member Churches, in which common worship of the members of those Churches was mentioned or recommended?

A: As I remember, the Synod of the Hervormde Kerk which met after Lunteren, discussed the matter and debated it, and I think also took a resolution but I am not certain about this. In so far as the NG Kerk is concerned the recommendations of Lunteren of 1968 were placed before the National Synod of the NG Kerk where they were referred, together with other documents, to a broad study commission on race questions later known as the Landman Commission. It is expected that this Commission will present its report in October of next year before the National Synod of the NG Kerk.

Q: That will be in October 1974?

A: That will be in October 1974.

Q: And when was Lunteren?

A: 1968.

As for the resolution concerning mixed marriages, Mr Naudé added that the Dutch Reformed Church's representatives to the 1972 Sydney Ecumenical Conference clearly expressed their opposition to a resolution identical to the one presented at the Lunteren Conference.

The Sydney Conference considered many of the same issues as the earlier Lunteren Conference. Again, church leaders from the Afrikaans Churches attended. Resolutions concerning race relations which were adopted at Lunteren were again adopted at Sydney, either *verbatim* or with expanded texts proposing specific programmes of implementation. The Conference again asked Churches to convene regional conferences to implement the resolutions and to report back to the next Synod.

Mr Kriegler questioned Beyers Naudé about the importance of the ecumenical conference in which the Afrikaans Churches had participated during the past thirteen years:

Q: Now, Mr Naudé, are these Synods, Conferences, meetings of churchmen of different church connexions only a social get-together or a social club, or is there something much deeper and more meaningful about them?

A: I would not like to deny that here and there may be someone who

would like to enjoy the social side of it, but for the Churches it is a matter of deepest concern and meaning when the Churches come together officially, because the discussions and the resolutions which are taken affect the future of the work and also the relationships between these Churches very deeply.

Q: What is the position of the meetings, gatherings seen within the ecumenical mission?

A: It is seen as the necessary and legitimate expression of the calling of the Church in its task of unity and of mission and to fulfil its prophetic calling.

Q: Mr Naudé, you have already said with regard to the resolutions of Lunteren that the Christian Institute, in so far as it is possible with human fallibility, tries to implement these resolutions?

A: That is correct.

Q: Does the same hold for the resolutions at Sydney?

A: Yes, because I think that the expansion of these resolutions reflects more fully the content of Scripture and the mission of the Church than those of Lunteren.

Q: Mr Naudé, are the resolutions of Lunteren and Sydney pietistically about the hereafter or something in heaven, or is it a charge for here and now on earth?

A: It is a mission for the task and calling and the witness of the Church here and now, in this world in which we find ourselves.

Q: Have these resolutions, if they are implemented, any social, political and economic implications?

A: Most definitely.

Q: Is this an interference by the Church in matters which do not concern it?

A: No, because the task of the Church is threefold. In the first place the task of the Church is a prophetic one, to preach the word of God and where necessary to warn of the judgment of God. Secondly the task of the Church is a priestly one: i.e., to bring before God the guilt and weakness of man and to pray and ask him for his forgiveness. Thirdly the task of the Church is a kingly one, to confess the lordship of Christ over all areas of human life and to seek that the society of which the Church is a part should recognize and apply his Kingship. If I may put it in this way, the prophetic task is where the Church intercedes with the people in the name of God; the priestly task is where the Church in the name of the people intercedes with God.

Q: Mr Naudé, is there any doubt in the Reformed theology about the accuracy of the points which you have just made regarding the calling and task of the Church?

A: I cannot think so, because what I have said here are old and well-known truths of all Churches of Reformed confession and in particular of our three Dutch Afrikaans Churches as it is written in the Heidelberg Catechism.

Q: Is the calling only that of the Church or also that of individual Christians?

A: No, it is the task of each Christian because in obedience to Christ every Christian is also prophet, priest and king and he is called to exercise the same three responsibilities and functions in his life, in his work, and in his witness every day to the best of his ability.

Q: May a Christian remain silent about the message which he has to bring because of social and economic embarrassment?

A: No, the claim and command of Jesus Christ is that his highest obedience is to God as was revealed in Christ Jesus. This remains the struggle of the Christian to what extent he sees his way open to implement this obedience.

Q: May the Christian withdraw because of the social and political implications of what the Scripture lays down for him?

A: No, if he wants to be obedient to Christ as his Lord and Saviour.

At this point the Magistrate intervened and asked a crucial question about the implications of what Beyers Naudé had just said:

By the Court: But does this mean the overthrow of a State?

A: That depends, Your Worship, what you mean by overthrow.

Q: You should possibly expand somewhat on that answer?

A: Yes, I gladly do so. Your Worship, the Church as well as the Christian has the responsibility and the task to proclaim the truth of the Gospel with its social, economic and other implications as well and to make it known and to call for submission and obedience to it. At the same time the Church and the Christian have the calling to obey authority which is not in conflict with the truth of the Gospel, and to follow all the legitimate ways and means to bring this conviction to the attention of the authority to accept it. According to my point of view the Church and the Christian do not have the right to try to achieve this by means of physical

violence, but by means of proclamation, of persuasion, and if a situation should arise where a Christian on the grounds of his convictions from God's word and his conscience has to disobey the law of the land, he has before God the right to disobey that law provided he understands clearly that he must then accept the results of his disobedience and endure them.

Mr Kriegler: Mr Naudé, is this just your own opinion or is it founded in the Reformed theology?

A: It is founded in the Reformed theology and also in the theology of all Christian Churches throughout the world, as we have also tried to express it in the reasons which we gave to the Commission for refusing to testify.

Q: The question of overthrow mentioned by His Worship naturally entails the problem of violence and you have already told His Worship what your attitude towards this is. But I think we owe it to His Worship that we should expand on this. Has there been since, or even before the time of John Calvin a debate in Christian theology concerning the question of legitimate violence?

A: Yes, the Christian Church, if I may call it that, the Churches of the world, have never reached an agreement on this question. There are two generally accepted points of view in connexion with this. The first point of view is that the Church and the Christian have under no circumstances the right to approve or to use violence. The other point of view is that when all other means have failed, a Christian has the right to use violence to change a situation of unbearable injustice and to bring about a situation of greater justice. In this matter there is no agreement among the Churches of the world.

Q: Have both teachings been supported throughout the ages by responsible theologians?

A: Yes.

Q: You hold the first of these two viewpoints?

A: That is correct.

Q: Neither support for, nor participation in violence?

A: Yes.

Q: Do you hold that point of view in secret or have you made it known where necessary?

A: I have always made it known in public, both here and abroad. It is generally known and should be known that it has been my constant and consistent point of view in the past and now.

Q: Have you taken part, or have you been present at church gatherings abroad where others have supported violence, within the context of the tensions of Southern Africa?

A: I was present at a conference of the World Council, or rather called by the World Council of Churches in 1968, yes, I think it was in 1968 in Geneva, where this question cropped up, and in which both these points of view were debated, and in which both these points of view were accepted as the points of view of people, of the representatives of that Conference. I was also present at a private and informal consultation in Ulvenhout in 1969 where this matter was again referred to and it was pointed out that there was a serious danger that the racial policy of our country would necessarily lead to a situation in which violence would be used to overthrow the racial injustices in South Africa, and at which I constantly expressed the point of view that I could not identify or associate myself with any such action which supported violence.

Q: Was this also your public standpoint in Geneva?

A: Yes, definitely.

Mr Kriegler returned to an examination of the Christian Institute's reaction to the Cottesloe, Lunteren and Sydney resolutions:

Q: Now, Mr Naudé, we have spoken about your points of view. Has the Christian Institute as such a policy regarding the resolutions of Lunteren, Sydney and Cottesloe?

A: The Christian Institute never officially discussed these resolutions nor took any decision about them, but in the constitution and in the aims and objectives and in the work of the Christian Institute we try to implement these truths which we see as the truth of Scripture, in our work and in our service.

Q: Does the Christian Institute do this because it is a social or political club or organization?

A: No.

Q: Why then?

A: Because the Christian Institute as a community of individual Christians sees it as part of our calling and task as Christians to implement these truths of the Gospel in the social sphere of our lives as well.

Q: Did you realize, did the Christian Institute realize that this would

necessarily bring about the dissemination of unpopular points of view, unpopular for the South African White population?

A: Yes. That is why I already pointed this out at the time of my sermon at Aasvoëlkop, as I saw it and felt it at the time.

By the Court: I did not follow the question. Will you please repeat it?

Mr Kriegler: Did you and the Christian Institute realize that what you would disseminate would be unpopular among the White population of South Africa?

A: Yes, as I had already tried to express it at the beginning in my sermon at Aasvoëlkop.

Q: According to you would the dissemination of the resolutions of Lunteren and Sydney among the White population of South Africa be unpopular?

A: The greater majority certainly.

Q: Have you ever flinched from this unpopularity?

A: In the beginning before I joined the Christian Institute, yes, as I mentioned yesterday, because I realized to some extent what deep tensions this would bring and the rejection, especially from the Afrikaans-speaking community, and that is why it took me a long time to overcome the anxiety and fear in the realization that if I remain true to the light of the Gospel, then that obedience to Christ would also take away all fear.

Q: And do you and the Christian Institute try to live out fearlessly the spirit and the implications of the resolutions of Sydney and Lunteren?

A: We try to do this but I have to add immediately to remove any possible misunderstanding, that the impression should not be created through my words as if the Christian Institute places itself above any Church in South Africa or any Christian or Christian group who does not possibly exercise this in the particular way in which we do it. If we do it, then we do it with a deep realization of our own weakness and shortcomings to be completely obedient, and in the application mistakes are certainly made due to our lack of complete insight into the truth of the Gospel.

Q: And Mr Naudé, this expression by you and the Christian Institute of the principles in which you believe, has this brought you opposition?

A: Yes.

Q: More than opposition, Mr Naudé?

A: Yes. I would, because this may give the impression that a person feels sorry for himself or is trying to create the image of a kind of martyr, I would prefer not to say much about this but I must answer the question.

Q: Did it go so far that in a court case you had to lay a charge because of libel to your name by a colleague in theology?

A: Yes. This was in conjunction with . . . a number of articles in *Die Hervormer* which clearly created the impression that by our action we committed treason against our country and our people, and that we agreed with an attempt to overthrow our country by violence. And because of the fact that we saw not only ourselves but the whole work of the Christian Institute being threatened in that series of articles, we were obliged to lay a charge.

Q: The outcome of which was an appeal court decision in your favour of R10,000.00 for you and R10,000.00 for Professor Geysler?

A: That is correct.

Q: On grounds of what was described as the grossest libel?

A: That is correct.

Q: Was this the only libel of your name over the years?

A: No.

Q: Did you endure this?

A: I hope so.

Q: Do you go on with your task?

A: I go on with my task because that is the way I see it, as I understand the Gospel, that Christ Jesus demands from you that your attitude to every man should be that of love and of forgiveness, friend or foe, that you must not allow any hatred or bitterness to enter into your heart or into your life.

Mr Kriegler again returned to the activities of the Christian Institute. Charges had been made, he said, perhaps even alluded to during the trial, that those activities were conducted secretly. Such allegations would have to be dispelled, the defence counsel realized, if Beyers Naudé's objections to the secret proceedings of the Schlebusch Commission were to carry weight. How then, did the Christian Institute do its work?

Beyers Naudé first noted that the Christian Institute was governed by a twenty-member Board of Management, elected at an annual public meeting. No staff member of the Institute had a seat or right

to vote on the Board. The work of the Institute could be divided into several main areas. The first was an attempt to give expression to the unity of the Gospel of all Christians of all Churches and colours. This often took the form of monthly bible study and discussion meetings with members of different Churches and races. A second sphere was one of reconciliation. In the spirit of reconciliation the Christian Institute had answered the requests of many independent Black Churches to provide assistance in furthering the theological studies of Black students. As a result an association of independent African Churches was started and a theological seminary was established. The action of the Christian Institute in this field was the first of its kind by a Christian group and helped to bridge the widening gap between the Black and White Churches which was the result of the serious racial tensions in South Africa.

The Christian Institute also concerned itself with the sphere of the witness that the Christian should give in the area of human life and the community, Beyers Naudé continued. In 1968 the Christian Institute informally assisted in the preparation of a report issued by the theological commission of the South African Council of Churches. The South African Council of Churches, Mr Naudé explained, was an inter-church body whose members included nearly every Protestant church group in South Africa, with the exception of the Afrikaans Churches, the Baptist Church and the German Evangelical Lutheran Church.

The Council's report was a theological criticism of *Apartheid* entitled *A Message to the People of South Africa*. It was published in 1968 and evoked wide reaction in the Afrikaans and English press.

Mr Kriegler asked about the report:

Q: Did this have unambiguous political implications?

A: Certainly.

Q: Was it political in origin?

A: No it was rooted and based on the Christian understanding of the word of God.

* * *

Q: What followed on this?

A: There was a wide discussion in the press, the Afrikaans as well as the English daily press, as well as in the church papers, in which

from the Afrikaans political side and also from the Afrikaans church side the main criticism of the *Message* was, if I may summarize it, like this: It is very easy to criticize the *Apartheid* policy if a person does not have to offer an alternative for *Apartheid*. If you want to be honest and consistent then it is essential that you should also offer an alternative for *Apartheid* which is in accordance with the basic truth and the basic principles of the Gospel; if not you make no positive contribution to fruitful development of, a peaceful development of a productive community. In answer to this criticism, which in my opinion was a legitimate criticism, the *Study Project on Christianity in Apartheid Society*, shortened to *Spro-Cas*, was established—a joint undertaking of the South African Council of Churches and the Christian Institute. The project was launched in 1969, and Mr Peter Randall was appointed as Director of the Project.

The Spro-Cas project eventually involved the participation of some 150 experts in the areas of social problems, economics, the Church, legislation and politics, Mr Naudé explained. Its goal was to offer an alternative to the policy of *Apartheid* which could be supported by Christians in South Africa by taking into account the Christian ethical principles found in the Old and New Testament. Six reports were published and forwarded to the South African Government and the member Churches of the South African Council of Churches. Spro-Cas also initiated a Black Community Programme designed to initiate projects in the Black community under Black leadership, with an emphasis on education, labour, social needs of the Church and youth work.

Next, Beyers Naudé turned to the question of the financing of the Christian Institute. There had been criticism that the Institute made a secret of its revenue sources and expenditures, Mr Kriegler stated. Those criticisms were unfair, Beyers Naudé replied, since the financial records of the Christian Institute were a matter of public knowledge. The operating budget of the Institute was approximately R120,000.00 during the present fiscal year. The money was used particularly to support the Institute's journal, *Pro Veritate*, and for such projects as Spro-Cas—jointly financed with the South African Council of Churches—and the African Church Programmes. The Institute received the bulk of its contributions from Protestant church groups and individuals in Europe and America and South Africa. In response

to a question from Mr Kriegler, Beyers Naudé said that the Christian Institute received no funding from the World Council of Churches. At the end of each year fully-audited statements were sent to the various donors of the Christian Institute. Those statements were now in the custody of the Schlebusch Commission, since they had been seized in connexion with its investigation of the Christian Institute.

Mr Kriegler asked Beyers Naudé to explain the concept of Black power and Black awareness or Black consciousness.

A: The concept 'Black awareness' or 'Black consciousness' is a wide concept open to various interpretations. There is no official statement from the Christian Institute in this matter. What I convey is what I believe to be the general opinion held by staff members and by the Board of Management of the Christian Institute.

Q: And in the past publicly expounded by you?

A: Yes, I would like to mention that on an occasion I was invited to give a lecture at the University of Natal, Pietermaritzburg, a lecture known as the Annual Edgar Brookes Lecture, in which I dealt extensively with the theme 'Black Anger and White Power in an Unreal Society'. Here I tried to formulate my own thoughts and the lines of future development relating to this whole situation, and I made it public in the lecture. In short I showed that the policy of *Apartheid*, in name later changed to the 'Policy of Separate Development', how well and honest its intention may be, for a number of reasons brings about frustration and embitterment and in the end hatred in the hearts and thoughts of the majority of the Black population in South Africa. Further, that it is inevitable that a situation will come about, also because of the over-emphasis on the future independence of the homelands, that a reaction will take place, that from the Black population will come firstly a stronger Black consciousness, in itself good and positive, that from this will follow a possible increasing demand by the Black population on the Whites, after the Black population had received a platform on which they feel they could stand as equals over against the White man, and that this too in my opinion is good and necessary because through this it is possible to know the just aspirations and demands (claims) of the Black population. But if we as the White population do not take note of and do not

take seriously the legitimate claims and aspirations of the Black population, then it would necessarily lead to estrangement, to bitterness and a polarization between White and Black which can lead to conflict which can possibly result in violence in our country, and we as Whites should be sensible enough to see this development and to recognize the legitimate claims of our Black population, to intercept it, in time through negotiation to come to a sensible agreement about a political and social order in which the Black community could feel that they have been granted an equal place in our community.

* * *

Q: Now, Mr Naudé, that line of thought, that point of view or opinion of yours in connexion with polarization and Black consciousness, how does it stand in contrast to or in line with the resolutions of Cottesloe, Lunteren and Sydney?

A: You mean my point of view, how I . . . ?

Q: Yes.

A: I see this as the logical and obvious conclusion of the conviction which has been reflected from the days of Cottesloe, Lunteren and Sydney.

Q: And much more important, Mr Naudé, where does your point of view stand in relation to Scripture?

A: I believe that this point of view interprets to the best of my knowledge the truth of the Gospel as it was given to me by Jesus Christ.

Q: Can you for a moment explain the concept, the theological concept, 'reconciliation'?

A: Your Worship, the New Testament brings us the great and wonderful truth in the first place that God in Jesus Christ reconciled man in his lost and fallen state with God. Paul is one of the greatest exponents of this Christian truth in his letters to the congregation at Corinth. It follows from this as a matter of course that because God worked this reconciliation in Christ it is part, indissolubly and unreservedly and eternally, it is part of the life and witness of the Christian, that he must reconcile himself with his neighbour and he should do all in his power to reconcile his neighbour with himself and his neighbour with another, who are in conflict, in opposition and alienation and in bitterness against each other. This is the heart of the Gospel.

Q: Where does this stand in relation to the second great commandment?

A: It is a natural result of it, where Christ said to us that the commandment of God is summarized in the first and the great commandment of love to God and the second that you should love your neighbour as yourself, and these two commandments are the law and the prophets.

Q: And what relation is there between the concept 'reconciliation' and the theological concept of 'identification'?

A: No reconciliation is possible without justice, and whoever works for reconciliation must first determine the causes of injustice in the hearts and lives of those, of either the persons or the groups who feel themselves aggrieved. In order to determine the causes of the injustice a person must not only have the outward individual facts of the matter, but as a Christian you are called to identify yourself in heart and soul, to live in, to think in, and to feel in the hearts, in the consciousness, the feelings of the person or the persons who feel themselves aggrieved. This is the grace that the new birth in Christ Jesus gives a person, every person who wishes to receive it.

Q: Is this your point of view?

A: Yes.

Q: Do you see this as your calling?

A: Yes.

Mr Kriegler pointed out that in the past the Christian Institute had been accused of promoting 'reconciliation' and 'identification' to the point that the two could hardly be differentiated from Communism. What then was Beyers Naudé's and the Christian Institute's attitude towards Communism?

A: The Christian Institute has on various occasions, I think already in 1964 and again in 1966 or 1967, by means of public press statements made clear its point of view regarding Communism and confirmed it, which was in short that in the first place owing to the fact that we are a Christian organization subscribing to the truth of the Gospel, we reject Communism completely because of the fact that Communism denies the existence of God, because of the fact that the biblical truth and truths of love and reconciliation according to the way of the Gospel are rejected by Communism;

and that we can therefore in no way reconcile ourselves with Communism. The tragedy of our situation and of the circumstances in our country is this, that in so many cases people are named as Communists because they are willing to identify themselves, on the basis of their evangelical calling and responsibility, with the aggrieved and the oppressed. This does not mean that there are no Communists in this country who also pretend to do this, that is possible, and I can understand the existence of this fear in the hearts of the Whites and in particular of our Afrikaners. But I regard this as a very serious misunderstanding of the truth that this false identification takes place between those who, because of their deep, holy Christian convictions, identify themselves with people who are regarded as oppressed, that they are placed in the same category as Communists. This is a compliment that Communism does not deserve.

Q: Mr Naudé, have you of the Christian Institute ever hesitated from debating this point of view in public?

A: No.

Q: Do you welcome a debate on this?

A: Definitely.

Q: Did you through Spro-Cas publications try to engender such a debate?

A: Yes. The hope and the expectation of the South African Council of Churches and of the Christian Institute was that this unhappy division which had come about over the years, with this painful silence and lack of discussion in the family of Christian Churches, especially from the side of the Afrikaans Churches on the one hand and the member Churches of the South African Council of Churches on the other, that this would be broken through and bridged by the Spro-Cas publications as a basis for discussion. Unfortunately this did not happen.

Beyers Naudé had now traced the development of his spiritual consciousness and the difficult decisions which led him to help establish and direct the Christian Institute. He had described the structure and programme of the Christian Institute itself, its philosophy and its roots in the Scriptures. Now Mr Kriegler sought to show how the deep convictions which Beyers Naudé held led him to refuse to give evidence before the Schlebusch Commission. In legal terms, Mr Kriegler hoped to establish that Beyers Naudé had 'sufficient cause'

to refuse to testify before the Commission. This required proof that the circumstances were such that it was humanly intolerable to expect Beyers Naudé to testify, and that it was by reason of those circumstances that he refused to do so. Defence Counsel asked Beyers Naudé why the Christian Institute had objected when the Parliamentary Select Committee, precursor of the Commission of Inquiry, had been appointed, and why the Christian Institute had asked for a judicial commission:

A: Your Worship, it seems presumptuous that I should do this before you as an authority on the law, but I will do my best to explain it. The Christian Institute objected to the method and the composition and the working of the Commission concerned, mainly because of these two reasons: Firstly because of secrecy, and secondly because of the possibility that the ordinary processes of law, as is acknowledged, cannot be followed by it, and we stand by that point of view as we have further explained in the document which we submitted to the Commission.

Q: Exhibit E?

A: That is correct.

Q: Is that also your attitude?

A: That is my attitude.

Mr Kriegler now asked Beyers Naudé more fully to explain his objections to secrecy:

Q: Would you now please place before His Worship your personal point of view and motivation regarding secret inquiry or a secret discussion?

A: To be able to do this it is necessary that I point out that for twenty-three years I was a member of a well-known secret organization, the Afrikaner Broederbond. My father was one of the founders of the Afrikaner Broederbond. In 1963, as a result of long and painful struggling in my own conscience for more than a year previously, I decided to resign and my objection was based on mainly two aspects, first the principle of secrecy of the Broederbond and secondly my objection that the Broederbond by means of circulars and otherwise influenced, exercised unwarranted influence in the discussion and in the decisions of the Church. The way in which the whole matter progressed, the fact that before my

decision and as a result of my earnest struggle and unclarity about it I took some of these documents and gave them to Professor Geysler, that it appeared in the press, caused me much grief, personal grief in my life. I also know that it caused much sorrow to the members of the Afrikaner Broederbond. I have already apologized on more than one occasion, in public offered my apology for that grief which I caused to the members of the Broederbond, and if it is necessary I do it again. But I must add to this that that experience and the inner spiritual struggle that went with it to seek light from the Bible regarding the principle of secrecy brought home to me the deep and unshakeable conviction that my previous insight in regard to this was wrong and that I could not allow it to continue. I should say, if it is necessary, that in this regard I was guided particularly by three sayings in Scripture. The first was the one found in John, 1, I think it is verses 5, 9 and 14, in which the announcement of the birth of Christ is made, that He who was the light of the world had come to the world and that he had been revealed, and then we read in verse 14 'so the word became flesh and was revealed to us'. His glory was revealed to us, a glory like that of the Father. In other words, that which was secret, that which was hidden became light, and therefore he came to live and walk in the light. And connected to this, Christ's utterance in Matthew 10:26 and 27—if I may I would like to quote this from the Bible, read the precise words to you, where Christ says: 'So do not be afraid of them. There is nothing covered up which will not be uncovered, nothing hidden that will not be made known, what I say to you in the dark you must repeat in broad daylight; what you hear whispered you must shout from the housetops.' This together with other pronouncements in Scripture brought me to the realization that my point of view in this connexion in the past was wrong and that I did not have the right to continue with it. The manner in which it was made known, or rather the factors that went with it, were in my opinion not in agreement with the light which God wanted to give me and which at that time I was not mature enough, open enough to receive. This brought me to the conclusion that through the grace of God I should try for the rest of my life to do everything in the open and in public. This is not to say, Your Worship, that there are no circumstances and situations in which a person should not act confidentially, certainly there are many such situations in which

confidential information is given, in which confidential relationships exist which a person would honour. But secrecy as a principle cannot be endorsed or supported by a Christian.

Q: Are you aware of any reason whatsoever why an inquiry into the actions and work of the Christian Institute by anyone else should be held in secret somewhere?

A: I am not aware of any.

Q: Have you in the past withheld any information requested from you?

A: As far as I can remember, no.

Q: What is your opinion on the imposed secrecy of the Commission's method of work?

A: I can in no way reconcile myself with that point of view and with that method of working because I regard this as being in direct conflict with Scripture and with the Gospel. I realize that in any such inquiry some circumstances may demand closed sittings because of state security and this I also accept. But as regards myself and the evidence which I would give before such a Commission, I would want to give it all in public because if I do not do so, I run the risk, however sincerely my intentions of unwittingly in one way or another prejudicing some other person, and would therefore not be true to the command of the Gospel. In this connexion I also remember what answer the Heidelberg Catechism gives on question 112 in connexion with the ninth commandment, namely that of false evidence, that false evidence is much more than just speaking an untruth or just a half truth, but it also formulates particularly clearly the danger in participating in any action or procedure in which a person does not do full justice to the truth.

But, Mr Kriegler noted, Beyers Naudé had, in spite of this conscientious objection, initially offered to co-operate with the Parliamentary Select Committee under protest, and indeed did co-operate.

Mr Naudé: That is true. This caused me deep unhappiness but I had the firm hope that the Parliamentary Select Committee would grant the opportunity on the basis of this objection, which I wanted to present at the beginning should I be called as a witness, that the opportunity would be granted me because of this conscientious objection to have my evidence heard in public.

In July 1972, however, Mr Naudé explained, the Select Committee was transformed into a Commission of Inquiry into certain organizations, with a much wider mandate and greater powers. His objections to such a Commission became deeper and sharper, and led him to question whether any appearance before such a Commission could be justified. However, he did not take an immediate position on whether he would testify if called, since no inquiry into the Christian Institute had yet been initiated and he still hoped that an exception would be made in his case so that he could give evidence in public session.

The Commission had begun its investigations by inquiring into the activities of one of the four organizations named in the proclamation establishing the Commission, NUSAS (National Union of South African Students). The Commission tabled its report before the South African Parliament on 27 February 1973.

Mr Kriegler: And what happened that evening?

A: In that report a recommendation was included which requested urgent action, without further explanation or formulation or specification thereof, and that evening banning orders were served on eight leaders of NUSAS, student leaders of NUSAS.

Q: Involved in that inquiry?

A: Involved.

Q: Mr Naudé, did you see any connexion between this recommendation of the Committee on the one hand and the bannings on the other?

A: Yes, a clear and direct connexion. I could not but conclude from that, and I believe that any persons with a reasonable normal intelligence had to conclude that the steps of banning resulted from or were connected with the report of the Commission.

What effect did the apparent cause and effect relationship between the tabling of the report and the immediate banning of the NUSAS leaders have on his mind, Mr Kriegler wanted to know.

A: That night after I received the news, I reflected on it at length and earnestly. Early next morning I got up and during my quiet time I considered the matter at length and carefully, read portions from scripture, and came to the conclusion that I could no longer see my way open for any co-operation with this Commission.

Q: What led to that decision?

A: Firstly, the principle of secrecy which I saw and could not but see in its full perspective, that here were people penalized as a result of this and powerless to do anything about it. Secondly, that what was at stake here was the whole principle of what was right and just, as contained in the whole Old and New Testaments and the basic principles of our Roman-Dutch Law, and I felt that it was the violation of these basic principles and thirdly, I saw in this the increasing danger that people would be silenced without the opportunity of defending themselves, and I asked myself the question in how far I could see in this that similar steps could be taken against staff members of the Christian Institute and other organizations. Naturally it came to mind that if it could happen to these young people, then the possibility of my being banned also surely had to be faced. In spite of such a possibility and as a result of my own point of view, I would continue my task fearlessly. I must tell you that in the work which I do I accept that such a step may be taken against me, but that in spite of the possibility that such a thing could happen, I am convinced that I should give my Christian witness in this country fearlessly and with love.

Q: Did you fear the implications for staff members of the Christian Institute?

A: That was my main concern. In the first place here I was not concerned about myself, but concerned about the possible result which such a secret inquiry could have on staff members of the Christian Institute, on Board members or persons who were directly connected to the Christian Institute.

Q: Mr Naudé, could you see any difference between the findings of the Commission and the resultant banning on the one hand and a criminal trial, with resultant punishment on the other?

A: Yes, in a criminal trial it is a public trial in which the accused is given the full opportunity to present the facts in connection with his case, in which a proper cross-examination can take place, in which a person knows who is the accused and who is the accuser, and in which a person is granted the opportunity to present his case completely before an impartial judicial bench. In the case of this commission this consideration does not apply. That is why I wish to say that in any public criminal trial, if I or any other member of the Christian Institute should be charged for any action or any charge of breaking the law, we would naturally

with the high regard which we have for the whole structure of law and for the process of law in our country, we would freely submit ourselves to it and should we be found guilty—we will, I must now speak for myself only, but I believe that this is also the point of view of members of the Christian Institute—I would accept that sentence and endure it.

Q: Did you at any time in connexion with the Commission have any design or intention to foil the law or to undermine an inquiry into the truth?

A: No.

Q: Did you motivate your point of view from scripture in Exhibit E and submit it to the Commission on the day which you appeared?

A: Yes.

Q: Did you explain to the Commission, as appears in Exhibit D, that you wished to take the oath and wanted to give evidence, but not under those circumstances?

A: Yes, I made the point clearly, at any rate I hope it was completely clear.

Q: Is this still your point of view?

A: It is still and it remains my point of view.

Q: Do you still stand by what you said in Exhibit E?

A: Yes, I stand by that.

Mr Kriegler: I have no further questions, Your Worship.

That concluded Beyers Naudé's evidence in chief.

He took the stand the same afternoon to face the Prosecutor's cross examination. The prosecution made it clear that it wished to demonstrate that Beyers Naudé had a basic prejudice against the Schlebusch Commission. Under questioning by Mr Rossouw, for the State, Beyers Naudé replied that he did not question the legitimacy of the appointment of the Commission. He said that he was fully aware that he was possibly committing a crime by refusing to testify. He saw the composition of the Commission by politicians, rather than judicial officers, as creating a serious risk of partiality. The impartiality of the Commission had been compromised by statements of the Prime Minister, and the majority of the members of the Commission were members of his party. It was well known that the Government did not approve of the Christian Institute, and in such circumstances the temptation was present to yield to existing prejudices.

Prosecutor: Did you therefore believe that the commissioners were not honourable?

A: No, that I cannot say. I do not wish for one moment to question the integrity or honour of any of the members of the Commission, but certainly the competence to act completely impartially and independently in this particular case.

Q: Your premiss that the Commission, that is to say the members of the Commission, would not act impartially, is based on suspicion?

A: It is based on suspicion, but it is also based on the knowledge which I have and which I believe that we as people have of human fallibility and the weaknesses of all of us involved in cases affecting ourselves and our position.

Q: Is a judge not also fallible?

A: Any person is fallible, but the system of law in our country, as based on the Roman-Dutch-law and developed over many centuries, has ensured in the best possible manner that the highest measure of impartiality can be guaranteed, and I have the highest regard for it.

Beyers Naudé said that he had a further objection to the activities of the Commission, in that its investigations could lead directly to a banning order circumventing the safeguards of a trial. The case of the NUSAS leaders had been proof enough of this. The prosecutor asked whether Mr Naudé knew on what information or grounds, other than the report of the Schlebusch Commission the NUSAS banning orders were based.

A: No, I do not know, because this is not made public. This is precisely my serious objection against the whole system of banning without trial, that it is not possible to judge whether there is guilt in such a case, and that is why I believe that one should regard such a person as not guilty until his guilt is proved.

The Prosecutor returned to the question of the composition of the Commission.

Q: When you speak of a judicial commission, to come back to the argument of partiality, did you have any objection if an ordinary layman should be chairman, someone who would be impartial?

A: I do not know what this question implies as regards an ordinary layman.

Q: In other words, someone not learned in the law, for example . . .

A: If it was someone who did not have the competence because of his knowledge of the law I would definitely object.

By the Court: But if he was a person who was generally respected and accepted in public life as an honorable, impartial person, would you even in this case have objected to giving evidence before the Commission?

A: Your Worship, I myself never considered that such a person would be appointed in such a case. I accepted that it would be someone from the judiciary who would fulfil this function, because I regard such a person as properly trained and equipped to handle such a case.

Q: Yes, but I do not believe that this answers the question which the court put to you. What would your attitude be if an ordinary impartial person standing outside politics, but respected in public life and recognized as a decent person, what would your attitude be in such a case, if such a person, or persons even, were appointed to a commission?

A: Your Worship, if such a person had enough knowledge to know how to conduct such an inquiry I would not make any objection, except that I would definitely prefer that it should be someone from the judiciary.

Prosecutor: Does the party politics in connexion with such a chairman not play a role with you?

A: Do you mean such an impartial person, or such a layman?

Q: Yes.

A: This would definitely be a factor in such a case, that is why for me the important factor is, how far can—to what extent is it clear that such a person is impartial and will act impartially.

Q: You see, I want to put it to you Mr Naudé, I will take it further later, that your refusal to testify springs from a basic prejudice against the Commission . . .

A: No, that is not so.

Q: You had no objection against the Commission members as persons?

A: No, I did not think of it in that connexion.

Q: Your only objection is then that because of party connexions there could have been a possible partiality to your detriment?

A: And the fact of the secrecy of the evidence and the procedure of the Commission.

The Prosecutor then turned to the question of secrecy. He noted that Beyers Naudé had been willing to give evidence before the Select Committee before it was changed to a Commission of Inquiry. But the Select Committee had proceeded in secrecy just as the Commission of Inquiry had done.

Prosecutor: You see, it seems that your attitude is not consistent.

Although you gave evidence of your deepest convictions against secrecy as such, you were prepared to co-operate with the committee, you indeed co-operated?

A: That is correct; because of the high regard that a citizen of this country naturally has for the authority of Parliament, a person likes to do everything in his power to co-operate and not to create the impression that you do not want to recognize authority. Although I had my reservations in this connexion from the very beginning, I nevertheless felt that as far as possible I should be willing to co-operate, until these other events brought the matter for me to finality.

Q: So at that time your endeavour to co-operate was much stronger than your conviction against secrecy?

A: No, my conviction about secrecy was there right from the beginning; that is why I said that I planned, when called, to place before the Commission, before the Select Committee, my serious problem with regard to secrecy and to await a decision in this connexion, and at that time I did not take any further decision, awaiting the answer that the Select Committee would give.

Q: Did you approach them in this matter?

A: No, because I was not called to give evidence.

Q: Did you expect that you would be called?

A: At that time it was not clear to me who would be called.

Q: Did you ever notify the Commission itself that you would give evidence, should the proceedings be public? Did you ever pertinently put it to them?

A: Not personally. In a statement made jointly by the four bodies immediately after the appointment of the Commission this was clearly stated.

Q: Do I understand you correctly then that your objection against secrecy is a conscientious objection?

A: It is a conscientious objection where it concerns an inquiry like this.

* * *

Q: Had the Commission, as now composed, sat in public would you then have given evidence?

A: Do you mean as the Commission was composed?

By the Court: But did you regard it as a trial? It was not a trial was it?

A: None of us knew what would come out of it, Your Worship, but the statement by the Prime Minister definitely implied that it was a trial or could become one.

Q: But surely you took legal advice to ascertain what the implications were of such a Commission of Inquiry, it was after all not a trial where a person stands accused but only a Commission of Inquiry.

A: Your Worship, the evidence or the information which was given us made us to understand very clearly that the possibility of a trial in the form of an inquiry which contained or implied a trial, that this possibility could not be excluded.

Q: But were you not under a terrible misunderstanding when you got that impression?

A: I do not think so, Your Worship, because the Commission's recommendations that urgent action should be taken in the case of NUSAS students implied clearly that it was a form of trial with a recommendation to Parliament.

Q: But surely that cannot be, because there have been many cases of bannings that have been issued without an inquiry or any trial preceding, not so?

A: That is so, but I do not think that you can blame any citizen of the country, when banning orders are served on people a few hours after such a report dealing with their activities was handed in, and the fact that they gave evidence before that Commission.

Prosecutor: To follow up this question, do you agree that the Commission itself did not recommend the nature of the action?

* * *

A: No the Commission did not recommend the nature of the action but the wording of the report was certainly of a very serious nature.

Q: You refer to the term 'urgent action'?

A: Yes.

Q: But the point which I am trying to make is that the Commission has no say in the nature of the action which will follow afterwards?

A: I do not know, because the fact is that no one of us knows whether the report that was tabled was the full report or whether there was another—or whether other information went with it which was not published.

The Prosecutor continued to insist that there was no cause-effect relationship between the tabling of the report and the subsequent banning orders. But Beyers Naudé maintained his position that they could not be separated.

The Prosecutor changed tack and asked Beyers Naudé how he could claim that the Commission hearings took the form of a trial when by his own admission they were held in secret and he therefore could have no knowledge of their proceedings. Mr Naudé replied that the results of the NUSAS case led him to that inevitable conclusion.

Prosecutor: So your premiss that it would be a trial is based only on the end result of the inquiry into NUSAS?

A: Correct. But this is just the problem with a secret inquiry of this kind, that it lays itself open to such a legitimate suspicion on the part of those people who stand outside.

But if Beyers Naudé had nothing to hide, as he has stated, the Prosecutor asked, what was his 'great fear' in testifying before the Commission? Why did he not want to put all his evidence before the Commission?

A: Because an important principle is involved here, that should I say anything in my evidence which could be detrimental either to the Institute or to a staff member or to anyone directly or indirectly connected with the Institute, or to people who oppose the Institute, they have no possibility of any kind to refute the possible incorrectness of my statements, to expose it.

* * *

Q: You also mention that you wanted to protect your staff members by refusing to testify?

A: Yes.

Q: I want to put it to you that it would have been a much better method to place the facts and evidence before the Commission, because in the final resort you are the person who has all the information, all the facts?

A: I have no objection to putting all the facts before the Commission, provided that members of staff have the opportunity to hear what I say, to react to it where necessary, or in case it should concern any one of them. I should possibly add that each one of us who knows himself is aware of the fact that a person can certainly not remember everything and that the impressions and judgments too that you give about a person or persons could be one-sided or incomplete and that in this way, with the best intention, you could still damage or wrong someone.

Q: Did you realize that by your refusal you would impede the Commission in the execution of its duty?

A: I saw this as a problem for the Commission, and I would have done everything in my power not to have caused it, but in the light of my conviction this was unavoidable.

Prosecutor: I have no further questions, Your Worship.

The Prosecutor had finished his cross-examination. Mr Kriegler now rose and began his re-examination of Mr Beyers Naudé. He sought to rebut the prosecution suggestion that Beyers Naudé harboured some irrational prejudice against the members of the Schlebusch Commission. Was the witness aware, Mr Kriegler asked, of press reports quoting various members of the Commission who expressed opinions on the probable outcome of the Commission's investigations? Yes, replied Beyers Naudé, both the chairman of the Commission and another Commission member had expressed themselves in such a way before the inquiries had begun.

Mr Kriegler: What impression did it create in you?

A: The first impression which it created in me was that I could not—it was a shock to hear that the Chairman could express an opinion in such a way before any of the members or the representatives or the persons who were called or would have been called before

the Commission actually appeared. It was beyond my understanding that the matter was put in such a way, and I felt that through this the whole case against the Christian Institute was prejudiced even before we had appeared.

In answer to further questions he said that doubts about the impartiality of the Commission had been the focus of much debate in the South African press. The Leader of Opposition had spoken out against the form of the inquiry during debate in Parliament. Thus Beyers Naudé had not been alone in questioning the impartiality of the Commission. Mr Kriegler asked the witness, in light of the experience of the NUSAS leaders, what his expectation was after he read of the prejudicial remarks by Commission members.

A: There was only one conclusion I could rightly draw . . . that . . . I must begin to prepare myself as in other cases to expect a banning order when the report on the Christian Institute was tabled.

Q: What is your freedom of speech or freedom of action or opportunity to put matters rights when you have been banned?

A: Nothing.

Mr Kriegler: I have no further questions, Your Worship.

The magistrate, Mr Kotze, now put some further questions. The Magistrate noted that in spite of the legitimate constitutional authority of the State President to convene a secret inquiry, and despite the unquestioned legality of the regulations he had established, Beyers Naudé had chosen not to acknowledge the legitimacy of the Commission. His act challenged the authority of Government. The magistrate said that his own impression of Beyers Naudé was that he was a man who had acted from deep conviction after careful consideration. But might not his action confuse many other people? Did not faith in a democratic system require that some few individuals be delegated the authority to make decisions on behalf of many? Was not the Delimitation Commission, appointed to revise the boundaries of parliamentary constituencies, such an example? They, like the Inquiry Commission, were empowered to act independently, based on their good judgment.

Mr Naudé: Your Worship, that is correct. But there is an essential difference of principle. In the case of the Delimitation Commis-

sion, they are working with areas, with ordinary affairs and matters. The individual right of a person who could possibly appear as an accused is not touched or interfered with, while in this case it affects the basic right of the individual.

By the Court: Yes, but is it still not the duty of the individual in a democratic system, because that is what it is—that I accept and that you must accept, we must all accept that we live in such a system of Government—must we not accept that the action was democratic because these matters were discussed in Parliament as has also been shown here. There is a leader of the Opposition who can say his say there about the actions of the Government, and the Government must be responsible to the voters. Account is after all given for action and when a Government takes such an unpopular decision then it is possible that at the next election it could be thrown out, not so? Is that not how the system works?

A: That is possible, Your Worship, but the one basic problem which remains with me is: why is there any hesitation from the side of the Government to follow the ordinary procedures of our judiciary if there is an alleged charge, or an inquiry which could lead to a charge, to appoint a public judicial commission of inquiry, and on this question no one has given me a satisfactory answer.

Q: Yes, but it is surely not necessary for the Court to call the Government to account or to criticize or to say what it should have done or what it should not have done—as far as the Court is concerned the Court has nothing to do with that. But is it not true that it sometimes happens—and we are living in the times that we live in—that such circumstances do occur and the Government by necessity must take certain action based on certain information, just to refer to you a certain instance. I name these things because I did not cover a very wide field and it interests the Court to know what your point of view would have been in times of crisis, as we have often lived through—it can happen in the best democratic systems that certain measures are taken which give the Executive wide powers to resist that situation.

A: I realize this and should it be announced in our country that such an emergency exists, and that because of it certain emergency measures are necessary, then I accept that a citizen, in so far as it is at all possible, must submit himself to those emergency measures. It remains the duty, however, the right and the duty of the

Christian, if he is convinced that those emergency measures are in conflict with his conscience and his point of view of the right of the authorities, to protest against it, and if it is necessary, to make it clear that he cannot go along with it, naturally with the realization of the consequences. I think I should put it in this way, Your Worship, if you would allow me, that it is of great importance that we should realize for the Christian in any case, all authority is given by God, that God gives this authority to the State to govern, he also gives the authority to the Church to bring its witness. The test is applied to both the Church and state to obey this authority which God gives, and both state and Church are subject to this.

* * *

Q: Is order not a pre-requisite to give the Church the opportunity to continue with its activities?

A: Yes, Your Worship, provided that order is based on justice, because where order is not joined with justice then it ends in chaos.

The Magistrate now asked Beyers Naudé what was the solution he had referred to which was offered on the political side in the Spro-Cas study project.

A: Your Worship, I will try to answer as briefly and fully as possible by saying, when a person speaks, when a person moves in the political sphere then I think it is a mistake to speak of a solution, because in human relationships there is never a perfect solution. There is always the necessity that, in accordance with developments, new relationships and new situations, a political party or parties should face the situation and on that basis adjust and amend their policy accordingly. But for the Christian the policy of any political party should satisfy certain basic claims of justice and neighbourly love. If that is not the case then that policy will ultimately mean the downfall, the ruin and the downfall not only of the party but also the nation and the community which the party tries to serve, and it was the attempt on the part of Spro-Cas to offer an alternative as a basis for discussion and in that report you will notice that mention is made not of the solution but of models for possible development and change which can give a

greater say to a larger portion of the population. But a solution for human relationships of this kind in the perfect sense of the word does not exist in this world.

Q: Now I do not expect you to tell me what the alternative is, what the details are, but the alternative which is visualized, does it not agree with any of the principles of any of the many political parties in this country?

A: With some yes, to a certain extent, with others not, and this is why that document should not be seen as a programme of principles for a political party, it is not that and was never meant to be, it was only meant to give certain guidelines, to give the needed stimulus to citizens and parties of the country to consider their particular programme and policies in that light. I should possibly add to this, it is based on the understanding and premiss that there are certain basic forms of injustices which are not in accordance with the Gospel and with the Christian claim of justice, that in any case this should be removed as soon as possible to ensure the peaceful development of our country.

The Magistrate put to Beyers Naudé that although he had labelled the Government's racial policy as un-Christian, some African leaders in fact supported the Government's homelands and multi-nationalist policies. Beyers Naudé replied that the great majority of African leaders rejected the Government's policies.

Nevertheless, the Magistrate suggested that Beyers Naudé should qualify his statements in Exhibit E so as not to mislead outsiders.

The Magistrate then asked Beyers Naudé about the Afrikaans Churches, and whether it was not true that he held much against them and the point of view that they take.

A: I do not hold anything against the Afrikaans Churches. I have something against the unbiblical points of view in our Afrikaans Churches, in which it is my calling and duty as a Christian to bring everything which, according to my conviction, is in conflict with Scripture to the attention of our Afrikaans Churches and in particular the Church to which I belong, the Nederduits Gereformeerde Kerk.

* * *

Q: But if you are not aware of all the ins and outs since you left the ministry of the Nederduits Gereformeerde Kerk, if you are not aware of all the ins and outs to make a judgment over what may be happening . . . is your judgment not rather harsh in that connexion?

A: I would be sorry if I created the impression that my judgment was harsh. I think I should just explain that, as I understand the essence of the Church and its witness, it is absolutely necessary, it is a command of the Gospel that the Church should proclaim its witness, not only by way of private and confidential discussions and conferences, but also in public. My objection which I have in this regard against the actions of the Church to which I belong is that, according to my knowledge and memory, with the exception of the criticism of the system of migrant labour which the Church expressed a few years ago, no public criticism has been made in connexion with many of the circumstances of our racial problem, which I am convinced is in conflict with Scripture.

The Court had no further questions to put. Mr Kriegler rose for a brief final examination of the witness. He dealt with some of the questions raised by the Magistrate. Was the debate about Christian obedience to the state a new one? No, replied Mr Naudé, it was an age-old problem, involving difficult decisions for people unable in conscience to obey what they considered unethical demands by their Government. Was it usual for a Commission appointed to investigate a school of thought or a spiritual trend, to sit in secret? No, it was without precedent and he knew of nothing which could possibly justify it in the case of the Christian Institute. Finally, Mr Kriegler asked about the Spro-Cas study documents.

Mr Naudé: . . . There [a]re six reports. The one report dealt with the Church, what should be changed in the Church to be in accordance with the demands of the Gospel, because our point of departure was that the Church which truly wants to be the Church which wishes to reform others should reform itself.

Q: Is this a revolutionary thought?

A: This is an old, recognized, accepted reformed truth on which Calvin's whole teaching is based.

Q: Is this indeed a breaking with and assault on the Reformed Church?

A: I cannot imagine that the Reformed Church could exist and live without this.

Q: Good, that then was the Church, that was one study document . . .

A: The second was on education. The third was on society. The fourth on legislation, what should be changed in legislation to bring it into accordance with the basic principles of justice. The fifth was on economics, in which greater justice should be done, and the sixth was on the political future of our country.

Q: Did you in any of these study documents—if I say you I now mean Spro-Cas—pretend to have an answer?

A: Recommendations were made to effect in practice the basic truths and principles but certainly not an answer in the sense that it is the final solution to a difficult and complicated problem.

Q: Did you send these study documents to the different political parties?

A: Yes.

Q: To the universities?

A: Not me, the Director of Spro-Cas did.

Q: And to the universities?

A: Yes, to the universities.

Q: To the Churches?

A: Yes.

Q: With what aim?

A: With the intention that they should be considered, discussed and that they would hopefully serve as a basis for discussion and give direction for the future to bring our society more into line with the Christian claims of justice and brotherly love.

Mr Kriegler had no more questions for the witness. Nor did the Prosecutor. Beyers Naudé left the witness box, and the Prosecutor began his closing argument, addressing the Court on the merits of the case.

He asked that the accused be found guilty as charged. A lawfully constituted Commission of Inquiry had been called upon to investigate the activities of the Christian Institute. The accused was in possession of all the facts concerning its activities and actions. The Commission would have neglected its duty if it had not subpoenaed the accused to give evidence. But Beyers Naudé had refused to take the oath or affirmation before the Commission, and thus was in clear

violation of Article 6 of the Commissions Act, which prohibited such a refusal, unless sufficient cause for the refusal was shown.

Had the defence discharged its burden of proving that Beyers Naudé had sufficient cause for not taking the oath or affirmation? The accused had based his defence on three pillars, none of which, according to law, amounted to proof of sufficient cause.

First, the accused had objected to the composition of the Commission. But that objection amounted to a refusal to recognize the constitutional authority of the State President to exercise his discretion in appointing the Commission. There was no precedent for such an objection.

Second, Beyers Naudé objected to the method of work of the Commission, both in respect to the secrecy of the hearings and his contention that the hearings amounted to a trial and not an inquiry. However, the accused's mere conscientious objection to secrecy would not protect him from failure to testify before the Commission. In the case of *State v. Lovell* 1972 (3) SA, 760, AD, it had been held that the conscientious objection of a Jehovah's Witness to undergoing military service did not constitute 'good cause' with the meaning of the Defence Act. Beyers Naudé's objection to secrecy again was nothing more than an objection to the inherent power of the State President to prescribe secrecy. As for the nature of the proceedings themselves, the accused was under a false impression if he thought that the Commission hearings took the form of a trial. The regulations setting up the Commission made no provision for providing a charge sheet, providing information to a witness, or other trial-type procedures. The accused was under a false impression as to the method of work of the Commission. This could not provide a sufficient defence for failure to testify.

The accused had thirdly objected to the consequences of the Commission's work, the Prosecutor said. The defence had suggested that the Commission had been responsible for the banning of the NUSAS students. However, the Prosecutor said, although banning orders 'may possibly follow from the report of the Commission as in the case concerned, it cannot be said that the Commission is responsible for the nature of the action by the executive authority. In the case concerned the Commission recommended that immediate action should be taken against the students, but it was not specified what action the Commission had in mind.' Thus, once again, the accused based his objection on a false impression of the work of the Com-

mission. Having failed to acquit himself of the burden of proving 'sufficient cause', the accused should be found guilty.

When the Prosecutor had finished, the Defence Counsel, Mr Kriegler, began his closing argument by making certain legal submissions.

First he argued that the regulations providing for and ensuring the secrecy of the proceedings before the Commission were invalid as being directly in conflict with Article 4 of the Commissions Act, 1947. Article 4 of the Act, he said, stated that all commission hearings were to be conducted in public, with certain specific exceptions. There was a proviso that the chairman of a commission could exclude persons whose presence was, in his opinion, not necessary or desirable. The general rule then, was that hearings were to be held in public, not secret, session. Article 1, however, was amended at a later date to give the State President the power to provide for 'the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy'. This power seemed to be at odds with the desire of the legislature in drafting the original provisions of the Commissions Act to ensure that all hearings be conducted in public. Mr Kriegler noted the common law tradition that when an amendment to an existing law seemed to conflict with the existing law, the two provisions should be reconciled where possible, to preserve the original intent of the legislation. In the case of the Commissions Act, he argued, the law should be construed as meaning that the State President had the power to authorize secret proceedings, but that he did not have the power to impose them. In other words, the actual decision of whether or not to impose secrecy must be left to the discretion of the Chairman. The State President in the present case had exceeded his delegated power under the Commissions Act by requiring the Chairman of the Inquiry Commission to impose secrecy at all hearings. The State President had removed the discretion specifically given to the Chairman by the legislature. The imposition of secrecy was thus constitutionally null and void, and therefore Beyers Naudé's objection to testifying in secret was a correct and lawful one.

His second legal submission was as to the meaning of 'sufficient cause' for refusing to testify. The Defence Counsel disputed the Prosecutor's claim that 'sufficient cause' could only be deduced from an objective examination of the actual circumstances surrounding an individual's refusal to testify. This definition of 'sufficient cause' did

not take into account the defendant's subjective reasons for not testifying, which according to relevant case law, should also be weighed in deciding whether the defendant had 'sufficient cause'. 'Sufficient cause' was really a standard of fairness, not merely a legal standard, and should take into account the practical, moral, and spiritual motivations of the accused in a case such as the one now being tried. In examining the objective 'surrounding circumstances' the Court should note the wide scope of the inquiry into the Christian Institute.

The Defence Counsel asked the Court to look carefully into Beyers Naudé's life, his beliefs, and his principles, in order to decide whether a humanly intolerable situation was created for him when he was subpoenaed to testify before the Inquiry Commission. Beyers Naudé's sincerity, honesty, and integrity had never been questioned during the course of the trial. On the contrary, the Court could not have failed to have been impressed by the scripturally based and Christocentric life-view of the defendant.

Mr Kriegler: Your Worship, the accused is a man, according to the evidence here before you, who gave up a privileged position, an honoured position in his Church, and in his community for principles, for religious convictions, and whether he was right or wrong is not the question. It concerns the sincerity of the person himself, and, Your Worship, not only did he give up that privileged position for the proverbial desert but since then he has had to endure calumny, since then he has had to endure the attempt to silence him by his own Church, for which he has a clear love and suffer the gag which, according to undisputed evidence, was put on him in church circles. It is relevant to ask whether the attitude of the accused and the actions against him were his just lot because he was cheeky or because he provoked, or whether he looked for it like a trouble-seeking child, because if you find this it would certainly cast a reflection on his attitude before the Commission. This is so because it is all a progression, through which one man has passed.

With due respect we suggest that you will find that the accused proclaimed that which his Church should have proclaimed, and that he had to endure the abuse which was his lot because, in accordance with the words of Resolution 9 of the Synod of Luntenen . . . he exercised his prophetic task as he saw it,

urgently, persistently and patiently, a prophetic task, as he saw it, flagrantly neglected by his brothers and his Church.

Now Mr Kriegler sought to show that Beyers Naudé's beliefs were not only sincerely held, but that they were reasonable and justifiable beliefs, the natural result of which was his refusal to testify before the Inquiry Commission.

Mr Kriegler: Your Worship, we feel, with respect, that the accused will have impressed you not as aggressive or arrogant, but as a humble person, not as a visionary but as a practical person who tries to live out his deep-rooted convictions, and this he tries to do in spite of the opposition and the aloofness of his Church and his people. Evidence has been given that he brought the displeasure of the governing party down on himself and this is naturally not surprising, because, we cannot get away from it, what the accused stands for in his message has social, political and economic implications. He was not unaware of this, but as is clearly indicated in the two decisions of the Reformed Synods . . . the accused can or could not . . . remain silent. And Your worship, whether a person agrees with his point of view or not is not the point. What is relevant and of central importance is that on uncontested evidence, the accused's point of view is founded in Scripture. It is not the product of the accused's political insights or ambitions—he would have been extremely foolish to have held such ambitions—but the very product of his theological studies. And we would agree that if that theological conclusion, that point of view which resulted from his theological study were to be far-fetched or ridiculous, then you could with that *residuum* of the objective criteria say: 'No, no, such foolishness the law cannot recognize.'

On the strength of [the resolutions of the Reformed Synods] we make the submission without any hesitation that the accused's point of view is in accordance with the decisions which representatives of his own Church have expressed, but which they have not yet proclaimed or tried to implement in this country. It is, in other words, not a totally unacceptable heresy, it is a responsible view, whether a person agrees with it or not.

In the light of the personal character which we tried to sketch to you as a correct image of the man, what then is the complex of facts within which he finds himself? He said to you—and he was

not attacked for this under cross-examination—that he and the Christian Institute work in the open and do not oppose questioning, inquiry and investigation. Indeed they would co-operate with a public investigation, and that was not mere lip-service, because they made such an offer to the Parliamentary Committee, and the accused made the same offer here again, an openness which in our submission will have impressed you. Together with this openness we ask you to take note of the accused's reasoned, deep-seated religious viewpoint regarding secret action.

Once again we submit that this is not a far-fetched or a ridiculous attitude. On the contrary, it was presented to you in the witness box, we submit, in convincing terms as founded on Scripture and it was not challenged. This viewpoint is exactly in accordance with the attitude which the accused took before the Commission, consistent, clear, irrefutable, but a moral point of view no one has yet tried to debate with him . . .

We ask you, Your Worship, to accept the subjective sincerity of the accused's objection against secrecy, against working in secret, against concealment, as a fact and not as an unreasonable point of view, and we want to remind you with respect of the accused's reference to the question and answer 112 of the Heidelberg Catechism which he paraphrased for you, and which in turn is, of course, an extension, an explanation of the ninth commandment by the accused's Church—'You may bring no false evidence against your neighbour.' We submit that this is not a far-fetched point of view.

Your Worship, what is the second principle or conviction of the accused before you here today? This is the point of prejudice. In Exhibit E, which the accused confirmed in the witness box, he mentions the factors which led him to have reservations about the impartiality of the Commission. We do not want to mention them all but only remind you of some of the important ones. The fact is that the whole process which is having its consequence here today started in the no-confidence debate in February 1972, when the Prime Minister made certain remarks which the witness Prinsloo and the accused told you about. At that time the leader of the National Party, to which (according to Mr Prinsloo's evidence) most of the Commission members belong, stating that he fully realized his own responsibility, said that there was a *prima facie* case against the Christian Institute.

There is evidence on the party connexion, the accused gave you his point of view on the party links. This was not contested and neither can it be contested. There is the fact which was also given to the court in evidence that the policy of the Party to which the majority of Commission members belong is in conflict with or at least is not reconcilable with the policy which the accused and the Christian Institute have presented for consideration in the Spro-Cas programme. You know that the Chairman of the Commission in the public press has speculated on the findings of his Commission concerning the Christian Institute, not only speculated but described those findings as shocking—‘More shocks to come’ (words to that effect). ‘It will be worse than Wilgespruit’; ‘It may be worse’. Now Your Worship, with these facts we do not ask you to find that you agree with the accused, you need not make such a ruling. It would, we respectfully suggest, be unfair towards you to ask you to make such a ruling. But the ruling that we do ask you to make is this—the accused’s reservations are not far-fetched. You need not to rule more than this, this would be reasonable for the accused.

These reservations, these objections on principle, concern a wide concept, the rule of law, which one should sub-divide into its components as it has developed here in this case and as it was set out in Exhibit E. Firstly, the office of the Commissioners, not their persons—the accused respectfully made it as clear as any person possibly could that he neither could nor would wish to reflect on any of the individuals as honourable men—but because of their role as politicians and their party connexions, the accused says to you that it would only be congruent with human fallibility if they could not evince the necessary impartiality. And now, Your Worship, once again this is not a point of view which the accused has just conjured out of thin air but he has pointed out to you that it was expressed throughout the country in many newspaper editorials and even by the Leader of the Opposition in Parliament—hardly a far-fetched point of view. And thus, Your Worship, when the accused compares those proceedings before persons of that office with these proceedings here, it also is not a far-fetched comparison. Moreover, what the accused said regarding his view of the rule of law and the essence of jurisprudence in our Roman-Dutch law, and the sharp contrast which was revealed here in this court with the procedures which Mr Prinsloo described for you—

once again in our respectful submission this is hardly a far-fetched consideration.

It goes further—his reservations also concern the consequences of the Commission which can be anticipated. My learned friend put it to the accused under cross-examination and also submitted in his argument, that the banning of the NUSAS people was an action of the executive authority and that the executive authority could have done this without any Commission of Inquiry, that it has the authority to ban without such an inquiry, and that this has indeed happened on occasion. Naturally there is no argument on this, that is naturally so. But, Your Worship, with respect, that is splitting hairs. Let us consider the facts with common sense and test whether the accused's premiss, that he sees cause and effect, is far-fetched.

Your Worship, very little needs to be presented to you except for what the accused has said himself. The Commission investigates that organization, NUSAS; the Commission interrogates the leaders of that organization; the Commission makes an interim recommendation about the organization; and *mirabile dictu*, the same day that the recommendation is made those people who were leaders of that organization, are banned. Your Worship, we respectfully argue that the connexion by the accused of the one as a logical result of the other, not a legal result, is not far-fetched. The interim report was brought out because urgent attention was necessary, and this was the subsequent urgent action. That is how the accused sees it. It is not far-fetched.

Regarding this last point, I must remind you of the accused's evidence that he is convinced that the same fate will overtake him if the same procedure is followed with him before the Commission. In the light of the existing precedent, on the light of the publicly reported comment by the chairman of the Commission regarding the shocks, this is hardly an unreasonable attitude, even although, of course, it does not have to be ruled as such, but even so it is not an unreasonable point of view.

Thus far we have dealt with the various points *seriatim* but it is, of course, not the approach of the legal practitioner or judicial officer to weigh up facts individually in isolation from each other and to find each one in turn too light and eventually to come out on the other side with no weight, as was the case with my learned friend's argument. The judicial approach is to consider all the

facts, all the circumstances in relation to each other . . . The relative weight of various factors in relation to each other, is a difficult matter, Your Worship, and it is possibly one indication that the accused's attitude that the weighing up of facts should be done by a trained legal practitioner, is not unreasonable. We ask you to consider these complex circumstances in relation to each other. This man who does not provoke and who does not challenge and who does not seek conflict; who wishes to testify, who here declares himself willing to testify and indeed to submit himself to cross-examination; and who here accounts for, explains and sets out the activities of the Christian Institute; this man who says: 'I wish to have nothing to do with secrecy because of religious convictions, I wanted to co-operate and I wanted to make public, but I do not submit myself to an inquisition'; who says: 'I have my reservations about the competency, however honourable the people may be and undoubtedly are, I have my reservations about their ability to make a reasonable judgment, they work in conflict with the principles of our law'; who says 'I see banning as a result, as an inevitable result of the previous proceedings, I foresee this for myself.' Under these circumstances, Your Worship, you must judge—on the moral grounds, the consideration of fairness which the legislature intended with Article 6 . . . And Your Worship, we want respectfully to remind you about the introduction to the constitution, Act 32/1961, which we submit indicates that the accused's appeal to religious convictions is not far-fetched. The preamble reads as follows:

ACT

'To constitute the Republic of South Africa and to provide for matters incidental thereto.

IN HUMBLE SUBMISSION to Almighty God, Who controls the destinies of nations and the history of peoples;

Who gathered our forbears together from many lands and gave them their own;

Who has guided them from generation to generation;

Who has wondrously delivered them from the dangers that beset them;

WE, who are here in Parliament assembled, DECLARE that whereas we ARE CONSCIOUS of our responsibility towards God and man;

ARE CONVINCED OF THE NECESSITY TO STAND UNITED

To safeguard the integrity and freedom of our country;
To secure the maintenance of law and order;
To further the contentment and spiritual and material welfare of
all in our midst;

ARE PREPARED TO ACCEPT our duty to seek world peace in association
with all peace-loving nations; and

ARE CHARGED WITH THE TASK of founding the Republic of South
Africa and giving it a constitution best suited to the traditions and
history of our land: . . .'

Your Worship, when the accused calls on a Christocentric
approach, a religious approach, a patriotic approach, in responsi-
bility towards his people, we submit that this is hardly far-fetched.

In conclusion, we want to make this summarized submission to
you. If there is not sufficient cause in this case on the grounds of
moral considerations within the intention of Article 6 of Act 8/
1947, then those words mean nothing and they may just as well be
scrapped. We ask you to find the accused not guilty.

When Mr Kriegler sat down the Prosecutor rose to make his counter-
plea. He began by challenging the Defence Counsel's interpretation
of Articles 1 and 4 of the Commissions Act. Article 1, he said, clearly
gave the State President the power to promulgate a regulation re-
quiring commission hearings to be conducted in secret when he found
it necessary. In such a case, Article 4 which required all hearings to
be conducted in public, would not be applicable. The regulations
promulgated by the State President which set up the Inquiry Com-
mission and required secrecy were clearly within the permissible
bounds of authority to the State President under Article 1.

The Prosecutor argued that the Defence Counsel's subjective
approach to the definition of 'sufficient cause' was unacceptable
because it would permit any subjective prejudice or supposed objec-
tion to be used as an excuse for refusing to give evidence before a
Commission. This would frustrate the purpose of the legislature
which had prescribed punishment for those individuals who refused
to co-operate with such Commissions in order to ensure that Com-
missions would be able to carry out their mandates. The accused's
objections really amounted to objections against the expressed terms
of the legislature in adopting the Commissions Act. Such an objection
was impermissible and could not serve as a basis for proving 'suffici-

ent cause'. The Prosecutor again asked that Beyers Naudé be found guilty.

Final arguments having ended, the Court adjourned until the following day, when the Magistrate gave judgment.

The judgment

In accordance with the normal practice, the Magistrate set out first the relevant legal provisions governing the case, the evidence given on both sides, and the arguments on law and fact submitted by the respective Counsel. The evidence was hardly in dispute. Everything turned on the question whether the Magistrate would accept or reject the argument that the Defendant had reasonable cause to refuse to testify.

What made the judgment remarkable was the almost complete absence of reasons given by the Magistrate for rejecting the case for the defence and for accepting the arguments presented for the State. Instead, the Magistrate descended into the arena and embarked upon a tendentious exposition of what he considered to be the democratic nature of the political system prevailing in South Africa.

He began by detailing the charge against Beyers Naudé, his plea, the documents submitted by the Prosecutor to prove that an offence had been committed, and the regulations prescribing the procedure to be followed by the Commission of Inquiry. He then summarized the prosecution evidence against the accused. This evidence was chiefly Mr Prinsloo's testimony that the defendant had been lawfully subpoenaed to appear before the Commission, and that upon a request from the Chairman had refused to take the oath or make the affirmation required by the Commissions Act.

Then the Magistrate turned to the evidence which Beyers Naudé had presented in his own defence:

By the Court: In his evidence he not only covered his personal and

home background, but also informed the Court step by step about the church activities and connexions since he became a minister of the NG Kerk in 1939, until 1963, when as a result of his support of the Cottesloe Resolutions and his refusal to submit to certain church decisions, he was removed from office. In the same year he accepted the directorship of the Christian Institute. Regarding this organization, he described its aims and he also described how as a result of his support of the Cottesloe Resolutions, and as a result of his directorship of the Christian Institute, and also as a result of his editorship of the journal *Pro Veritate*, he fell into great disfavour with the NG Kerk and the other Afrikaans Churches. He also fell into great disfavour with the present Government as well as the Afrikaans press, as a result of his pronouncements, opinions and convictions about the policy of *Apartheid*, which he described as un-Christian in his evidence and also in Exhibit E.

In the course of his evidence he also handed in the following documents—resolutions and recommendations made by the Cottesloe Conference—Exhibit G. Three sermons given by the witness on certain occasions—Exhibit H. In particular he referred to his valedictory sermon—Exhibit H. Copies of resolutions taken by delegates of certain Churches at a conference at Lunteren, Holland and Sydney, Australia concerning race relations. Delegates of the Afrikaans Churches of South Africa were also present at these conferences. The documents were handed in as Exhibits I and J.

Regarding the resolutions mentioned, they are according to the accused and also according to the argument, in accordance with the aims of the Christian Institute.

The witness then also referred to a lecture which he gave in 1971 on the subject 'Black Anger and White Power in an Unreal Society'. The lecture appears in the pamphlet Exhibit K.

In the course of his evidence and also in Exhibit E the witness often quoted from the Scriptures.

According to him the policy of the present Government and also the policy and the attitude of the Afrikaans Churches are in conflict with the Word of God. Further, according to him it is because of his unpopular point of view that he and members of the Christian Institute find themselves in disfavour, not only with the Government but also with the Afrikaans Churches and news-

papers. As far as he is concerned the Institute and its members have nothing to hide. Their important meetings, for example when the Board of Management is elected, are held in public, and at the request of the Parliamentary Select Committee financial statements were handed in, and there is nothing which they do in secret which could be a threat to the country—a threat to the security of the country. Concerning the income of the Institute, the sources of income were mentioned as well as the expenditure. As understood by the Court the largest source of income is from overseas church bodies and well-disposed institutions and persons. This body, the Christian Institute, is not supported financially by the World Council of Churches. I think that is correct?

Mr Kriegler: Correct, Your Worship.

By the Court: The Court does not find it necessary to go further into the evidence of the accused on these aspects. The Court now returns to the document, Exhibit E, and the accused's reasons for refusing to take the oath or to give evidence.

In his evidence the accused acknowledged—

- (a) that he appeared before the Commission as subpoenaed;
- (b) that he refused to take the oath when he was asked to do so; in principle he has no objection to taking the oath and before giving evidence before this Court he took the oath without any objection;
- (c) that the terms of Article 6 of the Commissions Act were brought to his attention when he made his attitude clear to the Chairman, and—
- (d) he acknowledged that he was aware that his attitude and his actions could be regarded as a transgression of the legal clauses mentioned;
- (e) he also acknowledged that as far as he was concerned the Commission was properly constituted.

There is of course an argument about this composition but this is nevertheless the acknowledgment that he made, for what it is worth.

His main reasons for refusing to take the oath to give evidence can briefly be summarized as follows:

- (a) Membership of the Commission is constituted of members of Parliament, that is to say of politicians, and he has no con-

vidence in their impartiality. Then there were also remarks in Parliament made by members of Parliament and published in the newspapers which strengthened his distrust.

In this connexion he referred to a document which . . . is a cutting from 'Die Transvaler', dated 22 August 1973, and there is also a report apparently from a correspondent in Windhoek which . . . was purported to have appeared in 'Die Burger' of the 24 July 1973.

- (b) The second objection is that the Commission sat in secret, and on principle he is against such secret sittings. From personal experience he came to the conclusion that such secrecy and such secret sittings are in conflict with scripture. A secret sitting, according to his objection, is in conflict with our accepted legal and administrative principles and practices.
- (c) The prescribed regulations do not make provision for proper legal representation and the people called to give evidence cannot defend themselves against false accusation. He may be condemned without a trial. In this connexion reference was made to the events involving the eight NUSAS students after the Commission had brought out its interim report, and after the students gave evidence before the Commission.
- (d) Then there was also the objection that a judicial commission was not appointed to undertake the inquiry.

There were also other objections advanced by the accused but for the purposes of this judgment I do not find it necessary to refer to all the objections.

Although it is very clear from the evidence of the accused that he has a vehement conscientious objection against secrecy, as provided for in the regulations, it nevertheless appears from his evidence that should the existing Commission have sat in public, he would nevertheless still have objected to taking the oath and giving evidence. On being questioned by the Prosecutor, the accused acknowledged that his actions before the Commission could possibly have interfered with the Commission's execution and fulfilment of its duty. But he added that in the light of his conviction this was inevitable. As far as he is concerned he stands by his Christian points of view, even if these points of view come into conflict with the laws of the land. Throughout the ages it has

also happened that the convinced Christian has made a stand, as he has done in his confrontation with the Commission, even though the stand may conflict with the law.

The evidence offered by the defence was clearly aimed at bringing, among others, the following things to the attention of the court: The accused's personal background and points of view, his church background, the events which led up to his losing his office as minister, also later losing his office as elder in the NG Kerk, the considerations which counted with him in accepting the directorship of the Christian Institute, the principles and objectives of the Christian Institute, the way in which the Christian Institute meets and acts, the Institute's connexion with other Churches, among others also with the World Council of Churches, the financial sources of the Institute, the Institute's connexion with that body which resulted from the decisions of the Institute and which is known by the name of Spro-Cas, and then reference was also made to the activities, to certain activities of Spro-Cas. Then he also presented the reasons for the attitude of the NG Kerk and other Afrikaans Churches towards him as a person and towards the Christian Institute, also the reason for the unpopularity of the Christian Institute and its members with the Government. The evidence emphasized the wrong policy directions of the Afrikaans Churches. Then the accused also enlarged upon his objections to giving evidence before the Commission, as contained in Exhibit E. The evidence read in its totality was intended to acquit him of the onus of proof set by the legislature, in other words that he had sufficient cause for his action before the Commission.

The Court then summarized very briefly the final argument of the Prosecutor, Mr Rossouw.

By the Court: When Mr Rossouw addressed the Court in support of a conviction he showed all the elements of the alleged contravention were provided and that the accused had not acquitted himself of the onus of proof as required by Article 6. The grounds of the accused's defence was then dealt with through, around and in the light of authorities. Mr Rossouw focused his argument on the accused's objection firstly against the composition of the Commission, secondly against the way in which the Commission operated and thirdly his conscientious objection.

Regarding the composition and procedures of the Commission, these flowed from the inherent and legal powers and authority of the State President, in terms of the Commission's Act of 1947. According to Mr Rossouw an objection against the composition of the Commission can never constitute a defence. His conscientious objection against secrecy cannot serve either.

The Magistrate turned next to consider the legal arguments submitted by Mr Kriegler for the defence, and rejected them in these terms:

By the Court: When Mr Kriegler addressed the Court in support of his argument for the discharge of the accused, he pointed out that the defence's case was based on the one hand on legal grounds and on the other on the facts of the case. Regarding the legal grounds the defence was two-fold. Firstly, it was pointed out that the defence does not admit that certain terms of the proclamations with reference to the Commission of Inquiry were *intra vires*, but in the light of the stipulations of Article 110 of the Magistrates Court Act proclamations cannot be challenged in this Court. Regulations issued under an Act do not have the same protection, and a number of grounds were advanced as to why the Court should find that Regulation 10, as read together with Regulations 3(2), 5 and 12, was invalid.¹ Mr Kriegler made a well-reasoned submission in support of his points of view, but according to my humble opinion the regulation in question appeared precisely under the protection of a proclamation: i.e., Proclamation 164 of 1972, issued on order of the State President. However had this Court been called to give a finding on this legal point the decision would have gone against the defence, on grounds that the legislature in creating articles (1)(i)(a) and (1)(i)(b) of the Commissions Act gave the State President those additional powers which are in dispute. However unpopular these new terms may be they could possibly have been made to meet new situations and circumstances which have cropped up since 1947. When these additional powers were created, the legislature must have been clearly aware of the terms of Article 4 and of the possible exclusion of Article 4 by the specific terms of sub-article (1)(i)(a) in particular situations.

There are also authorities which do not accord with many of the arguments which were advanced under this heading. I refer to

S. vs Hertzog, 1970 (2), SA, 578, Transvaal at 588 D, where the learned Judge remarks: 'I must however refer to the unrestricted powers vested in the State President regarding the issuing of regulations under article one of the Commissions Act, and I refer especially to article 1(b), (2) and (4) . . .'; and on the same page the learned Judge also mentions the powers of the State President and he describes these powers regarding procedures as wide and unrestricted.

In the case of *Bell vs van Rensburg and Others*, 1971 (3), 693, and pages 705 to 714, the learned Judge referred to an authoritative judgment and himself gave judgment on the origin and function of a commission, its powers, its rights, the rights of witnesses, the rights of legal representatives and cross-examination of witnesses, and it is particularly in the light of this latter decision, which is very illuminating, that many of the accused's objections against the Commission cannot succeed.

There then followed the crucial part of the judgment in which the Magistrate gave his reasons for rejecting the defence arguments.

As will be seen he did not in fact deal with the specific arguments about the composition and procedures of the Commission and the possible consequences in terms of banning orders as justifying the refusal to testify. Instead he returned to the theme of South African democracy he had raised during Beyers Naudé's evidence.

By the Court: In view of what I have just said the defence cannot succeed. The constitutional composition of our system of government is very clear to me and should be clear to all interested people. I have already mentioned in the course of this hearing, I think when the accused gave evidence, that our whole system is based on the right of the voters. At the moment a Delimitations Commission is sitting, which is composed of three judges. Those judges travel throughout the land, they hear representatives of all interested bodies; they decide on a just basis how these constituencies should be divided. In these constituencies any person has the right to nominate his candidate and the registered voter has the right to choose his candidate. If the candidate is elected he goes to Parliament, which is our legislative power, and he sits there. And then there is also the Senate, and there decisions are taken, in accordance with the will of the people. In the meantime congresses are also held before the sitting of Parliament which

instruct the Government in power and also the opposition on how they should act, what they should do and for what they should stand, what they should oppose, and a decision is placed in the Statute Book by a majority will, and that is then the law. But such a law means nothing if there is not also executive power and that executive power rests clearly with even more responsible people—our State President and his cabinet, people also chosen in a democratic way. They must execute the laws that have been placed on the Statute Book. Not only must they execute (the laws) but they must also account to Parliament, from platforms throughout the land and also in their own constituencies. They are therefore called to give account.

The Magistrate failed to point out in this exposition of South African democracy that the 'will of the people' to which he refers is the will of the ruling White minority and that the 'voters' to whom the Government must account are only the Whites. The Africans, who are the great majority of the population, and the Coloureds have no right to vote and no representation in the Parliament.

The Magistrate continued:

If that elevated body, the executive authority—or if the State President, which surely comes to the same thing since it is the State President in council with the Cabinet, takes a decision such as in this case, then it is our accepted principle that these decisions must be obeyed. These are not decisions that simply fall out of the sky, these are decisions based on authority and responsibility—and a person must accept that they are executed in a responsible manner. Surely no corrupt Government can maintain itself in the cross-fire of criticism which is present in a democratic country if it governs in a corrupt manner, that is why we must accept that these powers are executed in a highly responsible manner. Now the citizen should not forget there are also situations, such as we have had, a war situation, a time of emergencies, that certain particular decisions, possibly unpopular decisions, are taken and a person must accept—I think that the judiciary must accept, the citizen must accept—that these decisions are taken in good faith. This is the tradition of a democratic system.

I mention these things because the impression is often created

that action is taken when it comes to certain decisions, but everything happens with the ultimate approval of the voter. If the voter is not satisfied with the action of the government in power, then it can be removed at the next election.

If any body, such as the Institute, has very good ideas—I am speaking of Spro-Cas—has formulated very good ideas, then there is surely one or another political body behind which they can throw their weight to achieve their aims.

The Court has thought it proper to digress slightly here and to put the position in its right perspective. The Court now comes to the alternative submission of Mr Kriegler, concerning that interpretation that the Court should give the words 'sufficient cause', in article 6(1). The State argued that the Court should apply an objective test when judging whether the accused had sufficient cause to refuse to take the oath or to give evidence. Mr Kriegler in no way agrees with this point of view, and it is his view that in a certain sense a subjective test should be applied in the light of authorities which he quoted. He quoted the following cases in support of his argument: *S. vs Weinberg*, 1969 (4), SA 660 at p. 665 H; *S. vs Hayman*, 1966 (4), SA 598; *R. vs Parker*, 1966 (2), SA 56. This was a Rhodesian Appeal Court decision. Then he also referred to the already quoted case of *S. vs Lovell*.

A number of other cases were also quoted, but since the Court is in agreement with him in most respects regarding the interpretation which should be given to the words concerned I do not find it necessary to refer to the other quotations. As I understand and interpret his argument, he asked the Court to apply a test of reasonableness and not a legal test. He asked the Court to judge the actions of the accused objectively in all the surrounding circumstances, in other words that the Court should decide whether the accused acted unreasonably in his circumstances.

In justification of the accused's actions Mr Kriegler emphasized a number of differences between this accused and the accused in the *Hertzog* case, referred to above, and argued that the accused's position was in no way comparable with that of the accused in the case mentioned, and reference was made *inter alia* to the limited terms of reference of the Commission in the *Hertzog* case, while the terms of the Commission to investigate the activities of the Christian Institute were alarmingly wide, according to the argument.

In the opinion of the Court the terms were wide and comprehensive but they were clearly meant to be so. I do not believe that the accused can say that he did not know what these terms were about. In this Court he had no problem in answering without reference any questions put to him. If he or members of the Institute have nothing to hide, or have no feeling of guilt, why then the objection and why the fears? Does not the attitude of the accused and others in withholding information and co-operation from a legally appointed body, however unpopular it may be, merely arouse further suspicion against their activities? There is also very clear authority for the view that even though it may be to your detriment to appear before such a Commission, it still does not give you the right to refuse to give evidence. The authority, I believe, is also quoted in the case of *Bell vs van Rensburg*, referred to above. If the accused would like to clear his name and position and the name and position of the bodies with which he is connected, the Commission of Inquiry could have helped him greatly in this regard. Many of the possible misunderstandings could thus have been removed. Commissions of inquiry are not evil.

In the case of *Bell vs van Rensburg* the learned Judge quoted from authorities and emphasized the intrinsic powers of the State President. When the Republic of South Africa came into being, the State President inherited these intrinsic powers from the Governor-General and these powers were also stipulated in the constitution of the Republic. The power to appoint a commission of inquiry was part of the prerogative of the Governor-General before the coming about of a Republic. In the case of *Bell vs van Rensburg*, above, reference is also made to reports and decisions of Royal Commissions appointed in the United Kingdom. Authoritative reference is made to such reports and the procedures followed, and in particular to the rights of a witness in connexion with legal representation and the answering of questions. It is clear according to this authority that a witness is not entitled to legal representation, except in certain matters, and furthermore, it is also clear that a witness may not refuse to answer a question because the answers may prejudice him.

It has been further argued that the accused's sincerity shines from the report of the proceedings, Exhibit D. The accused was not unwilling to testify, but not in secret. He was willing to co-

operate with the Parliamentary Select Committee, willing to go into the witness box in this case and to give evidence on everything put to him and to make public everything about the Christian Institute's activities and work, its objectives and finances. The State chose not to cross-examine the accused on certain aspects of his evidence and as far as the defence is concerned his evidence therefore stands undisputed. According to the defence and as far as the accused's attitude was concerned, there was no deliberate intention or a deliberate refusal on his part to contravene any regulation.

In conclusion, Mr Krieglner also argued that the Court should find without any doubt that he is an honest, honourable and sincere person, who stands in the middle of the struggle because of his deep religious convictions, a man with great experience and knowledge of the Scriptures and church matters, a man who because of his Christian convictions and insights has landed in the proverbial desert with regard to the Afrikaans Churches and the Government. The Court was therefore asked to find that the accused, in the circumstances in which he found himself, had sufficient cause for his attitude and actions, and for these reasons his acquittal was requested.

As appears from the Court's summary and treatment of the evidence, the facts of the case, in so far as they concern the allegations in the charge sheet, are not disputed. The only dispute is whether the accused has acquitted himself of the onus of proof already referred to. As already mentioned, the accused gave evidence fully on different events and situations, with a clear aim of explaining certain attitudes on his part and of giving reasons for certain actions and points of view. Apart from his writings and sermons, he also impressed the Court with his conduct in the witness box and by the manner in which he could testify authoritatively on church and scriptural matters without the aid of notes. He also creates the impression of a person who speaks from deep conviction. He feels himself called to fulfil the task which he has accepted and which he believes is in the interest of his country and Church, regardless of the consequences this may have for him personally.

It is true that in the course of his evidence he made statements which were founded on hearsay evidence, or which were based on his or others' opinions, and from which unjustified conclusions

can be drawn. He was also harsh in some of his utterances which, in the opinion of the Court, are not justified particularly when one considers how such utterances and sharp judgments can be misused in certain circles and for certain purposes against authority and against certain inhabitants of the country. In the same way there were also many allegations and statements which, in humble opinion of the Court, can only hold water with qualifications.

However much one is inclined to criticize the witness on this aspect of his evidence, he did attempt in his testimony to explain and justify himself and his actions over many years. In this case I am not asked to pass judgment on certain of his statements, but in the interests of natural justice I do find it necessary to make a few remarks on some of the allegations, and when I make these remarks judicial cognizance is taken not only of certain legal stipulations but also of certain facts which are so commonly known that only the stranger in Jerusalem would not know them.

The Republic of South Africa is situated in Africa, an area in which a great process of ferment and development is taking place and in which the unexpected happens every day. Africa is also part of the world, in which there is also every day without exception one or another eruption or problem cropping up. And the world bodies, vested with all the necessary power and authority, are also often left powerless and tearing at their hair. It is surely not only the proper right but also the responsibility of a responsible government to take within the framework of its mandate to maintain law and order in the troubled world situation, even if in the process some toes are trodden on. At elections and also in Parliament account must be given for each treading on toes, and if the explanation is not acceptable to the voter then he can express his disapproval through the ballot box.

However the Government may be criticized, the supreme power of the Almighty is understood and laid down in the constitution of the Republic and freedom of worship and religious practice is recognized—his religion and his Church is of the utmost importance and a very delicate matter to a large portion of the South African people. The language spoken by the accused in this case is not a strange language; it is the language which is heard daily by way of verbal and written criticism—if

you listen carefully you will still hear this language today—but when a person has his say and takes his stand on contentious matters, he brings the limelight on to himself.

In this way the Court can also note many other facts which may have some bearing on the accused's evidence and allegations, but enough of this. I do not, however, believe that the Court is wrong in coming to the conclusion that many of the unqualified statements which the accused made not only in his evidence but also in the document Exhibit E, can create the impression that he and members of his organization not only put on the robe of accuser but also of Judge, and when a person does that he can expect to provoke reaction.

The defence asks the Court that when judgment is made on the accused's action, a global view should be taken, ought to be taken on all the surrounding circumstances and facts, but this view can in the opinion of the Court not be confined to the accused. The Court must also keep in mind the position of Parliament, the executive authority, even though certain members made remarks which did not please the accused. I do not believe that it is a sensible attitude to accuse highly responsible institutions of *male fide* action without weighty and proven reasons, when it comes to the application of accepted laws. The chosen members cannot act and decide as they would like, they must account to the voter, but the voter trusts them, also with the security of the country, and that is why I believe that we must accept that measures such as those which concerned the accused, were taken in good faith, however unpalatable they may be for some people. Unjust motives should not be imputed to the leaders of a people without very weighty reasons indeed.

After weighing all the facts and circumstances in the case, the Court comes to the conclusion that not one of the excuses offered by the accused can hold good, and that in his circumstances and in spite of everything he acted unreasonably. A citizen of this country, or a citizen of any democratic country, also has a legal responsibility towards the lawful authority of that land. Accordingly he is found guilty as charged.

Mr Krieglger indicated that he would not address the Court in mitigation of sentence. All the relevant matters were already before the Court.

The Magistrate then gave sentence in terms which indicated the severe political tensions underlying this trial.

By the Court: The accused has no previous convictions, and Mr Kriegler has indicated that he does not wish to address the Court with regard to sentence. He did however point out that all the relevant facts which could possibly have relevance to sentence are before the Court. The Court agrees with him in this connexion that the accused gave detailed evidence and the reasons for his action and that not much can be added to this.

Now it is the duty of the Court when it comes to the question of sentence to take into account the personal circumstances of the accused, but the duty is not limited to this. It is also the duty of the Court to take note of the contravention and the interests of the community.

Regarding the interests of the community I think that this issue has already been covered to a certain extent during the course of the judgment, and I do not think it is necessary to add anything in that connexion. One can, however, imagine the situation that could develop if a process of resistance were to be started in a democratic country, and I wish to put it to you very clearly here, that I am not trying to ascribe to you what is not your due. I regard you as an honest, outspoken person who stands by certain principles; perhaps you are in danger of making martyrs of yourself and members of your organization. I hope that is not the case, and I also believe that it is not your intention to be one or to become one. As the Court has already pointed out, you are a qualified, well-equipped person who can prevent developments in wrong directions. I do not want to be misinterpreted, but I do believe that you and other members of your organization took a very big responsibility on your shoulders when you drew up and signed the document, Exhibit E. It is not every person who would do something like this. I believe that your intentions are good according to the way you see things. But on the other hand I also believe that you are well-fitted and responsible enough to realize what the result of such action could be at the period in which not only the Republic but also the rest of the world is caught up. You are a well-equipped and well-qualified person who, according to your own evidence, as the Court interprets it, has a large platform from which many people can hear you. I ask you, however, to

think again and to reflect on the action on which you have decided. With your immense capabilities and qualifications, you can undoubtedly make a large contribution for good. Like all other people you are entitled to criticize the Government's policy—others also do it daily, but there are limits.

Now concerning the contravention itself, the penalty was placed on the Statute Book in 1947—when £1 was still a lot of money. In the opinion of the Court the penalty indicates that the legislature regarded a contravention of this kind in a relatively serious light, and if that penalty is read together with the findings of the Court, the Court can not do otherwise than to regard your contravention in a serious light. For you possibly more serious than for other less responsible members. You are the director of this institution, you give the lead, with your action you influence other people to take a similar attitude. That is why the Court is obliged to regard your contravention in a serious light. It is not the function of the Court to tell the authorities what must be done or what must not be done, but as a subordinate and highly responsible body in the system of government, the Court has nevertheless a responsible duty to fulfil, and one of these duties is to ensure that the requirements of the legislature are fulfilled.

You did not fulfil those requirements, as I have already indicated, you chose to act as you did, and therefore you must also endure the consequences of your action. The sentence on which the Court has decided is a fine of R50.00 or one month's imprisonment, with a further three months' imprisonment suspended for three years, on condition that you are not again convicted in terms of article 6(1) of Act 8/1947, as amended, during the time of the suspension.

This sentence must serve not only to punish you for your action, but must also serve as a deterrent for other persons intending to contravene the requirements of the law in question.

The Magistrate's remark 'like all other people you are entitled to criticize the Government's policy—others do it daily, but there are limits'—provided perhaps a fitting ending to this trial.

NOTE

¹ Relevant extracts from statutes and proclamations will be found in Appendix 4.

The appeal

Mr Kriegler lodged an appeal on behalf of Beyers Naudé against his conviction. The appeal lay to the Transvaal Provincial Division of the Supreme Court of South Africa. It was heard by Justices Bekker and Botha. Mr Rees appeared for the State, and Mr Kriegler on behalf of the Appellant.

Mr Kriegler presented three arguments to the Court in order to establish grounds for a reversal of the decision of the Magistrate. First, he argued that the body before which Beyers Naudé had appeared on 24 September 1973, and before which he refused to take an oath or give evidence was not 'a Commission' within the meaning of Section 6(1) of the Commissions Act. This is, of course, the section which makes it a punishable offence to refuse to testify before 'a Commission'. Consequently, Mr Kriegler submitted that Beyers Naudé's refusal did not constitute a violation of the section.

Mr Kriegler also argued, as he had done in his final argument before the Magistrate, that the State President did not have the power to require that the hearings before the Commission of Inquiry be held in secret. Thirdly, Mr Kriegler asked the Court to decide that the Magistrate had erred in his decision that Beyers Naudé did not have 'sufficient cause' to refuse to take an oath and give evidence before the Commission.

In giving their decision, the Court ruled only upon the first of these arguments. It was not necessary for them to deal with the other arguments, since they found in favour on the first point. On this point Mr Kriegler had argued that it was an essential element of the offence created under Section 6(1) of the Commissions Act that the

body before which Beyers Naudé was summoned to appear and give evidence, and before which he refused to give evidence, must be the commission appointed by the State President, that is to say, the full Commission consisting of Mr A. L. Schlebusch as Chairman together with all the other eight members. However, on 6 June 1973 the Commission had decided to appoint two committees out of their members, each one of which comprised six members. The four persons before whom Beyers Naudé appeared on 24 September 1973 were the Chairman, and three of the other five members of the first committee, which was charged with the investigation into the Christian Institute of South Africa. Mr Kriegler argued that the four persons before whom Mr Naudé appeared were not the Commission and consequently they had no legal authority to require anyone to take an oath or make an affirmation as a witness. Before an offence of refusal to testify could be committed under Section 6 of the Act, all nine members of the Commission must be present.

In short, the argument was that Beyers Naudé never appeared before a true Commission, and thus his refusal to testify before four members of the Commission's six-man committee was not a violation of the law.

Mr Rees, for the State, contended that the defence argument did not take into account the distinction which should be drawn between 'a Commission' and the members of a Commission. The absence of one or more members at any commission hearing did not deprive the body of its status as a Commission. A violation of Section 6(1) could occur regardless of whether all members were present. Mr Rees' arguments are set out more fully in the extracts of the judgment quoted below. To assist the reader in following the judgment, the Commission Act and the relevant Government Notice and Proclamations containing the Regulations made under the Act are set out in full in Appendix 4.

The Court, accepting Mr Kriegler's argument, expressed its judgment in these terms:

'We are of the opinion that the expression "a Commission" in the introductory passage of Section 1(1) of the Act means "a Commission comprising all of its members". It is in our judgment the natural and obvious content of the expression. It is indeed scarcely imaginable that Parliament would refer to "a Commission" created by the State President comprising more than one member in any other sense [than] that appointed Commission in its entirety with all its members.

If that is the meaning of "a Commission" in Section 1(1) of the Act, as we think it clearly is, then the same expression in the rest of the Act as in Section 3(1) and in particular Section 6(1) *prima facie* bears the same meaning.

'That the argument on behalf of the appellant is correct appears in our opinion from the close analysis of the counter-arguments which were advanced on behalf of the State. In support of the contention that "a Commission" is an entity which exists and functions apart from its members, Mr Rees referred to two allegedly analogous situations. The first is the legal position of companies which have a judicial existence apart from their directors or members. In our opinion this analogy cannot wash. A company is cloaked with legal personality according to law but there is nothing in the Act or in the Government Notices of Proclamations which we are concerned with here which indicate that a Commission appointed by the State President was similarly intended to be endowed with legal personality. Therefore and in any case it appears to us that the analogy sought to be drawn is too far-fetched. We also do not think that the second case to which he referred is in any way analogous to the present case; that is the provisions of the Zuid-Afrika Act 1909, Section 95 and the present Constitution Act No 32 of 1961, Section 94, with reference to the establishment of the Supreme Court of South Africa which, so the argument ran, exists independently of the judges who manned it. We do not think that it is necessary to say anything more than we do not find that these provisions are of any assistance in the discussion of the present problem.

'The fundamental weakness in the argument of the State, as it appears to us, stems from the fact that Mr Rees conceded, as he was compelled to do, that according to this argument a Commission could function legally, also for the purposes of Section 6(1), even if only the Chairman of the Commission and no other member was present. We are convinced that this is a far reaching consequence which was never contemplated by the legislature, certainly not with reference to the application of Section 6(1) of the Act. Yet this consequence is inevitable on the basis of the State's argument and it is in our opinion sufficient cause in itself for the rejection of that argument. And seeing that Parliament did not make any provision for a *quorum* of the Commission it must therefore follow, as the only possible alternative, that Parliament meant by "a Commission" in Section 6(1) of the Act, a Commission comprising all its members.

'In support of the argument advanced on behalf of the appellant we were referred to numerous examples of where Parliament, in order to give effect to an intention that a statutory body could function with less than its full number of members expressly made provision for a *quorum* . . . and it was contended that in the absence of such provisions a statutory body can only function as a whole with all its members . . .

'Mr Rees' answer to this was that all the cases referred to were concerned with bodies which exercised judicial or quasi-judicial powers, while a Commission such as the one under discussion here, exercises no such powers . . . In our opinion, however, . . . the distinction between the judicial and quasi-judicial powers, on the one hand, and other types of powers on the other hand is not *per se* an answer to the question under discussion. In *Schierhout v. Union Government*, 1919, AD 30, Chief Justice Innes put the position as follows: "We were referred to a number of authorities in support of a principle which is clear and undisputed. When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together, there can only be one adjudication, and that must be the adjudication of the entire body . . . *And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of them all . . .* for otherwise they would not be acting in accordance with the provisions of the Statute. It is those provisions which in each instance must be regarded . . ." [italics are our own].

'The ultimate question is therefore; what was the intention of the Legislature as it appears from the provisions of the Act? With this question as a starting-point it is indeed necessary to take notice of the nature of the powers and activities of the body under discussion, as one of the facts which are relevant to the determination of the Legislature's intention. It is in this light that Mr Rees' further submissions must be dealt with.

'It was argued that a Commission of Inquiry such as that contemplated in the Act is a body brought into being solely and entirely to gather information and assemble facts and then to report thereon, and if necessary to make recommendations. Consequently, so ran the argument, it is reasonably to be expected that the Legislature would have intended that a commission in the process of gathering facts could divide up its activities between different committees of the

Commission. Examples were given of how one member could have been appointed to research a particular set of books, another to make inquiries into particular facts, a committee to hear the evidence of a particular person and so forth. The Legislature could not have intended, so it was argued, that each one of such wide and divergent activities had to be undertaken by the full commission, although it was accepted that for the final report and recommendations the Commission would act as a whole . . .'

The Court said that since it was only called upon to consider whether criminal penalties could be imposed for a refusal to give evidence before a reduced panel of commission members, it would assume, without deciding, that the legislature had contemplated that a division of activities among commission members in the general conduct of the Commission's work would not jeopardize the validity of its ultimate findings. It might even be assumed, for purposes of discussion, the Court said, that only a few members need be present to hear evidence.

'But all these assumptions do not make it possible to interpret Section 6(1) of the Act in the manner proposed by the State. The general method of operation of a Commission is one thing, but the particular criminal sanction which is created in Section 6(1) is another. As we have already said we think that "a Commission" in Section 1(1) of the Act clearly refers to a Commission which consists of all its members and *prima facie* "a Commission" in Section 6(1) means the same. The assumptions to which we have referred, do not in our view justify any departure from the *prima facie* meaning of the expression in Section 6(1). On the contrary in our opinion it would be necessary, if the State's contention is to be accepted, to assume the existence of words in Section 6(1) which do not appear there, for example after "a Commission", the words "or of its members" or "or a committee thereof". Such a wide interpretation is in our view in no way justified not even on the basis of the assumptions to which we have referred. This is all the more so if it is borne in mind that we are concerned here with a criminal provision, which must be interpreted strictly and restrictively rather than widely.

'The result which is arrived at along this route is not far-fetched even on the basis of the above-mentioned assumptions. It does not appear to us anomalous that a Commission can function validly (as

is assumed) with less than its full number of members in all circumstances with the exception of those to which Section 6(1) is applicable. It is reasonable to understand that the sort of conduct to which Section 6(1) has relevance is the exception rather than the rule and that there is nothing strange in the concept that the legislature contemplated that the criminal sanctions of the section, in the exceptional situations where it could be of application, will be of application where the particular person summoned appeared before the full Commission. As against this the alternative put forward by the State, that the offence created by the section can be committed before a single member of the Commission, is something which we have already described as a far-reaching result which we cannot accept as contemplated by the Legislature.

'A further argument in regard to Section 6(1) which was advanced by the State was that the first type of offence therein provided, namely the failure to appear on the prescribed time and place, could be committed without a full Commission being present and that it follows therefrom that other types of contravention, including the refusal to take the oath as a witness, could also be committed in the absence of some of the members of the Commission. Even if it is assumed that the first part of this argument is correct (we do not express any opinion thereon), the second part thereof is in our opinion a *non sequitur*. The Section begins [by] referring to somebody summoned to appear "before a Commission" and we have already found that "a Commission" means here what the words indicate in their normal sense, namely all the members of a Commission; where then reference is made to somebody "he having attended refuses to be sworn as a witness" then it is clearly contemplated, as clearly as if the words appear there, "having attended before a Commission" with the same meaning.

'Thus far we have determined the interpretation of the Act as such.'

The Court then considered the effect of the relevant Government Notices and Proclamations setting up the Commission of Inquiry. It found that the term 'commission' as used in these documents was at least consistent with the interpretation the court had given to the expression 'a Commission' in the Act, and in some cases clearly referred to the whole commission. Mr Rees for the State had relied heavily upon clauses 16, 17 and 18 of the regulations in Proclamation No 138 of 1973, which gave the Commission power to appoint a

committee of some of its members to hear evidence on particular matters and declared that such a committee 'shall be deemed to be the Commission'. The Court dealt with the argument based on these regulations as follows:

'In the first place it appears from the facts previously mentioned that the Appellant did not appear before a committee appointed by the Commission, but only before four of the six members of such committee. The provisions of Section 16 of the regulations that "such a committee" is presumed to be a Commission, clearly refer to a committee which is appointed by the commission in terms of Section 16 as a whole and not to some members of that committee. It does not appear from the facts that the committee concerned ever delegated its powers to four of its members, but even if the committee attempted to do so then in our view such delegation would have been of no effect in view of the application of the rule *delegatus delegare non potest*.

'In the second place, and in any event, we are of the opinion that Section 16 and 17 of the regulations with specific reference to the application of Section 6(1) of the Act are *ultra vires* in respect of the powers of the State President in terms of Section 1(1) of the Act. We do not express any opinion on the validity of these regulations on any aspect other than the application of Section 6(1). But as far as Section 6(1) is concerned, we have already found that the legislature intended that the particular conduct set out in the section is only punishable if the particular refusal to give evidence takes place before a full Commission. This being the case the State President had no power to extend the application of the section by way of regulation to include the case where the summoned person appeared before something less than the full Commission.

'For the foregoing reasons we are of the opinion that the conviction of the appellant was wrong and cannot be upheld.'

Thus the Court held, on this crucially important constitutional issue, that the State President had no power under the doctrine of the prerogative to extend by regulation the scope of a criminal offence created by Parliament. When Parliament creates an offence, the limits of that offence are determined by the intention of Parliament. It is Parliament and not the Government (acting in the name of the State President) who can create or determine the nature of a criminal offence.

Accordingly, Beyers Naudé's conviction was reversed on appeal by the Provincial Court and the sentence imposed on him by the Magistrate was discharged. The State subsequently decided to appeal that ruling to the Appellate Division of the Supreme Court of South Africa. This was probably in part prompted by the conflicting decision given by two other Supreme Court judges of the Transvaal Division in the case of Mrs Dorothy Cleminshaw, another member of the Christian Institute who had refused to testify before the Schlebusch Commission. See Appendix 2 for judgment and comments (p 165).

The State wins

The Appellate Division of the Supreme Court of South Africa gave its decision upon the State's appeal against the Justices' decision on 2 December 1974. Five judges sat on the appeal. Four of them found for the State, one for Beyers Naudé.

The majority judgment was delivered by the Chief Justice, Mr Justice Rumpf, with Justices Botha, Trollip and Rabie concurring. The dissenting judgment was by Mr Justice Corbett.

The appeal was limited to the only issue on which the Transvaal Provincial Division had pronounced: i.e., the issue whether a failure to testify before four members of the Commission could constitute an offence under the Commissions Act. As a result, Beyers Naudé's case has had to be referred back to the Transvaal Provincial Division to determine the other two issues raised in the defence, namely whether the State President had power to require that the hearings before the Commission of Inquiry be held in secret, and whether Beyers Naudé had 'sufficient cause' to refuse to testify. The Appellate Division criticized this piecemeal manner of dealing with the issues raised on the appeal, which may add considerably to the costs.

In the majority judgment the Chief Justice said that the Provincial Division had erred firstly in approaching the meaning of the word 'Commission' in Article 6 of the Commissions Act in isolation, as if the Commission's origin must be found in the Act; and secondly in accepting as their starting point a conclusion on the question which was essentially in issue, namely the conclusion that the term 'Commission' in the introductory part of Article 1(1) of the Act means 'a Commission consisting of all its members'.

This illustrates once again the point made in Appendix 2, that

differences in judicial opinion on points of law often spring from a difference of approach. As will be seen, Mr Justice Corbett began his dissenting judgment with the approach criticized by the majority.

The Chief Justice stressed that the State President's power to establish Commissions was derived from the Royal Prerogative. He could order how the Commission should carry out its work, and in the absence of any specific instructions from the State President a Commission could determine its own procedures.

In his view, a study of the Act showed that Parliament did not envisage changing the nature of the Commissions to which the Act was applied by the State President. Persons or associations or bodies into whom an inquiry was instituted did not gain any right over against the Executive. The effect of the Act was that a certain protection was given to the Commission, and their powers to obtain evidence were made more effective through sanctions. Witnesses could now be subpoenaed and refusal to testify made punishable. The application of the Act did not make the Commission a 'statutory body'. On the other hand the Commission must comply with any regulations issued by the State President.

The inherent right of a Commission to make its own procedures was, in his view, recognized by Parliament in the power given to the State President to issue regulations, if he wished, which allowed for 'the manner in which the investigation must be instituted or the procedures which must be followed therein'. This meant that in the absence of regulations a Commission must determine its own methods of investigation. In his view this was directly in conflict with the finding of the Provincial Division that Parliament intended that, for purposes of Article 6 (which creates the criminal offence of refusing to testify), a Commission means a Commission consisting of all its members.

Furthermore, the effect of the Commissions Act could be modified for the purposes of a particular Commission through the regulations. (With all respect to the Chief Justice, the State's argument involved the proposition that the regulation could extend, not modify, the effect of the penal provision in Article 6.)

Regulation 16, said the Chief Justice, gave the Commission power to appoint one or more committees from its members, and regulation 17 laid down that, for purposes of Regulation 16, a committee was to be regarded as being the Commission. This clearly meant, in his

view, that when such a committee acted to hear evidence it acted with the same competency and powers as the full Commission.

In his opinion there was no justification for the view that, even if all the members of the Commission did not have to be present at all the activities, they must nevertheless be present when a witness refused to take the oath or refused to answer a question. This, he thought, showed the sort of anomaly to which the Provincial Division's interpretation could lead.

He rejected the finding of the Provincial Division that the Regulations were *ultra vires*, in so far as they concern Article 6 of the Act. From the wording of Regulation 16 and 17 it appeared that the State President intended that the Commission could appoint a committee and that the Commission itself could determine how the committee should function, subject only to the requirement of the State President that the Chairman or Vice-Chairman of the Commission had to be a member of the Committee.

The appeal, therefore, succeeded, the order of the Provincial Division was set aside, and the case was referred back to them.

Mr Justice Corbett then delivered his dissenting opinion in a judgment which, it may fairly be said, was a model of clarity and simplicity.

He began by saying that the essential inquiry was whether, in refusing to give evidence before four members of the Commission, the respondent (Beyers Naudé) contravened section 6(1) of the Commissions Act. After reading the section, he said that the situation envisaged by it was an attendance before a sitting of a Commission by the person summoned to give evidence, and his refusal, when formally required to do so, to be sworn or make affirmation as a witness.

Before considering the construction to be placed on section 6(1) he made two preliminary observations, namely (1) that a section containing a penal provision should not lightly have its scope extended beyond the plain meaning of its language; and (2) the Commission had a unique power to affect the rights of the individual in being able to require him to submit to an inquisitorial investigation without the safeguards to protect him which are to be found in a court of law. The exercise of such a power should, therefore, be strictly in accordance with the Act by which the powers were granted.

The term 'Commission' was not defined in the Act. A body of this nature had no corporate existence apart from its members. 'Prima

facie, therefore the term "Commission" means all the members of the Commission acting together.'

He conceded that the Commission had power to determine its own procedures, and that it was not necessary that every member should participate in every activity of the Commission. 'Where, however, the Act (as modified by the State President) and the regulations prescribe procedures, then the Commission's freedom of action is inhibited; and where the activity affects the rights of the individual, the latter can demand a strict adherence to the prescribed procedures.'

It seemed to him that there was much to be said for the view that when the Act made it an offence to refuse to testify before a Commission, then, in the absence of any valid modification or regulation to the contrary, the 'Commission' in this context meant all the members of the Commission sitting together. If not, what did it mean? A majority of the members? Or could an offence be committed by a refusal before two members of the Commission, or only the Chairman? No satisfying answers had been given to these questions.

It could make a substantial difference to an unwilling witness whether or not the full Commission was present when he was required to give evidence, so that each of them could have an opportunity to hear his evidence, put questions to him and form their own individual judgments on his evidence. He was not impressed by arguments as to the inconvenience which would be caused. This could easily be ameliorated by regulations providing for a quorum.

In his view the regulations made by the State President were *intra vires* and valid. The Commission, therefore, had the power to appoint committees to hear witnesses and for this purpose the committees would be deemed to be the Commission. Consequently, if the respondent had been called upon to give evidence before the full committee appointed to hear evidence relating to the Christian Institute, his refusal without sufficient cause would have constituted an offence under section 6 of the Act. 'But,' he went on, 'it is clear that this did not happen. Only four members of the committee were present when he was required to take the oath.' In his view, for the purposes of section 6, read together with regulations 16 and 17, 'a committee appointed by the Commission in terms of regulation 16 means the full committee acting together'.

Mr Justice Corbett would, therefore, have dismissed the appeal on the narrower of the two grounds upon which Mr Justices Bekker and Botha based their decision in the Provincial Division.

Postscript

Following the decision of the Appellate Division, the proceedings against Dr Beyers Naudé, as well as those against other members of the Christian Institute who refused to testify, have continued. Beyers Naudé's case was referred back to the Transvaal Provincial Division of the Supreme Court to decide the two outstanding questions on his appeal, namely whether Beyers Naudé had 'sufficient cause' to refuse to testify, and whether the State President had power to order the proceedings to be held in secret. These issues were argued before two other judges, Justices Boshoff and Williamson, on 25 March 1975. Judgment was reserved and had not yet been delivered at the time of going to press.

The Rev. Theo Kotze, Director of the Christian Institute office in Cape Town, appeared again before the Magistrate in Pretoria on 3 February and 1 March 1975, but judgment was reserved, and was due to be given on 3 July. Similarly, judgment in Mr Peter Randall's case has been reserved.

The passports of the Christian Institute leaders Dr Beyers Naudé, the Reverend Theo Kotze, the Reverend Brian Brown and the Reverend Roelf Meyer, and of Mr Horst Kleinschmidt and Mr Peter Randall were all withdrawn by the police on 10 December 1974. This was apparently a reaction to a speech by Dr Beyers Naudé in Holland, on his return from a visit to the United States where he received the Reinhold Niebuhr Award and an honorary doctorate in law from the Chicago Theological Seminary.

Mr Schlebusch has now become Speaker of the South African Parliament and Mr Le Grange has succeeded him as Chairman of the Commission to Inquire into Certain Organizations. Its report on

the Christian Institute was published on 28 May 1975. In it the Institute is accused of supporting 'violent change', in spite of the well-known opposition to violence of Dr Beyers Naudé and other spokesmen of the Institute. In its determination to make an adverse finding against the Institute, the Commission has descended to oblique smears and guilt by association. In face of the Institute's predictions that the Government's policies may lead to violence, the Commission find that the Institute, and in particular Dr Beyers Naudé, attempted to achieve their objectives 'regardless of the possibility that their actions might lead to the violent overthrow of the authority of the state'.

On 30 May 1975, the South African Government made the expected declaration that the Christian Institute was 'an affected organization' under the the Affected Organizations Act, 1974. This means that the Institute will no longer be able to receive funds from abroad. Dr Beyers Naudé, making an appeal for funds from local sources, stated 'We see this action by the Government as a challenge to all Christians, indeed to all citizens of our country, to prove by their reactions to what degree they regard the work and witness of the Christian Institute to be of such significance that it needs to continue.'

It is clear that the South African Government, at a time when it is seeking détente with its African neighbours, is determined to stifle those voices within the country calling for an alternative to *Apartheid* policies. As the Roman Catholic board of bishops has warned, without radical change no détente is possible, 'only violence'.

APPENDIX 1

Divine or civil obedience?

[The following statement of reasons for refusing to testify was handed in by Beyers Naudé to the Schlebusch Commission, and became Exhibit E at his trial. It was later published as a pamphlet by the Christian Institute in South Africa under the above title.—Ed.]

A WITNESS IN THE NAME OF JESUS CHRIST TO THE COMMISSION OF INQUIRY INTO CERTAIN ORGANIZATIONS CONCERNING THE REFUSAL TO CO-OPERATE BECAUSE OF OBEDIENCE TO GOD AS THE HIGHEST AUTHORITY.

As believers in Jesus Christ we wish to give account before our fatherland, before the Commission and above all before God, of why we cannot co-operate with the Commission and why we regard our refusal to testify as a Christian deed (1 Peter 3: 15), The reasons for our viewpoint are set out here.

I WHY HAS THE COMMISSION BEEN APPOINTED TO INVESTIGATE THE CHRISTIAN INSTITUTE?

1.1 When the Prime Minister originally suggested in Parliament on 4.2.72 that the Christian Institute among others should be investigated he also said: 'Information indicates that there is a *prima facie* case to investigate. Our Parliament must be on the alert for all organizations and currents which do work that undermine. We may not make a mistake in this connexion. With such explosive material here South Africa will pay heavily' (*Die Transvaler*, 5.2.72). Again on 5.2.72 *Die Transvaler* further reported in connexion with the Commission: 'Mr Vorster quoted from the writings of Sir Winston Churchill of 20 years ago, about the *modus operandi* of the Communists in using the banner of freedom to establish a Communist state. These words and this warning of Churchill are still appallingly true today.'

Could this mean that the Prime Minister himself prejudged the Commission and placed it under pressure so that the Commission is now obliged to prove a case against the Christian Institute in order to obviate the Prime Minister's being discredited? 'If anyone has prejudged the issue it is the Government itself' (*Sunday Express*, 6.2.72).

Furthermore the National Party and the United Party have also made negative statements about the organizations to be investigated: 'The Nationalist Party have already prejudged the issue. There is already a Party commitment on this matter illustrated by the fact that spokesmen of the Nationalist Party have attacked all four organizations on numerous occasions. The Nationalist Party's mind therefore is already made up. When one recalls some of the things the United Party spokesmen have said about NUSAS for instance, the same could be said about them' (B. Naudé, T. Kotze—*Sunday Times*, 6.2.72).

Did the Prime Minister's vague references to 'Communism', 'undermining' and 'explosive material' not anticipate the investigation which sprang from the '*prima facie*' case and place pressure on the Commission?

1.2 There is nothing of importance about the Christian Institute (which operates in the open) which the Government does not know already. Seeing that the majority of the politicians who are doing the investigating are Nationalists, the question must be asked whether the inevitable conclusion is not that the Government wishes to make political capital out of the investigation to the detriment of the Christian Institute. 'Those of you who thought a Parliamentary Select Committee was impartial and objective will be astounded as I am to learn that Parliamentarians themselves do not think so. Both sides openly attributed bias to the Parliamentary Commission which inquired into the so-called Bell-Herman Martin's sugar scandal' (*Sunday Times*, 16.7.72). One of the members of the Commission itself pleaded for a judicial commission. 'Mr Marais Steyn of Yeoville spoke just before him (the Prime Minister). Earnestly and urgently he asked the Prime Minister rather to appoint a judicial commission' (*Die Vaderland*, 11.2.72).

1.3 It is generally known that the Government is against the existence and the work of the Christian Institute. The Christian Institute witnesses in words and deeds in the name of Christ against the un-Christian policy of *Apartheid*, and an alternative to *Apartheid* on all the different social levels of the community has been developed by Spro-Cas in its various reports. Seeing that the Prime Minister has apparently classified the Christian Institute as an 'undermining' influence, does it not seem that the plan is to balk the Christian Institute in its work? 'The mere fact that a Parliamentary Inquiry is being sought by the Prime Minister into the Institute's affairs

will be seen by many people as confirmation that the Government is out to silence clergymen who oppose its policies' (*Sunday Express*, 6.2.72).

1.4 The question must be raised whether the fact that the Commission is investigating the Christian Institute together with other organizations means that 'guilt by association' can be attached to the Christian Institute. According to a newspaper report it would seem that the Chairman of the Commission not only anticipated the inquiry but prejudged it. *Die Burger* made the following report under the heading: 'Probably more shocks says Schlebusch.' 'There is the possibility that the investigation into the Christian Institute will bring even more shocking things to light than in the case of Wilgespruit, Mr A. L. Schlebusch, MP for Kroonstad and Chairman of the Schlebusch Commission said here yesterday' (*Die Burger*, 24.7.73). Are suspicions possibly raised in this manner against the Christian Institute by association and insinuation? 'By linking the Institute of Race Relations with student bodies which do not enjoy a particularly good public image, Mr Vorster no doubt hopes to smear the Institute and the fourth organization named, Mr Beyers Naudé's outspoken and courageous Christian Institute' (*Cape Times*, 8.2.72).

1.5 The work of the Commission led to and resulted in eight NUSAS leaders being severely punished by banning without trial in a court. This means that the investigation by this Commission without the control of normal legal process may result in people being persecuted in an un-Christian and unfair manner. Must the conclusion then be drawn that the Christian should not co-operate with a procedure such as this? If he does co-operate he also will be guilty before God because he participated in the process of punishing people in an un-Christian manner and persecuting them.

1.6 Is it not clear that the aims in appointing the Commission and the methods of operation prescribed for it, must be questioned in depth in terms of the Gospel?

1.6.1 Jesus said: 'Do not judge by appearances but judge with right judgment' (John 7:24).

Whether the Commission's judgment can be 'right' must be questioned. There was supposed to be a *prima facie* case against the Christian Institute but we do not even know the nature of the charge, or who the accusers (if any) are. The real danger is that the findings of the Commission may already have been prejudged and placed under pressure by the comments of the Prime Minister and some members of Parliament. We are not informed of any accusations against any person or organization: as a result no right to defence or denial

exists and the accusers can never be confronted, challenged or subjected to cross-examination. The Christian Institute is linked to other organizations and in this manner guilt by association can be attached. The members of the Commission are politicians who are bound by certain party politics and as a result they are unlikely to be without prejudice. If investigation were necessary—and this we do not believe—it should have been carried out by a judicial commission; the reasonable request for such a commission has been summarily rejected.

1.6.2 Jesus said: 'A sound tree cannot bear evil fruit nor can a bad tree bear good fruit . . . thus you will know them by their fruit' (Matthew 7:18, 20). The Commission's work resulted in the Government punishing the NUSAS leaders in an un-Christian and unfair manner, without their having been charged or found guilty in a court of law. The question must be asked whether one may co-operate with a procedure which has such results. So far six reasons have been given for banning the students instead of trying them, and none does either the Government or the security system much credit.

Mr Vorster: It is unfair to burden the courts with responsibility for security. The bannings are preventive not punitive. *Mr Schlebusch*: The students threatened to break the law. *Mr Pelser*: Trials would give the students a platform. *Mr Horwood*: Trials would expose the whole security system. *Mr L. Nel MP*: No time to get the necessary proof for trial.

No one—and not all of these reasons together—justify abuse of the rule of law (*The Star*, 27.3.73).

2 THE COMMISSION'S METHOD OF OPERATION

2.1 The mandate of the Commission requires that its work be done in secret.

Jesus said: 'For everyone who does evil hates the light and does not come to the light lest his deeds should be exposed. He who does what is true comes to the light that it may be clearly seen that his deeds have been wrought in God' (John 3: 20-1).

Do the following implications of the Gospel of Christ not apply to the Christian Institute, the Government and also to the Commission?

'The Church lives from the disclosure of the true God and his revelation, from him as the Light that has been lit in Jesus Christ to destroy the works of darkness. It lives in the dawning of the day of the Lord and its task in relation to the world is to rouse it and tell it that this day has dawned. The inevitable political corollary of this is that the Church is *the sworn enemy of all secret policies and secret diplomacy. It is just as true of the political sphere as of any other that only evil can want to be kept secret.* The dis-

tinguishing mark of good is that it presses forward to the light of day. Where freedom and responsibility in the service of the State are one, whatever is said and done must be said and done before the ears and eyes of all, and the legislator, the ruler and the judge can and must be ready to answer openly for all their actions.

'The Statecraft that wraps itself up in darkness is the craft of a State which, because it is anarchic or tyrannical, is forced to hide the bad conscience of its citizens or officials. The church will not on any account lend its support to that kind of State' (Epitome of: *Christengemeinde und Bürgergemeinde*, Prof. Karl Barth; our italics). This means that right and righteousness must not only be done, but must also be *seen* by everybody to be done.

Because the investigation takes place in secret, there is abundant scope for false evidence and damage to the good name of Christians. The ninth commandment says: 'You shall not give false witness against your neighbour.' According to the Nederduits Gereformeerde doctrine this means 'that I do not judge, or join in condemning, any man rashly or unheard . . . and that, as far as I am able, I defend and promote the honour and reputation of my neighbour' (*Catechism*, answer 112).

2.2 Is the freedom of the people who give evidence not curtailed because they are sworn to secrecy? Does it not clash in a similar way with the following implication of the Gospel of Christ?

'The Church sees itself established and nourished by the free Word of God—the Word which proves its freedom in the Holy Scriptures at all times. And the Church believes that the human word is capable of being the free vehicle and mouthpiece of this free Word of God. It will do all it can to see that there are opportunities for mutual discussion in the civil community as the basis of common endeavours. And it will try to see that such discussion takes place openly. With all its strength it will be on the side of those who refuse to have anything to do with the regimentation, controlling and censoring of public opinion. It knows of no pretext which would make that a good thing and no situation in which it could be necessary' (*op. cit.*, Prof. Karl Barth; our italics).

2.3 Does the Commission not deviate from the normal, acknowledged legal procedures of democracy and is it not true that in so doing it diverges from the rule of law? Normally this means that the three usual functions, namely the legislative, the judicial and the executive power are attached to three different groups. Here the powers entrusted to the Commission include not only the legislative but also the judicial aspects.

'Since the Church is aware of the variety of the gifts and tasks of the one Holy Spirit in its own sphere, it will be alert and open in the political sphere to the need to separate the different functions and "powers"—the

legislative, executive and the judicial—inasmuch as those who carry out any one of these functions should not carry out the others simultaneously. *No human is a god able to unite in his own person the functions of the legislator and the ruler, the ruler and the judge, without endangering the sovereignty of the law* (*op. cit.*, Prof. K. Barth; our italics). R. Wessler confirms this truth: ‘The democratic State has definite indispensable characteristic features. To this belongs the division of the power of state in (a) legislation, (b) government, (c) justice, which should be separated as far as possible’ (*Social Ethics*, p 142).

So long as the *modus operandi* of the commission does not adhere to the usual rule of law of a democracy, neither the individual nor the Christian Institute organization is protected by the accepted legal procedures. The question must be asked whether this does not expose those who appear before the Commission to possible errors of judgment by this authority.

Are not certain indispensable elements inherent in the rule of law, elements which the Commission must of necessity ignore? ‘. . . that every person whose interest will be affected by a judicial or administrative decision has the right to a meaningful “day in court”; that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influences of personal gain and partisan or popular bias’ (A. W. Jones as quoted by Prof. A. S. Mathews, *Law, Order and Liberty in S.A.*, p 15). And further: ‘The inevitability of human error . . . requires that the law, and the assumptions which underlie it, should be interpreted by a judiciary which is as far as possible independent of the Executive and the Legislature’ (Report of the Fourth Committee, *The Rule of Law in a Free Society*, p 279, quoted by A. S. Mathews, *op. cit.* p 45).

The normal legal process protects the basic rights of the individual and limits the power of the governing body in order that it will not become arbitrary power. Is it not clear therefore, that because it by-passes the rule of law and the usual democratic legal procedures, the Commission is in a position to violate justice, basically? If this happens, its power will not be the ‘*potestas*’ which adheres to the law and serves it, but will become ‘*potentia*’ (power for the sake of power), which forestalls justice and subjects it, bends it, and breaks it. This type of authority in itself of necessity becomes evil: ‘Notwithstanding their arbitrariness, power and justice are mutually adjoined sides of the God-maintained and ordained existence of man’ (*Macht und Recht*, H. Dombois and E. Wilkins, p 200).

The warning must be heard: ‘He who takes up the sword shall perish by the sword.’ He who employs absolute power shall be destroyed thereby. (Power corrupts and absolute power corrupts absolutely.)

2.4 The Commission’s investigation resulted in the NUSAS leaders being punished by the Government, arbitrarily and harshly, by way of banning

without trial. As opposed to this the Gospel of Jesus Christ must be stated:

'Jesus answered him. "If I have spoken wrongly, bear witness to the wrong; but if I have spoken rightly, why do you strike me?" (John 18:23).' This means that if there has been wrong-doing according to God's will, then it must be proved openly and punishment can be meted out. If, however the evil is not proved in public, there may not be 'striking', banning or punishment. Whosoever does this, does it to Christ himself. '. . . none of our brothers may be hurt, despised, rejected, misused or offended in any manner by us, without at the same time hurting, despising and misusing Christ through the wrong things that we do . . . we should care for the bodies of our brothers as for our own' (*Institution IV*, 8, J. Calvin).

3 THE RIGHT AND THE DUTY TO RESIST UNCHRISTIAN GOVERNMENTAL AUTHORITY IN THE NAME OF CHRIST

The believer in Christ not only has the right, but the responsibility to hearken to the Word of God and his righteousness rather than to the Government, should the Government deviate from God's will. Does not the responsibility lie with the Christian not to co-operate with the Government in a matter which is in conflict with the Gospel? By doing so is he not witnessing to Christ and his righteousness?

Civil disobedience is an act of protest by the Christian on the grounds of Christian conscience. It is only permissible when authority expects of him an un-Christian deed and pleads for a return to observance of the Gospel have not availed. 'The right of passive resistance can only be applied if it becomes apparent that no other method can overcome the emergency situation and restore righteousness' (*Die Strijd om die Ordes*, Prof. H. G. Stoker, p 243). The State and its Commissions do have authority over the citizens, but in a moral sense the individual has a personal right towards the State for inasmuch as the citizen is part of the structure of the State, he is subject to the authority of the State; as a person before God even within the structures of the State he is however, totally subject to God. 'In the last instance the Christian may not be bound by the State's authority because it is not the final dominion of God and therefore belongs to the being of the historical world which passes (*Glaube in politischen Entscheidung*, Dr. A. Rich, p 161). Man never belongs totally to the State. He cannot be degraded into being a pawn of the State; the State exists for the benefit of man, not man for the benefit of the State.

Is it possible that the powers granted to this Commission by the Government and the results flowing from it reveal a totalitarian tendency? A totalitarian State usually wants complete control over its subjects. 'Its conflict with the Church is therefore not a coincidence, but is inevitable for as long as the Church remains a Church which knows the absolute necessity of its inner independence. Such a State can tolerate the inner indepen-

dence of the Church even less than its outward independence, because it wants to control the soul of man. It is the soul that it wishes to control and shape after its own image' (*Gerechtigheit*, Prof. E. Brunner, p 216).

It must be remembered that the most important matter for the citizens of a democratic state is not blind *obedience* and servile *submissiveness* to the Government, but joint responsibility for the concerns of State in the sight of God. 'Democracy strives to curtail the freedom of the individual as little as possible but that freedom must result in maintaining the joint responsibility' (Wessler, *op. cit.* p 142). Cf. also Wolfgang Trillhaas: 'Accordingly obedience is no longer the predominant problem of the citizen. Much more is it the responsibility (or the joint responsibility) for the success of the State in the political life' (*Ethik*, Wolfgang Trillhaas, p 373).

It must also be remembered what Reinhold Niebuhr said about the Christian motivation of democracy, namely, that human strivings towards justice make democracy possible, but the human inclination towards injustice makes democracy *essential*.

It may be that this type of action on the part of the Government reveals tendencies towards fascism, and such a Government then no longer *serves* but *dominates*. In such a situation the tendency is to govern by means of arbitrary power and to control by force. Government becomes primarily a power structure. If such a Government continues in this headlong way, the logical outcome is that it becomes idolatrous because everything has to flow out of, through and towards the National State. (cf. *Revelation* 13). The Government's task is *not* to create arbitrary law. Its task is to reduce to writing in the form of legislation the substantive will of God as revealed in the Gospel. A Government with fascist leanings, however, creates its own justice which it enforces by way of penal sanctions. Anything opposed to the will or policy of such a Government is then regarded as subversive or as dangerous to the State. Freedom is regarded as a concession from the Government and not the normal way of life. In this the Government as well as the Commission will have to answer to God in regard to the bannings and also in regard to punishment which may possibly follow for those who refuse on grounds of conscience to testify before the Commission.

The power of a State such as this is not only territorial and military but also moral. As a result everything has to be subjected to the authoritarian, co-operative State—nothing is outside its power and authority and it determines the norms, even in relation to conscience. As a result a person may be led to violate his conscience, make it conformable and sacrifice it to the State. 'The more sensitive such a conscience is and the more receptive to the will of God, the more dangerous it is to offer it in sacrifice. He who is more obedient to man than to God against his better judgment and his conscience, destroys the integrity of his being, his unity within himself, and sooner or later he falls victim to schizophrenia' (*Freiheit und Bindung des Christen in der Politik*, T. Ellwyn, p 27).

In this kind of State the real issue at stake is not whether the Government is *right or wrong, good or bad*, but whether the order, the policy and the will of the State, *fails or succeeds*.

If the present Government, as shown incidentally by the appointment of this Commission, reveals the above-mentioned traits, should it not be called back to the Gospel of Christ? If we too are guilty, the same applies to us. If such a call is ineffectual '... it becomes a matter of a clash between religious belief and Government, a clash in which man should be obedient to God rather than to the person in authority ...' (Prof. H. G. Stoker, *op. cit.* p 213). The believer can, however, only act outside the law and refuse to co-operate if he acts according to God's will which is being violated by authority. 'Without justification nobody should claim the "right" to offer resistance against the authorities. This justification should in my opinion, include the responsibility of resistance and must be included with the "Higher Authority" in whose name you are acting' (*Ethik*, Wolfgang Trillhaas, p 373).

When reading Romans 13 :1, 'Let every person be subject to the governing authorities ...', it must be remembered that the Government does not have authority and power just because it is the Government as such, but because it is 'God's servant' (verse 4). 'The problem about the right to resist ... is in fact contained in Romans 13. We ought to consider whether the term "God's servant" does not include the right to resist when the authorities exceed their God-given mandate and turn away from the clearly articulated commandments of God' (W. Schulze, quoted in *Politik zwischen Dämon und Gott*, Dr W. Kunneth, p 301). Authority is only legitimate when it does not act contrary to God's will.

The same thought was expressed in the 1973 *Studies of the Christian Institute* as follows: '... the concept of the Government of a country as a creation and system of God in itself, is false and a Government is always subject to the righteousness of the Gospel. "It is exegetically no longer possible to base obedience to Governments on some peculiar character in them" (H. W. Bartsch).

Peter 2:13, "Be submitted to every human ordinance because of the Lord", must be correctly translated as "Be subject to everyone (every human creature) for the Lord's sake" (H. W. Bartsch).

"The words in Romans 13: "The Government is ordained by God" and "they are servants (ministers) of God" do not refer to a peculiar commission or dignity of the Government but to what it in fact is, whether it accepts Romans 13 or not. God did not give special commission to the Government as such. The trend therefore, is to *debunk the false concept of Governments*' (*Poverty in Abundance or Abundance in Poverty?*, Roelf Meyer, p 13).

Where such deviation from the Gospel occurs, it is therefore not only the right of the Christian to resist authority, but his duty to offer passive resistance in obedience to the Gospel, even if in so doing he has to disobey

the Government. If a Government violates the Gospel, it loses its authority to be obeyed in its office as ruler. 'The Government loses its essential office because of its contradictory attitude towards God' (W. Kunneth, *op. cit.*, p 294). And: 'As an extension of these thoughts the right, even the duty can be imposed on the subject to resist the tyrant who commits an act of violence against a private person by the misuse of his office' (W. Kunneth, *op. cit.*, p 295).

Therefore one can only speak of Government and its authority '... as long as it is said that it possesses the intention and the capability to accept responsibility for justice and righteousness. If this governmental function is distorted, however, then that Government has dissolved itself, its authority is no longer from God, and it is plainly in conflict with God. As a result of this, according to Romans 13, the Christian is no longer required to be obedient to the guilty (Government), but to a much greater extent obliged to resist such a Government which has degenerated' (W. Kunneth, *op. cit.*, p 301).

The Calvinist John Knox also advocates the same idea. In his '... conversations with Queen Mary he had declared not only the right of the nobility to resist in defence of the people but the right of the subject to disobey where the ruler contravenes the law of God' (*Calvinism and the Political Order*, G. L. Hunt, p 14). Calvin championed this same truth in vigorous language: 'Because earthly princes forfeit all their power when they revolt against God . . . We should resist them rather than obey . . .' (*Lecture XIII*).

The authority of the Government and State as such is not rejected in general by these ideas but maintained, because it is still *de facto* the Government, even if it deviates in essential points from the Gospel and then it has to be resisted. 'Even a distorted governmental system still retains the remnants and elements of the stable order of God' (W. Kunneth, *op. cit.*, p 302).

A step such as this of disobeying the Government, must be taken on grounds of Christian conscience. The Christian's conscience is that God-given ability to distinguish between right and wrong according to the criterion of the Gospel, which inwardly compels him to follow the right course. '... Conscience also has the remarkable result that it can suddenly initiate resistance against the Government; an inner distress can also make itself felt when he allows the Government to force him to commit acts which he knows to be wrong.' Paul experiences a similar distress in Romans 9:1, 2 (*Christelijke Encyclopedie*, Deel III, Prof. H. Schippers, p 218). Conscience is the inner will that urges one to respond to the conscious norms, and the Christian conscience is bound up with the Gospel.

When the Government deviates from the Gospel, the Christian is bound by his conscience to resist it. Even if this results in breaking the law, it has to be done because God's will must be maintained above the law of man

(Acts 4). The Government is God's servant and this means that it cannot arbitrarily place itself above the rule of law without impinging on the highest authority. If it does it, it becomes the evil-doer, (Romans 13) which must be resisted in obedience to God.

4 CHRISTIANS MAY IN PRAYERFUL ANTICIPATION HOPE

Christians may in prayerful anticipation hope that a Government which does not conform to the Gospel with regard to a particular matter may be brought to 're-think' its attitude. They hope for even more; namely, that God's righteousness may become the criterion in every facet of their lives, and particularly in their political life in South Africa. For this they work and pray.

If, however the Government persecutes a Christian who finds it impossible to co-operate when departure from the Gospel occurs, the pertinent question must be asked: What is the crime against Christ for which he has to be punished? For this the Government would have to supply an answer to God and to South Africa. The Government, already persecuting and punishing people in an un-Christian manner, must remember that when Saul persecuted some believers, Christ asked him: 'Saul, Saul, why do you persecute *Me*?' (Acts 9:4). Is it not the duty of a Christian in such a situation constantly and in deep humility to call his fellow men to the same obedience in the light of the Gospel? And should a Christian not appeal to the Government in terms of the Gospel to turn away from its wrong course? 'Repent . . . even now the axe is laid to the root of the trees; every tree therefore that does not bear good fruit is cut down and thrown into the fire' (Matthew 3).

In conclusion we wish to repeat that we have nothing to hide and that, if an inquiry is necessary (which we do not believe), we are willing to give evidence before a public, impartial, judicial tribunal and to co-operate. We do not wish to make ourselves heroes or martyrs as the Afrikaans press has implied; to us it is not a matter of martyrdom or heroism but a matter of obedience to Christ, the highest authority.

Through the Grace of God, we only want to remain obedient to Christ, the Word of God, because:

Verbum Dei manet in aeternum.

Signed: *Theo Kotze, Roelf Meyer, Beyers Naudé.*

APPENDIX 2

The Cleminshaw appeal

On 25 May 1974, two other Justices of the Transvaal Division of the Supreme Court of South Africa heard another appeal raising the same legal issues as those in Beyers Naudé's case, and refused to follow the decision of Justices Bekker and Botha.

Mrs Dorothy Cleminshaw had also been summoned to appear and give evidence about the Christian Institute before the Schlebusch Commission on 26 September 1973. She attended before the same four members of the Commission and when called upon to do so, refused to take the oath or affirm, and refused to testify. She handed in a statement of the reasons for her refusal.

She also was prosecuted, before another Regional Magistrate, Mr Jordaan, in the Regional Court of Pretoria for an offence under section 6(1) of the Commissions Act. She was found guilty and sentenced to a fine of 20 rand or ten days imprisonment and in addition to two months imprisonment suspended for three years on condition that she was not again convicted of a similar offence during the period of the suspension.

Her appeal to the Transvaal Division of the Supreme Court was heard by Justices Snyman and Viljoen. Her appeal was argued by Mr Kriegler, who naturally relied strongly upon the decision in Beyers Naudé's appeal. As the Court in Cleminshaw's case pointed out in their judgment, 'unless . . . this Court comes to the conclusion that the judgment by that Court is clearly wrong, it is bound by that decision and must follow it'. In the event, they found that it was 'clearly wrong' and refused to follow it.

When courts reach conflicting decisions, it is often found that their reasoning begins from a different starting point. As has been seen, Justices Bekker and Botha began by examining the Commissions Act, which creates the offence under which the defendants were charged, in order to ascertain from the wording of the statute its precise meaning and the

implied intention of Parliament. Justices Snyman and Viljoen on the other hand began by examining the nature of the somewhat nebulous 'prerogative powers' inherited from the British Crown and now bestowed upon the State President acting upon the advice of the Executive Council, i.e., the ministers of the government.

They first reaffirmed what was common ground, namely that 'the State President's power to appoint the Commission is inherent in his Prerogative and it is clear that he acted in terms of that Prerogative in appointing the Commission'. The Court then referred to the 'exhaustive analysis' of the State President's Prerogative in the case of *Bell v. van Rensburg* NO 1971 (3) SA(8) and commented 'what emerges from it is that in spite of the voluminous learning and literature on the subject, the powers of the Queen-in-Council are dimmed by antiquity and the extent of the Queen's powers under her Prerogative in present circumstances are, or have become, uncertain'.

The Court then followed that statement with an important pronouncement upon the relationship between the Commissions Act and the Prerogative:

'Our Legislature has sought to clarify the position by enacting the Commissions Act. That Act (see Section 1) assumes the existence of the Governor General's (now the State President's) power under his Prerogative to appoint Commissions to investigate matters of public concern, and proceeds to grant him wide powers in regard to it. But while it confers these powers upon him, it in no way detracts from his rights under his Prerogative. It does not bind him to the powers it grants him, but specifically says that he *may* (not *must*) declare the provisions of the Act or any other law applicable with reference to a Commission. He is also permitted to make such modifications or exceptions to it as he thinks fit. Furthermore, he may make regulations conferring additional powers on a Commission, and he may provide for the manner of holding, or the procedure to be followed at the investigation, or for the preservation of secrecy; and provide generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation.

'It cannot be doubted that the purpose of the Commissions Act is to amplify, clarify and even to extend the State President's power when exercising his Prerogative; and not in any way to limit or restrict it. It is in this light that the Commissions Act must be seen.'

It must be pointed out that there is nothing in the wording of the Commissions Act to indicate that it was intended to 'clarify' the Prerogative power. The long title describes it as an Act 'To make provision for conferring certain powers on Commissions appointed by the Governor-General

for the purpose of investigating matters of public concern, and to provide for matters incidental thereto'. In other words, it is described as an Act to 'confer certain powers on Commissions' not to *clarify* their powers. The distinction is important. Was Parliament conferring a new power on the State President to require witnesses, under penal sanction, to give evidence on oath before the Commissions, or was it merely clarifying an existing power? If the former, the extent of the offence would be determined solely by the wording of the Act. If the latter, it might be held that the State President could, under the prerogative power, enlarge the scope of the offence.

The Court then turned to examine the regulations made by the President under the Commissions Act, still without examining the Act itself:

'In the first set of regulations, (regulations 1 to 15) the task of the Commission was left to it as one body. Some eleven months later the State President proclaimed three further regulations (16, 17 and 18). Regulation 16 authorized the Commission to appoint committees to perform certain specified tasks on its behalf. Regulation 17 conferred on such committees in respect of their function, the same status as had the Commission itself. Regulation 18 allows the Vice-Chairman of the Commission to act as Chairman should the Chairman be absent from a sitting of the Commission.

'We see the addition of these three regulations as intended by the State President to expedite and facilitate the working of the Commission.

'By means of Regulation 16 the hearing of evidence and addresses could be divided among the members of the Commission so as to expedite or facilitate that aspect of the Commission's work.

'Regulation 17, by deeming such a committee when hearing evidence or addresses, to be the Commission, bestows upon it all the essential functions, duties, rights, authority, protection and sanctions which the Commission has in terms of its appointment; more particularly, under the Regulations and those portions of the Act made applicable to it when hearing evidence or addresses.

'Regulation 18 provides for the Vice-Chairman to act as Chairman when the Chairman is absent from a sitting of the Commission. Save that, like the other Regulations and the appropriate portions of the Act, it affects the procedure of a Committee when hearing evidence or addresses on behalf of the Commission, it seems to us to have no special reference to a committee appointed under Regulation 16.'

When the Court did turn to the Act, they did so stating that it seemed to them that any power conferred on the Commission by the Statute would also be conferred on a committee of the Commission by the

Regulations. This almost casual comment goes to the root of the principal issue raised in the appeal.

‘As the issues before us involve the question of whether the Chairman of a committee had the right to administer an oath or affirmation to witnesses appearing before it, it is necessary to consider the powers of the Commission; for it seems to us that whatever power the Commission had, a committee would also have.’

The Court then pointed out that under the terms of the Act, the Commission had a discretion whether or not to require a witness to take the oath or affirm. This discretion had been removed by the State President by Regulation 6, which made the oath or affirmation imperative.

The Court then considered the question whether the Commission was affected by the rules relating to judicial or quasi-judicial tribunals and, like Justices Bekker and Botha, decided that it was not. The Court then added significantly:

‘We are of the view that it is mainly a fact-finding Commission, and that although it may make recommendations (which may or may not be accepted by the State President-in-Council) its report and recommendations (if any) cannot in law directly affect any organization or person.’

As will be seen the Court returned to this theme several times during the judgment. While it is strictly true that the Commission’s report cannot *directly* affect any person, the case of the NUSAS students shows clearly that it can indirectly. It was the very eight students named in their NUSAS report, with a recommendation that ‘the continued participation of these persons in student politics is most undesirable’ who were, by banning orders made on the day of publication of the report, prevented from taking any further part in student or other politics.

Turning to the position of Mrs Cleminshaw in relation to the Commission, the Court stated in frank terms the feeble position of a witness summoned by the Commission:

‘The appellant was summoned to give evidence before the Commission. She was in the position of an ordinary witness appearing before the Supreme Court to give evidence (see sub-section (1) of the Act). The Commission had no power or rights in respect of her other than to require her to give evidence of matters within her knowledge, or to produce documents. As stated, the Commission’s report and recommendations will have no direct effect upon her, or anybody else. The Commission in respect of its report, owes no duty to anybody other than the State President. If it acts outside or short of the scope of its authority, it would in law be a matter concerning only the State President. If, for

instance, it failed to report or to investigate fully, the State President might have cause for complaint or dissatisfaction, but no one else could intervene, not even the organizations or persons it purported to investigate. Such an organization, or person, could complain to the State President, but it could not in law oblige the Commission to complete its work, or make a report, or to correct it. The Commission's position and responsibilities may be compared with that of an employee given a task by his employer. If he performs his task badly, the employer would have reason for dissatisfaction, and could act against him, but no one else has any legal rights in respect of the matter.

'The Commission's only legal relationship with persons other than the State President arises from its right to summon witnesses and to administer an oath or affirmation to them. When doing so, it exercises a right affecting their rights as witnesses. It must then act within the powers conferred upon it by law, and witnesses need only obey it to the extent required by law. Beyond that witnesses have no rights in respect of the Commission. Any other complaints a witness may have can only be addressed to the State President. Probably the only basis on which the Commission's summons could be resisted by a witness is that on which the present appeal has been brought, namely, that it is not the Commission which the State President appointed, and therefore has no power to summon witnesses, or to administer an oath or affirmation to them; or that the witness has sufficient cause in terms of section 6(1) of the Act to refuse to be sworn or affirmed.'

The Court then turned to examine the decision in *Beyers Naudé's* case. It rejected the authority of the passage quoted from *Schierhout's* case (see p 142 above), firstly on the ground that it was *obiter*: i.e., was not necessary to the decision in that case, secondly that it referred only to a body having power to affect the rights of persons appearing before it, and thirdly that it related only to bodies created by statute, whereas the Schlebusch Commission was a creature of the State President's Prerogative.

The Justices then examined the interpretation given to the term 'commission' in *Naudé's* case, and their comments reveal their very different approach to the issues raised in these cases:

'At page 14 of the judgment, that Court states that the word "Commission" as read in Section 1(1) of the Act obviously means a "Commission consisting of *all* its members". Having decided that, it says that this same meaning must attach to the word as used in Sections 3(1) and 6(1) of the Act. At page 16 it fortifies its view by pointing to the fact that the Legislature made no provision for a quorum for the Commission, whereas in the appointment of other Statutory bodies, it has provided

for a quorum where it intended one. In support of this latter contention, it referred to a number of cases dealing with such statutes.

'We have examined these cases, and find that they all have reference to tribunals or administrative bodies with power to affect the rights of the person appearing before them. As indicated before, we are of the view that bodies such as the Commission in this case are not subject to the same test as no one is in law directly affected by its report. Not even the appointing body is bound by its report or recommendations. If dissatisfied, it can reject or ignore the report; or use it to the extent it wishes to. In other words, in law, reports of such bodies are documents without legal consequences.

'In construing Section 1(1) of the Act, the Court in *Naudé's* case has confined itself to the Act as such, losing sight of the fact that the Act was intended to fortify the State President's powers under his Prerogative. Under his Prerogative the State President can appoint as many Commissioners as he wishes, and while he may invoke the Act to support him, he may use such parts of the Act or of any other Act as seems to him to meet his purpose. He may also modify or exclude parts of the Act; finally he may make regulations *inter alia*, giving the Commission additional powers, and providing for the manner and the holding of investigations. These factors, it seems to us, were not taken into account sufficiently by the Court in *Naudé's* case.

'The "Commission" as referred to in the Act, is, it seems to us, a Commission as constituted by the State President with all the divergencies which he thought fit, in his absolute discretion, to attach to it. There is nothing in the Act to prevent his appointing committees to act as if they were the Commission; or to allow the Commission to appoint such committees; or to confer on such committees the rights, protection, and sanctions that the Act makes available to the Commission. The Act does not limit him. It bestows wide and extended powers on him. In fact the Act permits him to add to the Act itself. The only limiting factor is that the Commission must have been appointed to investigate a matter of public concern.

'When the Act in Section 6(1) speaks of the Commission, it is referring to a Commission thus appointed. Where therefore the State President has given the Commission power to appoint committees to hear evidence and addresses on its behalf and deems such committees to be the Commission it is inconceivable how it can be said that section 6(1) of the Act cannot apply to all its activities.'

It is interesting to note that these Justices find 'inconceivable' a conclusion which had been reached by two of their brothers, namely that the Prerogative does not give the power to the State President to extend the

scope of a criminal offence created by statute. These differences of legal opinion seem to reflect different attitudes to the proper balance between the powers of the Executive and the right of the individual.

The judgment continues:

'Furthermore, by regulation 6 the State President requires that the Commission *shall* administer the oath or affirmation to witnesses appearing before it. If the decision in *Naudé's* case is carried to its logical conclusion, then taken in conjunction with regulation 6, the Chairman may only administer the oath or affirmation to a witness appearing before the full Commission. Consequently he has no right to administer the oath or affirmation to witnesses appearing before a committee of the Commission. If that were so it would be futile to say that it is only in the cases of a few unwilling witnesses that a committee would be hampered in its work. The logical result flowing from that decision is that such a committee cannot hear evidence at all.

'The State President, by regulation 17 specially deemed such a committee to be the Commission to (we insert) "hear evidence and addresses on behalf of the Commission". There can be no doubt that the State President had the right under the Act to do so. We cannot agree with the Court in *Naudé's* case that in so far as the State President purported to bestow the sanction of Section 6(1) of the Act upon a committee, the regulations made by him are *ultra vires*. Nor did we understand Mr Kriegler to support the judgment on that basis. He contented himself in supporting the judgment on the basis that section 6(1) of the Act, being a penal provision, must be strictly construed and consequently that section 1(1) and therefore section 6(1) of the Act, had reference only to the full commission appointed by the State President, and when sitting with all its members.

'We are of the view that the Act, and in particular those sections, referred to the Commission in whatever manner it was constituted or functioned, and that if section 6(1) applied only to the full Commission it would defeat the intention of the State President by destroying the efficacy of regulations 16 and 17, whereas the Act was intended to ensure and promote his intention.'

The Court appears here to have lost sight of the fact that the Act was passed in 1947 and the regulations were made in 1973. It is difficult to see how the true meaning of an Act of 1947 can be derived in any way from the wording of a Proclamation by the State President twenty-six years later.

The Court then set out the reasons why they considered it proper for the Commission or one of its Committees to sit with less than its full number of members, and came to the conclusion that, since a witness could not, in law, be prejudiced by a report of the Commission, he could

have no standing to complain if less than the full number took part. In their view, "Commission" as used in the Act surely means the Commission as appointed by the State President; and the State President did not intend that the Commission should always sit with all its members.'

Once again this Court was looking to the intention of the State President where the Court in Beyers Naudé's appeal was looking to the intention of Parliament. The final conclusion followed inevitably.

'To reach the conclusion it did, the Court in *Naudé's* case was forced by the logic of its reasoning to rule that regulations 16 and 17 were *ultra vires* the powers of the State President for the purpose of Section 6(1) of the Act. As we have indicated earlier in this judgment, in our view, the State President's powers and rights under his Prerogative are not limited by the Act, but have been amplified, clarified and extended by it. To hold that Section 6(1) of the Act renders his regulations 16 and 17 *pro tanto ultra vires* seems to us to fly in the face of the Act and the State President's Prerogative.

'For the reasons given in this judgment, we have come to the conclusion, with great respect, that the judgment in *Naudé's* case is clearly wrong. We are therefore not obliged to follow it. In our view the Chairman of the committee lawfully required the appellant to be sworn or to make affirmation and that in terms of Section 6(1) of the Act, unless she showed sufficient cause, she is guilty of an offence.'

The Court then dealt with the second ground of appeal, namely that Mrs Cleminshaw had shown 'sufficient cause' for refusing to testify. Earlier, the Court had summarized her evidence on this issue in these terms:

'Before setting out her reasons for refusing to testify the appellant stated that she would have been perfectly happy and fully prepared to answer in open Court any questions at all which the Court or the Prosecutor might put to her including those which might have been put to her at the Commission. She then proceeded to say that she had not lightly made her decision not to testify before the Commission. She had given the matter deep thought, being concerned that in refusing she might in some way be infringing the law.

'She claims that it seemed to her that she was in danger that she might be asked in secret about "those people and about the organization" (she interpolated: about herself also), and that she might be in danger of bearing false witness against them. She explained (we quote): "I didn't know what they would ask me or how well I might be able to remember anything, or how I might misinterpret what any of them had said or done, and that then I might be associated with any punitive action which might be taken against them, or against the organization, or against myself."

'She handed in a photocopy of a statement setting out in shortened form her motivation for her decision not to testify.

'The appellant then deals in her evidence with utterances in Parliament and in public by the Prime Minister, the Parliamentary Leader of the Opposition, and by certain members of the Commission. Because of these, she says, she felt that "these men (i.e., the members of the Commission) were party politicians first and foremost, and because their members and some members of the Commission had threatened the very organizations they were now going to investigate, they could not possibly come to an impartial and objective report about these organizations." She added that because of what the Prime Minister had said in advance, in fact, wittingly or otherwise, pressure was being exerted on the Commission.

'The appellant, in her evidence, also deals with a body referred to as "NUSAS" certain of whose members were served with "banning orders" shortly after an interim report was issued about them by the Commission.

'It was because of all this, as we understand her evidence, that she came to the conclusion that people could be punished by Administrative measures as a result of the Commission's report; and as the evidence was given in secret, they had no recourse to the ordinary courts, so that they could be punished for something they couldn't testify about in Court, or try to prove wrong; or prove their innocence. She thought this could happen to the staff of the Christian Institute and herself as well. Furthermore, she felt herself to be on trial without knowing the charges. She had also heard that she was considered to be a Communist.

'In conclusion of her evidence-in-chief, she reiterated that her objection was to giving evidence in secret, as she may be wrong and the persons affected would not be able to correct her. She averred that she had nothing to hide or be ashamed of, but wished to dissociate herself from a procedure which by-passes the normal courts, and undermines the rule of law. She thought that the Commission would try to create an aura around the organization being investigated which would make it more easy for the public to accept any banning or restriction of their activities.

'In cross-examination she said her grounds were based on her understanding of the political situation in the country, and that the appointment of the Commission was a political gambit on the part of the Prime Minister.'

The judgment of the Court of this point was brief:

'Neither Counsel has addressed us on this ground of appeal. The Magistrate has dealt with it very fully in his judgment. We agree with his conclusion and do not think any useful purpose would be served by elaborating on it save to say that in our view the appellant's reasons for

refusing to testify go to the root of the State President's right to appoint a commission of inquiry of his choice, and to his decision as contained in regulation 5, namely, that the public are to be excluded from the sittings of the Commission or of its committees. We do not consider such reasons to fall with the meaning of "sufficient cause" as required by Section 6(1) of the Act. Broadly stated her reasons are of a political nature. They have no merit in law.'

Accordingly her appeal was dismissed.

It now remained for the Appellate Division to resolve this judicial deadlock and determine finally the issues raised in Beyers Naudé's and Dorothy Cleminshaw's cases.

The outcome is one of interest to lawyers as well as to all those who are concerned about the struggle being waged within South Africa against the racial doctrines of *Apartheid*.

The Ravan Press trial

Ravan Press (Pty) Ltd is a company which owns and operates a printing press in Johannesburg. It is effectively the press of the Christian Institute, though in law it is a separate entity. The Directors are Mr Danie van Zyl, Dr Beyers Naudé and Mr Peter Randall.

On 21 November 1973, the Ravan Press and its three directors were all summoned for committing an offence under section 11 of the Suppression of Communism Act. On the face of it, the facts of the case appear trivial but the interest in the case lies in this very triviality. The fact that the prosecution was brought, and is still being pursued with zeal by the authorities, indicates the extent to which they are prepared to go in trying to impede and discredit the work of the Christian Institute and its associated organizations.

The background of the case is as follows. In November 1972, the National Union of South African Students (NUSAS), a white students' organization active at most universities in South Africa, decided to prepare a dossier of newspaper clippings to be distributed in the new year to newly enrolled university students. NUSAS asked Spro-Cas to help arrange the printing of the broadsheet. Spro-Cas is an unincorporated association of persons, connected with the Christian Institute, who have undertaken study projects in two phases. Phase one was a 'Special Project on Christianity in Apartheid Society', and phase two was a 'Special Project on Christian Action in Society'. The name Spro-Cas is an acronym derived from the title of these projects. The Director of Spro-Cas, until it ceased to operate in December 1973, was Mr Peter Randall. Spro-Cas asked Ravan Press to do the printing of this dossier, and they agreed to do so.

On 14 February 1973, Ravan Press had completed the printing and stapling of the dossier, and its stock book indicates their delivery by Ravan Press to Spro-Cas on that date. No physical delivery took place, as they

occupy the same premises jointly, but the State contended that in law this constituted a delivery and that the property in, and possession of, the dossiers passed on that day to Spro-Cas.

On 26 February, a banning order was served on Paul Pretorius, President of NUSAS. One of the effects of this order was that it became an offence for anyone to publish or disseminate any document containing any writing or statement by Paul Pretorius, whether made before or after the date of the banning order. As the dossiers contained an editorial by him, as well as some newspaper cuttings quoting statements made by him, they could not lawfully be distributed in their original form. By 26 February most of the dossiers had already been distributed by Spro-Cas to NUSAS organizations at near-by universities, but there remained nine hundred copies for delivery to the University of Cape Town. It was decided that printed paper slips saying that Paul Pretorius had been banned should be prepared and glued over the editorial article before any further distribution took place. This work was done by employees of the Ravan Press. The paste-over sheets were stuck to the dossier at their four corners. It was not a very effective method of obliteration, as the paste-over sheets could easily be removed and the printed material below could then be read. The newspaper cuttings containing quotations from Pretorius were apparently overlooked, and no attempt was made to obliterate them.

The nine hundred copies were sent to the University of Cape Town, but they arrived too late for distribution. All, or almost all, the packages remained unopened, and in July they were returned to Spro-Cas in Johannesburg, where they arrived on 3 July. On the same day a police officer called at the offices of Spro-Cas and acquired a copy of the dossier.

On 25 September, the police interrogated Billy Lazarus, a printer in Ravan Press, who told the police that delivery of the dossiers had not been made before 27 February, which was the day after the service of the banning order.

The police also interviewed Mr van Zyl, manager and one of the directors of Ravan Press. On 2 October, the police officer returned to take statements from the three directors. Mr Randall made one, but the other two declined to do so.

On these facts the Ravan Press and its three directors were charged with having between 27 February and 30 July 1973, at or near Johannesburg, published or disseminated prohibited material, namely 'speeches, utterances, writings or statements . . . made or produced or purporting to have been made or produced by one Paul Pretorius being a person [in respect of whom a banning order had been made]' If convicted of this offence the three directors would be liable to a sentence of imprisonment for up to three years. A conviction would also mean that they could in future be labelled as 'Communists' with impunity. Section 17 *bis* of the Suppression of Communism Act provides that 'No action for damages shall lie and no

criminal action may be instituted against any person who describes as a Communist a person . . . who has been convicted of [violating certain sections of the Suppression of Communism Act, including Section 11 which prohibits quoting a banned person]'. In this way the South African Parliament has followed the dictum of Humpty-Dumpty: 'When I use a word it means just what I want it to mean, neither more or less.'

The summonses were served on 28 November 1973. The trial was originally fixed for 15 January 1974, but on that day Mr Randall was due to appear before another court. The trial eventually began on 16 May, continued on 17 May, and was then adjourned until June. Judgment was given on 22 August.

The case was heard at Johannesburg in the Regional Court of Transvaal. This is a magistrate's court. The magistrate is an official of the Minister of Justice who performs both judicial and administrative functions. He need not be qualified as a barrister or attorney. In most cases magistrates have some legal experience in a law office or, more usually, in a government office and have received some basic training in law. The magistrate sitting in this case was Mr P. H. F. van Zyl, an experienced magistrate who had previously worked in a prosecutor's office.

The prosecution was conducted by a senior prosecutor, Mr L. C. Kotze. The defendants were represented by Mr J. C. Krieger sc, and Mr D. M. Williamson, barristers instructed by Mr A. T. F. Williamson, an attorney of the firm of Bowman, Gilfillian and Blacklock. Professor Luvern V. Rieke of the Law School, University of Washington, Seattle, attended part of the hearing as an international observer on behalf of the Lawyers' Committee for Civil Rights Under Law. This is a body primarily concerned with civil rights cases in the United States, but it has for many years taken an active interest in cases in South Africa raising civil rights issues. (The editors have been much assisted by Professor Rieke's report to the Lawyers' Committee in preparing this chapter.)

Professor Rieke described the court room as follows:

'The regional court sits in a rather large building which, I was told, has over thirty court rooms and space for supportive functions. The court room itself was relatively small, perhaps twenty-five feet in width and forty feet in depth. The judge sat at a long, high bench at the front of the room. Immediately in front of the bench was one table for the prosecutor and another for the defendants' attorneys. To the rear of the attorneys, approximately in the middle of the room, there was a dock in which the three accused were seated. A stairway from a lower floor came into the dock—I was told it was an access way to the jail area. At the rear of the room there were two small galleries for spectators. One for "Europeans" and one for "non-Europeans". Each had a separate doorway from the hallway and in each gallery there were a few short benches. Not over fifteen spectators could have been accommodated comfortably in either area. There were

few spectators present. The general appearance of the court room was that of a typical magistrate's court in the United States. It needed repainting, the facilities were old, battered, and the area was generally dirty. Nothing about the physical setting suggested that this trial was one of special importance.¹

The issue in the case was whether anything done by the Ravan Press on or after 27 February amounted to publishing or disseminating a statement of a banned person.

The prosecution first called a security officer to prove the banning order. Another officer attached to the security police, Warrant Officer K. J. F. Janse van Rensburg, then testified that he had received from a colleague the dossier purchased on 3 July, had removed the paper pasted over the Paul Pretorius editorial article, had examined it and began his investigation. Under cross-examination he agreed that the records he had examined indicated that the NUSAS request for the dossier had been made to Mr Randall acting for Spro-Cas, and that Spro-Cas had in turn asked for the assistance of Ravan Press in printing the material. There was no contractual relationship between NUSAS and Ravan Press. Moreover, the stock book recorded that delivery of the dossiers was made by Ravan Press to Spro-Cas on 14 February.

The printer, Mr Lazarus, was then called for the prosecution and asked to confirm that he had given a statement to the police indicating that the work on the dossier had not been completed until after 27 February. Under cross-examination he explained that he had made an error in his police statement and confirmed that the entry in the stock book was correct. He also explained that the decision to paste over the Paul Pretorius editorial was made because it would have been difficult, expensive and time-consuming to have obliterated it by taking the dossiers apart and running them through the printing press in order to ink them over.

The prosecution then called an independent printer who testified that he had been able to obliterate the offending material by 'solid over-printing', but he agreed that Ravan Press lacked the equipment needed for solid over-printing.

Other employees of Ravan Press were then called to explain how they had done the work of pasting sheets over the Paul Pretorius article.

At the adjourned hearing in June police officers were called to prove the purchase of the dossier on 3 July in Johannesburg and the purchase of another copy from NUSAS in Cape Town. No evidence was called on behalf of the defence.

Mr Kriegler SC on behalf of the defendants submitted that the prosecution had brought their case against the wrong persons. If any offence had been committed, it was committed by Spro-Cas. Ravan Press had delivered all

the dossiers to Spro-Cas before the date of the banning order, and no offence could be committed before that date. All that Ravan Press had done after that date was to cover over, even if ineffectually, part of the prohibited passages in the dossiers, and neither Ravan Press nor its directors could be held responsible for what Spro-Cas did with the dossiers after that date.

The Magistrate reserved judgment. Judgment was eventually given on 22 August 1974. The Magistrate held that the dossiers were printed by Ravan Press on behalf of its client Spro-Cas prior to 14 February 1973, and the entire printing was delivered to Spro-Cas on that date. Thereafter Spro-Cas distributed the dossier to various persons and/or bodies. The banning order had been served on Paul Pretorius on 26 February 1973, and at some stage thereafter Spro-Cas instructed or requested Ravan Press to cover up the offending portion on the inside covers of the dossiers. Ravan Press did cover up this portion, but not effectively. Other offending portions were not covered up at all. Ravan Press thereafter returned the partially and ineffectively covered-up dossiers to Spro-Cas, who thereafter sent some of them to NUSAS in Cape Town. NUSAS at some stage returned some or all of them to Spro-Cas unopened.

On these facts the Magistrate held that the defendants did not publish or disseminate any prohibited material. No offence could be committed before 26 February 1973, the operative date of the banning order. The printing and delivery of the dossiers had been completed before that date. The only activity of Ravan Press in relation to the dossiers after 26 February related to the receipt of them from Spro-Cas, the covering up of part of the offending material, and thereafter the return of the same dossiers to Spro-Cas. These activities could not, on any reasonable basis, be said to constitute either 'publication' or 'dissemination'. After completing the job given them to do by Spro-Cas, Ravan Press merely returned the dossiers to their owners, Spro-Cas. It was of no concern to Ravan Press what Spro-Cas did with them thereafter. This act of re-delivery by the printer to the publisher of his own property cannot be regarded as an act of publication. There was no evidence whether or not Spro-Cas had given any specific instructions as to how the obliteration of the offending article was to be done, or whether the work was done to their satisfaction. Apart from the terms of their contract with Spro-Cas, there was no general legal duty upon Ravan Press to cover up the offending portions of the dossiers effectively. Any further publication or dissemination of the dossiers was the responsibility of Spro-Cas and responsibility could not be projected back upon Ravan Press.

The Magistrate, therefore, found all the defendants not guilty, and discharged them.

The prosecution are not prepared to accept the Magistrate's decision. They entered an appeal against it by way of case stated. On that appeal

they will be bound by the Magistrate's findings of fact, but can argue that he erred in law in finding that the defendants committed no offence.

NOTE

¹ Professor Rieke might have added that the witness box is divided into two sections, each with a separate entrance, one for 'European' witnesses and one for 'non-Europeans'. It is interesting to speculate upon the reasons for this segregation. It cannot be, as in the case of the public galleries, to prevent physical contact between Whites and non-Whites, since only one witness can give evidence at one time.

APPENDIX 4

Excerpts from statutes and proclamations

Commissions Act No. 8 of 1947; Government Notice No. 1238, 14 July 1972: Appointment of the Commission of Inquiry; Proclamation No. 164, 14 July 1972: Regulations 1-15; Proclamation No. 138, 6 June 1973: Regulations 16-18.

STATUTES OF THE REPUBLIC OF SOUTH AFRICA—CONSTITUTIONAL LAW. COMMISSIONS ACT NO. 8 OF 1947. [ASSENTED TO 1 APRIL, 1947] [DATE OF COMMENCEMENT: 18 APRIL, 1947] (AFRIKAANS TEXT SIGNED BY THE GOVERNOR-GENERAL) AS AMENDED BY GENERAL LAW AMENDMENT ACT, NO. 80 OF 1964 [WITH EFFECT FROM 24 JUNE, 1964—SEE TITLE GENERAL LAW AMENDMENT ACTS] GENERAL LAW AMENDMENT ACT, NO. 102 OF 1967 [WITH EFFECT FROM 21 JUNE, 1967—SEE TITLE GENERAL LAW AMENDMENT ACTS]

ACT

To make provision for conferring certain powers on Commissions appointed by the Governor-General for the purpose of investigating matters of public concern, and to provide for matters incidental thereto.

1. Application of this Act with reference to commissions appointed by the Governor-General.—(1) Whenever the Governor-General has, before or after the commencement of this Act, appointed a Commission (hereinafter referred to as a 'Commission') for the purpose of investigating a matter of public concern, he may by proclamation in the *Gazette*—

- (a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and [Para. (a) inserted by s. 13 (a) of Act No. 80 of 1964].
- (b) make regulations with reference to such Commission—(i) conferring additional powers on the Commission; (ii) providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy; (iii) which he may deem necessary or expedient to prevent the Commission or a member of the Commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated; (iv) providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation. [Para. (b) inserted by s. 13 (a) of Act No. 80 of 1964 and substituted by s. 3 (a) of Act No. 102 of 1967].

(2) Any regulation made under paragraph (b) of subsection (1) may provide for penalties for any contravention thereof or failure to comply therewith, by way of—

- (a) in the case of a regulation referred to in sub-paragraph (i), (ii) or (iv) of the said paragraph, a fine not exceeding two hundred rand or imprisonment for a period not exceeding six months; (b) in the case of a regulation referred to in sub-paragraph (iii) of the said paragraph, a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year. [Sub-s. (2) added by s. 13 (b) of Act No. 80 of 1964 and substituted by s. 3 (b) of Act No. 102 of 1967.]

(3) Notwithstanding anything to the contrary in any other law contained, a magistrate's court shall have jurisdiction to impose any penalty prescribed by any such regulation. [Sub-s. (3) added by s. 3 (b) of Act No. 102 of 1967.]

2. Commission's sittings.—A Commission may sit at any place in the Union or the mandated territory of South-West Africa for the purpose of hearing evidence or addresses or of deliberating.

3. Commission's powers as to witnesses.—(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a Commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province, and in the mandated territory of South-West Africa have the powers which the High Court of that territory has, to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.

(2) A summons for the attendance of a witness or for the production of any book, document or object before a Commission shall be signed and issued by the secretary of the Commission in a form prescribed by the

chairman of the Commission and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in a superior court at the place where the attendance or production is to take place.

(3) If required to do so by the chairman of a Commission a witness shall, before giving evidence, take an oath or make an affirmation, which oath or affirmation shall be administered by the chairman of the Commission or such official of the Commission as the chairman may designate.

(4) Any person who has been summoned to attend any sitting of a Commission as a witness or who has given evidence before a Commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, and in connexion with the giving of any evidence or the production of any book or document before a Commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply.

4. Sittings to be public.—All the evidence and addresses heard by a Commission shall be heard in public: Provided that the chairman of the Commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable.

5. Hindering or obstructing a Commission.—Any person who wilfully interrupts the proceedings of a Commission or who wilfully hinders or obstructs a Commission in the performance of its functions shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

6. Offences by witnesses.—(1) Any person summoned to attend and give evidence or to produce any book, document or object before a Commission who, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the inquiry or until he is excused by the chairman of the Commission from further attendance, or having attended, refuses to be sworn or to make affirmation as a witness after he has been required by the chairman of the Commission to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any book, document or object in his possession or custody or under his control, which he has been summoned to produce, shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprison-

ment for a period not exceeding six months, or to both such fine and imprisonment.

(2) Any person who after having been sworn or having made affirmation, gives false evidence before a Commission on any matter, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment.

7 Short title.—This Act shall be called the Commissions Act, 1947.

**GOVERNMENT NOTICE: DEPARTMENT OF THE PRIME MINISTER.
NO. 1238, 14 JULY 1972: APPOINTMENT OF COMMISSION
OF INQUIRY INTO CERTAIN ORGANIZATIONS**

It is hereby notified for general information that the State President has been pleased to appoint Mr James Thomas Kruger, MP, as a member and as Chairman and the following persons as members of a Commission of inquiry into certain organizations: Mr Radclyffe Macbeth Cadman, MP; Mr Johannes Jacobus Engelbrecht, MP; Mr Teunis Nicolaas Hendrik Janson, MP; Mr Louis le Grange, MP; Mr Lionel Garner Murray, M.C., MP; Mr Daniel Jacobus Louis Nel, MP; Mr Alwyn Louis Schlebusch, MP; Mr Stephanus Jacobus Marais Steyn, MP.

The Commission's terms of reference are as follows:

(1) To inquire into and, taking into account the evidence, memoranda and exhibits which were submitted to the Parliamentary Select Committee on Certain Organizations, report on—

(a) the objects, organization and financing of the National Union of South African Students, the South African Institute of Race Relations, the University Christian Movement, the Christian Institute of Southern Africa and any related organizations, bodies, committees or groups of persons; (b) the activities of the aforementioned organizations, bodies, committees or groups of persons and the direct or indirect results or possible results of those activities; (c) the activities of persons in or in connexion with the aforementioned organizations, bodies, committees or groups of persons and the direct or indirect results or possible results of those activities; and: (d) any related matter which comes to the notice of the Commission and which in its view calls for inquiry.

(2) To make recommendations if, in view of the Commission's findings, it appears to be necessary to do so.

In order that the Commission may be better able to carry out this Commission, it has been granted full power and authority to interrogate

at its discretion all persons who in its opinion are able to furnish information on the subjects mentioned in its terms of reference or on matters relating thereto; to obtain, inspect and make extracts from all books, documents, papers and registers which in its opinion may contain information on the said subjects; and to conduct investigations into the subject matter of this inquiry in any other authorized manner.

The Commission has been requested to report to the State President as soon as possible.

Interested persons who desire to make representations to or give evidence before the Commission should present memoranda to the Secretary of the said Commission, c/o Department of the Prime Minister, Union Buildings, Pretoria, as soon as possible but not later than 30 days from the date hereof.

PROCLAMATION BY THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA. NO. 164, 1972. REGULATIONS UNDER SECTION 1 OF THE COMMISSIONS ACT, 1947 (ACT 8 OF 1947). COMMISSION OF INQUIRY INTO CERTAIN ORGANIZATIONS

Under the powers vested in me by section 1 of the Commissions Act, 1947 (Act 8 of 1947), I hereby declare that the provisions of that Act, with the exception of the provisions of subsection (3) of section 3 and of section 4 thereof, shall be applicable to the Commission of Inquiry into Certain Organizations which I have appointed on the fourth day of July 1972, and I hereby make the regulations contained in the Schedule with reference to the said Commission. Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this Fourth day of July, One thousand Nine hundred and Seventy-two.

J. J. FOUCHÉ, State President.

By Order of the State President-in-Council:
B. J. VORSTER.

SCHEDULE: REGULATIONS

1 In these regulations, unless the context otherwise indicates—

'Chairman' means the Chairman of the Commission;

'Commission' means the Commission of Inquiry into Certain Organizations referred to in this Proclamation;

'document' includes any book, pamphlet, record, list, circular, plan, placard, poster, publication, drawing, photograph or picture;

'inquiry' means the inquiry being conducted by the Commission;

'member' means a member of the Commission;

'officer' means a person in the full-time service of the State who has been

appointed or designated to assist the Commission in the performance of its functions;

'premises' includes any land, building or structure or any part of a building or structure, any vehicle, conveyance vessel or aircraft.

2 The proceedings of the Commission shall be recorded in the manner determined by the Chairman.

3 (1) Any person appointed or designated to take down or record the proceedings of the Commission in shorthand or by mechanical means or to transcribe such proceedings which have been so taken down or recorded shall at the outset take an oath or make an affirmation in the following form:

I, A.B., declare under oath/affirm and declare—

(a) that I shall faithfully and to the best of my ability take down/record the proceedings of the Commission of Inquiry into Certain Organizations in shorthand/by mechanical means as ordered by the Chairman of the Commission;

(b) that I shall transcribe fully and to the best of my ability any shorthand notes/mechanical record of the proceedings of the Commission of Inquiry into Certain Organizations made by me or by any other person.

(2) No shorthand notes or mechanical record of the proceedings of the Commission shall be transcribed except by order of the Chairman.

4 An officer designated thereto by the Chairman may be present at the hearing of evidence at the inquiry and adduce evidence and arguments relating to the inquiry.

5 No person whose presence at the inquiry is, in the view of the Chairman, not necessary for the performance of the functions of the Commission or is not authorized by these regulations may be present at the inquiry.

6 The Chairman or an officer authorized generally or specially thereto by the Chairman, shall administer to any witness appearing before the Commission an oath or affirmation.

7 Any witness who appears before the Commission, may only be cross-examined by a person if the Chairman permits it to be done by that person because it is in the Chairman's view necessary in the interests of the functions of the Commission.

8 If any person who gave or is giving evidence before the Commission or has been summoned so to give evidence so requests the Commission, no person shall publish in any manner whatsoever the name or address of such person or any information likely to reveal his identity.

9 Any witness who appears before the Commission may be assisted by an advocate or an attorney only to the extent to which the Chairman permits it.

10 No person shall publish in any manner whatsoever or communicate to any other person any proceedings of the Commission or any informa-

tion furnished to the Commission or any part of any such proceedings or information, or suffer or permit any other person to have access to any records in the possession or custody of the Commission or any officer or any person referred to in subregulation (1) of regulation 3, except in the performance of his duties in connexion with the functions of the Commission or by order of a competent court.

11 The Chairman, any member or any officer may, for the purpose of the inquiry of the Commission, at all reasonable times enter and inspect any premises and demand and seize any document which is or is kept upon such premises.

12 Every person employed in carrying out the functions of the Commission, including any person appointed or designated to transcribe proceedings of the Commission taken down in shorthand or recorded by mechanical means, shall aid in preserving secrecy in regard to any matter or information that may come to his knowledge in the performance of his duties in connexion with the said functions, except in so far as the publication of such matter or information shall be necessary for the purposes of the report of the Commission, and every such person, except the Chairman, any member or any officer, shall before performing any duty with the Commission, take and subscribe before the Chairman an oath of fidelity or secrecy in the following form:

I, A.B., declare under oath/affirm and declare that, except in so far as it shall be necessary in the performance of my duties in connexion with the functions of the Commission of Inquiry into Certain Organizations or by order of a competent court, I shall not communicate to any person any matter or information which may come to my knowledge in connexion with the inquiry of the said Commission, or suffer or permit any person to have access to any records of the Commission, including any note, record or transcription of the proceedings of the said Commission in my possession or custody or in the possession or custody of the said Commission or of any officer.

13 No person shall, except in so far as shall be necessary in the execution of the terms of reference of the Commission, publish or furnish the report of the Commission or a copy or part thereof to any other person unless and until the report has been laid on the Tables of the Senate and the House of Assembly.

14 No person may insult, disparage or belittle a member of the Commission or prejudice, influence or anticipate the proceedings or findings of the Commission.

15 Any person who contravenes any provision of regulation 8, 10, 13 or 14 or wilfully hinders, resists or obstructs the Chairman, any member or any officer in the exercise of any power referred to in regulation 11, shall be guilty of an offence and liable on conviction to a fine not exceeding R200 or imprisonment for a period not exceeding six months.

PROCLAMATION BY THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA. NO. 138, 1973. REGULATIONS UNDER SECTION 1 OF THE COMMISSIONS ACT, 1947 (ACT 8 OF 1947). COMMISSION OF INQUIRY INTO CERTAIN ORGANIZATIONS

Under the powers vested in me by section 1 of the Commissions Act, 1947 (Act 8 of 1947), I hereby amend the regulations published under Proclamation No. 164 of 1972 by the addition thereto of the regulations contained in the Schedule. Given under my Hand and the Seal of the Republic of South Africa at Cape Town on this Thirtieth day of May, One thousand Nine hundred and Seventy-three.

J. J. FOUCHÉ,
State President.

By Order of the State President-in-Council,
B. J. VORSTER.

SCHEDULE: REGULATIONS

16. The Commission may appoint one or more committees consisting of such members of the Commission as it may think fit, to hear evidence and addresses in respect of any particular matter on behalf of the Commission: Provided that the Chairman or the Vice-chairman of the Commission shall be a member of such a committee.

17. For the purposes of the application of regulation 16, such a committee shall be deemed to be the Commission.

18. When the Chairman is absent from a sitting of the Commission and the Vice-chairman of the Commission is present thereat, he shall act as Chairman, with all the duties and powers of the Chairman.



In South Africa there is almost complete social separation between black and white people. Whole black families and parts of families are moved from cities to undeveloped areas. There are immense gaps between the job opportunities, wages and labour rights of blacks and whites. "Separate development" is the enforced government policy and seems likely to continue thus despite Pretoria's trade and political contacts outside South Africa's borders. The budget allocation for the education of the African population is several hundred million rands below that for Defence. Political leaders and activists are detained and interrogated

despite superficial relaxations of the rules governing 'petty apartheid'. The policy of apartheid is deeply inhuman and clearly un-Christian. The indignities and repression suffered by black Africans cry out for justice, not only to their fellow citizens but to the rest of the world.

This book is a sober presentation of the trial of the Reverend Dr C. F. Beyers Naudé, the Christian Institute and, by implication, any informed and responsible Christian conscience for affirming that no one who believes in Jesus Christ should be excluded from any church on the grounds of colour or race, and that the right to own land where he is domiciled and to take part in the government of a country is part of the dignity of any man.

Dr Beyers Naudé was tried for refusing to give certain evidence regarding the Christian Institute. The meticulous record of the trial gradually reverses the situation so that the man in the dock becomes the prosecutor and the prosecutor is in the dock. Here the South African government is put on trial before the court of humanity and history and found guilty by its own testimony. The record of the trial, the appeal, other relevant appeals, and the text of the famous statement *Divine or Civil Obedience?* are presented in the light of international jurisprudence. Lucid introductions by Sir Robert Birley, and Professor A. N. Allott of the London School of Oriental and African Studies, make this one of the great informed "trial books" of modern times. Lord Ramsey of Canterbury has written a Preface.

To read this book is a profoundly moving spiritual and intellectual experience as well as an exercise on Christian solidarity with the suffering and oppressed masses of South Africa. It is also an opportunity to learn about the methods of non-violent resistance. Above all it is a meeting with a remarkable personality. As Lord Ramsey says: "... when I think of the men who have shown me what it means to be a Christian my thoughts will always go quickly to Beyers Naudé."