

	<u>Paragraphs</u>	<u>Pages</u>
The bearing of the definition of "discrimination" in Article 1, paragraph 1, of the Convention .....	510-520	223-227
The nature of obligations assumed under Convention No. 111.....	521-523	227-228
The significance of recent judgements of the European Court of Human Rights .....	524-526	228-229
Inherent job requirements - applicability of Article 1, paragraph 2, of Convention No. 111 to the measures under consideration in the present inquiry .....	527-573	229-243
Implications of variations of policy and practice among different authorities within the Federal Republic .....	540-545	232-234
The effects on the functioning of the public service of activities on the basis of which it has been sought to exclude particular individuals from the public service .....	546-553	234-236
Application of the provisions on the duty of faithfulness as a preventive measure to ensure the functioning of the public service in times of conflict or crisis ..	554-556	236-237
The undifferentiated application to all officials of the duty of faithfulness ...	557-565	237-239
The special situation of teachers in regard to the duty of faithfulness .....	566-572	239-242
General conclusion regarding the application of Article 1, paragraph 2, of Convention No. 111 .....	573	242-243
Activities prejudicial to the security of the State - applicability of Article 4 of Convention No. 111 to the measures under consideration in the present inquiry .....	574-581	243-245
Recommendations .....	582-594	245-248
Dissenting opinion by Professor Parra-Aranguren .....		249-251
Observations by the Chairman and Professor Schindler .....		252-253
APPENDIX I: Text of the substantive provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) .....		261-262
APPENDIX II: Provisions of the ILO Constitution relating to Commissions of Inquiry ..		263-265

## CHAPTER 1

### EVENTS LEADING TO THE ESTABLISHMENT OF THE COMMISSION

#### Representation made by the World Federation of Trade Unions under article 24 of the ILO Constitution

1. By letter dated 13 June 1984, the World Federation of Trade Unions (WFTU), referring to article 24 of the Constitution of the International Labour Organisation, submitted a representation to the International Labour Office alleging that the Government of the Federal Republic of Germany had failed to fulfil the obligations incumbent on it by virtue of its ratification of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).<sup>1</sup> The WFTU stated that the non-observance by the Federal Republic of Germany of its obligations was the result of discriminatory practices applied to public servants and candidates for public service posts in respect of recruitment, extension of service or dismissal, for political reasons.

2. The WFTU recalled that on 24 January 1978 it had already submitted a representation against the Government of the Federal Republic of Germany concerning the Government's failure to secure by its legislation and practice the effective observance of the above mentioned Convention. In that representation it had especially stressed discriminatory practice on the basis of political opinion in the procedure for the verification of loyalty to the national Constitution of public servants - so-called work-bans ("Berufsverbote") - based in particular on the following documents:

- Common declaration of the Federal Chancellor and the Prime Ministers of the constituent States of 28 January 1972;
- Guiding principles of the Federal Constitutional Court as regards the obligation of loyalty in the public service, decision of the Second Senate dated 22 May 1975;
- Principles for investigating loyalty to the Constitution (updated 19 May 1976);
- Principles for investigating loyalty to the Constitution (new version of 10 January 1979).

3. The WFTU recalled that at its 211th session (November 1979), the Governing Body had discussed its earlier representation and declared the closure of the procedure on the basis of the report of 15 June 1979 of the Committee which it had appointed to examine the representation.<sup>2</sup> The WFTU alleged that since that time the Government of the Federal Republic of Germany had not made serious efforts to bring legislation and practice into conformity with the Convention.

4. The WFTU referred to the comments made by the Committee of Experts on the Application of Conventions and Recommendations in its report of 1983 concerning the application of Convention No. 111 by the Federal Republic of Germany.<sup>3</sup> The WFTU associated itself with the conclusions of the Committee of Experts recalling the importance of procedural principles to the observance of the Convention as well as with the necessity not only to redefine criteria for the exclusion from the public service, but also to ensure that the burden of proof regarding a person's integrity did not lie upon him and that the evaluation of his integrity made by administrative authorities was subject to full judicial review.

5. According to the WFTU, the Government of the Federal Republic of Germany continued to misinterpret Article 1, paragraph 2 and Article 4 of the Convention to justify its discriminatory practices which were in contradiction with ILO Convention No. 111.

6. The WFTU alleged that since 1979 there had been several hundred cases of discriminatory measures taken to the detriment of candidates for posts in the public service or civil servants. It gave details concerning certain of these cases and provided documentation in support of its allegations.

7. The WFTU added that such practices had been denounced by congresses of representative trade union organisations of the Federal Republic of Germany, such as the National Union of Teachers and Scientific Workers, the National Union of Metal Workers, the German Postal Workers' Union and the National Union of Printing Workers. It provided copies of the resolutions adopted by these congresses.

Examination of the representation by the Governing Body and decision to refer the matter to a Commission of Inquiry

8. At its 227th Session (June 1984), the Governing Body, in accordance with the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, declared the representation receivable and appointed the Committee for the examination of the representation, as follows: Mr. Jaakko Riikonen (Government member, Finland), Chairman, Mr. Roger Decosterd (Employer's member) and Mr. Heribert Maier (Worker's member).

9. The WFTU furnished further information and documents by letters of 1 and 23 August 1984.

10. By a communication dated 18 December 1984 the Government rejected the allegation that it had failed to comply with the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Referring to the report of the Committee appointed by the Governing Body to examine the earlier representation made by the WFTU, the Government considered that subsequent developments in the Federal Republic of Germany under administrative procedures both at the federal level and in the Länder were in compliance with the Committee's expectations as regards the limitation of investigations to individual cases motivated by concrete circumstances and the granting of comprehensive legal protection through independent courts. According to the Government, the demands made by the authorities on candidates for employment regarding their faithfulness to the Constitution and the facts to be taken into consideration were subject to full judicial review. The Government considered the Governing Body Committee report of 15 June 1979 to be fully complied with. The Government stated that no one was removed from public service in the Federal Republic because of his political opinion. According to the decision of the Federal Constitutional Court of 22 May 1975, the obligation of faithfulness to the free democratic basic order was violated only if consequences were drawn from a political conviction for the person's attitude towards the constitutional order, for the way in which he discharged his service obligations, for his dealings with colleagues or for political activities in line with the political conviction.

11. Referring to Article 1, paragraph 2 of the Convention, the Government stated that the duty of faithfulness to the Constitution was an indispensable prerequisite for any employment in the public service. The obligation to support actively the free democracy was laid down in civil service law provisions which were given constitutional rank by Article 33, paragraph 5 of the Constitution. The Government also considered that Article 4 of the Convention was complied with, since the free democratic basic order was the essential core of the State and constitutional order of the Federal Republic of Germany, and an attack on this essential value was prejudicial to the security of the State.

12. The Government stated that from May 1975 to December 1982, there had been altogether 111 formal disciplinary proceedings at the Federal and Länder levels for violations of the duty of faithfulness to the Constitution, not all of which led to sanctions. In addition, there had been 39 cases in which officials on probation had been dismissed on the same grounds. These figures had to be compared with a total of 1,829,636 established officials and officials on probation. Thus, over a period of eight years, only 0.008 per cent of officials had been affected. Referring to the individual cases cited by the WFTU, the Government stated that, by law, officials were obliged in their entire conduct to support and uphold the free

democratic constitutional order; employees were subject to a similar obligation under the relevant collective agreements. The Government stressed that in all cases of violation of the duty of faithfulness, there was a right of appeal to independent courts, which was not always exercised. As far as the Government was aware, none of the officials or employees named by the WFTU had appealed to the Federal Constitutional Court against their dismissal.

13. The Government transmitted comments by the Confederation of German Employers' Associations which fully supported the position expressed in the Government's observations.

14. The Committee set up to examine the representation submitted its report to the Governing Body at its 229th Session (February 1985). The Governing Body examined the report at its 230th Session (June 1985).

15. At that session, the Government representative of the Federal Republic of Germany indicated that his Government was not able to accept the Committee's conclusions and indicated the points on which it disagreed with them. He stressed however that the Government subscribed wholeheartedly to the ILO's supervisory procedures for promoting and ensuring the application of ratified Conventions. In view of the experience and authority of the Committee of Experts on the Application of Conventions and Recommendations and the universality of the Conference Committee on the Application of Conventions and Recommendations, his Government was in favour of continuing and deepening the exchange of views in those two bodies. The Government was also prepared to consider any other method of continuing the procedure.

16. After a discussion the Governing Body decided, in application of Article 10 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution,<sup>4</sup> to refer the matter to a Commission of Inquiry, in accordance with article 26, paragraph 4, of the Constitution.<sup>5</sup>

#### Appointment of the Commission

17. At its 231st Session (November 1985), the Governing Body adopted proposals made by the Director-General concerning the composition of the Commission, as follows:

##### Chairman:

Mr. Voitto SAARIO (Finland), former Justice of the Supreme Court of Finland, former President of the Helsinki Court of Appeal, former Chairman of the Governmental Competition Council, delegate of Finland to the UN General Assembly, 1956-57, 1962-63, 1972-77, 1980, and to the Economic and Social Council, 1972-74,

representative of Finland at the UN Commission on Human Rights, 1969-71, member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1957-68.

##### Members:

Mr. Dietrich SCHINDLER (Switzerland), Professor of International Law and Constitutional and Administrative Law at the University of Zurich, member of the International Committee of the Red Cross, member of the Institute of International Law, member of the Permanent Court of Arbitration.

Mr. Gonzalo PARRA-ARANGUREN (Venezuela), Professor of Private International Law at the Central University of Venezuela and at the Andrés Bello Catholic University, Caracas, member of the Institute of International Law, member of the Permanent Court of Arbitration, former judge of the Commercial Court of the Federal District and the State of Miranda.

In conformity with established practice, the Governing Body decided:

- (a) that the members of the Commission should serve as individuals in their personal capacity, and should undertake by a solemn declaration, corresponding to that made by the judges of the International Court of Justice, to perform their duties and exercise their powers honourably, faithfully, impartially and conscientiously;
- (b) that the Commission should determine its own procedure, in accordance with the provisions of the Constitution.

#### Notes

<sup>1</sup> The substantive provisions of this Convention are reproduced in Appendix I to the present report. The ratification of the Convention by the Federal Republic of Germany was registered by the Director-General of the International Labour Office on 15 June 1961. The Convention entered into force for that country on 15 June 1962.

<sup>2</sup> ILO Official Bulletin, Vol. LXIII, 1980, Series A, No. 1, pp. 40 to 53. See also below, Chapter 4.

<sup>3</sup> International Labour Conference, 69th Session, 1983, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 216 to 219. See also below Chapter 4.

<sup>4</sup> Article 10 of the Standing Orders provides:

"When a representation within the meaning of article 24 of the Constitution of the Organisation is communicated to the Governing

Body, the latter may at any time in accordance with paragraph 4 of article 26 of the Constitution adopt, against the government against which the representation is made and concerning the Convention the effective observance of which is contested, the procedure of complaint provided for in articles 26 and the following articles."

<sup>5</sup> The provisions of the Constitution relating to Commissions of Inquiry are contained in articles 26 to 29 and 31 to 34 of the ILO Constitution. These articles are reproduced in Appendix II. See, further, Chapter 10, paras. 451 to 453.

## CHAPTER 2

### PROCEDURE FOLLOWED BY THE COMMISSION

#### First session

18. The Commission held its first session in Geneva on 25 and 26 November 1985.

19. At the beginning of this session, the members of the Commission made a solemn declaration, in the presence of Mr. Francis Blanchard, Director-General of the International Labour Office, by which they undertook to perform their duties and exercise their powers honourably, faithfully, impartially and conscientiously.

20. The Commission noted that the decision to refer the case to a Commission of Inquiry had been taken by the Governing Body of the International Labour Office, in accordance with article 10 of the Standing Orders concerning the examination of representations under articles 24 and 25 of the Constitution of the ILO, in the course of consideration of the representation made by the World Federation of Trade Unions. The Commission was consequently called upon to examine, in accordance with articles 26 to 28 of the Constitution, the issues raised in the said representation.

21. The Commission took note of the information and documentation submitted in connection with the aforesaid representation. It adopted a series of decisions on the procedural arrangements for the investigation of the questions at issue.

22. The Commission was informed that a number of communications providing information on matters relevant to its work had recently been addressed to the International Labour Office by individuals and organisations in the Federal Republic of Germany. It decided to take cognisance of these communications, and to transmit copies thereof to the Government of the Federal Republic of Germany and to the World Federation of Trade Unions, for their information and to enable them to make such comments thereon as they might wish to present to the Commission. Several other communications addressed to the International Labour Office referred to the situation of persons employed in the private sector. The Commission decided not to take those communications into account, since the representation made by the World Federation of Trade Unions, and therefore the scope of the investigation which the Commission was called upon to make, related to persons employed in the public service.