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STATE LEGITIMACY, CONFESSION AND RESISTANCE[1]

Contents

1 This article was originally written for a German audience. The English versions of the cited German translations could not be verified in every case.

The question of confession and resistance[2] of the church in view of manifest injustice, is the focus of church conflicts in our time. No church that acknowledges its ties to the ecumenical community can evade the question that is raised by Christians and churches in South Africa. The churches in Germany are of course involved, concerned and consulted in a special way, because Christians in Germany in the twentieth century confessed their faith in an exemplary manner in the face of the totalitarian state, and finally, they took, even if only represented by a few figures, the step from confessing their faith to political resistance. The sacrifice of these few was the sign through which a new beginning for the church was possible after 1945, it at all the word of the Early Church holds true that the blood of the martyrs is the seed from which the church grows.

Or is this spoken too boldly, too emphatically ? Can one compare the struggle of the Confessing Church in Germany to the present confrontations in Southern Africa? Is not the Boer state still capable of a peaceful change of system, whereas Hitler from the beginning had written genocide, world domination and destruction of the Christian church on his banners? I will attempt to investigate these questions by following the connecting lines between our own history and present problems in South Africa, beginning with the concept of confession and then moving on to the traditions of the right of resistance. In the third part I relate these deliberations to the constitutional situation in South Africa. In a fourth part I raise the question of the urgent duties of the ecumenical church unity and solidarity.

1. Concerning the problem of confession and status confessionis

On the occasion of the commemoration of the Theological Declaration of Barmen in May 1984, Christian F. Beyers Naudé, former leader of the Christian Institute in Johannesburg and then newly elected Secretary General of the SACC, sent a greeting.[3] It had to be conveyed by telex, as the South African government had granted him no exit permit. In his word of greeting

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2 The following deliberations take their point of departure from the memorandum: "Südafrika: Bekenntnis und Widerstand" of October 1982. The text appears, amongst others, in: Bekenntnis und Widerstand (1983), 513-536. An English translation was published in December 1982 by the South African Council of Churches, entitled "South Africa - Christian Faith and Resistance"; in this book reprinted , pp 215 ff. Concerning the echo in the member churches of the EKD, compare *Raiser* (1985).

3 *Naudé* (1984). Concerning Beyers Naudé, compare *Randall* (1983) and *Villa-Vicencio de Gruchy* (1985).

Naudé names three points in which the significance of the Declaration of Barmen for South Africa can be summarized:

(1) Barmen gives testimony to the *unity of the church* across all boundaries of race, language, class and sex. Christians recognize and represent this unity in their actions by breaking through the politically and economically set boundaries by means of church services, the Eucharist and the ministering to the poor and sick, and thereby actually resisting exploitation and injustice.

(2) "Barmen means *resistance against unlawful state rule*"[4], and that means resistance against all regulations and laws of the state contradicting the gospel.

(3) Barmen is finally understood as the call to reflect on all worldly spheres of life in the light of the *coming kingdom of God* and to examine whether and to what extent the worldly rule exercises unlawful power.

Confessing the unity of the church and resisting state injustice are the two central points that are common to the Barmen synod or the Confessing Church, and the Church Struggle ('Kirchenkampf') in South Africa. This means that a central issue of political ethics - the question of the reason for and the limit of obedience by the citizens and their responsibility towards the community - and a central issue of church understanding - the question of the uniting or dividing significance of ethical questions - coincide. This close connection between church understanding and political ethos, between ecclesiology and ethics, is not completely new for the churches of the Reformation, but at present there is obviously a shortage of concepts that are suited to define this relationship in more detail.

It must be realized that for South African Christians the orientation to the 'Kirchenkampf' is not conveyed by their own participation, but rather through literature.[5] This does not belittle their position, it is merely a qualification of it: it means, amongst other things, that the concepts and opinions of Dietrich Bonhoeffer have received a far greater significance in SA today than his (special) historical role in the 'Kirchenkampf' would warrant. This also means that neither the political conservatism nor the traditional confessionalism of the Barmen theologians are considered as being the context of that time. Before I outline the reception of the 'Kirchenkampf' in South Africa, a few characteristics about the concept of confession in the churches of the Reformation must be briefly mentioned.

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4 *Naudé* (1984), 24.

5 Compare *de Gruchy* (1979), *de Gruchy* (1985); *de Gruchy/ Villa-Vicencio* (1984); *Kistner* (1984).

1.1. From confession to status confessionis

a) Each confession as a literary document that demonstrates a binding and obligatory decision of a church or its representative organs, presupposes as its foundation the public proclamation of the gospel and the confession of its witnesses.[6] In this sense each formal confession derives from the continuous confession (confessio continua) of the church, so that Luther could say: tota nostra operatio confessio est.[7] The church is as such confessing church in its preaching of the word, administering of the sacraments and ministering to the poor and sick.

From this the formal and explicit process of fixation of a confession has to be distinguished. Since the time of the Early Church this has happened time and again to defend and distinguish the doctrine of the church against heresy. The confessions of the Early Church thus served the gradual specification of the truth, given to the church, which it now praised and professed in its dogmas. At the same time insofar these confessions were written down they were characterized by the dignity of imperial law. Since the Edict of Theodosius "Cunctos populos" (28.2.380) that helped the Nicene orthodoxy to obtain imperial monopolistic validity, church confessions have always affected the relationship to the state in this respect. The Confessio Augustana (1530) also functioned within this legal framework, in which it expounded the catholic, that is the universal validity of the principles of the Reformation.[8]

b) The constellation within which a self-distinction of the teaching and confessing church becomes necessary from within, or the situation in which the church is induced to a solemn confession by external developments, is called *status* or *casus confessionis*.[9] (Historical examples such as the first adiaphoristic struggle (1548 ff) and the opera dispute in Hamburg need not interest us here.) Decisive is that the range of issues that can bring about a formal confession are not laid down from the beginning. This fact is biblically exemplified in the dispute about the food offered to idols. As such, in the language of the 16th century, it is an adiaphoron.[10] However, its consumption is no longer unimportant to God if it becomes a burden for the conscience. This is all the more so, if doctrines and rules that are determined from outside and

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6 Compare especially *Gollwitzer* (1962). Concerning the concept and history of the confessions of faith resp. articles of faith, compare *Wirsching* (1980).

7 Compare *Huber* (1983), 252.

8 Compare *Moeller* (1980).

9 Compare *Smit (1984); Möller* (1983); *Stoll* (1984).

10 Compare *Trillhaas* (1954).

that do not agree with the confessio continua of the gospel, are forced upon the church. If, for example, the freedom of the public proclamation of the gospel is interfered with for political reasons, then the status confessionis is thereby ipso facto forced upon the church.

c) Against the background of the experiences of the Confessing Church, but not as belated legitimization, Karl Barth[11] developed a very differentiated concept of confession. He distinguishes three levels: firstly, in the face of false doctrines or infringements from outside, the church must try to gain a clarification of the debatable facts through careful listening to what Scripture has to say and through discourse with tradition. She must then portray the insight given to her in a clear, precise form and moreover point out explicitly and precisely which doctrine or attitude is rejected. Finally, the formulated insight must be realized by corresponding actions. This threefold combination of hearing, confessing and struggling is, according to Barth, fundamental to each serious church confession; if one falls short of the consequence of the third step then, so it seems, the first step itself has not been performed carefully enough.

d) Since the Third Reich the main point of controversy within the church concerning the issues of confession and status confessionis centres around the question whether - besides false doctrines within the church - only interventions from outside hindering the unrestrained proclamation of the gospel, can bring about a status confessionis, or whether other developments outside the church can also demand - and that means: with explicit rejections - a solemn confession. In essence, there are two questions of importance here, (1) whether there can be 'ethical heresies' within the church, and (2) whether there can be opinions, attitudes and rules outside the church which the church must oppose under all circumstances.

In his speech in April 1933 "Die Kirche vor der Judenfrage" ("The Church and the Jewish Question")[12] that has gained eminent significance amongst South African theologians[13], Dietrich Bonhoeffer[14] brought this question to a head in the following: Bonhoeffer fundamentally concedes to the state wide discretionary scope for legislative organization, also in the issues of citizenship. Yet it is decisive that the state be subjected to a twofold limitation.

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11 Compare *Lienemann* (1980) and *Jacob* (1986).

12 Gesammelte Schriften (Coll. Writings), vol. II; engl.: No Rusty Swords. Letters, Lectures, and Notes, ed. E. Robertson, vol. 1, London 1965, 221 ff.

13 Compare *de Gruchy* (1984).

14 Compare *Bethge* (1984); *Feil/Tödt* (1980).

Bonhoeffer describes these limitations with a 'lack of order and justice' and an 'excess of order and justice'. Bonhoeffer identifies the 'lack' there, where one group of people has no rights, that is, where specific people are denied a minimum of rights and justice. The fixing of this minimum is itself subject to historical change, but it would be violated if, for example, serfdom and slavery were to be reintroduced.

An 'excess of order and justice' exists if the state arrogates to itself the control of preaching and faith and interferes in issues characteristic of the church. To these Bonhoeffer counts especially the "forced exclusion of the baptized Jews from our Christian congregations" or the "banning of the mission to the Jews". Bonhoeffer carries on: "Here the church would find itself in a status confessionis and the state would find itself in an act of self-denial".[15] The synod of Barmen did not comply with Bonhoeffer's opinion that the church could not remain silent on the issue of the Jews. She was not prepared for conflict in this direction, and she saw other priorities in her conflict with state and party. Karl Barth characterized this fact in respect of Barmen as a culpable failure, but also added that the synod of Barmen would have split, if a passage about the Jewish issue would have been incorporated in its theological declaration.[16]

Irrespective of these historical circumstances,however, the realization grew that it is possible in principle, that issues of cultural, political or social order can become a status confessionis for the church.[17] For the churches in Germany this issue has become especially virulent in view of the peace discussions, without having led to a solution up to now. In South Africa, however, the formation of a Confessing Church can be observed; to this we will now turn.

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15 Gesammelte Schriften, vol. II, 49.

16 "A text in which I would have done that, would, obviously in 1934 with the then prevailing state of mind also of the 'Confessors', not have been acceptable, neither in the reformed nor in the general Synod. But that does not excuse the fact that I did not then - because interested in other things - fight in every way for this matter. That Bonhoeffer did that from the beginning only came to my attention through your book (Bethge's biography on Bonhoeffer)..." Thus K. Barth in writing to E. Bethge, Evangelische Theologie, 28, 1968, 555; printed again in: *K. Barth*, Briefe 1961-1968, Zurich 1975, no. 252 (here 403); originally in German.

17 Already in 1964, the then Secretary General of the WCC, W. A. Visser't Hooft, stated: "In relation to the issue of race-relations, the churches in the countries where that issue is now the crucial problem of the present and the future are 'in statu confessionis', that is to say their integrity as representatives of the new humanity and as bearers of the divine word of righteousness and reconciliation, their obedience to their Lord, are at stake." *Visser't Hooft* (1967), 94, engl. original (1964) p. 12.

1.2. On the way towards a Confessing Church in South Africa

The development in South Africa has shown that the recognition and declaration of and the response to a status confessionis is a slow process that is mainly determined by two factors: by careful interpretation of the Holy Scripture in view of challenges to confess, and by precise analysis of legal, political and economic conditions. I will briefly recall the most important stages in the forming of these convictions:

a) After the massacre of Sharpeville an ecumenical consultation took place in Cottesloe in December 1960.[18] After that a few representatives still found it conceivable to consider a 'separate development' as a legitimate, politically possible order, even if most of the provisions of apartheid were rejected in concreto.

b) In the following years the implementation of the policy of apartheid became more rigid. In 1968 the SACC answered with its 'Message to the People of South Africa'.[19] Here it was emphasized that the doctrine of racial segregation in South Africa was increasingly presented as a 'true form of Christian obedience'. In contrast to this it was unmistakably stated that this was a matter of a 'wrong belief' and a 'novel gospel' that served to legitimize religiously the political rule of a minority over a majority. This justification of apartheid misuses theology as an ideological power base.

c) Then in 1975 FELCSA, encouraged amongst others by the ecclesiological studies of the LWF, passed the so-called Swakopmund-Appeal.[20] Central to it is the insight that the principles of separate development in a deadly way endanger in its essence the unity and the witness of the Lutheran churches. When the opposing ethical and political loyalties of Christians are the cause that the unity of the church is seen only as a spiritual unity, that cannot be experienced in visible fellowship and communion at the table of the Lord, then the substance of the church is directly endangered.

d) From this appeal the path leads directly to the 6th Plenary meeting of the Lutheran World Federation (LWF) in Dar-es-Salaam (June 1977) as well as the General Assembly of the World Alliance of Reformed Churches (WARC)

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18 Compare *Randall* (1983), 28 ff. The text of the declaration of the conference can be found amongst others in *de Gruchy/Villa-Vicencio* (1984), 175-179.

19 Text in *de Gruchy/Villa-Vicencio* (1984), 179-184.

20 Text amongst others in LWB-Pressedienst 13/1975, 5-7; also in: Kirchen zwischen Apartheid und Befreiung, KAEF-Dokumentation 1/77, edited by *K.-H. Dejung/H.-Th. Risse* (August 1977).

in Ottawa (August 1982). Both bodies agreed that in certain situations the confession of the church imperatively calls for a clear position and unequivocal delimitation; the situation of apartheid constitutes a status confessionis for the churches.[21] Even if the Catholic and Anglican Churches do not use this terminology, they agree in essence with the declaration of the World Federations, often with reference to the clausula Petri (Acts 5,29)[22].

e) It is not necessary to follow the further course of deliberations in the big confessional World Federations and their member churches up to the suspension of the membership of two Lutheran churches at the last plenary meeting of the LWF in Budapest in 1984.[23] It is more important that since 1977 the conviction has grown that the active approval or the silent acceptance of apartheid is sin and that the doctrines which try to substantiate apartheid theologically are to be condemned as heresies. Especially in the sphere of black Reformed Churches this insight was generally accepted, but in the meantime this confession forms an ecumenical tie that unites most churches in South Africa. The confessio continua manifests itself therefore in explicit statements of confession which are manifold in form, but clear in structure and direction. The 'Kairos Document'(first edition in 1985) summarizes and sharpens these trends.

f) I would like to emphasize two points in conclusion. At the beginning of the discussion it was by no means agreed whether apartheid could be an appropriate political option of 'separate development', or whether it was a form of rule falling under the clausula Petri. It is only in the course of more exact theological and political-legal clarification that the insight asserted itself, that

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21 The decisive passage in the LWF resolution reads: "Under normal circumstances Christians may have differences of opinion on political issues. Political and social structures can, however, become so perverted and oppressive that it is in agreement with the confession to reject them and to work for change. We call especially upon our white member churches in Southern Africa to acknowledge that the situation constitutes a *status confessionis*. This means that the churches on the basis of their faith and in order to make the unity of the church visible will have to reject the apartheid system publicly and unambiguously." Quoted according to Daressalam (1977), 212. *Lorenz* (1983) documents opinions about this decision; compare also *Smit* (1984) 13.- The key words of the 'Resolution on Racism and South Africa' of the WARC read: "The General Council declares that this situation constitutes a *status confessionis* for our churches, which means that we regard this as an issue on which it is not possible to differ without seriously jeopardizing the integrity of our common confession as Reformed Churches." Quoted according to Reformed World, 37, 1982, 76-80 (here 77 f.). Concerning the early history, compare *Nordholt* (1983).

22 Compare *Rothe* (1986), 92-102.

23 Compare *Weiße* (1984), the text of the resolution regarding the suspension can be found in the appendix.

it is not an appropriate development model, but a religious garnish of the worldly exercise of power, which is in addition characterized by systematic infringements of the law. In other words: in the course of recognizing, declaring and responding to a status confessionis and of the formation of a Confessing Church, political matters of discretion were not turned into theological ones but the misuse of the gospel for political aims within the church and against the unity of the church called for a confession, now indeed also in political questions, that is, in conflict with the state powers. In the second part, under the title 'Resistance', I will discuss the forms by which this conflict should be settled.

2. THE PROBLEM OF RESISTANCE

The question of a legitimate right of resistance has accompanied Christianity - as well as other religions - since its beginnings.[24] Hermann Dörries wrote a concise and impressive interpretative history of the clausula Petri[25] from which one can detect that Christians in each era were assigned anew to inquire about the limits of worldly powers and, if necessary, to draw consequences for their actions. For a short summary it must suffice to refer to three stages of this growth of tradition that should be decisive for present purposes and decisions: the Reformation, the rational natural law and the consequences that are significant in present EKD statements as a result of the experiences of the 'Kirchenkampf'.

2.1. Luther on revolt and resistance

With regard to the Reformation I select only Luther's statements[26], as the most restrictive directions in this matter can be found here. One can distinguish three stages in Luther's formation of an opinion. In a first phase at the

24 Fundamentally *Wolzendorff* (1916/1968), *Murhard* (1832/1969), *Kaufmann* (1972); latest review in *Schmude* (1987).

25 *Dörries* (1970).

26 Important documents in *Scheible* (1969); compare also the relevant case studies in *Wolgast* (1977) as well as *Scharffenorth* (1982), 238-276, and *Lienemann* (1982), 143-185. Concerning Reformed tradition, compare in respect of Calvin *Wolf* (1955), in respect of Danaeus, Althusius and Keckermann see in detail *Goedeking* (1977). In Mindolo (Sambia), Visser't Hooft in 1964 referred especially to the Confessio Scotica of 1560 which emphasizes in par. 24 the civic responsibility of obedience, while in par. 14 (on good works) it also emphasizes the command, "to save the lives of the innocent, to resist tyranny, to defend the oppressed"; compare *Visser't Hooft* (1967), 90 f, as well as concerning the Confessio Scotica the interpretation by *Barth* (1938), esp. 212 ff. Concerning the Mindolo- Consultation of the WCC compare *Nash* (1975), 262 ff.

beginning of the Reformation he warned against every form of violent self-assertion. In the small publication "A true admonition to all Christians to guard against revolt and rebellion"(1522)[27], he laid down three principles from which, as far as I am aware, he never deviated:
(a) Nobody can be judge in his (or her) own case.[28]
(b) Whoever begins a revolt or starts a war is in the wrong.
(c) That which is right, can and may only be brought about by lawful means.

Luther applied these three principles with regard to the question of resistance as well as to the question of war. The first principle is decisive for Luther; it must be seen against the background of the feudal justice of the late Middle Ages. Feuding opponents accepted no superior legal authority, so that justice was determined by the power of the stronger. To be judge in one's own case therefore means: justice is based on arbitrariness. For Luther this was practical atheism.

While these principles were based on an individualistic view of ethics, Luther, in a second phase after the 'Reichstag' in Augsburg (1530), argued more in terms of political responsibility, in the sense of the general duty of the sustaining of justice.[29] Even in March 1530 Luther had still denied the protestant estates the right of resistance and advised: "Let the country and the people be exposed as Cesar's own, and entrust the matter to God".[30] Violent means of defence in favour of religion had been rejected; only obedience and suffering to the point of martyrdom had been seen as possible. Afterwards Luther modified this position, through the influence of judicial arguments. Lawyers of his time advised him that *resistance* in the case of notoria iniustitia with the result of a gravamen irreparabile[31] was permissible according to valid imperial law, whereby persons exercising such resistance were not judges in their own cases, but in fact served the bringing about of justice.

In Luther's third phase, this line of thought led to the acceptance of a cura religionis on the part of Christian sovereigns and estates, in case the emperor should attempt to force the protestant estates to return to the former faith.

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27 WA 8, 676-687.

28 Concerning this principle, - compare Rom. 12, 19! - esp. *Maron* (1975).

29 Concerning the reasons for this new orientation, see *Wolgast* (1977), 154 f.

30 Expert opinion from 6.3.1530, German text in *Scheible* (1969), 60-63 (here 62): "Lasse dem Kaiser Land und Leute offen stehen als die Seinen, und befehle die Sache Gott an."

31 *Wolgast* (1977), 176.

This implies a right of resistance in favour of the lower authorities in their realm of responsibility.

Two principles with current significance arise from these controversies: (a) Resistance is absolutely illegitimate if it has as its aim the arbitrary establishment of new justice and law, but it can be necessary, if it is a matter of protecting justice against notoria iniuria by the public authorities. (b) If necessary, Christian office-bearers are justified to use violent resistance against interference in religious freedom and freedom of conscience. While in the first phase Luther stressed that in the case of arbitrary interference in religious freedom evil should not be resisted with violence, he later maintained this maxim with regard to individual Christians, but, with regard to the government, he relativized it, because their mandate also included the cura religionis and therefore the right to defend religious freedom against violent infringements if necessary with violence. This was of special significance whenever false doctrine, that is the faith of the papists, was to be introduced and enforced by means of imperial power.

These main features must finally be complemented and made more precise by three considerations. Firstly, it must be realized that Luther's point of departure in all these viewpoints was not the modern idea of an active subject who is alone responsible for the success and failure of his or her actions. On the contrary, he was deeply convinced that it is not human decisions and actions which determine history, but the sub contrario acting God.[32] The metaphor of the masks ('Larven'), of which the divine actions in history make use, is one expression of this eschatologically determined basic presupposition, which is certain that the worldly powers are powerless in the final instance. In this basic attitude Luther differs fundamentally from most modern social theories. Secondly, it should not be forgotten that for Luther the figure of the apocalyptic tyrant[33] also existed who destroyed all justice through unlimited arbitrariness. To restrain this tyrant was not only not forbidden, but required of everybody. Finally, it should not be forgotten that Luther certainly condemned every revolt, but he did not consider every infringement of the law - we would say: each case of civil, illegal disobedience - as revolt. Instigators were for him, in the strict sense of the word, rather people who did "not want to endure government and justice at all and who themselves wanted to be lord and to declare justice, as Müntzer did."[34]

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32 Compare *Lohse* (1982), 198-202.

33 *Lienemann* (1982), 168.

34 Here Luther distinguishes very carefully: "Auffrur ist nicht, wenn einer widder das Recht thut. Sonst müsten alle auffrürer, übertrettung des Rechten auffrur heissen. Sondern der heisst ein auffrürer der die Oberkeit und Recht nicht leiden wil, sondern

2.2. *Natural and rational law doctrines of resistance*

In the discussion about the question of the right of resistance too little consideration is given to the fact that, and the extent to which, Luther emphasized the characteristic of legitimacy. His view of authorities which is nowadays criticized as being authoritarian, is only adequatly understood if one sees it against the background of the basic principle that it is absolutely forbidden to want to be judge in one's *own* case. The respect for authorities rests therefore on an ethos in which the rule of law is accepted as the highest norm, to which those who are ruled as well as the ruler are similarly subjected. Furthermore, it must be realized from this that this law which everyone must obey is also seen as historically changeable. Especially Luther's interest in the great reform of the empire[35] is clear evidence for the fact that the possible evolution of the law was not foreign to him, and this especially with regard to those developments which restricted the power of the local and regional representatives of the government in favour of a central power orientated towards the common good.

Of course it may not be claimed that Luther was a forerunner of modern theories of social contract or a supporter of the doctrine of the sovereignty of the people. One may and should however ask whether it would not correspond to the intentions of Luther's legal ethics, if one recognizes Luther's principles in the legal doctrine of Kant. In the first instance one must here think of the principle of the universality of justice and law. Kant, too, regards the one-sided erection of 'justice' on the basis of actual power, that is, to help make oneself the highest judge in one's own case, as the essence of tyranny.

Besides Luther, I refer to Kant because his philosophy of law[36] is also the most important theoretical basis on which the decisions of the forerunners of the Constitution, the "Basic Law" of the Federal Republic of Germany are founded. Such a democratic constitutional state includes those legal standards that we as citizens claim for ourselves. It is therefore right and fair that we do not apply stricter standards in the establishment of the right of resistance in South Africa than we accept for ourselves. Here it would be going too far to review Kant's argumentation and demarcation in respect of the natural law

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greift sie an und streit widder sie und wil sie unterdrücken und selbs Herr sein und Recht stellen, wie der Müntzer thet." (Warnung an seine lieben Deutschen, 1531, here WA 30, 283). I refer to Luther in the German context of this book. - In respect of the Calvinist tradition (and Bonhoeffer's orientation) compare de Gruchy (1984), 91-122, and also Boesak (1984).

35 Compare *Scharffenorth* (1982), 205-220; *Günter* (1976).

36 See recently *Dreier* (1986) concerning Kant's teachings on law, see *Langer* (1986) concerning his political and institutional concept of reforms.

tradition[37]. I will only summarize the most important features by means of theses[38]:

(1) The basic human right is the right to live under a legal order. Especially the rule of law and the equality before the law constitute a legal status. The most important markers of this 'basic constitutional right' are, according to Kant, the independence of legislative, executive and judicial powers, and the freedom to criticise. Technically, the later so-called basic rights of the courts (judicial basic rights) also belong here (Habeas Corpus, legal judge, legal process of law).

(2) Kant distinguishes clearly between the natural state and the legal state. In the natural state privileges exist, effective power has priority over justice and there is arbitrariness in legal decisions (this corresponds to Luther's 'judge in one's own case'). According to Kant it is a duty to overcome the natural state through the establishment of a constitution.[39] This is only possible through the united will of the people.[40]

(3) The citizens owe obedience to a constitution once it has been established by themselves; resistance is illegal and unnecessary in so far as the freedom of public criticism and moreover the possibility of legal change is guaranteed. (In the case of Kant the ius emigrandi was added!)[41]

From this standard the following consequence results: it is to be asked whether the 'constitution' of South Africa is in fact a constitution which meets the minimal standards of a constitution in a constitutional sense. If this is not the case, the matter of the right of resistance does not arise, but it becomes a matter of duty first of all to establish a constitution.[42]

2.3. Criteria within the realm of the EKD in the appraisal of a right of resistance

With regard to Luther and Kant I have attempted to develop particularly narrow and sharp criteria in order to ascertain whether a nation may claim the right of rebellion against a de facto government. Finally, however, it is natural

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37 Compare *Köhler* (1973), 27-46.

38 Compare *Huber* (1978), *Lienemann* (1980) and *Lienemann* (1982), 214-229.

39 *Kant* (1797/98), §§ 41 f. (422-425); compare recently *Böckenförde* (1986).

40 Loc.cit., 432.

41 Compare *Spaemann* (1972), 234, who substantiates why the denial of these three criteria must "revoke the presupposition of justice in favour of the holder of public power".

42 *Kant* (1797/98), 430-434.

for members of the evangelical regional churches in the Federal Republic of Germany to inquire into criteria that were developed in committees of their own church and have found approval. In the memorandum "South Africa - Christian Faith and Resistance" of September 1982[43] there is a presentation and application of these criteria which take their point of departure from the list of theses published by the Commission of the EKD for Public Responsibility on "Violence and the use of violence in society". This argument has existed for years, so that it therefore suffices to quote the decisive tenth thesis of the commission for Public Responsibility:

"Because of its inherent dangers, the use of force requires the assumption that, without it, any change in human living conditions is impossible. It can only be seriously envisaged, therefore, when all other ways of improving conditions have failed or at least offer no real prospect of success. But even then, there are other conditions to be met: a practicable conception of a new viable order must be available, capable of replacing the old contested order. The order being striven for must itself be governed by the idea of human rights and also guarantee room for the former oppressors to live. The use of force must offer a reasonable chance of achieving the clearly defined goal, namely, to replace the present tyranny of violence in a foreseeable future."[44]

3. The Legitimacy of the Political Order of the Republic of South Africa

"Scripture tells us that, in the as yet unredeemed world in which the Church also exists, the State has by divine appointment the task of providing for justice and peace. (It fulfills this task) by means of the threat and exercise of force, according to the measure of human judgement and righteousness, and thereby the responsibility both of rulers and of the ruled. It trusts and obeys the power of the Word by which God upholds all things." These words of the 5th thesis of the Theological Declaration of Barmen[45] evidently do not opt for a specific form of government. The thesis nevertheless presupposes the legitimacy of the state's monopoly on power and immediately binds its execution to the criterion of establishing justice and peace. - When we inquire into the legitimacy of the political order of South Africa against this background, it is a matter of examining whether and to what extent the mandate of a legitimate political order to establish justice and peace can be generally used under the real circumstances in South Africa. The question to be asked is therefore not in the first instance about the actual occurrence of discrimination, arbi-

43 Compare foot-note 2 above, and in the appendix of this volume.

44 Gewalt und Gewaltanwendung (1973), 28, compare this volume, p. 235.

45 Concerning Barmen V, compare esp. *Huber* (1983), 95-112, and *Jüngel* (1984).

trariness and violence in Southern Africa, but whether there are in fact constitutional-legal and constitutional-political conditions and principles to be identified that could substantiate a claim to political legitimacy. This approach originates mainly from the intention to discuss also with the representatives, who still have to be taken seriously, of a (primarily white) 'policy of reform', the legal basis of so-called 'reforms'.

The following discussion of constitutional issues can of course not be limited to the explanation of the dominant constitutional principles, but in a second step must include, in respect of the question of citizenship, the development of homelands and the accompanying empirical issues of the constitutional reality. In doing that I will adhere strictly to the present constitution; the reader should, however, remember that from the start the black majority of South Africa is not part of the sovereign of the constitution.

3.1. The Constitution Bill of 1983

On the basis of the previous deliberations one could argue as follows: the central condition of Kant for the legitimacy of a political order which is the establishment of a constitution according to legal principles has been fulfilled in South Africa since 1983; it is now a matter of the citizens' willingness to obey this legal order. Does this thesis agree with the constitution of South Africa?

First of all it must be stated that with the Constitution Bill of 1983, the Westminster parliamentary model was, at first sight, partly abandoned in favour of the continental type of constitution[46], that is, in favour of a fundamental political order which is put down in writing, is binding and can be put in question before a court of law. Furthermore, it can be established that according to form and content this Bill is not to be a document that might be revised arbitrarily, but that it claims to represent a generally binding basic order. The decisive question is: have we got the outline of a *legal order* in front of us?

According to the form and the first impression this question can be answered in the affirmative. Although the structure of the document[47] is complicated, the text contains without doubt important elements of a constitution. How-

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46 Concerning the Constitution of 1983, compare the outline by *Welsh* (1986).

47 The following is based on the official English version, equal to the Afrikaans version, but decisive in case of a conflict of interpretation; compare *Rudolph/Mureinik* (1983), 3 f. The text is easily accessible in the appendix in *Pretorius* (1984). - Concerning the question of the validity of language versions, compare Zimmermann (1983), 47 f.

ever: one can show from the decisive principles of construction that this is only an illusion. This needs to be explained.

a) Presidential Constitution

The Constitution Bill of 1983 replaced the Republic of South Africa Constitution Act of 1961 with which the South African Union had constituted itself into the Republic of South Africa on 31 May 1961.[48] While the consolidation of the British Colonies of the Cape, Natal, the Orange Free State and the Transvaal took place on the basis of the law of the English Parliament on which also the Statute of Westminster (1931) and the "Status of the Union Act" (1934) were based, a formal transition from Westminster to a Presidential Constitution with a unique character took place between 1961 and 1983. Important information on the early history of the constitution since 1973 can be found in the contributions by Hahlo/Kahn (1973), J.L. Pretorius (1984) and K.v.d. Ropp (1984) and need not be presented here. A point of departure was the intention to involve the so-called "coloured" group to a greater extent in making political decisions; the outwardly most important results were the extraordinary strengthening of the position of the State President, the institution of a President's Council as well as the formation of three chambers of Parliament. In short, this constitution serves to find an answer to "The Botha Quest: Sharing Power without Losing Control".[49]

48 Compare *Delbrück* (1971), 211-218.

49 *Giliomee* (1983).

PLAN OF THE CONSTITUTIONAL ORDER OF 1983

State President
(term of office as for Parliament)

Cabinet (chairmanship President)

*members can be appointed by the State President from all three groups
*executive body for affairs of general interest

Council of Ministers

*one for each respective group
*members have the majority in their chambers
*executive body for group affairs

President's Council - 60 members:

20 chosen by House of Assembly	25 appointed by State President 10 of these are reserved for the Parliamentary opposition	10 chosen by House of Representatives	5 chosen by House of Deputies

Electoral Council (elects the President) - 93 members

55 elected by House of Assembly	25 elected by House of Representatives	13 elected by House of Deputies

Parliament

House of Assembly (Whites) 178 members	House of Representatives (Coloureds) 85 members	House of Deputies (Indians) 45 members

common standing committees
- whose members
*belong to all three chambers
*strive for agreement amongst the chambers

The attached diagram shows that the parliament as the foundation of this order is divided into three chambers: of the Whites, of the Coloureds, of the Indians. A Three Chamber System of course can be a legal one; even a final decision through a casting vote by the President of the Republic or by the President's Council may be be legal in principle. We must therefore inquire about the legitimacy of the individual provisions and how they relate to one another.

b) General Principles

The largest number of paragraphs of the Constitution Bill are devoted to organizational and procedural issues. The text is conceived in the first instance as being "an instrument of government in the narrow technical-organisational sense of the word".[50] It is not a constitutional law which lays down the basic principles of a legal order that would be binding on all bodies of the state. Although a Bill of Rights would not be indespensable for this, its absence is noteworthy enough.[51] As is the case in the United Kingdom, the general constitutional principles have to be developed from the unwritten common law if necessary, but such a recourse by a judge could be lastingly impeded by the declared departure from Westminster. In this respect the Constitution Bill contains practically no basic legal standards that would be absolutely binding; Pretorius cautiously speaks of "a lack of normative circumscription of powers and functions and a broad scope of institutional manoeuvrability".[52]

To this must be added that it is almost impossible to determine who the sovereign is according to this order. The Constitution Bill does not contain even a rudimentary idea of a sovereignty of the people. It is even impossible to say whether Parliament will exercise the function of sovereignty.[53] For in the first place there is in no sense a Parliament that could represent the united will of the *people* (in the sense of, for example, all inhabitants who are eligible

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50 *Pretorius* (1984), 526. In essence, the South Africa Act of 1909 and the Republic of South Africa Constitution Act of 1961 also contained only the constitutional right of organization; compare *Delbrück* (1971), 211 f., and *Hahlo/Kahn* (1973).

51 A motion by the Progressive Federal Party to include a section on Basic Rights was at that time rejected; compare *Welsh* (1986), 57.

52 *Pretorius* (1984), 527.

53 *Rudolph/Mureinik* (1983), 7 write: "...the sovereignty of the South African Parliament, taken as a whole, is being deluted inasmuch as power is now being given to a non-elected body outside Parliament in effect to make laws and to resolve deadlocks over the head of Parliament." Compare also *Welsh* (1986), 56. With this, the Parliamentary sovereignty of the South Africa Act of 1909 and of the Constitution of 1961 is completely undermined; concerning the previous constitutional situation compare Delbrück (1971), 212-215.

to vote), but only three 'Houses'; their ratio is so regulated in the organizational part that no decision can be taken against the will of the white 'House'. Of more significance is, however, secondly that Parliament - be it as a whole, or only as the 'House' of the whites - can only be considered as being sovereign in a very limited sense, but rather finds itself dependent on the President in decisive issues (election of President, law initiative, regulation of conflicts).

The third decisive principle of construction of this order lies in the distinction between general affairs and own affairs as well as the concomitant legal and judiciary results. 'Special' ('own') affairs concern the issues which are of special significance to the maintenance of the way of life of a particular population group; everything else is seen as 'general' affairs. Section 16 and 17 of the Constitution Bill mention these provisions without defining what is meant. Only in the appendix to the Constitution Schedule 1) are own affairs listed (social and health services, education system, water supply etc.[54]), but even here there is no clear demarcation. The right to classify all political issues according to these categories lies in the hands of the President of the Republic *alone*. Doubtless this is extremely precarious (especially as all important budget issues are generally reserved as general matters for the white House), but need not automatically be injust. Therefore the decisive question is: where do the legal limits of the authority of the President lie?

c) The Constitution Bill as Enabling Act of the Presidential Executive

As has been shown, the constitution is a presidential constitution, that is, it provides the President with considerable power. This need as such not be harmful to a constitutional state; France was a constitutional state under de Gaulle, and in the USA it was even possible to force President Nixon to resign by impeachment. In the Republic of South Africa, however, the magnitude of Presidential power is without precedence, on the basis of a combination of competences that are granted by virtue of office and of competences that automatically accrue to the President by procedural regulations. In effect nobody can become President who is not supported by the majority of the

54 The passage about finance issues being 'own affairs', ends with the decisive proviso "... but excluding the levying of taxes and the raising of loans" (Schedule 1, no. 12)! Concerning the fundamental significance of the distinction 'general'/'own affairs', compare also *van der Vyver* (1985), 332, who states: "The legislature in essence gave the State President the authority to arbitrarily label any matter as either an 'own affair' or 'general affair'."

white voters.[55] However, whoever is supported by *this* majority possesses quasi-dictatorial authority without having to use and present his or her power in this precarious form. This person can at all times fall back on a confusing diversity of most differing jurisdictions. Decisive are (a) the already mentioned jurisdiction of distinguishing 'general affairs' from 'own affairs' (Sect. 18) and (b) the amount of power of the President's Council (Sect. 72-80). In the case of diverging votes by the Houses of Parliament the decision is referred to the President's Council, whose composition in its turn substantially depends on the President.[56]

Furthermore, the following apply amongst other things to the President: he is the Commander-in-Chief of the South African Defence Force (SADF); he appoints the times for the holding of sessions of Parliament and can dissolve Parliament; he has the right of speech in all three Houses (Sect. 7); if the Houses want to pass differing and/or conflicting laws, he can convey these laws to the President's Council for its decision; if it approves a law, it is regarded as having been accepted also by that House which has previously rejected it (Sect. 34); he can only reject a law if it violates the constitution, but he can turn back any bill with amendment proposals (Sect. 35); he determines the sessions of Parliament - but there shall be at least one per year - and he can adjourn sessions (Sect. 40). In Sect. 41,1 the legislative period is stipulated to be 5 years; the President *may* dissolve Parliament or one of the Houses *at any time*, he *must* dissolve them if they introduce a motion of no-confidence or reject budget bills (Sect. 41,2 and 3); he appoints 4 Members of Parliament of the House of Assembly; two of the Houses of Representatives and Deputies respectively (Sect. 43-45); he can lay down rules for the indirect election of the representatives, who are elected by the Houses (Sect. 48); he can decrease the percentage number for the quorum of the Houses (Sect. 63, 2 a); he can summon a House for the execution of duties (Sect. 68), convene special sessions of the Houses (Sect. 69); he appoints 25 of the 60 members of the President's Council(see above) and determines the allowance for the members (Sect. 75,1) etc. etc. This list shows that the constitution is directed to the concentration of power in the President's hands. A compensating factor like the "countervailing powers" in the USA is completely absent.

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55 To the election committee that elects the President belong members of all three Houses of Parliament with the following distribution of seats: 50 whites (House of Assembly), 25 coloureds (House of Representatives), 13 Indians (House of Delegates); compare Sect. 8. The proportion 4:2:1 comes up time and again; it secures white majority decisions everywhere.

56 Added to the 4:2:1 relation of members (20:10:5), are another 25 members in the President's Council which the President himself appoints (Sect. 72).

d) The absolutistic arbitrary character of the Presidential Executive

The constitution contains a very concise passage (VII.) about the Administration of Justice. Its jurisdiction is, however, not only limited by two short provisions, but it is in effect made meaningless while it does not have the competence and power to examine the compatibility of laws with the constitution. Sect. 20 and 36 state that the decisions of the President or of Parliament are not to be made accessible to any judicial examination. The provisions are constructed exactly parallel, even in the wording: "No Court of Law shall be competent to inquire into or pronounce upon the validity of a decision of the President that matters mentioned .../of any Act of Parliament ...". With that all possibility of a constitutional jurisdiction falls away.[57] Also the classification of own affairs and general affairs - at least in cases of uncertainty - which decides everything else and which constitutes the fullness of power of the President is therefore exempt from any investigation into its legitimacy.[58] There can be no appeal to the courts. A President who is supported by the majority of whites therefore complies, on the basis of Sect. 20, with all the characteristics of tyranny by a lack of judicial control: such a person is irreprehensible, unappealable, infallible.

e) Absence of a constitutional court and jurisdiction

No part of the judiciary in South Africa has the power to verify effectively the compatibility of a decision of the state bodies with provisions of the Constitution Bill or with standards of human rights of the community of nations or with the unwritten traditions of Common Law. A constitutionally legal or administratively legal control of decisions and actions of the executive is practically only possible in individual cases[59]; a suit to test compatibility of laws with the constitution, for example, is incompatible with the logic of this 'order'. There is no opportunity for complaints against unconstitutional laws. Admittedly, such a possibility of appeal is also not possible in the classical judicial system of Great Britain on the basis of the principle of the undivided sovereignty of

57 *Delbrück* (1971), 214. As far as I am aware, the Constitution of 1961 withheld only the decisions of Parliament from legal investigation (Sect. 59, 2).

58 *Van der Vyver* (1985), 332 f. and 336 f.

59 The observation of *Wiechers* (1979), 192, still stands; "Im südafrikanischen Verfassungsrecht bekleidet die Verfassungsgerichtsbarkeit keine zentrale Stellung, weil die Gerichte traditionell dem Parlament unterstehen und nicht über die Gültigkeit der Gesetze entscheiden dürfen." Compare also *Zimmermann* (1983), 28 ff., esp. 32 f.

Parliament as defined by Common Law[60]; in view of the completely different sovereignty in South Africa and the effectively sharply curtailed competences of the Houses of Parliament, a further exemption of the (white) legislative and executive power from all indispensable investigation possibilities in regard to the legality of their actions follows from these conditions.

f) Exclusion of the black population

Against every well-meaning presupposition of a constitutional state regarding the Constitution Bill, there is the striking but simple fact that the majority of the people, the black population, is totally excluded as a part of the united will of the people. Only in Sect. 93 of the 'Constitution' under the heading "Administration of Black Affairs" is this majority of the inhabitants of the country mentioned. That means: this 'Constitution' is not a constitution which a nation has or could have chosen for itself, but the usurpation of the 'right' by a minority. What follows from this for the constitutional and ethical legitimacy of the state will be discussed in more detail in the following passage.

3.2. The Homeland Policy and the Constitution of South Africa

Sect.93 of the Constitution determines:"The control and administration of Black affairs shall vest in the President". The political rights of the black population are not mentioned further, because according to official government opinion, blacks are in principle considered as 'citizens' of 'independent national states'. What significance can be attached to this 'legal' provision, for the investigation into political legitimacy? The homeland policy[61] constitutes the basis of the legal status of the black population in South Africa. Its most important judicial aids lie in the administration of the provisions of citizen-

60 "The expression 'The Sovereignty of Parliament' means that Parliament ... can pass laws on any topic affecting any persons, and that there are no 'fundamental' laws which Parliament cannot amend or repeal in the same way as ordinary legislation", thus *O. Hood Phillips*, The Constitutional Law of Great Britain and the Commonwealth, London, 2nd edition 1957, quoted according to *Granow* (1962), 530, together with footnote 6. Compare also *van der Vyver* (1985), 296-299; the same (1982), whose hopes of that time were, however, not fulfilled by the Constitution of 1983.

61 Current informations in Race Relations Survey 1985, 257-326; as introduction, compare Human Rights in the Homelands, ed. by Fund for Free Expression, New York June 1984, and *Dugard* (1980).

ship[62]; the political object lies in the efficient control of the black majority of the total population. The ingenious mechanism of this control is made up of the fiction of state 'independence' of the homelands on the one hand and the 'legally' extensive far-reaching uncontrolled yet planned and partly indirect, partly direct oppression of the blacks on the other hand. This form of oppression in the guise of fictitious legal structures, which occurs hardly disguised and yet almost unnoticed by the news media[63], must be briefly portrayed:

a) The historical prerequisites of the homeland policy were created by the 'Native' Laws since 1894; these laws[64] - Glen Grey Act 1894, Native Land Act 1913, Native Administration Act 1927, Representative of Native Acts 1936, Bantu Authorities Act 1951, Promotion of Bantu Self-Government Act 1959, Bantu Homelands Citizenship Act 1970, Bantu Homelands Constitution Act 1971 - are legally independent from the Constitution of 1983 and of the previous fundamental order relating to constitutional law. All these laws that have regulated the administration of black areas since 1927 distinguish themselves in this way, that they transfer extremely far-reaching powers to specific authorities in the homelands without subjecting them to an effective legal control.

b) The Sebe-regime[65] in the Ciskei, the broken rule of the Matanzimas in the Transkei[66] as well as the presidencies of Mpephu in Venda and Mangope in Bophutatswana[67] are the most well-known examples of the establishment of arbitrary rule under the label of apparent release into 'independence'. Also the example of Lesotho has shown that it is possible for Pretoria to replace an

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62 I only realized with time that the laws and ordinances which regulate the citizenship of the inhabitants of South Africa are a decisive instrument for the maintenance of apartheid. Whoever decides about citizenship, determines who has a part in civil equality. It might therefore be permitted to point out that right at the beginning of Western practical philosophy this insight existed, when Aristotle in the third book of his 'Politics' defines the status of the citizen as participation in judging and governing: his special characteristic is that he shares in the administration of justice, and in offices; 1275 a 22, transl. by B. Jowett. (1275 a 22). More detail about this, par. c. below.

63 Practically no information on the homelands can be found in the news media outside South Africa. Under the conditions of the state of emergency which was declared in South Africa on 12.06.1986, the opportunities of reporting news have further deteriorated.

64 Compare *Sodemann* (1986), 80-84, Human Rights in the Homelands (1984).

65 For a penetrating analysis, see *Lelyveld* (1986), 178-210.

66 Compare *Haines/Tapscott/Solinjani/Tyali* (1984), as well as the other relevant Carnegie Conference Papers (no. 43-49).

67 Compare *Thomashausen* (1984), *Keenan* (1986).

unpopular government in a relatively short time[68]. Without doubt, it appears that state sovereignty is transferred to the homelands; Pretoria tries to create this illusion, partly through the fact that formal responsibility for relations with the homelands lies with the Ministry of Foreign Affairs and that the homeland representatives are treated according to protocol (and, provided with passports of the Republic of South Africa, it is arranged that, if possible, they are also treated internationally like this). However, in actual fact these 'independent states' are nearly totally dependent on the Republic of South Africa in just about all matters. They are not only completely unable to survive on their own economically because of their territorial fragmentation, their overpopulation in terms of numbers and their agricultural as well as industrial underdevelopment, but as a rule most of the South African laws also remain in effect in the homelands[69], though in such a way that their repressive function is intensified, while legal protection is reduced. Nicholas Haysom (1985) pointed out to what extent the labour legislation in the homelands contributes to taking away the rights of the workers, and that the jurisdiction is still in the hands of the whites and the highest Appellate Court was, up to a short time ago, the Appeal Court in Bloemfontein (death sentences of homeland courts were executed in Pretoria[70]). Against this background, it goes almost without saying that the security legislation and the security apparatus of the Republic of South Africa also operate in the homelands[71] unhindered; in some cases one also comes across ex-Rhodesian mercenaries.[72] Especially the administrative and security 'laws' of the homelands are distinguished by such undefined terms and general powers of attorney that in fact a permanent state of emergency prevails in the 'independent national states'[73]. Although Pretoria established these structures, maintains and, if necessary, supports them militarily, it exempts itself from any legal responsibility for the actions of its proxy rulers. When a few years ago the Lutheran Dean of Venda, Farisani, gave an account

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68 Compare *Kühne* (1986), 36 f., who emphasizes that, with regard to the neighbouring states, Pretoria's main aim is to eliminate the ANC.

69 This is also not changed by the fact that the homelands have 'constitutions'; the texts in *Vorster/Wiechers/van Vuuren* (1985).

70 *Haysom* (1985), 37. According to Weekly Mail of 23.10.1987, 14, death sentences are also passed and executed in the homelands. - Statistical data about the execution of the death sentence, which probably in no country is passed as often as in South Africa, can be found in Race Relations Survey 1985, 475-478. According to this, 97 blacks, 35 coloureds and 5 whites were executed in 1985.

71 Concerning this complex (Security), compare Race Relations Survey 1985, 414-529.

72 *Haysom* (1985), 39.

73 Compare the proclamation R 252 on the Administration of the Ciskei of 1977, in: Human Rights in the Homelands (1984), Appendix II, or the Law on Public Security in the Transkei, loc.cit., 42 f.

of his tortures while on a trip to the USA, David Sole, then South African Ambassador, declared:" South Africa does not interfere in the affairs of an independent country."[74]

It is evident that the homelands have not been released into 'independence' as defined by constitutional or international law. This Orwellian distortion of language cannot disguise that it is in fact exactly the opposite: the internal recolonization of a country that is in part systematically based on plain criminal cliques. In the place of protection of justice and peace, therefore, there exists the safe-guarding of the domination by a minority through collaboration of the 'state' with organized crime.

c) What makes people become citizens of a homeland under these circumstances? The answer is simple: not voluntarily, but by breach of law, and violence by the state. This thesis will be briefly exemplified.

Par. 15 of the General Declaration of Human Rights of 1948 states (2nd sentence): "Nobody may be revoked of his citizenship arbitrarily nor may the right be denied him to change his citizenship." Par. 16 I of the Basic Law of the Federal Republic of Germany states: "No one may be deprived of his German citizenship." (In addition, in 1968 the Federal Constitutional Court declared the deprivation of German citizenship for Jews from 1941 ex tunc null and void.) Through homeland legislation, South Africa on the other hand, adopted a course whose goal lies in the fact that all black Africans are to become citizens of 'independent' national states. In place of legal discrimination on the grounds of racial characteristics, they will now only have the normal rights of foreigners in a South Africa with a (future) white majority. The necessary means for this end is the forced expatriation of, if possible, all blacks into one or other of the homelands. According to judicial convention, apartheid contradicts human rights[75] and international law[76]. In so far as the prohibition to intervene of the UN-Charter cannot be applied to South African liberation movements[77], the fixation of a 'separate development' of 'sovereign' states with the help of the national right of foreigners would in the opinion of official South African authorities eradicate the blemish of apartheid, without endangering white rule. The Johannesburg jurist, John Dugard, in particular, has repeatedly pointed out that the South African government has only two options in view of international ostracism: "It can either extend

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74 Quoted according to Human Rights in the Homelands (1984).

75 Fundamentally *Dugard* (1978).

76 Recently *Delbrück* (1987); in detail *Delbrück* (1971).

77 Compare *Ginther*, in this volume p.71, as well as *Partsch* (1973), passim.

equal political rights to its black nationals or it can ensure that there are no blacks with South African nationality able to claim such rights."[78] Since 1970 the government has definitely chosen the second option, so that each black person who previously had South African nationality will now become a 'citizen' of an ethnic homeland, to which she or he is connected by birth, language or cultural bond or to which she or he could be attributed, even if the person concerned has never lived there or possibly even has no relatives there. C.P. Mulder, previously Minister of 'Bantu Administration', declared in Parliament in 1978: "If our policy is taken to its logical conclusion, as far as the black people are concerned, there will not be one black man with South African citizenship."[79]

This system that was formulated by the former Prime Minister Verwoerd was indeed time and again confronted by difficulties. A complete territorial and civil separation is not practically feasible. Here the South African regulations for the right of nationality intervene in a complementary manner. The basis is the distinction between nationality and citizenship.[80] According to this, 'nationality' is only a formal classing of a person with a certain state, without thereby establishing reciprocal rights and duties. Citizenship is therefore the civic status activus of which the positive-legal regulation is a matter of state legislation. The most important principles that are common to both provisions and thereby control the acquisition of citizenship are conventionally the ius sanguinis (citizenship by virtue of descent) and the ius soli (birth in the national territory).[81] In South Africa these principles are substituted by the regulation of citizenship by means of a plethora of laws and ordinances[82], whose essential characteristic and object lie in the reservation of the full rights and responsibilities of citizenship for the whites, therefore keeping the majority from the participation in judging and governing of which Aristotle spoke[83],

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78 *Dugard* (1984), 5 f.

79 House of Assembly Debates, vol. 12, col. 579 (07.02.1978), quoted according to *Dugard* (1984), 6, foot-note 11.

80 I am not aware of a systematic presentation of this fundamental complex of questions. Compare, however, the productive basic explanations about constitutional and international law by *Strydom* (1985).

81 *Rust* (1987). Of course, this material contains, also in Germany, an abundance of absurdities so that *Denninger* (1973), vol.1, 168, spoke of an "Irrgarten des (gesamt-) deutschen Staatsangehörigkeitsrechts".

82 Compare recently the Restoration of South African Citizenship Act of 2 July 1986, in: Government Gazette vol. 253, no. 10327, which was supplemented by the introduction of identity documents for permanent and lawful residents; the documents are the same for all and can also be issued to foreigners, yet in no way establish citizenship.

83 See foot-note 63 above. Concerning the history of the terms 'Bürger' and 'Staatsbürger' (freeman-citizen), compare *Riedel* (1972).

and thereby perpetuating continually the difference between free-born on the one hand and slaves and citizens without full civil rights on the other[84].

There is no completely unanimous opinion amongst scholars of international law on the question whether a government violates international law if it revokes the citizenship of citizens. Yet it is evident and substantiated by manifold statements that South Africa only wants to circumvent and disguise the manifest internal racial discrimination by this denial of equal civil rights through expatriation and the apparent replacement of the policy of apartheid by a 'normal' right of foreigners. Whether this is a case for the International Court of Justice, as Dugard believes, I cannot assess. In any case, this policy of expatriation must be seen in connection with the above comments on the legal situation of the homelands. Then it becomes clear that the systematic expatriation is part of an extensive strategy to revoke all rights of the black majority as equal citizens in South Africa.

d) I confined myself, on purpose, to legal aspects and did not go into detail about the actual coercive measures such as resettlement[85], arbitrary establishment of boundaries, vexatious application of the pass laws etc. In any case, it is clear with regard to this that the effective enforcement of 'grand apartheid' by means of the policy concerning homelands and foreigners is also made possible by the fact that state administration of the systematic despotism towards the black majority cannot be restrained by any administratively and constitutionally legal control.[86] Judicial help in individual cases, however admirable and worthy of support, can change nothing about this unjust structure as a whole. In this sense the Republic of South Africa is not capable of being reformed by a federative legal solution; such a 'solution' would only help to conceal to many observers the despotic character of a minority rule which even relies on forms of organized crime.

e) Some further comments about the continued apartheid laws: The Constitution Bill does not comment explicitly on the question of the ongoing validity of the older legal provisions and laws. However, the unimpaired validity of all the former laws and ordinances is presupposed, in so far as they have not been

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84 An informative breakthrough of this tendency can be found in the naturalization provisions for foreigners, who are fit for military service; compare *Thomashausen* (1983).

85 Concerning this, precise and detailed information can now be found in *Platzky/Walker* (1985).

86 There is no special administrative jurisdiction in South Africa; infringements by the executive can therefore only be sued case by case in different courts, and indeed only with regard to formal and procedural errors. Moreover, strict rules of contempt-of-court complicate the possibility of querying judicial decisions, thus *Zimmermann* (1983), 34.

amended or repealed by conventional procedure. A current review of the relevant provisions is conveyed in German by Sodemann (1986). It is, moreover, appropriate to distinguish between laws that concern racial segregation as such, and laws that regulate the security system as a whole.[87] While the former, in pursuing the homeland policy as it was outlined above, are planned in such a way as gradually to lose their function within the Republic of South Africa, because and in so far as racial segregation will be legally externalized (I suspect in any case that this is ultimately unfeasible), the security legislation is formulated in such a way that the state of emergency in fact becomes a permanent condition.[88] This condition is based on the extensive powers of the executive on all levels which, in addition, are subject to no legal control of the administration, and has its strategic peak in the almost total immunity of the members of the security forces (the military, police, secret services) in the face of criminal prosecution[89]. In case a court accepts a relevant suit or possibly demands a repeal of a government measure, the executive has through retrospective laws all the possibilities of subsequently creating the appearance of legality of the amendments and ordinances, which then become unassailable in terms of the positive 'law'.[90] While, finally, the security forces in other dictatorships operate extensively in a realm of arbitrariness, the indemnity of the members of these services is in South Africa even 'legally' secured. Thereby, it cannot even be clearly demarcated that this only applies to their actions in the execution of their duties, but members of the National Security Management System (NSMS), in particular, can at all times intervene at their own discretion. (The structure of this 'shadow'-system would be worth a detailed analysis, that could show that and to what extent semi-state

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87 The Annual Survey of South African Law informs in review articles about current law development; *Rudolph/Mureinik* (1983) and *Rudolph* (1984), in particular, after the coming into force of the Constitution. (I could not consult later articles, especially not concerning the state of emergency since 12.06.1986.)

88 The Race Relations Survey 1985, 455-463 is informative about the Emergency Regulations; their foundation was the Proclamation in the 'Government Gazette' in 1985, vol. 241, no. 9876 of 21.07.1985. This text as well as the Declaration of the State of Emergency of 12.06.1986 distinguish themselves through detailed individual provisions, which together with the regulations by the Minister of Justice that are often passed in retrospect, result in unrevokable uncertainty of their legal position for each member of the opposition.

89 Compare § 16 of the Declaration of State of Emergency of 12.06.1986.

90 The Association of Law Societies of the RSA protested with two memoranda against the Public Safety Amendment Bill and the Internal Security Amendment Bill; text in: De rebus. The SA Attorney's Journal, July 1986.

executive power can be carried out in private form without any legal control.[91])

It is on purpose that I did not choose as point of departure of these deliberations the well-known examples of the daily oppression, humiliation and revoking of rights, but have tried to analyse the basic system of the unjust order caused by the 'law'. The analysis has shown that the situation in South Africa is not at all adequately described, if only the continuous, grave and limitless violations of human rights (which as such could already substantiate the right of resistance, see above) are emphasized. Rather, it must be realized that the legal system constitutes in its foundations, as well as in general, a perversion of the concept of law (this does not have to mean that absolute arbitrariness rules in civil and criminal law, but rather, that, in principle, political viewpoints can at any time arbitrarily override legal provisions). From these observations one can only conclude: the Constitution Bill depicts only the appearance of a constitution. In reality, it is the pseudo-constitutional wording of an *Enabling Act* ("Ermächtigungsgesetz") of the whites in South Africa.

4. Consequences for the ecunemical churches of the ecumenicity

If my description of the South African 'constitution' and legal situation is correct, then the preamble of the Constitution Bill has a special significance for the position of the churches in this regard. The result of my investigation was that, against the background of Luther's and Kant's strict legal ethics, the South African 'constitution' represents a perversion of justice. If this constitution appeals to the name of God in its preamble, it becomes a blasphemy. This is a harsh judgement and needs detailed substantiation. The preamble reads literally:

"IN HUMBLE SUBMISSION to Almighty God; Who controls the destinies of nations and the history of peoples; Who gathered our forebears together from many lands and gave them this their own; Who has guided them from generation to generation; Who has wondrously delivered them from the dangers that beset them; We declare..."

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91 The most comprehensive analysis known to me was given by *Harber* (1986). In an unpublished manuscript J. S. Pobee (1987) most appropriately compared this system of private power with the 'herrenlose Gewalten' of which *K. Barth* (1976), 363-399, speaks.

It is evident that the representation of the 'great deeds of God' (Acts 2,11) is exclusively claimed by and for the whites in South Africa. This means that the "Constitution" of the RSA, following its predecessor of 1961, is the first and only document in world history that degrades the Father of Jesus Christ whom the Christians profess to be 'creator of heaven and earth' to a tribal god. The fathers of this constitution raise themselves thereby, in Luther's words, ultimately to judges in their own case and for this lay claim to the God of Christianity.

I must admit that for a long time I did not fully realize these aspects of the constitution. Perhaps I have exaggerated some aspects. I do not think that I have to retract anything concerning the essence, namely the degradation of God to a guarantor of one-sided privileges. What follows from this? In conclusion I would like to summarize the consequences in four theses:

(1) Church community with people who proclaim such blasphemies as being Christian is impossible. No doubt, many white South Africans know as little about their constitution as most of the citizens of the Federal Republic of Germany know about the Basic Law. Yet, it still applies that with this form of political theology no co-existence is possible.

(2) The churches of the Christian world must clearly state towards the national servicemen of the RSA that their military service is under the circumstances unjust.[92] The use of the army against the majority of the nation whose rights are 'constitutionally' revoked is a crime. Christian churches confessing something of the kind will have to commit themselves to granting political asylum to the conscientious objectors of the Republic of South Africa.

(3) According to Luther's criteria, the pre-Kantian natural law, and the relevant statements of the EKD, resistance under present circumstances is not only possible, but called for. Speaking in Kant's categories, the people of South Africa, irrespective of its races and colours, have the right and responsibility to, first of all, decide on a constitution which formulates the principles of a legal order for all.

(4) Christian churches should acknowledge that the Freedom Charter of the ANC of June 1955 contains the outline of a constitutional project that includes the necessary conditions for a legal and peaceful order.[93] Talks with

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92 Compare the contribution of *Grohs* in this volume.

93 Concerning this, compare in greater detail the contribution on the Freedom Charter in this volume.

representatives of the freedom movements as well as with representatives of the white minority can orientate themselves by the Charter.

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